Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

21 December 2016*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/22/EC — Universal service — Articles 12 and 13 — Calculation of the cost of universal service obligations — Article 32 — Compensation for costs relating to additional mandatory services — Direct effect — Article 107(1) and Article 108(3) TFEU — Maritime radio safety and emergency services in Denmark and Greenland — National rules — Submission of an application for compensation for costs relating to additional mandatory services — Three-month time limit — Principles of equivalence and effectiveness)

In Case C-327/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Eastern Regional Court, Denmark), made by decision of 26 June 2015, received at the Court on 2 July 2015, in the proceedings

TDC A/S

v

Teleklagenævnet,

Erhvervs- og Vækstministeriet,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 June 2016,

after considering the observations submitted on behalf of:

— TDC A/S, by O. Spiermann, advokat,

— the Danish Government, by C. Thorning, acting as Agent, and by J. Pinborg, advokat,

— the European Commission, by L. Nicolae, G. Conte and M. Clausen, acting as Agents,

* Language of the case: Danish.

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 32 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive; OJ 2002 L 108, p. 51).

2 The request has been made in proceedings between TDC A/S and Teleklagenævnet (Telecommunications Complaints Board, Denmark) and Erhvervs- og Vækstministeriet (Ministry of Business and Growth, Denmark; 'Ministeriet') concerning the rejection of a number of requests for compensation for the costs incurred by TDC for the provision of additional mandatory services and of a request for derogation from the time limit laid down within which such requests for compensation are to be made.

Legal context

EU law

The Universal Service Directive

3 Recitals 4, 18, 19, 21, 23, 25 and 26 of the Universal Service Directive state:

'(4) 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. 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.

…

(18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles [107 TFEU et 108 TFEU].

(19) Any calculation of the net cost of universal service should take due account of costs and revenues, as well as the intangible benefits resulting from providing universal service, but should not hinder the general aim of ensuring that pricing structures reflect costs. Any net costs of universal service obligations should be calculated on the basis of transparent procedures.

…

(21) … Any funding mechanism should ensure that market participants only contribute to the financing of universal service obligations and not to other activities which are not directly linked to the provision of the universal service obligations. …

…

(23) The net cost of universal service obligations may be shared between all or certain specified classes of undertaking. Member States should ensure that the sharing mechanism respects the principles of transparency, least market distortion, non-discrimination and proportionality. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.

…

(25) … Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with [EU] law but not by means of contributions from market players.

(26) More effective competition across all access and service markets will give greater choice for users. The extent of effective competition and choice varies across the EU and varies within Member States between geographical areas and between access and service markets. … For reasons of efficiency and social reasons, end-user tariffs should reflect demand conditions as well as cost conditions, provided that this does not result in distortions of competition. … Price cap regulation, geographical averaging or similar instruments, as well as non-regulatory measures such as publicly available comparisons of retail tariffs, may be used to achieve the twin objectives of promoting effective competition whilst pursuing public interest needs … Access to appropriate cost accounting information is necessary, in order for national regulatory authorities to fulfil their regulatory duties in this area, including the imposition of any tariff controls. …'

4 Article 1 of the Universal Service Directive, entitled 'Subject matter and scope', provides in paragraph 2:

'This Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. …'

5 Article 3 of that directive, entitled 'Availability of universal service', states in paragraph 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 the Universal Service Directive, entitled ‘Designation of undertakings’, provides, in paragraph 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 12 of that directive, entitled ‘Costing of universal service obligations’, states in paragraph 1:

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

For that purpose, national regulatory authorities shall:

(a) calculate the net cost of the universal service obligation, taking into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or

(b) make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2).’

8 Article 13 of the Universal Service Directive, entitled ‘Financing of universal service obligations’, provides, in paragraph 1:

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

(a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or

(b) to share the net cost of universal service obligations between providers of electronic communications networks and services.’

9 Article 32 of the Universal Service Directive, entitled ‘Additional mandatory services’, is worded as follows:

‘Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.’

10 Annex IV, Part A, to the Universal Service Directive provides:

‘…

… 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. … 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. …

…’

11 Annex IV, Part B, to the Universal Service Directive lays down the mechanisms for the recovery of the net costs of universal service obligations.

Directive 2002/21/EC

12 Under Article 2(j) 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 (OJ 2002 L 108, p. 33; ‘the Framework Directive’):

‘“Universal service” means the minimum set of services, defined in [the Universal Service Directive], of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price.’

The Overseas Association Decision

13 Greenland was included in the list of countries and overseas territories in Annex I A to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (‘the Overseas Association Decision’) (OJ 2001 L 314, p. 1).

Decision 2012/21/EU

14 In accordance with Article 12 of Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012 L 7, p. 3), that decision entered into force on 31 January 2012. As is clear from the order for reference, in view of when the facts occurred, the dispute in the main proceedings may be regarded as not being governed by that decision.

