OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN
delivered on 22 June 2010 [1]

I — Introduction

1. The Court of Justice has given rulings in the past on the financing of universal service obligations in the telecommunications sector. [2] However, this action for failure to fulfil obligations, which has been brought against Belgium, raises a new issue in so far as it is the first case to be concerned with 'social tariffs', that is to say the tariffs which undertakings apply at less than market rates when providing their services to certain categories of user.

2. In these proceedings, the Court is called upon to interpret the terms on which financial compensation may be paid for social tariffs. More specifically, it will have to analyse the terms on which Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services [3] allows a Member State to classify as an 'unfair burden' all social tariffs which are loss-making to the operators required to provide them.

3. Nevertheless, the case has not arisen in a vacuum but is part of an ongoing dispute between Belgian operators in the sector, on the one hand, and Belgium's historic operator, Belgacom, on the other. The Commission has intervened in the debate by bringing the present action for failure to fulfil obligations, although the Court also has pending before it a reference for a preliminary ruling closely connected with this case which was made in the course of proceedings brought by operators before the Belgian Constitutional Court (Case C-389/08 *Base and Others*). This explains why the Opinions in both cases are being delivered on the same day, the two cases sharing the same subject-matter but possessing features which justify their being dealt with separately.

1 — Original language: Spanish.

2 — See inter alia Case C-55/06 *Arcor* [2008] ECR I-2931; Joined Cases C-152/07 to C-154/07 *Arcor and Others* [2008] ECR I-5959; and Case C-438/04 *Mobistar* [2006] ECR I-6675.

3 — Directive of the European Parliament and of the Council of 7 March 2002 (OJ 2002 L 108, p. 51).

II — Forms of order sought

4. The European Commission seeks a declaration from the Court of Justice under Article 226 EC to the effect that the Kingdom of Belgium has failed to fulfil its obligations under Articles 12(1), 13(1), and Annex IV, part A, of Directive 2002/22 by

— failing to make a specific calculation of the net costs of social tariffs before classifying them as an 'unfair burden', and

— defining the method for calculating the net cost of 'social tariffs' in a manner contrary to Directive 2002/22.

III — Legislative framework

A — *Community law*

5. Article 3 of Directive 2002/22 calls on the Member States to avoid any distortions in the telecommunications market, in particular where services are provided at prices or on other terms or conditions which are more advantageous or favourable in pursuit of objectives in the general interest. The Directive thus seeks to secure the provision of 'universal service' in that sector while at the same time ensuring that the market operates on the basis of equal terms for all operators.

6. Under Directive 2002/22, universal service includes: (a) a connection to the public telephone network at a fixed location, at an affordable price;[4] (b) adequate provision of public pay telephones, and emergency telephone numbers, in particular the single European emergency call number *112*, free of charge from any telephone;[5] (c) telephone directories and a directory enquiry service;[6] and (d) certain measures in favour of the most socially vulnerable users, such as those living in rural or isolated areas, the elderly,[7] the disabled[8] or those on low incomes,[9] in order to ensure that they have access on the same conditions as other users.

4 — Recital 8 and Article 4(1).
5 — Recital 12 and Article 6(1) and (3).
6 — Recital 11 and Article 5.
7 — Recital 7.
8 — Article 7.
9 — Article 9.

7. Article 8 of Directive 2002/22 concerns the designation of universal service providers:

'1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.

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.'

1. 'Social tariffs'

8. Based on the need to provide an 'affordable price', social tariffs are a component of universal service provision which is expressly recognised in the EU legislation. According to recital 10 of Directive 2002/22, 'affordable price' means a price 'defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure'.

9. Article 9(1) to (3) of Directive 2002/22 provides:

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

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

from accessing or using the publicly available telephone service.

3. Member States may, besides any provision for designated undertakings to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, ensure that support is provided to consumers identified as having low incomes or special social needs.'

