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

I — Introduction

1. The Grondwettelijk Hof (Constitutional Court), Belgium, seeks a ruling from the Court on the scope of the provisions governing compensation for universal service obligations which are laid down in Directive 2002/22/EC on universal service in the telecommunications sector. [2] More specifically, the Court must determine whether that directive, taken in conjunction with its Framework Directive, Directive 2002/21/EC, [3] allows a legislature to act as a national regulatory authority and to decide that the provision of a universal service at a loss is an 'unfair burden' solely on the basis of an assessment of costs carried out before the liberalisation of the telecommunications market.

2. Although the order for reference focuses on the Belgian provisions governing compensation for universal service obligations as a whole, the national proceedings appear to be concerned in particular with one specific service: the so-called social tariffs. Indeed, the Belgian provisions governing compensation for the provision of that service have also come to the attention of the European Commission, leading it to bring an action before the Court for failure to fulfil obligations in Case C-222/08 *Commission* v *Belgium*, in which I shall deliver the Opinion on the same day as the one in the present proceedings.

3. In these preliminary ruling proceedings, a group of telecommunications undertakings has brought an action for annulment on the grounds of unconstitutionality before the Grondwettelijk Hof, contesting the law governing compensation for the provision of universal service in the telecommunications market. The applicants claim that they suffer from discrimination vis-à-vis the incumbent operator, Belgacom NV, in that compensation for those services benefits that operator to the detriment of the others.

1 — Original language: Spanish.

2 — Directive 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).

3 — Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

4. Consequently, the Grondwettelijk Hof asks the Court to rule on the interpretation of the nature of national regulatory authorities (NRAs) under European Union law and also on the manner in which universal service obligations should be compensated for under Directive 2002/22.

II — The applicable legislation

A — *European Union law*

5. As the framework text of secondary law in the field of telecommunications, Directive 2002/21 lays down a series of general provisions applicable to NRAs. For the purposes of the present dispute, it is necessary to draw attention to Article 3, which provides as follows:

'1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.

3. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently.

4. Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body.... Where more than one authority has competence to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.

...

6. Member States shall notify to the Commission all national regulatory authorities assigned tasks under this Directive and the Specific Directives, and their respective responsibilities.'

6. The provisions of the Framework Directive are rendered more specific by Directive 2002/22, which applies them to the universal service aspect of telecommunications services.

7. Article 3 of Directive 2002/22 entrusts Member States with ensuring that telecommunications services are provided at a specified quality, making sure, in particular, that services are provided at an affordable price where conditions exist which differ from the norm.

8. In accordance with Directive 2002/22, the basic services comprise: (a) connection to the public telephone network from a fixed location at an affordable price; (b) an adequate supply of public pay telephones, with emergency numbers, in particular the single European number 112, being freely available from any telephone; (c) telephone directories and a telephone directory enquiry service; and (d) certain measures for the most socially vulnerable users, such as those in rural or isolated areas, the elderly, people with disabilities, and those on low incomes, so that they may have access on the same conditions as everyone else.

9. Article 8 of Directive 2002/22 refers to 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.'

10. According to recital 10 in the preamble to Directive 2002/22, '[a]ffordable 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'.

11. Social tariffs are dealt with, in general terms, in Article 9 of Directive 2002/22:

'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.

...'

12. In order to guarantee the effectiveness of universal service, Article 13 of Directive 2002/22 establishes a method of financing universal service obligations in these terms:

'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.

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 of 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.'

13. The step prior to compensation is an assessment of the costs of universal service, which are calculated according to the method laid down in Article 12 of Directive 2002/22:

'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.'

14. Annex IV, Part A, provides as follows:

'…

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 who 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*

15. The Law of 13 June 2005 on electronic communications, as amended by the Law of 25 April 2007 ('the Law of 2005 as amended'), lays down a system for financing universal service which distinguishes between social tariffs and the other universal service obligations.