Danish law

15 Lov nr. 418 om konkurrence- og forbrugerforhold på telemarkedet (Law No 418 on competition and consumer matters in the telecommunications market) of 31 May 2000, as codified by lovbekendtgørelse nr. 780 (Consolidating law No 780) of 28 June 2007 (‘the Law on telecommunications’), in force at the time of the facts in the main proceedings, contained provisions which transposed the Universal Service Directive into Danish law.

16 It is apparent from the order for reference that, in accordance with Paragraph 20 of the Law on telecommunications, universal service operators designated pursuant to that law could be compensated for all properly justified losses connected with the provision of the services referred to in Paragraph 16 of that law that form part of the universal service obligation with which they have been entrusted.

17 The Law on telecommunications did not specify, as is clear from the request for a preliminary ruling, what is to be understood by ‘all properly justified losses’, but it is apparent from the travaux préparatoires of that law that a loss connected with the maritime radio spectrum safety and emergency services (‘the maritime safety and emergency services’) ‘was to be set off against any profit from the provision of other services under the undertaking’s universal service obligations’. Any loss remaining after deduction of the profit should, under the Law on telecommunications, be covered by

the operators on the market if it was connected with the provision of services referred to in Chapter II of the Universal Service Directive' and by the State if it was connected with the provision of additional mandatory services, in accordance with Paragraph 20 of that law.

18 Those rules were repeated in substantially identical terms in lov nr. 169 om elektroniske kommunikationsnet og –tjenester (Law No 169 on electronic communication networks and services) of 3 March 2011. Nonetheless, following a letter of formal notice and a reasoned opinion from the European Commission, that law was amended by lov nr. 250 (Law No 250) of 31 March 2012 and since then provides for the possibility of obtaining cover for losses which arose after 1 April 2012 in the context of the maritime safety and emergency services without deduction of the profit earned in connection with other services under the undertaking's universal service obligation.

19 On 26 June 2008, Ministeriet adopted the bekendtgørelse nr. 701 om forsyningspligtydelser (regulation No 701 on the universal service obligation), Paragraph 30 of which is worded as follows:

'*Paragraph 1.* When applying for compensation for the loss under Paragraph 20 of the Law No 418 on competition and consumer matters in the telecommunications market (see Codifying Law No 780 of 28 June 2007), the universal service operator must provide the IT- og Telestyrelsen [National IT and Telecommunications Authority, 'the ITT'; now the Erhvervsstyrelsen, the Danish Business Authority] with details of its loss for a closed financial year. …

Paragraph 2. The universal service operator must submit its application for compensation for the loss in the previous financial year at the latest three months after the deadline for submission of the annual report to the Erhvervs- og Selskabsstyrelsen [Danish Commerce and Companies Agency]. …

Paragraph 3. The [ITT] shall provide, within six months of receipt of the information sent by the universal service operator referred to in paragraph 1, a calculation setting out whether the universal service operator is entitled to reimbursement of the loss.'

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

20 TDC, previously known as Tele Danmark A/S, was, until its privatisation in 1997, an undertaking in which the Danish State was the sole shareholder. In Denmark, it is the main operator in the electronic communications services sector.

21 The Danish State tasked that undertaking, even before its privatisation, with providing, in Denmark and Greenland, free of charge, the maritime safety and emergency services enabling vessels to request assistance when they are in distress. That task was maintained after its privatisation. TDC remains the principal telecommunications operator in Denmark and offers there, on a voluntary basis, the services covered by Chapter II of the Universal Service Directive, in particular basic telephony. As the undertaking designated to fulfil the universal service obligation, it is required to offer maritime safety and emergency services in Greenland and does not carry out any activity there other than those arising under the universal service obligation. In practice, the maritime safety and emergency services are provided by Tele Greenland A/S, which is owned by the Greenland autonomous authorities and TDC only covers the costs related thereto.

22 Under the Danish legislation, TDC could not receive compensation from the State for the costs connected with the provision of maritime safety and emergency services in Denmark and Greenland since, overall, it made a profit in providing the services under the universal service and additional mandatory service obligations.

23 On a number of occasions, TDC, on the basis of the Universal Service Directive, challenged the Danish legislation, as interpreted by the Danish authorities, which did not allow it to obtain compensation for those costs. During 2008, it applied to the Commission, asking it to adopt a position on whether the Danish legislation complied with the Universal Service Directive. After a number of exchanges of views with the Danish authorities and TDC, the Commission sent the Kingdom of Denmark a letter of formal notice and a reasoned opinion on 27 January and 29 September 2011, respectively.

24 The Kingdom of Denmark then decided to amend the Danish legislation at issue, which henceforth provides for compensation by the State for losses incurred after 1 April 2012 in the provision of maritime safety and emergency services without deduction of the profits made on other services under the universal service obligation. However, that legislation does not have any effect in respect of the period before 1 April 2012.

25 On 29 July 2011, on the basis of EU law, TDC applied for compensation for costs incurred in connection with the provision of safety and maritime emergency services for the year 2010. On 26 September 2011, that undertaking made an identical application for compensation for the years 2007 to 2009.