2. Financing of the universal service

10. Directive 2002/22 states in its preamble that compensating undertakings engaged in universal service provision need not 'result in any distortion of competition' provided that such compensation covers only 'the specific net cost involved … in a … neutral way'. [10] On that premiss, Directive 2002/22 allows Member States to establish mechanisms for providing compensation for the net cost of universal service provision, but only 'where necessary' and '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'. [11] The result of applying those criteria is the determination of what the Directive refers to as an 'unfair burden'. [12]

11. Under the heading 'Financing of universal service obligations', Article 13 of Directive 2002/22, sets out the methods for providing compensation for universal service obligations:

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

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

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

10 — Recital 4.

11 — Recital 18.

12 — Recital 21.

2. Where the net cost is shared under paragraph 1(b), Member States shall establish a sharing mechanism administered by the national regulatory authority or a body independent from the beneficiaries under the supervision of the national regulatory authority. Only the net cost, as determined in accordance with Article 12, of the obligations laid down in Articles 3 to 10 may be financed.

3. A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.

4. Any charges related to the sharing of the cost of universal service obligations shall be unbundled and identified separately for each undertaking. Such charges shall not be imposed or collected from undertakings that are not providing services in the territory of the Member State that has established the sharing mechanism.'

3. Net cost of universal service provision.

12. Article 12 of Directive 2002/22, under the heading 'Costing the universal service obligation', provides the following guidelines:

'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).

2. The accounts and/or other information serving as the basis for the calculation of the net cost of universal service obligations under paragraph 1(a) shall be audited or verified by the national regulatory authority or a

body independent of the relevant parties and approved by the national regulatory authority. The results of the cost calculation and the conclusions of the audit shall be publicly available'.

13. Finally, Annex IV, part A, provides:

'… In undertaking a calculation exercise, the net cost of universal service obligations is to be calculated as the difference between the net cost for a designated undertaking of operating with the universal service obligations and operating without the universal service obligations. This applies whether the network in a particular Member State is fully developed or is still undergoing development and expansion. Due attention is to be given to correctly assessing the costs that any designated undertaking would have chosen to avoid had there been no universal service obligation. The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator.

The calculation is to be based upon the costs attributable to:

(i) elements of the identified services which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards.

This category may include service elements such as access to emergency telephone services, provision of certain public pay telephones, provision of certain services or equipment for disabled people, etc.;

(ii) specific end-users or groups of end-users who, taking into account the cost of providing the specified network and service, the revenue generated and any geographical averaging of prices imposed by the Member State, can only be served at a loss or under cost conditions falling outside normal commercial standards.

This category includes those end-users or groups of end-users which would not be served by a commercial operator which did not have an obligation to provide universal service.

The calculation of the net cost of specific aspects of universal service obligations is to be made separately and so as to avoid the double counting of any direct or indirect benefits and costs. The overall net cost of universal service obligations to any undertaking is to be calculated as the sum of the net costs arising from the specific components of universal service obligations, taking account of any intangible benefits. The responsibility for verifying the net cost lies with the national regulatory authority'.

B — *Belgian law*

14. The Law of 13 June 2005 on electronic telecommunications [13] as amended by the Law of 25 April 2007 ('the Law of 2005 as amended'), [14] sets out a scheme for financing universal service provision which makes a distinction between social tariffs and other universal service obligations.

1. Financing of social tariffs

15. Article 74 of the Law of 2005 as amended contains the basic principles governing compensation among operators and considers 'special tariff conditions for certain categories of user' to be a social component of universal service provision. [15]

16. The Belgisch Instituut voor postdiensten en telecommunicatie (Belgian Postal Services and Telecommunications Institute) ('the BIPT') is responsible for submitting to the Minister an annual report setting out the number of 'social subscribers' served by the various undertakings in relation to their share of the public telephone market. [16]

17. Responsibility for providing compensation for the costs of 'social tariffs', upon request to the BIPT by the relevant operator, lies with a fund which has legal personality and is managed by the BIPT. [17]

18. In order to compensate for the burden of the 'social customers' served by each company, the sixth and seventh paragraphs of Article 74 provide for the sharing of funds in proportion to the overall turnover of the company in question. Compensation is payable immediately, although payments due from the fund are to be made once the fund becomes operational or, at the latest, during the year following the entry into force of Article 74 itself. [18]

