



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

20 December 2017\*

(Reference for a preliminary ruling — Common regulatory framework for electronic communications networks and services — Directive 2002/21/EC — Articles 8 and 16 — Directive 2002/19/EC — Articles 8 and 13 — Operator designated as having significant market power — Price control — Obligations imposed by national regulatory authorities — Obligation to ensure cost orientation of prices — Prices set below the costs incurred by the operator concerned for the provision of voice call termination services on mobile networks — Charter of Fundamental Rights of the European Union — Article 16 — Freedom to conduct a business — Proportionality)

In Case C-277/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 21 January 2016, received at the Court on 17 May 2016, in the proceedings

**Polkomtel sp. z o.o.**

v

**Prezes Urzędu Komunikacji Elektronicznej,**

other party to the proceedings

**Krajowa Izba Gospodarcza Elektroniki i Telekomunikacji,**

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, K. Lenaerts, President of the Court, acting as a judge of the Second Chamber, A. Rosas, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 11 May 2017,

after considering the observations submitted on behalf of:

- Polkomtel sp. z o.o., by E. Barembruch, radca prawny,
- the Prezes Urzędu Komunikacji Elektronicznej, by L. Ochniewicz and D. Dzedzic-Chojnacka, radcowie prawni,

\* Language of the case: Polish.

- the Polish Government, by B. Majczyna, D. Lutostańska and K. Wilimborek-Makulska, acting as Agents,
  - the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
  - the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,
  - the European Commission, by G. Braun, J. Hottiaux and L. Nicolae, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,  
gives the following

### **Judgment**

- 1 The present request for a preliminary ruling concerns the interpretation of Article 8(4) and Article 13 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive') (OJ 2002 L 108, p. 7).
- 2 The request has been made in proceedings between Polkomtel sp. z o.o. and the Prezes Urzędu Komunikacji Elektronicznej (President of the Office for Electronic Communications, Poland; 'President of the OEC'), concerning a decision taken by the latter setting the fees for terminating voice calls on Polkomtel's public mobile network.

### **Legal context**

#### *EU law*

##### *Directive 2002/21/EC*

- 3 Articles 6 and 7 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; 'the Framework Directive') provide, respectively, for a consultation and transparency mechanism and for a procedure for consolidating the internal market for electronic communications.
- 4 Article 8 of the Framework Directive sets out the policy objectives and regulatory principles, observance of which is ensured by national regulatory authorities ('NRAs'). That article provides as follows:

'1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the [NRAs] take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

...

2. The [NRAs] shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

- (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;
- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

...

4. The [NRAs] shall promote the interests of the citizens of the European Union ...

...'

5 Article 14 of that directive, entitled 'Undertakings with significant market power', lays down the criteria allowing NRAs to take the view that a particular operator holds significant market power.

6 Article 16 of the directive, entitled 'Market analysis procedure', provides:

'1. As soon as possible after the adoption of the recommendation or any updating thereof, [NRAs] shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

2. Where [a NRA] is required under Articles ... 7 or 8 of [the Access Directive] to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

...

4. Where [a NRA] determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the [NRA] shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

...'

7 Article 19 of the Framework Directive, entitled 'Harmonisation procedures', provides, in paragraph 1:

'Where the Commission, acting in accordance with the procedure referred to in Article 22(2), issues recommendations to Member States on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8, Member States shall ensure that [NRAs] take the utmost account of those recommendations in carrying out their tasks. Where [a NRA] chooses not to follow a recommendation, it shall inform the Commission, giving the reasons for its position.'

*The Access Directive*

8 Recitals 15 and 20 of the Access Directive state:

‘(15) The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified.

...

(20) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable ..., or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When [a NRA] calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.’

9 Article 8 of that directive, entitled ‘Imposition, amendment or withdrawal of obligations’, provides:

‘1. Member States shall ensure that [NRAs] are empowered to impose the obligations identified in Articles 9 to 13.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], [NRAs] shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.

...

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of [the Framework Directive]. Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

...’