26 In parallel with the proceedings commenced before the Danish authorities concerning that compensation, TDC requested Ministeriet for a derogation from the time limit provided for in Paragraph 30(2) of regulation No 701 on the universal service obligation, under which all applications for compensation must be made within three months of the expiry of the deadline for submitting the annual report to the competent authority. The undertaking argued that it had not sought that compensation within the time limit since at that time, under the Danish legislation at issue, it was not entitled to claim it.

27 On 2 November 2011, Ministeriet informed TDC that it was rejecting that application for a derogation.

28 On 24 November 2011, the Erhvervsstyrelsen rejected TDC's applications for compensation in respect of the costs on the ground that, firstly, the debt for 2007 was time-barred and the time limit within which the applications for 2008 and 2009 could be lodged had expired and, secondly, the Danish legislation in force at the time did not allow the application for compensation relating to 2010 without deducting the profits arising from the services provided under the universal service obligation, within the meaning of Chapter II of the Universal Service Directive.

29 TDC appealed against those rejection decisions before the telecommunications appeals committee which, by a decision of 17 September 2012, confirmed the decisions at issue concerning the applications for compensation in respect of 2007 to 2009. As regards the application for compensation in respect of 2007, that committee held that 'the application was time-barred, given that the limitation period of three years on TDC's possible entitlement to compensation began to run from the date on which TDC was able to establish the definitive amount of its entitlements and submit its application'. With regard to the applications for compensation for 2008 and 2009, that committee also confirmed the rejection decision taken by the Danish authority on the ground that those applications had been made after expiry of the three-month period provided for in Paragraph 30(2) of regulation No 701 on the universal service obligation.

30 With regard to the application for compensation for 2010, the telecommunications appeal committee decided to stay the proceedings and to request the Court to answer questions of interpretation concerning the Universal Service Directive. In the judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265), the Court answered, however, that it did not have jurisdiction to answer those questions, since that authority was not entitled to request the Court for a preliminary ruling under Article 267 TFEU.

31 In parallel with the proceedings before the telecommunications appeals committee, on 13 November 2012 TDC brought an action before the Københavns byret (City Court, Copenhagen, Denmark) for damages in respect of the loss suffered during 2008 and 2009 as a result of the incorrect transposition into Danish law of the Universal Service Directive. The action was subsequently transferred to the Østre Landsret (Eastern Regional Court, Denmark).

32 In addition, TDC brought an action before the Københavns byret (City Court, Copenhagen) seeking the annulment of the decision of Ministeriet of 2 November 2011 rejecting its application for a derogation as regards the time limit and of the decision of the telecommunications appeal committee regarding its claims relating to 2007 to 2009. That case has also been transferred to the Østre Landsret (Eastern Regional Court), which entertains some doubts as to the interpretation of EU law.

33 In those circumstances, the Østre Landsret (Eastern Regional Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does the Universal Service Directive, in particular Article 32 thereof, preclude a Member State from laying down rules which do not allow an undertaking to lodge a claim against the Member State for separate recovery of the net costs of providing additional mandatory services not covered by Chapter II of that directive, where the undertaking’s profits from other services which are covered by the undertaking’s universal service obligations under Chapter II of that directive exceed the losses associated with the provision of the additional mandatory services?

2. Does the Universal Service Directive preclude a Member State from laying down rules allowing undertakings to lodge a claim against the Member State for recovery of the net costs of providing additional mandatory services which are not covered by Chapter II of that directive, only if the net costs amount to an unreasonable burden for the undertakings?

3. If Question 2 is answered in the negative, may the Member State decide that there is no unreasonable burden associated with the provision of additional mandatory services not covered by Chapter II of that directive, if the undertaking as a whole has achieved profits from the provision of all those services where that undertaking has a universal service obligation, including the provision of services which the undertaking would have provided even without having the universal service obligation?

4. Does the Universal Service Directive preclude a Member State from laying down rules that a designated undertaking’s net costs associated with the provision of universal service pursuant to Chapter II of that directive are to be calculated on the basis of all income and costs associated with the provision of the service in question, including that income and those costs which the undertaking also would have had without having the universal service obligation?

5. If the national rules in question (see Questions 1 to 4) are applied to an additional mandatory service that has to be provided not only in Denmark but in both Denmark and Greenland, which by virtue of Annex II to the TFEU is an overseas country or territory, do the answers to Questions 1 to 4 then also apply to that part of the obligation that relates to Greenland, where the service is entrusted by the Danish authorities to an undertaking established in Denmark and that undertaking has no other activities in Greenland?

6. Of what relevance are Articles 107(1) TFEU and 108(3) TFEU and Decision [2012/21] for the answers to Questions 1 to 5?

7. Of what relevance is the principle of minimum distortion of competition in inter alia Article 1(2) and Article 3(2) of and recitals 4, 18, 23 and 26 in the preamble and Part B of Annex IV to the Universal Service Directive for the answers to Questions 1 to 5?

8. If the provisions of the Universal Service Directive preclude national schemes as referred to in Questions 1, 2 and 4, do those provisions or preclusions have direct effect?