19. The net cost of 'social tariffs' is calculated by the BIPT, for each operator that makes a request to that effect, in accordance with the methodology set out in the Annex. [19]

20. The BIPT may, in addition, determine the rules for calculating costs and compensation within the limits laid down by that Law. [20]

21. Under Article 45a of that Annex, the net cost of social tariffs is calculated as being the difference between the revenue which

13 — *Moniteur belge* of 20 June 2005.
14 — *Moniteur belge* of 8 May 2007.
15 — Article 74, first paragraph.
16 — Article 74, third paragraph.
17 — Article 74, fourth paragraph.
18 — Article 74, eighth paragraph.
19 — Specifically provided for in Article 45a of the Annex to the Law of 13 June 2005 inserted by Article 200 of the Law of 25 April 2007.
20 — Article 74, tenth paragraph.

an undertaking would obtain under ordinary commercial conditions and the revenue which it actually receives as a result of having to apply the social discounts provided for in the Law for persons benefiting from social tariffs. It also contains a transitional rule to the effect that, within the first five years from the entry into force of the Law, the compensation (if any) due to the historic provider is to be reduced by a percentage fixed by the BIPT on the basis of the indirect benefit accruing to that provider, in accordance with its calculations of the net costs of its social tariffs.

22. Article 202 of the 2007 Law provides an explanation of the last paragraph of Article 74 of the 2005 Law, under which reimbursements from the fund are payable immediately. Article 202 describes how, during the preparatory work on the 2005 Law, at the request of the historic universal service operator and after the net cost of that service had been fixed by the BIPT, the Belgian legislature, in its capacity as the national regulatory authority, made an assessment of the burdens borne by the former monopoly holder. The legislature thus came to the view that any loss making situation revealed by that calculation as resulting from universal service provision was unreasonable and therefore constituted an 'unfair burden'.

23. The 'Royal Decree' of 20 July 2006 laid down the detailed rules for the operation of social tariffs. [21] The third paragraph of Article 4 of that decree provided that the fund was to calculate compensation by reference to the amount of the reductions granted to beneficiaries by each operator, the number of beneficiaries and the days on which the service was provided. That provision was repealed by the 2007 Telecommunications Law.

2. Social tariff rebates.

24. Article 22 of the Annex to the 2005 Law establishes the conditions governing eligibility for social tariffs. [22]

25. Article 38 of that Law specifies the tariff reductions applicable to this component of universal service provision, starting with a minimum rebate ('at least', to use the expression employed in that article) on standard tariffs which, depending on the type of beneficiary, may take the form of a 50 % reduction of the normal tariff for connection to a public telephone network at a fixed location, or a fixed-rate reduction of the line rental or

21 — *Moniteur belge* of 8 August 2006.

22 — Subject to compliance with the additional requirements laid down in this regard by Article 22, the persons eligible are inter alia persons aged 65 years or older, persons aged 18 years or over who are at least 66 % handicapped, persons in receipt of a minimum guaranteed income, persons who are the subject of a decision adopted by the King and blind war veterans.

call charges depending on the periods over which the reduction is calculated and whether payment is made to one or more operators; for a certain category of social customer, the article provides for a two-month pre-payment card worth EUR 6.20.

3. Financing the other universal service obligations

26. Title IV, Chapter I, Section 7 of the Law of 13 June 2005 deals, in Articles 92 to 95, with the universal service fund. The specific financing mechanisms are set out in Section 8. [23]

27. Under Article 100, once each universal service provider has duly communicated the relevant data, the BIPT is required, once a year, to calculate the net cost of those obligations, excluding social tariffs, and to publish the details of those calculations.

28. Article 101 of the Law on electronic telecommunications, as worded in accordance with the Law of 25 April 2007, excludes social tariffs from its scope, these being subject to the rules of a different fund. Furthermore, that article stipulates that, for each element of universal service provision, with the exception of social tariffs, the fund is to make a payment to the providers concerned if they have made a request to that effect to the BIPT.