10 Article 13 of the Access Directive, entitled ‘Price control and cost accounting obligations’, is worded as follows:

‘1. [A NRA] may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. [NRAs] shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.

2. [NRAs] shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard [NRAs] may also take account of prices available in comparable competitive markets.

3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, [NRAs] may use cost accounting methods independent of those used by the undertaking. [NRAs] may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

...'

*Recommendation 2009/396/EC*

- 11 According to point 1 of Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU (OJ 2009 L 124, p. 67):

'When imposing price control and cost-accounting obligations in accordance with Article 13 of [the Access Directive] on the operators designated by [NRAs] as having significant market power on the markets for wholesale voice call termination on individual public telephone networks (hereinafter referred to as "fixed and mobile termination markets") as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], NRAs should set termination rates based on the costs incurred by an efficient operator. This implies that they would also be symmetric. ...'

*Polish law*

- 12 Article 39 of the ustawa Prawo telekomunikacyjne (Law on telecommunications) of 16 July 2004 (Dz. U. No 171, heading 1800), in the version applicable to the dispute in the main proceedings ('the Law on telecommunications'), provides:

'1. Under the conditions referred to in Article 24(2)(a), the President of the OEC may, by way of a decision, impose on operators with significant market power an obligation to:

(1) calculate the justified costs of the service for accessing the telecommunications network (by setting out the detailed arrangements for the calculation of the costs) that it must apply on the basis of the provisions of the regulation referred to in Article 51, in accordance with the description of the calculation of the costs carried out by the President of the OEC,

(2) apply access fees the amount of which includes the recovery of the justified costs of the operator.

2. An operator on which an obligation as referred to in paragraph 1 is imposed shall provide the President of the OEC, on request, with justification of the amount of the fees on the basis of the justified costs.

...

4. In the event that:

...

- (3) the body responsible for carrying out the audit referred to in Article 53(5) delivers a negative opinion or a qualified opinion,
- (4) a discrepancy is identified between the amount of the fees set by the operator and that of the fees set by the President of the OEC, in accordance with paragraph 3,

the President of the OEC shall set the amount of the fees for accessing the telecommunications network or the maximum or minimum levels thereof, applying the methods referred to in paragraph 3(2). The abovementioned fees shall be set by separate decision ...

5. The President of the OEC shall set the fees for accessing the telecommunications network in a way that promotes efficiency and sustainable competition and ensures maximum benefits for end-users, while taking into account the recovery of the justified costs.'

13 Article 40 of the Law on telecommunications is worded as follows:

'1. The President of the OEC may, in accordance with the conditions referred to in Article 24(2)(a), impose on operators with significant market power, by way of a decision, an obligation to set fees for accessing the telecommunications network on the basis of the costs incurred.

2. An operator on which an obligation as referred to in paragraph 1 is imposed shall provide the President of the OEC with justification for the amount of the fees set on the basis of the costs incurred.

3. In order to assess whether or not the amount of the fees set by the operator referred to in paragraph 1 is correct, the President of the OEC may take account of the amount of, or the detailed arrangements for establishing, the fees on comparable competitive markets or other means of assessing whether those fees are correct.

4. In the case where, according to the assessment referred to in paragraph 3, the amount of the fees set by the operator is incorrect, the President of the OEC shall set the amount of the fees or the maximum or minimum level thereof, by applying the methods referred to in paragraph 3, having regard to promoting economic efficiency and sustainable competition and ensuring maximum benefits for end-users. The fees shall be set by separate decision ...'

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

14 By decision of 19 July 2006, the President of the OEC designated Polkomtel as an undertaking with significant power on the market for voice call termination services on its mobile network and imposed on it, inter alia, the obligation to set its fees for accessing the communications network on the basis of the costs incurred in the provision of those services.