9. What more specific factors should be considered when assessing whether a national time limit for applications as described in point 3.17, and its application, are consistent with the principles of cooperation in good faith, equivalence and effectiveness in EU law?'

Consideration of the questions referred

The first, sixth, and seventh questions

34 By its first question, the referring court asks, in essence, whether the provisions of the Universal Service Directive and, in particular, Article 32 thereof, must be interpreted as precluding national legislation under which an undertaking is not entitled to compensation from the Member State for the net cost of the provision of an additional mandatory service because the profits made by that undertaking on other services related to the universal service obligation are greater than the loss arising from the provision of that additional mandatory service.

35 In that context, by its sixth and seventh questions, the referring court is doubtful, in essence, as to the effect on the interpretation of that provision, firstly, of the EU rules on State aid flowing from Article 107(1) TFEU and Article 108(3) TFEU.

36 Since the EU rules on State aid referred to by the referring court in its sixth and seventh questions apply to the implementation of the obligations flowing from the Universal Service Directive and, in particular, the universal service and additional mandatory service compensation mechanisms, it is appropriate to examine those two questions with the first question.

37 First of all, it must be noted that the Universal Service Directive defines two sets of services with which the Member States may entrust designated undertakings, namely, firstly, the services within the universal services obligations as defined in Chapter II of that directive and, secondly, the specific services defined in Article 32 of that directive.

38 With regard to the services within the universal service obligations, it is appropriate to note that, under Article 1(2) of the Universal Service Directive, the object of that directive is to define, as provided for in Article 2(j) of Directive 2002/21, the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price in the light of specific national conditions, without distorting competition. That minimum set of universal services is defined in Chapter II of the Universal Service Directive.

39 Articles 12 and 13 of that directive and Annex IV, Part A, thereto contain rules governing the mechanisms for the calculation of the net cost of the universal service obligations as defined in Chapter II of that directive and for the financing of those obligations.

40 As regards the specific services which are not within the universal service obligations, Article 32 of the Universal Service Directive provides that Member States may decide to make additional services publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

41 Next, it must be found that, unlike the universal service as defined in Chapter II of the Universal Service Directive, Article 32 thereof does not provide for a compensation mechanism for the additional mandatory services, but merely provides that a financing mechanism for those services

involving specific undertakings cannot be imposed. Consequently, the financing mechanism provided for in Article 13(1)(b) of the Universal Service Directive cannot be extended to such services (see judgment of 11 June 2015, *Base Company and Mobistar* , C-1/14, EU:C:2015:378, paragraph 41).

42 In the present case, as recalled in paragraph 17 of this judgment, the Danish legislation provided that any loss was to be covered by the State if it was connected with the provision of additional mandatory services, such a loss having, however, to be set off against any profit from the provision of other services within the undertaking's universal service obligations.

43 However, it follows from Article 32 of the Universal Service Directive that the undertaking designated as the provider of an additional mandatory service must not be made to bear the cost of the provision of that service. Under that provision, use cannot be made of a compensation mechanism involving specific undertakings.

44 It is appropriate to add, with regard to that compensation mechanism, that it follows from the rules governing the mechanisms for calculation of the net costs of the universal service obligations and the financing of those obligations provided for in the Universal Service Directive that there must be separation of accounts for the activities within the universal service and those related to other types of services, including the additional mandatory services.

45 Recitals 21 and 25 of the Universal Service Directive state, in particular, that, firstly, the funding mechanisms should ensure that market participants only contribute to the financing of universal service obligations and not to other activities which are not directly linked to the provision of the universal service obligations and, secondly, Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Recitals 4 and 18 of that directive state, in essence, that Member States must ensure that the designated undertakings are compensated for the 'specific' net cost involved in providing the universal service.

46 Thus, in accordance with Articles 12 and 13 of the Universal Service Directive, in order to determine the amount of any compensation due to an undertaking designated to provide a universal service, it is necessary, as a first step, to calculate the net cost of the universal service obligation to the undertaking designated as the provider and, next, where national regulatory authorities find that an undertaking is subject to an unfair burden, those authorities must decide to introduce a mechanism to compensate that undertaking for the determined net costs, transparently and from public funds, and/or to share the net cost of universal service obligations between providers of electronic communications networks and services (see judgment of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* , C-508/14, EU:C:2015:657, paragraph 33).

47 It follows therefrom that, for the purposes of the compensation, a distinction must be drawn between the net cost of the universal service obligations and the net cost of the additional mandatory services which are not covered by Chapter II of that directive.

48 Consequently, the compensation mechanisms provided for in the Universal Service Directive relating, firstly, to the universal service and, secondly to the additional mandatory services are independent of each other and, accordingly, the net costs incurred for each of those services must be the subject of separate accounts so as to ensure that all the revenue derived from the universal service is not included in the calculation of the net cost of the additional mandatory service and is not a condition of whether or not the compensation due for providing that service is granted.