29. Article 203 of the Law of 25 April 2007 interprets the earlier provision, pointing out that, 'in the preparatory work on the Law of 13 June 2005 on electronic telecommunications, in the light of the requirements laid down in Directive 2002/22/EC on universal service, the legislature, acting in its capacity as national regulatory authority, examined the unfair nature of the burden following a request to that effect from the historic universal service operator and after the BIPT had determined the net cost of universal service provision. In that context, the legislature came to the view, confirmed moreover by the Raad van State, that, in so far as account is taken of any indirect benefit, including any intangible benefits, which may accrue from the provision of universal service, any loss-making situation revealed by the calculation does in fact constitute an unfair burden which must be borne by all the undertakings concerned'.

IV — Pre-litigation procedure and proceedings before the Court

30. On 15 December 2006, the Commission expressed to the Kingdom of Belgium its doubts as to the compatibility of the 2005 Telecommunications Law with Articles 12(1),

23 — Articles 96 to 102.

13(1) and Annex IV, part A, of Directive 2002/22.

31. In its reply of 16 February 2007, the Belgian Government informed the Commission that it disagreed and maintained that it had correctly transposed the Directive. In that letter, the Belgian authorities announced that amendments were to be made to the 2005 Law which were duly introduced by the 2007 Law. As a result, the Commission withdrew certain grounds of its complaint and confined itself to maintaining its objection to the compensation for obligations connected with social tariffs.

32. On 27 June 2007, the Commission sent a reasoned opinion to the Kingdom of Belgium. This having elicited no response, the present action was brought on 22 May 2008 under the then Article 226(2) EC.

33. Following the lodging of the application and the defence, the Commission lodged a reply, to which the Kingdom of Belgium responded by way of the corresponding rejoinder.

34. The hearing, organised jointly for the present action for failure to fulfil obligations and the reference for a preliminary ruling in Case C-389/08, was held on 17 March 2010 and was attended by representatives of the Kingdom of Belgium and the Commission. From that date, work could commence on delivering the Opinion.

V — Analysis

A — *Issues raised and preliminary remarks*

35. In Belgium, all telecommunications service providers are required to apply social tariffs to anyone entitled to receive them. The remaining universal service obligations, on the other hand, are not provided by all undertakings, but only by some.

36. For the purposes of providing financial compensation for social tariffs, Belgian law shares that burden between all the companies concerned by setting up a fund administered on the basis of the tariff reductions applied by each operator in relation to its total volume of business on the market: if an operator takes on fewer social tariffs than it should, it will have to compensate the fund for that difference; on the other hand, if the operator is burdened by a proportion of 'unprofitable customers' which exceeds its proper share, it is entitled to receive from the fund a payment in the amount of that difference.

37. Alongside that system of compensation for social tariffs, there is another fund the purpose of which is to finance the remaining universal service obligations.

38. The Commission bases its first ground of infringement on the allegation that the Belgian system for financing social tariffs infringes Directive 2002/22 because it makes no provision, in the context of the declaration as to the existence of an 'unfair burden', for a specific calculation of the net costs connected with those tariffs and makes that classification automatically and by way of a law interpreted retrospectively by another, later, law.

39. Under its second ground of infringement, the Commission criticises Belgium for the fact that its system for calculating the net cost of 'social tariffs' is incompatible with Directive 2002/22 in so far as it gives to the term 'net cost' a meaning different from that laid down in the Directive and fails to take intangible benefits into account in the calculation of net costs.

40. The Belgian Government denies that net costs were not calculated before the determination was made as to the existence of an 'unfair burden' and points out that, in 2003, a calculation was made of the net cost of the universal service obligations discharged by Belgacom, an undertaking which, at that time, was alone responsible for such obligations. It also maintains that Directive 2002/22 provides for an abstract system of calculation which does not need to be reproduced in relation to every operator. Finally, it contends that the Directive does not preclude an economic assessment made on the basis of cost-effectiveness not achieved as a result of applying the rebates in question.

41. In order to settle the points of uncertainty raised here, we must look at Articles 12 and 13 of Directive 2002/22 in order to clarify their scope and the objectives pursued. That assessment would also be useful for the purposes of addressing both the first and second grounds of infringement raised by the Commission.