15 Polkomtel, in the context of implementing that obligation, submitted to the President of the OEC elements justifying the amount of the mobile termination rate on its mobile network. The President of the OEC found that amount to be incorrect and instituted a procedure designed to verify that fee and to adjust it. After having found that the costs actually incurred by Polkomtel to provide the mobile termination services amounted to 0.1690 Polish zloty (PLN) (approximately EUR 0.0398) per minute, the President of the OEC decided to adjust those fees so as to promote efficiency and sustainable competition and to ensure maximum benefits for end-users, in accordance with Article 40 of the Law on telecommunications. It set those fees on the basis of the average mobile termination rate set for the other incumbent operators carrying out their activity on the Polish mobile phone market, taking into account, inter alia, the fact that they carry out their activity on the same market and have similar market shares, the same infrastructure suppliers and identical line rental costs.



- 16 Thus, by a decision of 9 December 2009, taken on the basis of Article 40 of the Law on telecommunications, the President of the OEC set the mobile termination rate on the Polkomtel network at PLN 0.1677 (approximately EUR 0.0395) per minute. By that decision, the President of the OEC also imposed on Polkomtel the obligation to submit to him annual justification for the mobile termination rate on its network, calculated on the basis of the costs incurred in the provision of that service.
- 17 That undertaking brought an action against the decision of the President of the OEC of 9 December 2009 before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland). By a judgment of 27 May 2013, that court amended that decision and set the amount of the mobile termination rate on the Polkomtel network at PLN 0.1690 (approximately EUR 0.0398) per minute, on the ground that, where an undertaking designated as having significant power on the market is placed under the obligation to cost-orient its mobile termination rate, the President of the OEC is not authorised to correct the rate which that undertaking submitted to him and to set its amount at a level lower than that of the actual cost of providing that service.
- 18 Polkomtel and the President of the OEC brought an appeal against that judgment before the Sąd Apelacyjny w Warszawie (Appeal Court, Warsaw, Poland). By a judgment of 7 May 2014, that court upheld the appeal of the President of the OEC, varied the judgment under appeal and dismissed Polkomtel's action. That court held, moreover, that the obligation to submit to the President of the OEC annual justification for the amount of the mobile termination rate on the basis of costs was lawful.
- 19 Polkomtel lodged an appeal on a point of law against the judgment of the Sąd Apelacyjny w Warszawie (Appeal Court, Warsaw) before the referring court, namely the Sąd Najwyższy (Supreme Court, Poland).
- 20 That latter court is uncertain as to the interpretation to be given to Articles 8 and 13 of the Access Directive. In the first place, it seeks to ascertain whether, pursuant to paragraph 3 of that Article 13, the NRA may only verify the costs which the operator designated as having significant power on the market attributes to the services concerned or whether it may also verify that those costs are economically justified. It questions, in particular, in view of the second sentence of that paragraph 3, whether the NRA may verify the amount of the costs only to a limited extent or whether it may also correct the amount of the prices set by referring to an actual average market price. In that context, it expresses doubt as to whether an interpretation of that Article 13 which excludes that latter possibility is compatible with the provisions of Article 8(4) of the Access Directive.
- 21 In that regard, the referring court states that Polkomtel claims that Article 40 of the Law on telecommunications allows an operator to take into account, in calculating its prices, the entirety of the costs linked to providing the service covered by the obligation concerning cost orientation of prices. According to that undertaking, NRAs may not use the efficiency and sustainable competition criteria, but must confine themselves to taking into account the costs actually linked to providing the service covered by that obligation, with the result that it cannot set the amount of the rate at a level lower than that of the costs actually incurred.
- 22 The referring court nevertheless considers that, despite the difference between the costs referred to in Articles 39 and 40 of the Law on telecommunications, respectively, that latter article does not limit the NRAs' competence solely to verifying the costs which the operator concerned took into account in setting the rate and allows the amount of the rate to be set at a level lower than that of the costs actually incurred by the operator concerned. Such an interpretation would contribute, in its view, to the achievement of the objectives pursued by the EU and Polish legislatures, namely those of promoting efficiency and sustainable competition and ensuring maximum benefits for end-users.