49 Finally, it must be pointed out that the requirement for separate accounting not only contributes to the transparency of the procedure for the funding of the universal service obligations, in accordance with recital 19 of the Universal Service Directive, but also means that the method of funding of the

universal service is guaranteed to be competitively neutral. Such a requirement also ensures, in accordance with recital 18 of the Universal Service Directive, that the financing of universal service and additional mandatory services complies with the rules on State aid.

50 The provision of an additional mandatory service is clearly, like universal service, a service of general economic interest within the meaning of Article 106(2) TFEU.

51 The compensation granted by Member States for providing a service of general economic interest is subject to compliance with the rules laid down by the EU legislature in Articles 107 and 108 TFEU.

52 Thus, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 88).

53 Firstly, the undertaking receiving such compensation must actually have public service obligations to discharge, and the obligations must be clearly defined. Secondly, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Thirdly, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourthly, the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the requisite means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* , C-280/00, EU:C:2003:415, paragraphs 89, 90, 92 and 93, and of 10 June 2010, *Fallimento Traghetti del Mediterraneo* , C-140/09, EU:C:2010:335, paragraphs 37 to 40).

54 Furthermore it is necessary to observe that fulfilling the obligation to keep separate accounts makes it possible to avoid taking account twice of the revenue earned by the undertaking under its universal service obligations, firstly, for the purposes of calculating the net cost of the universal service obligation and, consequently, the compensation granted in that regard and, secondly, for the purposes of calculating the net cost of the additional mandatory services and, consequently, the grant of compensation paid in respect of that additional mandatory service. Such a practice actually amounts to making the service-providing undertaking bear the cost of the additional mandatory service, which is contrary to the very terms of Article 32 of the Universal Service Directive.

55 It follows therefrom that a compensation mechanism for the additional mandatory services taking account of all the revenue that the designated undertaking earns from other services related to its universal service obligations runs counter to the Universal Service Directive.

56 Having regard to all the foregoing considerations, the answer to the first, sixth and seventh questions is that the provisions of the Universal Service Directive and, in particular, Article 32 thereof, must be interpreted as precluding national legislation which provides for a compensation mechanism for the provision of additional mandatory services by virtue of which an undertaking is not entitled to compensation from the Member State for the net cost of the provision of an additional mandatory service because the profits made by that undertaking on other services related to the universal service obligation are greater than the loss arising from the provision of the additional mandatory service.

The second question

57 By its second question, the referring court asks, in essence, whether the Universal Service Directive must be interpreted as precluding national legislation under which an undertaking designated as the provider of additional mandatory services is entitled to compensation from the Member State for the net cost of providing those services only if that cost constitutes an unfair burden on that undertaking.

58 As has been recalled in paragraph 46 of the present judgment, a condition requiring that there be an unfair burden for paying of compensation by a Member State is provided for by the provisions of the Universal Service Directive with regard to the universal service obligations.

59 The first subparagraph of Article 12(1) of the Universal Service Directive in fact provides that, where national regulatory authorities consider that the provision of universal service, as set out in Articles 3 to 10 of that directive, may represent an unfair burden on undertakings designated to provide universal service, they must calculate the net costs of its provision.

60 Nonetheless, the provisions of the Universal Service Directive on the mechanisms for calculating the net cost of the universal service obligations and on the funding of those obligations and, in particular, Article 12(1) of that directive do not apply to the provision of the additional mandatory services.

61 Moreover, as has been noted in paragraph 43 of this judgment, it follows from Article 32 of the Universal Service Directive that the undertaking designated as the provider of an additional mandatory service must not be made to bear the cost of the provision of that service.

62 National legislation under which an undertaking designated as the provider of additional mandatory services is entitled to compensation from the Member State for the net costs of providing those services only if that cost constitutes an unfair burden on that undertaking, does not exclude that the undertaking in question must itself bear all or part of the costs of those services.

63 Consequently, making payment of compensation by the Member State subject to the condition that the net cost of the provision of the additional mandatory services must constitute an unfair burden on the designated undertaking is contrary to Article 32 of the Universal Service Directive.

64 Moreover, as the Commission argues, if it were permitted to make payment of compensation for the provision of the additional mandatory services subject to compliance with the same requirements as those set out in Chapter II of the Universal Service Directive, that would amount to permitting the Member States unilaterally to extend the scope of the rules on the universal service obligation to the additional mandatory services, which would run counter to the objective of that directive, set out in Article 1(2) thereof, consisting of defining the minimum set of services of specified quality to which all EU end-users must have access.

65 Having regard to all the foregoing considerations, the answer to the second question is that the Universal Service Directive must be interpreted as precluding national legislation under which an undertaking designated as the provider of additional mandatory services is entitled to compensation from the Member State for the net cost of providing those services only if that cost constitutes an unfair burden on that undertaking.

The third question

66 In view of the answer to the second question, it is unnecessary to reply to the third question.

The fourth question

67 By its fourth question, the referring court asks, in essence, whether the Universal Service Directive must be interpreted as precluding national legislation under which the net cost borne by an undertaking designated to fulfil a universal service obligation is the result of the difference between all the revenue and all the costs connection with the provision of the service in question, including the revenue and the costs which the undertaking would also have registered had it not been a universal service operator.