42. As already indicated, while Directive 2002/22 contains a number of specific remedial measures for circumstances in which the obligations associated with universal service provision become unreasonable for undertakings, it does not actually set out a comprehensive financing system. None the less, despite the fact that universal service obligations vary in nature and serve to meet specific needs, it is clear from Directive 2002/22 that universal service costs must be identified, monitored and assessed by the Member States in accordance with a number of criteria relating to individuality, specificity and periodicity.

1. Individuality

43. Counsel for the Kingdom of Belgium maintains that the financial effort involved in universal service provision should be assessed on a comprehensive and broad basis. In its opinion, the effect of a system such as that provided for in the Directive may be that some undertakings do not obtain the support available under that system if they do not ask for it or if the costs so incurred are reasonable, thus giving rise to unequal treatment which would be contrary to the objectives pursued.

44. That contention is not convincing.

45. In the first place, that argument is undermined by the fact that the Directive entitles – but does not oblige – undertakings to request compensation by virtue of an 'unfair burden'. Secondly, it is unconvincing because not all burdens connected with universal service provision are necessarily 'unfair'.

46. The Directive requires Member States to take into consideration the strategic position and financial capacity of each operator but it does not in principle provide for a general mathematical calculation based on data from a single undertaking. This assertion is solidly supported by recital 21, which states that '… in the case of cost recovery by means of levies on undertakings, Member States should ensure that the method of allocation amongst them is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle does not prevent Member States from exempting new entrants which have not yet achieved any significant market presence …' and that '… in particular in the case of sharing mechanisms [involving a fund, the principles] of non-discrimination and proportionality [must also be respected]'.

2. Specificity

47. The argument set out in the previous point indicates that the justification for the burden should be assessed on a case-by-case basis, that is to say in relation to each of the obligations connected with universal service provision, rather than in the abstract.

48. In *Commission* v *France*, [24] the Court of Justice, although ruling on the earlier directive, held that, in calculating the costs of universal service provision, 'only those costs that are a direct consequence of the provision of universal service' may be taken into account, and concluded that 'it is therefore not permissible under Directive 97/33 to ascribe flat-rate or imprecise values to the components of the net cost of universal service provision, rather than carrying out specific calculations'.

24 — Case C-146/00 *Commission* v *France* [2001] ECR I-9767, paragraph 60.

49. Furthermore, Annex IV, part A, of Directive 2002/22 provides that 'the calculation of the net cost of specific aspects of universal service obligations is to be made separately …. The overall net cost of universal service obligations to any undertaking is to be calculated as the sum of the net costs arising from the *specific components* of universal service obligations.' [25]

50. Likewise, recital 24 of Directive 2002/22 calls on the national regulatory authorities to satisfy themselves that undertakings receiving universal service funding provide 'a sufficient level of detail of the specific elements requiring such funding in order to justify their request'. There is no lack of awareness in recital 24 that 'there are incentives for designated operators to raise the assessed net cost of universal service obligations', and, in order to stifle any temptation, it therefore instructs Member States to ensure 'effective transparency and control of amounts charged to finance universal service obligations'. [26]

51. In my view, the fact that services which are 'additional' to those within the universal service obligations are governed by the criterion of cost-effectiveness and that 'no compensation mechanism involving specific undertakings may be imposed' [27] supports the view that unbundling the calculation serves to prevent possible acts of fraud, such as including additional components of universal service provision in the financing or using 'cross-subsidies'.

3. Periodicity of the calculation

52. In line with its arguments regarding the flat-rate nature of the assessment, the Kingdom of Belgium maintains that, once economic neutrality has been established through payments to the fund, there is no need for any further analysis of whether the burdens are unjustified, although this does not, in its view, preclude an annual review. [28]

25 — Emphasis added.

26 — Advocate General Geelhoed is more forthright in point 15 of his Opinion in *Commission* v *France*, when he explains that '*… the rules generally involve supervision of the former monopoly-holders which not only have a dominant position on the market but often also, on account of that position, are the only ones with any insight into the economic soundness of the costs to be calculated. It goes without saying that they have an interest in ensuring that the costs calculated are not too low …*'.

27 — Article 32 of Directive 2002/22, anticipated by recital 25 which states: '… 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 Community law but not by means of contributions from market players'.