- 23 In the second place, that court raises the question whether Article 8(4) and Article 13(3) of the Access Directive, read in conjunction with Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter'), must be interpreted as meaning that the NRA may impose on an operator an obligation to provide periodic justification for the rates set on the basis of costs.
- 24 That court indicates, in this regard, that it favours a 'functional interpretation' of Article 40(2) of the Law on telecommunications, which does not specify the frequency at which the operator must fulfil the obligation to provide justification for the amount of the rate set on the basis of costs. It could, in its view, be inferred from that article that the NRA may specify the period within which the operator must fulfil that obligation, since the setting of such a period provides a minimum level of legal certainty as to the frequency of any adjustments to the amount of the rate applied, would be proportionate and would also contribute to guaranteeing the transparency of the acts of the NRA. The same court is unsure whether such an interpretation of that provision of national law is compliant with Article 13(3) of the Access Directive.
- 25 In the third place, the referring court seeks to ascertain whether Article 13(3) of the Access Directive, read in conjunction with Article 16 of the Charter, must be interpreted as meaning that NRAs may request a price adjustment from an operator both where that operator, designated as having significant power on the market, applies the prices that it has determined autonomously and where it applies prices previously set by that authority. The referring court observes that those doubts stem from the Polish-language version of Article 13(3) of the Access Directive, according to which NRAs may request an undertaking to provide full justification of the 'prices applied' and, if necessary, require them to be adjusted, which suggests that the NRA may require an operator to adjust the level of those prices only where it has already started to apply the prices which it has calculated.
- 26 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Must Article 13 of the Access Directive, in conjunction with Article 8(4) thereof, in their original wording, be interpreted as meaning that, where an obligation in regard to cost orientation of prices is imposed on an operator with significant market power, the [NRA] may, in order to promote efficiency and sustainable competition, set the price for the service covered by that obligation below the level of the costs of supplying that service that are incurred by the operator, verified by the [NRA] and regarded as costs attributable to that service?
- (2) Must Article 13(3) of the Access Directive, in conjunction with Article 8(4) thereof, in their original wording, read in combination with Article 16 of the [Charter], be interpreted as meaning that the [NRA] may impose on an operator obliged to orientate prices to costs an obligation to set the price annually on the basis of the most up-to-date data on costs and submit the price thus set, together with a cost justification, to the [NRA] for verification before that price becomes applicable in trade?
- (3) Must Article 13(3) of the Access Directive, in its original wording, read in combination with Article 16 of the [Charter], be interpreted as meaning that the [NRA] may request the operator required to orientate prices to costs to adjust the price only where that operator first sets the amount of the price independently and starts to apply it, or also where the operator applies the price at the amount set previously by the [NRA] but it follows from the cost justification for the subsequent reporting period that the price set previously by the [NRA] is above the level of costs incurred by the operator?'



## Consideration of the questions referred

### *The first question*

- 27 By its first question, the referring court asks, in essence, whether Article 8(4) and Article 13 of the Access Directive must be interpreted as meaning that, where an obligation in regard to cost orientation of prices is imposed by a NRA on an operator, designated as having significant market power on a specific market, that NRA may, in order to promote economic efficiency and sustainable competition, set the prices of the services covered by such an obligation below the level of the costs incurred by that operator to provide them.
- 28 According to Article 8(2) of the Access Directive, where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive, NRAs are required to impose the obligations set out in Articles 9 to 13 of the Access Directive as appropriate.
- 29 Article 13(1) of the Access Directive, for its part, provides that NRAs may, in accordance with the provisions of Article 8 of that directive, impose obligations relating to cost recovery and price controls, including obligations in regard to cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.
- 30 Neither Article 13(1) of the Access Directive nor any other provision of that directive specifies what is to be understood by ‘obligations for cost orientation of prices’.
- 31 However, it should be noted that it follows from the term ‘including’ used in Article 13(1) of the Access Directive that the ‘obligations for cost orientation of prices’ may constitute one of the detailed arrangements both for obligations relating to cost recovery and for those relating to price controls. Moreover, as the Advocate General observed in points 31 and 32 of his Opinion, an ‘obligation for cost orientation of prices’, having regard to the usual meaning of those terms, refers to an obligation in regard ‘cost orientation’ of prices, not an obligation ‘to recover’ all costs incurred. Thus, it is appropriate to disregard the interpretation of that provision which suggests an obligation to set prices at a level enabling the operator concerned to recover all the costs which it has incurred with a view to providing the service in question.
- 32 That interpretation of Article 13(1) of the Access Directive is strengthened by the context of which that provision forms part. Apart from the heading of Article 13, which expressly refers to ‘price control’, Article 13(2) of that directive refers not only to a ‘cost recovery mechanism’ but also to a ‘pricing methodology that is mandated’ by a NRA. In addition, recital 20 of the Access Directive states that, in the context of price control, ‘the regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable ... or much heavier such as an obligation that prices are cost oriented ...’. It may be inferred from that recital that the EU legislature accorded NRAs a broad discretion to choose the price control measures to be imposed in an individual case. Also to that effect, Article 16(4) of the Framework Directive, read in combination with paragraph 2 of that article, refers to ‘appropriate specific regulatory obligations’, also referred to in Article 8 of the Access Directive.
- 33 As regards the concept of ‘costs’, it should be noted that Article 13(1) of the Access Directive does not define the costs on which prices must be oriented. However, it is apparent from paragraph 3 of that article that, where an operator has an obligation in regard to the cost orientation of its prices, NRAs are to calculate the cost of efficient provision of services and may, to that end, use cost accounting