68 In that regard, it must be borne in mind that the national regulatory authorities must determine and calculate the net cost of the universal service obligation in accordance with Article 12 of the Universal Service Directive and Annex IV, Part A, to that directive.

69 In accordance with Article 12(1), second subparagraph, (a) and (b) of the Universal Service Directive, where national regulatory authorities calculate the net costs of its provision, they are to take into account any market benefit which accrues to an undertaking designated to provide universal service, in accordance with Annex IV, Part A; or make use of the net costs of providing universal service identified by a designation mechanism in accordance with Article 8(2) of that directive. That provision provides that the designation methods are to 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 of that directive.

70 Annex IV, Part A, second paragraph of the Universal Service Directive provides that the net cost of universal service obligations corresponds to the net cost to a designated undertaking when providing a universal service and when not providing such a service.

71 It is clear from all those provisions that the net cost of the provision of the universal service is the difference between the net cost borne by a designated undertaking when providing a universal service and when not providing such a service. Consequently, the net cost of the provision of a universal service cannot be the difference between all the revenue and all the costs connected with that provision.

72 Having regard to all the foregoing considerations, the answer to the fourth question is that the Universal Service Directive must be interpreted as precluding national legislation under which the net cost borne by an undertaking designated to fulfil a universal service obligation is the result of the difference between all the revenue and all the costs connection with the provision of the service in question, including the revenue and the costs which the undertaking would also have registered had it not been a universal service operator.

The fifth question

73 By its fifth question, the referring court asks, in essence, whether, in circumstances such as those at issue in the main proceedings, the fact that the undertaking entrusted with an additional mandatory service within the meaning of Article 32 of the Universal Service Directive provides that service not only on the territory of Denmark but also on that of Greenland makes any difference to the interpretation of the provisions of that directive.

74 It should be noted first of all that Article 52 TEU provides, in its first paragraph, that the Treaties are to apply to the Member States and, in its second paragraph, that the territorial scope of the Treaties is specified in Article 355 TFEU.

75 Article 355, point 2, TFEU provides that the special arrangements for association set out in Part Four of that Treaty are to apply to the overseas countries and territories (OCTs) listed in Annex II thereto, namely Articles 198 to 203 TFEU, the detailed rules and procedures for which, in accordance with Article 203 TFEU, are established by provisions laid down by the Council.

76 It must be stated that Greenland is included in that list and, accordingly, under Article 204 TFEU, is covered by those special arrangements defined in Articles 198 to 203 TFEU, subject to the specific provisions for Greenland set out in the Protocol (No 34) on special arrangements for Greenland, annexed to the Treaties.

77 The Court has previously held, in that regard, that the existence of the special arrangements between the European Union and OCTs results in the general provisions of the FEU Treaty, namely those which are not referred to in Part Four of that treaty, not being applicable to OCTs in the absence of an express reference (see, to that effect, judgments of 28 January 1999, *van der Kooy*, C-181/97, EU:C:1999:32, paragraphs 36 and 37, and of 5 June 2014, *X and TBG*, C-24/12 and C-27/12, EU:C:2014:1385, paragraph 45 and the case-law cited).

78 In the present case, it must be borne in mind that the first to fourth questions referred by the referring court concern the interpretation of the provisions of the Universal Service Directive, the legal basis of which is Article 114 TFEU.

79 Neither Part Four of the FEU Treaty nor the Overseas Association Decision, adopted by virtue of that Part of the Treaty, makes reference to Article 114 TFEU.

80 In those circumstances, it must be stated that the provisions of the Universal Service Directive are not applicable to Greenland.

81 Accordingly, since TDC was designated by the Danish State to carry out the maritime safety and emergency services, the fact that that undertaking was entrusted to provide those services in both Denmark and Greenland does not affect the interpretation of the provisions of the Universal Service Directive.

82 Having regard to the foregoing considerations, the answer to the fifth question is that, in circumstances such as those at issue in the main proceedings, the fact that the undertaking entrusted with an additional mandatory service, within the meaning of Article 32 of the Universal Service Directive, provides that service not only on the territory of Denmark but also on that of Greenland does not make any difference to the interpretation of the provisions of that directive.

The eighth question

83 By its eighth question, the referring court asks, in essence, whether Article 32 of the Universal Service Directive must be interpreted as meaning that it has direct effect.

84 According to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgments of 24 January 2012, *Dominguez* , C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited, and of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic*, C-508/14, EU:C:2015:657, paragraph 52 and the case-law cited).

85 In that regard, Article 32 of the Universal Service Directive prohibits the Member States from making the undertakings in the sector, including the designated undertaking, bear all or part of the costs connected with the provision of additional mandatory services.

86 The terms of that provision are sufficiently precise and unconditional to be directly effective as regards that prohibition.