28 — In accordance with Article 45a of the Belgian Telecommunications Law.

53. That opinion seems to disregard the dynamic nature of universal service obligations, which, as Directive 2002/22 points out, 'should be periodically reviewed with a view to proposing that the scope be changed or redefined, [taking account of] evolving social, commercial and technological conditions'. [29] Furthermore, the directive also provides that 'any change of scope automatically means that any net cost can be financed via the methods permitted in this directive'. [30]

54. Consequently, if new obligations were included in universal service provision or if undertakings not previously involved in universal service provision were to emerge, other costs would arise which would require a new assessment. The purpose of such a reassessment would be to enable the national regulatory authority to consider how each undertaking should bear the costs under the new scenario, and thus to determine whether those costs ultimately constitute an 'excessive burden' by comparison with the previous situation.

B — *The first ground of infringement*

55. Looking now at the detail of the grounds raised by the Commission, the latter alleges in the first of those grounds that there was no prior examination to determine whether universal service provision constitutes an excessive burden for each telecommunications operator. However, the explanations given by the Belgian Government indicate that such an analysis did take place and that it was confined to Belgacom, the only operator in existence at that time. Furthermore, the calculation covered all the universal service obligations to be discharged and not just social tariffs.

56. The Belgian Government recognises that, until the entry into force of the Law of 25 April 2007, there had been no express declaration that the net costs of social tariffs constituted an 'unfair burden' within the meaning of Directive 2002/22. The formal declaration did not come into being until Article 202 of that Law was adopted, which sought to bring to an end the legal uncertainty that had existed by providing an interpretation. After the preliminary contacts prior to these proceedings, Belgium declared in law that, under its 2005 legislation, the application of social tariffs was always considered to constitute an unfair burden. In reaching that conclusion, the authors of the 2005 legislation relied on the calculation, carried out in 2003 and updated in 2005, of the net costs connected with *all* the universal service obligations discharged by Belgacom. Accordingly, the Kingdom of Belgium maintains, the decision on the unjustified nature of the burden was taken by

29 — Article 15 and recital 25 of Directive 2002/22.
30 — Recital 25 of Directive 2002/22.

the legislature following the analysis carried out by the BIPT.

57. Article 12 of Directive 2002/22 provides for a system under which assessment and calculation precede the declaration as to the existence of an 'unfair burden'. The Commission has submitted that the Belgian legislature set up a compensation scheme under which no mention was made of the unfair nature of universal service obligations but a retroactive declaration to that effect was made subsequently. In my Opinion in Case C-389/09, I emphasise how important the preliminary assessment and calculation phase is from the point of view of legal certainty and the technical neutrality guaranteed by the national regulatory authority. In the light of the aims pursued by the procedure for declaring that an 'unfair burden' exists, as well as the wording of Article 12 of Directive 2002/22, a course of action such as that taken in 2007, whereby a legislative decision made in 2005 was interpreted *ex lege*, is conduct which is incompatible with that directive.

58. However, the Commission pointed out in its application that the legislative nature of the declaration is not the main focus of its concern. On the contrary, what has prompted this action is the lack of any preliminary calculation, combined with the fact the declaration made in 2005 and 2007 is general and not readily reviewable.

59. In this regard, I have already pointed out in points 42 to 54 of this Opinion that the system laid down in Article 12 of the directive imposes, albeit tacitly, a number of conditions concerning individuality, specificity and periodicity which must be observed when applying the mechanism provided for in that provision. As I have already indicated, those characteristics were absent from the process by which the Kingdom of Belgium made the declaration as to the existence of an 'unfair burden'. Consequently, in so far as the legislature acted in such a way as to make it difficult to apply the criteria of individuality, specificity and periodicity, I consider that the first ground raised by the Commission is well-founded.

C — *The second ground of infringement*

60. The Commission divides its second ground of infringement into two sub-grounds, one relating to the method for calculating the 'net costs' of social tariffs, and the other relating to the inclusion of intangible benefits in that calculation. Thus, whereas the previous ground focused on the interpretation of Article 12 of Directive 2002/22, the second ground concerns the sharing mechanism permitted under Article 13, where the criteria of individuality, specificity and periodicity must also be observed.