methods independent of those used by the operator. It is also apparent from that Article 13(1) and (3) of the Access Directive, read in combination with recital 20 thereof, that, in imposing obligations relating to cost recovery, NRAs are required to take into account a reasonable rate of return on adequate capital employed, taking into account the risks involved.

- 34 In that regard, the Access Directive also stipulates, in recital 20 thereof, that the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.
- 35 Thus, Article 13(2) of the Access Directive requires NRAs to ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. Similarly, Article 8(4) of that directive provides that obligations imposed in accordance with that article are to be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. That latter article provides, in paragraph 2(a) and (b) thereof, that NRAs are to promote competition by ensuring that end-users derive maximum benefits, particularly in terms of choice and price, and that competition is not distorted or impeded in the electronic communications sector.
- 36 Furthermore, Recommendation 2009/396, which was adopted for the purposes of implementing Article 13 of the Access Directive, provides, in point 1 thereof, that, when imposing price control and cost-accounting obligations in accordance with that Article 13 on the operators designated as having significant market power on the markets for wholesale fixed and mobile call termination as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive, NRAs should set termination rates based on the costs incurred by an efficient operator.
- 37 Article 19(1) of the Framework Directive, however, requires that NRAs, in carrying out their tasks, ‘take the utmost account’ of the recommendations of the Commission and that, where a NRA chooses not to follow a recommendation, it is to inform the Commission giving the reasoning for its position. Therefore, it is for the NRA, when imposing obligations concerning price control and cost accounting in accordance with Article 13 of the Access Directive, to follow, as a rule, the guidance contained in Recommendation 2009/396. It is only where it appears to the NRA, in its assessment of a given situation, that the model advocated by that recommendation is not appropriate to the circumstances that it may depart from it, giving reasons for its position (see, to that effect, judgment of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraphs 37 and 38).
- 38 Thus, it follows from a joint reading of Article 8(2)(a) and (b) and Article 16(4) of the Framework Directive, on the one hand, and from Article 8(4) and Article 13(1) and (2) of the Access Directive, on the other, that it is for the NRA, when imposing an obligation in regard to cost orientation of prices in accordance with Article 13 of that latter directive, to require, as a rule, the termination rate to be set on the basis of the costs incurred by an efficient operator, including the rate of return on adequate capital employed by it, to which Article 13(1) and (3) of the Access Directive refers.
- 39 It follows that NRAs may, after having monitored the compliance of the operator concerned with the obligation to cost orient its prices and decided that it is necessary to require those prices to be adjusted, oblige that operator to set the rate at a level lower than that of the costs incurred by it if those costs are higher than the costs of an efficient operator, it being necessary for those latter costs to include the reasonable rate of return on adequate capital employed by it.
- 40 In view of all the foregoing considerations, the answer to the first question is that Article 8(4) and Article 13 of the Access Directive must be interpreted as meaning that, where an obligation in regard to cost orientation of prices is imposed by a NRA on an operator, designated as having significant market power on a specific market, that NRA may, in order to promote efficiency and sustainable

competition, set the prices of the services covered by such an obligation below the level of the costs incurred by that operator to provide them, if those costs are higher than the costs of an efficient operator, which is for the referring court to verify.