87 Accordingly, the answer to the eighth question is that Article 32 of the Universal Service Directive must be interpreted as having direct effect, inasmuch as it prohibits the Member States from making the undertaking responsible for providing an additional mandatory service bear all or part of the costs connection with the provision of that service.

The ninth question

88 By its ninth question, the referring court asks, in essence, whether the principles of good faith, equivalence and effectiveness must be interpreted as precluding legislation, such as that at issue in the main proceedings, which makes the submission of applications for compensation for the loss in the previous financial year by the operator responsible for a universal service subject to a time limit of three months running from the expiry of the period within which that operator is required to send an annual report to the competent national authority.

89 In that regard, it must be noted that such a time limit constitutes a procedural requirement for the submission of an application intended to ensure the exercise of a right which the party concerned draws from EU law, namely the right to compensation for the provision of a universal service.

90 In the absence of rules laid down in EU law concerning the procedural requirements for the submission and examination of an application for compensation for loss from the performance of a universal service applicable to Denmark, it is for the domestic legal system of that Member State, in accordance with the principle of cooperation in good faith now enshrined in Article 4(3) TEU, to govern those arrangements, provided, firstly, that the requirements are not less favourable than those governing similar domestic situations (principle of equivalence) and, secondly, that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) (see, to that effect, judgments of 27 June 2013, *Agrokonsulting* , C-93/12, EU:C:2013:432, paragraph 36 and the case-law cited, and of 20 October 2016, *Danqua* , C-429/15, EU:C:2016:789, paragraph 29 and the case-law cited).

91 It is in the light of those two principles that it is necessary to consider the ninth question referred by the national court.

92 As regards the principle of equivalence, it should be recalled that observance of that principle requires that a national rule be applied without distinction to procedures based on EU law and those based on national law (judgment of 20 October 2016, *Danqua* , C-429/15, EU:C:2016:789, paragraph 30 and the case-law cited).

93 In order to establish whether the principle of equivalence has been observed in the main proceedings, it is for the national court, which has direct knowledge of the procedural rules governing actions under national law, to ensure, in national law, that the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded respect that principle (see, to that effect, judgment of 8 September 2011, *Rosado Santana* , C-177/10, EU:C:2011:557, paragraph 90 and the case-law cited).

94 In the main proceedings, according to the Danish Government, the period set in Paragraph 30(2) of Regulation No 701 on the universal service obligation is a general time limit provided for all universal service providers which applies without distinction to claims for compensation based on Danish law or EU law. However, TDC submits, in essence, that that time limit was introduced only in respect of the submission of applications for compensation for the loss on additional mandatory services.

95 In the light of those divergences, it is for the referring court to ascertain whether the period laid down in Paragraph 30(2) of Regulation No 701 on the universal service obligation is no less favourable than that provided for in national law for an analogous application.

96 As regards the principle of effectiveness, as recalled in paragraph 90 of this judgment, a national procedural rule such as that at issue in the main proceedings do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order.

97 In that regard, it must be noted that the Court has previously held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure (see, to that effect, judgments of 8 July 2010, *Bulicke* , C-246/09, EU:C:2010:418, paragraph 35 and the case-law cited; of 8 September 2011, *Rosado Santana* , C-177/10, EU:C:2011:557, paragraph 92; and of 20 October 2016, *Danqua* , C-429/15, EU:C:2016:789, paragraph 42 and the case-law cited).

98 It is settled case-law that the setting of time limits must, in principle, satisfy the requirement of effectiveness since it constitutes an application of the fundamental principle of legal certainty which protects both the person and the administration concerned. Such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law In respect of national legislation which comes within the scope of EU law, it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration. Subject to that reservation, the Member States are free to provide for longer or shorter time limits (see, to that effect, judgments of 15 April 2010, *Barth* , C-542/08, EU:C:2010:193, paragraph 28 and the case-law cited; of 8 July 2010, *Bulicke* , C-246/09, EU:C:2010:418, paragraph 36 and the case-law cited; and of 20 October 2016, *Danqua* , C-429/15, EU:C:2016:789, paragraph 44 and the case-law cited).

99 In that regard, a national rule laying down a three-month time limit, running from the expiry of the period within which the operator must send an annual report to the competent national authority, for the submission of an application for compensation for the loss in the previous financial year does not, prima facie, appear to be contrary to the principle of effectiveness.

100 However, TDC is of the opinion that the situation in the main proceedings is comparable to that at issue in the action which gave rise to the judgment of 25 July 1991, *Emmott* (C-208/90, EU:C:1991:333), since Danish law and its interpretation by the competent Danish authorities did not offer it any possible way to obtain compensation for the loss from the maritime safety and emergency services. It points out that, at the date of the adoption of Regulation No 701 on the universal service obligation providing for a three-month time limit for submission of an application for compensation, those authorities were aware that the Universal Service Directive had been incorrectly transposed into Danish law.