1. The definition of 'net cost' and the distinctiveness of the calculation of such costs in relation to social tariffs

61. According to the Commission, the Belgian method of financing universal service provision is at odds with Directive 2002/22 in so far as it makes a flat-rate assessment on the basis of data which relate exclusively to Belgacom – the former monopoly holder – and extends that assessment to other undertakings without investigating their particular circumstances. Accordingly, in Belgium, 'social tariffs' are always an 'unfair burden' for all operators. In so far as that conclusion is based on a method of calculation which, in the Commission's view, is incorrect, the Kingdom of Belgium is alleged to have failed to fulfil its obligations under Articles 12(1), 13(1) and Annex IV, part A, of Directive 2002/22.

62. The Kingdom of Belgium, on the other hand, maintains that the subsidising of universal service provision should not be based on a periodic examination of the unjustified nature of the burden, which could lead to 'the award of compensation'. On the contrary, the Kingdom of Belgium takes the view that costs need be analysed only once for the purposes of 'establishing a general financing mechanism'.

63. Directive 2002/22 provides that competition is also to be introduced in areas which are 'geographically and economically less favoured'. The Belgian Government has pointed out the beneficial impact which its social tariff scheme has on free competition, by reference to the following argument: if an operator attracts more social subscribers than its volume of business calls for, it will receive a payment from the fund; however, if it makes no effort to enlist such subscribers, it will have to pay for the share which it has not taken on. In this way, it is market forces which determine how those customers are distributed.

64. The analysis of that submission, which is based on the promotion of competition between operators, must have regard to the special circumstances that surround the provision of social tariffs in Belgium, while taking into account, as the relevant and general framework of reference, the conditions of individuality, specificity and periodicity set out above, which follow from the wording of Directive 2002/22.

65. First of all, as is clear from Article 8 thereof, Directive 2002/22 does not prevent all telecommunications undertakings in a Member State from collaborating in the provision of a universal service component, as is the case in Belgium with respect to social tariffs. Secondly, the financing mechanism introduced in Belgium is based on Article

13(1)(b) of Directive 2002/22, which, unlike Article 13(1)(a), does not provide for the payment of publicly-funded contributions to an undertaking but only for the sharing of the net cost of universal service obligations 'between providers of electronic communications networks and services'.

66. In short, that sharing mechanism is effectively a self-financing scheme: in other words, it distributes the burden not only between operators which have assumed the universal service obligation in question but also between those which have not been designated to do so.

67. On that premiss, that is to say where *all* service providers assume the universal service obligation in question (in this case, social tariffs), the need for a prior assessment of costs is mitigated. Furthermore, given that the net cost of social tariffs is the same as the discount represented by the market-rate rebate, an individual and specific calculation is not essential for the purposes of maintaining free competition.

68. However, that proposition would not be sustainable if any (even one) operator were not subject to the obligation to apply social tariffs, or if the universal service obligation did not lend itself to an arithmetical calculation, unlike social tariffs. In that situation, applying the same measure of the ratio of market share to social customer complement to all operators, without any prior assessment of costs, could lead to over-compensation or under-compensation, to the benefit of one or more operators, and thus to distortions of competition. Such an outcome is clearly contrary to Directive 2002/22 and would be all the more likely to occur in a situation such as that in Belgium, where, as the hearing unequivocally showed, the historic operator is responsible for 96 % of social tariffs.

69. After all, for some operators, the assumption of universal service obligations other than social tariffs would represent a sacrifice of significant magnitude in monetary terms, whereas, for others, it would not adversely affect their overall profitability. Everything would depend on the economic robustness of each operator and, clearly, on its market position.

70. The Kingdom of Belgium is manifestly aware of those risks since, leaving aside the distinctiveness of social tariffs, Article 100 of the Telecommunications Law provides that, after each universal service provider has duly communicated the relevant data, the BIPT is to make an annual calculation of the net cost

of those obligations. Furthermore, that calculation is to be published in detail.

71. For those reasons, I consider that the first part of the second ground of infringement raised by the Commission is unfounded.