### *The second question*

- 41 By its second question, the referring court asks, in essence, whether Article 8(4) and Article 13(3) of the Access Directive, read in combination with Article 16 of the Charter, must be interpreted as meaning that a NRA may require an operator, designated as having significant market power on a specific market and under an obligation in regard to cost orientation of prices, to set its prices annually on the basis of the most up-to-date data and to submit those prices to it for verification together with justification before they become applicable.
- 42 In that regard, it should be pointed out that Article 8(2) and Article 13(1) of the Access Directive, which authorise NRAs to impose on an operator designated as having significant market power on a specific market an obligation in regard to cost orientation of prices, does not specify whether that authority may, in imposing that obligation, lay down the modalities for implementing it and, in particular, require that operator to update its prices at a certain frequency and provide that authority, for the purposes of periodic monitoring, with justification for the rate applied.
- 43 Article 13(3) of the Access Directive, in turn, provides, in its third sentence, that NRAs may require an operator to provide full justification for its prices and may, where appropriate, require prices to be adjusted. Although it is apparent from the first sentence of that provision that that requirement may be directed at an operator already bound by an obligation in regard to cost orientation of prices, it does not specify the frequency at which the NRA may require that justification and, if necessary, require prices to be adjusted.
- 44 It follows from those considerations that the EU legislature intended neither to lay down the detailed arrangements for implementing the obligation in regard to cost orientation of prices imposed pursuant to Article 13(1) of the Access Directive nor, in particular, to set the frequency of updates, by the operator under that obligation, of the prices of the services subject to that obligation, nor to lay down the rules concerning the frequency of the NRA's monitoring of compliance with that obligation.
- 45 Furthermore, it must be noted that Article 8(4) of the Access Directive provides that obligations imposed by the NRA, including those provided for in Article 13 of that directive, must be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive and that the obligations may only be imposed following consultation in accordance with Articles 6 and 7 of the Framework Directive (see, to that effect, judgment of 14 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraph 56).
- 46 It follows that the frequency with which NRAs may require the operator concerned to justify and adjust cost-oriented prices previously set must be determined according to the nature of the problem identified, must be proportionate and must take into account the objectives defined in both the Framework Directive and the Access Directive. In that regard, as the Advocate General observed in point 59 of his Opinion, one particularity of electronic communications markets is their rapid evolution due to technological developments, such that an obligation in regard to the annual adjustment of prices previously set is capable of meeting those imperatives. As the referring court also noted, that obligation imposed on the operator concerned can provide it with a minimum level of legal certainty as to the frequency of any adjustment to the amount of fees applied and the imposition of that obligation, in contributing at the same time to guaranteeing the transparency of the acts of NRAs, may be proportionate.