101 The Danish Government argues, for its part, that it was neither impossible nor excessively difficult for TDC to submit an application for compensation and, in that context, to argue that the application was directly based on the provisions of the Universal Service Directive. In its view, that is confirmed by the

fact that TDC submitted its application for compensation for 2010 within the time limit set and claimed its right to compensation before the national courts. That Government is of the view, therefore, that the circumstances of the main proceedings are not comparable to those which give rise to the judgment of 25 July 1991, *Emmott* (C-208/90, EU:C:1991:333).

102 In that regard, it must be noted that it is true that the Court has held that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon that individual by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time (see judgment of 25 July 1991, *Emmott* , C-208/90, EU:C:1991:333, paragraph 23).

103 Nevertheless, in accordance with the settled case-law of the Court subsequent to the judgment of 25 July 1991, *Emmott* (C-208/90, EU:C:1991:333), the Court has acknowledged that a defaulting Member State may rely on the expiry of a limitation period as a defence against legal proceedings, even though by the date on which the actions in question were brought that Member State had not yet correctly transposed the directive in question, ruling that the solution established in the judgment of 25 July 1991, *Emmott* (C-208/90, EU:C:1991:333) had been justified by the circumstances particular to that case, in which a time-bar had had the result of depriving the applicant in the main proceedings of any opportunity whatever to invoke her right under a directive (see, to that effect, judgments of 19 May 2011, *Iaia and Others* , C-452/09, EU:C:2011:323, paragraph 19, and of 8 September 2011, *Q-Beef and Bosschaert* , C-89/10 and C-96/10, EU:C:2011:555, paragraph 50 and the case-law cited).

104 In that regard, the Court has held that EU law does not preclude a national authority from relying on the expiry of a reasonable limitation period unless the conduct of the national authorities combined with the existence of a limitation period result in totally depriving a person of the opportunity to enforce his rights before the national courts (judgment of 8 September 2011, *Q-Beef and Bosschaert* , C-89/10 and C-96/10, EU:C:2011:555, paragraph 51 and the case-law cited).

105 In the present case, it does not appear from the information provided to the Court that the failure to observe the three-month time limit laid down in Paragraph 30(2) of Regulation No 701 on the universal service obligation deprived TDC of the opportunity to enforce its right to compensation for the costs of the provision of the maritime safety and emergency services from the competent Danish authorities, including before the national courts, which is for the referring court to ascertain.

106 In the absence of any particular circumstances having been brought to the attention of the Court, that provision of Regulation No 701 on the universal service obligation does not seem such as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law.

107 Having regard to the foregoing, the answer to the ninth question is that the principles of good faith, equivalence and effectiveness must be interpreted as not precluding legislation, such as that at issue in the main proceedings, which makes the submission of applications for compensation for the loss in the previous financial year by the operator responsible for a universal service subject to a time limit of three months running from the expiry of the period within which that operator is required to send an annual report to the competent national authority, provided that that time limit is no less favourable than that provided for in national law for an analogous application and that it is not such as to render impossible in practice or excessively difficult the exercise of rights conferred on undertakings by the Universal Service Directive, which is for the referring court to ascertain.

Costs

108 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. **The provisions 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) and, in particular, Article 32 thereof, must be interpreted as precluding national legislation which provides for a compensation mechanism for the provision of additional mandatory services by virtue of which an undertaking is not entitled to compensation from the Member State for the net cost of the provision of an additional mandatory service where the profits made by that undertaking on other services related to the universal service obligation are greater than the loss arising from the provision of the additional mandatory service.**

2. **Directive 2002/22 must be interpreted as precluding national legislation under which an undertaking designated as the provider of additional mandatory services is entitled to compensation from the Member State for the net cost of providing those services only if that cost constitutes an unfair burden on that undertaking.**

3. **Directive 2002/22 must be interpreted as precluding national legislation under which the net cost borne by an undertaking designated to fulfil a universal service obligation is the result of the difference between all the revenue and all the costs connected with the provision of the service in question, including the revenue and the costs which the undertaking would also have registered had it not been a universal service operator.**

4. **In circumstances such as those at issue in the main proceedings, the fact that the undertaking entrusted with an additional mandatory service, within the meaning of Article 32 of Directive 2002/22, provides that service not only on the territory of Denmark but also on that of Greenland does not make any difference to the interpretation of the provisions of that directive.**

5. **Article 32 of Directive 2002/22 must be interpreted as having direct effect, inasmuch as it prohibits the Member States from making the undertaking responsible for providing an additional mandatory service bear all or part of the costs connected with the provision of that service.**

6. **The principles of good faith, equivalence and effectiveness must be interpreted as not precluding legislation, such as that at issue in the main proceedings, which makes the submission of applications for compensation for the loss in the previous financial year by the operator responsible for a universal service subject to a time limit of three months running from the expiry of the period within which that operator is required to send an annual report to the competent national authority, provided that that time limit is no less favourable than that provided for in national law for an analogous application and that it is not such as to render impossible in practice or excessively difficult the exercise of rights conferred on undertakings by Directive 2002/22, which is for the referring court to ascertain.**

[Signatures]