2. The calculation of intangible benefits

72. As the Commission has pointed out, Directive 2002/22 refers specifically, in recital 20, to intangible benefits, thus: 'an estimate in monetary terms of the indirect benefits that an undertaking derives by virtue of its position as provider of universal service should be deducted from the direct net cost of universal service obligations in order to determine the overall cost burden.'

73. The concern that intangible benefits should be taken into account is also reflected in Annex IV, part A, which, after stating that 'the calculation of the net cost of specific aspects of universal service obligations is to be made separately', makes it clear that 'the double counting of any direct or indirect benefits and costs' must be avoided. Finally, the Annex also refers to the taking into consideration of any 'intangible benefit' in calculating the overall net cost of universal service obligations.

74. Similarly, the Court of Justice, in *Commission* v *France*,[31] rejected the proposition that the advantages generated by the provision of universal service could be left out of account. There is no denying that each operator projects onto the market a certain brand image the recognition of which may be enhanced depending on the way in which those services are provided.

75. Those advantages have been overlooked by the Belgian legislation, since it has been shown that they were taken into consideration only in the analysis of Belgacom's costs, but no provision was made for them to be taken into account in the case of other operators, and none is made for the purposes of any future assessments which might be undertaken either.

76. For those reasons, the second part of the second ground raised by the Commission is well-founded in so far as the method devised by Belgium for calculating the net cost of social tariffs does not allow for the possibility of taking such indirect benefits into account.

31 — In paragraph 76, the Court points up the obligation to take those intangible benefits into account.

3. Summary

77. As I explained in points 48 to 59 of this Opinion, the calculation of net costs must, as a general rule, and for the purposes of sharing compensation funds in line with the responsibilities of each operator, be made according to criteria of individuality, specificity and periodicity, whose absence in this case is a reason for accepting the Commission's first ground of infringement.

78. Likewise, the requirement that that calculation precede any actual declaration as to the existence of an unfair burden must be observed in situations where, under a cost-sharing scheme such as that provided for in Article 13(1)(b) of Directive 2002/22, not all operators discharge a specific universal service obligation even though they all contribute towards the costs of such obligations. That is, however, not the case here. In fact, the reverse is true: all undertakings are subject to the obligation to provide universal service and they all contribute funds to the scheme. In this case, the calculation of the net cost is obtained by an arithmetical operation which is applied in the same way to all the operators concerned. For all the foregoing reasons, the Commission has not demonstrated that the net cost of social tariffs must be obtained by means of a method different from that proposed by Belgium. If account is also taken of the fact that all operators contribute towards providing the service, since they are all under the same obligation to do so, and that they participate jointly in its financing, I conclude that the first part of the second ground of infringement should be rejected.

79. None the less, for the reasons set out in points 72 to 74 of this Opinion, the second part of the second ground raised by the Commission must be upheld in so far as the Kingdom of Belgium fails to take into consideration the intangible benefits accruing from the provision of social tariffs when calculating the net cost of such tariffs.

VI — Costs

80. Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of Justice may order that the costs be shared or that the parties bear their own costs.

81. In the event that the Court gives a ruling consistent with my proposal, the fact that the Commission has been unsuccessful on one part of the two grounds relied on by it as against the Kingdom of Belgium would indicate that, for reasons of equity, each party should bear the costs of its participation in the proceedings.

VII — Conclusion

82. In the light of the foregoing, I propose that the Court should:

(1) declare that, by failing at the required time and in the circumstances described to make a declaration of 'unfair burden', the Kingdom of Belgium has failed to fulfil its obligations under Article 12(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services;

(2) declare that the Kingdom of Belgium:

— has not failed to fulfil its obligations under Articles 12(1), 13(1) and Annex IV, part A, of Directive 2002/22 by establishing a system of calculating the net cost of social tariffs as being equal to the difference between the revenue which a service provider would obtain under normal market conditions and that which it actually receives from the beneficiary of the tariff;

— has failed to fulfil its obligations under Articles 12(1), 13(1) and Annex IV, part A, of Directive 2002/22 by establishing a system of net cost calculation which does not take into consideration the intangible benefits accruing from the provision of universal service;

(3) order each party to bear its own costs.