- 47 Consequently, the view must be taken that NRAs may require an operator, designated as having significant market power on a specific market and under an obligation in regard to cost orientation of prices, to set its prices annually on the basis of the most up-to-date data and to provide them with justification for those prices, if such obligations are based on the nature of the problem identified, are proportionate and are justified in the light of the objectives laid down in Article 8 of the Framework Directive and, in particular, in the light of those referred to in paragraph 2(a) and (b) of that article.
- 48 As for the question whether new obligations may be imposed only after a fresh market analysis, it is appropriate to state that Article 16(2) of the Framework Directive provides that, where, in accordance with, inter alia, Article 8 of the Access Directive, the NRA is required to determine whether to impose, maintain, amend or withdraw obligations imposed on undertakings, that authority is required to determine on the basis of its market analysis referred to in Article 16(1) of that directive whether a relevant market is effectively competitive. Moreover, it is apparent from recital 15 of the Access Directive, in essence, that the imposition of a specific obligation on an operator designated as having significant market power on a specific market does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified.
- 49 It follows, as the Advocate General noted, in essence, in points 68 and 69 of his Opinion, that the conducting of a fresh market analysis is not necessary when, as in the case in the main proceedings, the NRA is planning to impose a specific obligation in regard to the implementation of a general obligation in regard to cost orientation of prices previously set.
- 50 With regard to the question whether Article 16 of the Charter precludes the possibility, for a NRA, to require an operator to update its prices on an annual basis and to submit them for periodic monitoring, it is appropriate to recall that, according to the settled case-law of the Court, the protection afforded by that provision covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition. In addition, freedom of contract includes, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a service. However, the freedom to conduct a business does not constitute an absolute prerogative, but must be viewed in relation to its function in society (see, to that effect, judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 42, 43, 45 and the case-law cited, and of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, paragraphs 25 and 28).
- 51 The possibility for the NRA to require an operator to update its rates on an annual basis and to submit them for periodic monitoring constitutes an interference in the exercise of the right guaranteed by Article 16 of the Charter. Therefore, it must, pursuant to Article 52(1) of the Charter, be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 46 to 48, and of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 70 and the case-law cited).
- 52 In the present case, it is appropriate to note, first, that the decision of the President of the OEC of 9 December 2009 was adopted in accordance with the national legislation aimed at transposing the Access Directive and that that legislation confers on him the power to impose obligations to cost orient prices and to adjust those prices on an annual basis. Second, the imposition of those obligations did not adversely affect the essence of the freedom to conduct a business, since the operator concerned could continue to provide the services at issue after the imposition of those obligations. Third, the objectives of general interest pursued by that national legislation are in line with those of the European Union, such as the promotion of competition and of the interests of citizens of the European Union as referred to in Article 8(2) and (4) of the Framework Directive and in Article 13(1) of the Access Directive. In particular, the obligation to cost orient prices and to adjust those prices on an annual basis should, within the meaning of Article 13(1) of the Access Directive,



prevent the operators concerned from sustaining prices at an excessively high level, or applying a price squeeze, to the detriment of end-users. Fourth, with regard to the examination of the need for such a measure — which includes examining the proportionality of that measure, which is the role of the national court — it corresponds to verifying compliance with the conditions set out in Article 8(4) of the Access Directive.

- 53 Thus, it is for the national court to verify whether the obligation to adjust prices annually is in conformity with the requirement of proportionality referred to in Article 8(4) of the Access Directive, in so far as that obligation is necessary to achieve the objectives of general interest mentioned in the preceding paragraph.
- 54 It follows that, subject to that verification, Article 16 of the Charter does not preclude the possibility for a NRA to require an operator designated as having significant market power on a specific market to update its rate on an annual basis and submit it for periodic monitoring.
- 55 Having regard to all of the foregoing considerations, the answer to the second question is that Article 8(4) and Article 13(3) of the Access Directive, read in combination with Article 16 of the Charter, must be interpreted as meaning that a NRA may require an operator, designated as having significant market power on a specific market and under an obligation in regard to cost orientation of prices, to set its prices annually on the basis of the most up-to-date data and to submit those prices to it for verification together with justification before they become applicable, provided that such obligations are based on the nature of the problem identified, are proportionate and are justified in the light of the objectives laid down in Article 8 of the Framework Directive, which is for the referring court to verify.

### *The third question*

- 56 As a preliminary point, it should be noted that it is apparent from the request for a preliminary ruling that the third question is based on the premiss that the wording of the third sentence of Article 13(3) of the Access Directive, in its Polish-language version (*‘Krajowe organy regulacyjne mogą zażądać od danego operatora całościowego uzasadnienia stosowanych cen, a w razie potrzeby — odpowiedniego dostosowania tych cen’*), differs from that of the other language versions. In the Polish language, that phrase suggests that NRAs may require an operator to adjust its prices calculated on the basis of costs only where it has already started to apply them.
- 57 In those conditions, it is necessary to understand that, by its third question, the referring court asks, in essence, whether Article 13(3) of the Access Directive must be interpreted as meaning that, where an obligation in regard to cost orientation of prices has been imposed on an operator on the basis of Article 13(1) of that directive, that operator may be required to adjust its prices only after it has started to apply the cost-oriented prices, or also before it has started to apply them.
- 58 It is appropriate to note that the versions of the third sentence of Article 13(3) of the Access Directive in, inter alia, German (*‘Die nationalen Regulierungsbehörden können von einem Betreiber die umfassende Rechtfertigung seiner Preise und gegebenenfalls deren Anpassung verlangen’*), English (*‘[NRAs] may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted’*), French (*‘Les autorités réglementaires nationales peuvent demander à une entreprise de justifier intégralement ses prix et, si nécessaire, en exiger l’adaptation’*) and Italian (*‘Le autorità nazionali di regolamentazione possono esigere che un operatore giustifichi pienamente i propri prezzi e, ove necessario, li adegui’*) lead to that provision being interpreted as meaning that prices do not necessarily already have to be applied by the operator concerned before the NRA requires it, if necessary, to adjust its prices.

- 59 According to the settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 1 March 2016, *Alo and Osso*, C-443/14 and C-444/14, EU:C:2016:127, paragraph 27 and the case-law cited).
- 60 In that regard, it is important to note, first, that, while paragraph 1 of Article 13 of the Access Directive permits operators to cost orient prices, paragraph 3 of that same article, in authorising NRAs to require an operator to provide full justification for its prices and, where appropriate, to require them to be adjusted, provides NRAs with the means to ensure the implementation of that law and to ensure that that operator actually applies cost-oriented prices.
- 61 Second, pursuant to Article 8(1) of the Framework Directive, in carrying out the regulatory tasks specified in the Framework Directive and, in particular, in the Access Directive, NRAs are authorised to take all reasonable measures to achieve the objectives defined in Article 8(2) of the Framework Directive, which include, in particular, the objective of promoting efficiency and sustainable competition and maximising benefits for end-users. Thus, the application of the measures provided for in the third sentence of Article 13(3) of the Access Directive permits NRAs to ensure, by requiring the operator concerned to provide full justification for its prices and, where appropriate, to require those prices to be adjusted, that the objectives referred to in both Article 8(2) of the Framework Directive and Article 13(1) and (2) of the Access Directive are pursued.
- 62 Those objectives would not be achieved, however, if NRAs could require the operator concerned to provide full justification for its prices and, where appropriate, require them to be adjusted, only if those prices are already being applied.
- 63 Consequently, the answer to the third question is that Article 13(3) of the Access Directive must be interpreted as meaning that, where an obligation in regard to cost orientation of prices has been imposed on an operator on the basis of Article 13(1) of that directive, that operator may be required to adjust its prices before or after it has started to apply them.

## Costs

- 64 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 (Second Chamber) hereby rules:

- 1. Article 8(4) and Article 13 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive') must be interpreted as meaning that, where an obligation in regard to cost orientation of prices is imposed by a national regulatory authority on an operator, designated as having significant market power on a specific market, that national regulatory authority may, in order to promote efficiency and sustainable competition, set the prices of the services covered by such an obligation below the level of the costs incurred by that operator to provide them, if those costs are higher than the costs of an efficient operator, which is for the referring court to verify.**



2. **Article 8(4) and Article 13(3) of Directive 2002/19, read in combination with Article 16 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a national regulatory authority may require an operator, designated as having significant market power on a specific market and under an obligation in regard to cost orientation of prices, to set its prices annually on the basis of the most up-to-date data and to submit those prices to it for verification together with justification before they become applicable, provided that such obligations are based on the nature of the problem identified, are proportionate and are justified in the light of the objectives laid down in Article 8 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), which is for the referring court to verify.**
3. **Article 13(3) of Directive 2002/19 must be interpreted as meaning that, where an obligation in regard to cost orientation of prices has been imposed on an operator on the basis of Article 13(1) of that directive, that operator may be required to adjust its prices before or after it has started to apply them.**

[Signatures]