16. Article 74 of the Law of 2005 as amended (in the version inserted by Article 173 of the Law of 25 April 2007) sets out the basic principles which govern compensation between operators and provides that 'special tariff conditions for certain categories of beneficiary' are a social component of universal service. [4]

17. The Belgisch Instituut voor postdiensten en telecommunicatie (Belgian Institute for Post and Telecommunications; 'the BIPT') is responsible for sending an annual report to the minister containing the number of 'social subscribers' which each undertaking has in relation to its market share in the public telephone sector. [5]

18. Where an application is made to the BIPT by the operator concerned, compensation for social tariffs is paid from a fund with legal personality which is administered by the BIPT. [6]

19. In order to compensate for the burden of social customers assumed by each company, Article 74(6) and (7) provide for the funds to be allocated in proportion to overall turnover. Compensation is payable immediately, although payment of compensation through the fund takes place as soon as it is operational or, at the latest, during the year following the entry into force of Article 74. [7]

20. The net cost of social tariffs for each operator which has submitted an application is calculated by the BIPT in accordance with the methodology set out in the annex. [8] In addition, the BIPT may lay down detailed rules for calculation of the costs and compensation within the parameters set by the Law. [9]

21. According to Article 45a of the annex, calculation of the net cost of social tariffs reflects the difference between the revenue that the undertaking concerned would receive under normal commercial conditions and that which it actually receives as a result of having to apply the social discounts provided for in the Law to social tariff beneficiaries. The provision also lays down a transitional rule pursuant to which, within the first five years following the entry into force of the Law, the compensation (where appropriate) paid to the incumbent operator must be reduced by a percentage set by the BIPT on the basis of

4 — Article 74(1).
5 — Article 74(3).
6 — Article 74(4).
7 — Article 74(8).
8 — Article 74(9).
9 — Article 74(10).

indirect gains, taking into account the calculations which it made in connection with the net cost of its social tariffs.

22. Article 202 of the Law of 25 April 2007 supplies an interpretation of the final paragraph of Article 74 of the Law of 13 June 2005, which provides that compensation from the fund is payable immediately. Article 202 states that, when the Law of 13 June 2005 was being drawn up, in the light of the requirements laid down in Directive 2002/22, at the request of the incumbent universal service provider, and after the BIPT had determined the net cost of universal service, the Belgian legislature, in its capacity as the NRA, undertook an assessment of the burden on the former monopoly. The legislature concluded that, taking into account indirect gains (including non-material gains), any deficit situation constitutes an unreasonable burden.

III — The national proceedings and the question referred for a preliminary ruling

23. On 8 November 2007, Base NV, Euphony Benelux NV, Mobistar NV, Uninet International NV, T2 Belgium NV and KPN Belgium NV brought before the Grondwettelijk Hof an action for annulment of the Law of 25 April 2007, claiming infringement of Articles 10 and 11 of the Grondwet (Belgian Constitution).

24. The applicants complain that, in their opinion, those provisions have led to their being treated differently from Belgacom in so far as the legislature decided that universal service constitutes an unfair burden for the former monopoly, which therefore means that that determination may be reviewed in the future only by statute. By contrast, as far as the applicants are concerned, an unfair burden may be determined and, where appropriate, updated only by the BIPT.

25. The applicants further complain that the legislature calculated the net costs of Belgacom, a public limited company, on the basis of figures taken from accounting documents for the 2001 financial year, whereas, in their case, the assessment was carried out by the BIPT using actual figures.

26. However, based on the consideration that, in its capacity as the national regulatory authority, the legislature found that the provision of universal service under non-cost-effective conditions constitutes an unfair burden on all providers, the Grondwettelijk Hof referred the following question for a preliminary ruling:

'Can Article 12 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) be interpreted as allowing the competent legislature of a Member State, acting in the capacity of the national regulatory authority, to determine generally and on the basis of the calculation of the net costs of the universal service provider – previously the sole provider – that the provision of universal service may represent an "unfair burden" for those undertakings designated as universal service providers?'

IV — The procedure before the Court

27. The reference for a preliminary ruling was lodged at the Registry of the Court on 8 September 2008.

28. Written observations were lodged by the Belgian Government, Base NV, Belgacom NV, and the Commission.

29. A joint hearing was held on 17 March 2010 for this case and for Case C-222/08. It was attended by the representatives of the Kingdom of Belgium, Base NV and Others, Belgacom NV, and the Commission.

V — Analysis of the question referred for a preliminary ruling

30. In view of the terms in which the Grondwettelijk Hof has framed the question, it is necessary to determine, first of all, whether the Belgian legislature acted in accordance with Directive 2002/22 when it set out the retroactive interpretative statement of 2007, having regard to the fact that the directive expressly provides that that decision is to be made by the NRA. If the reply to that question is in the affirmative, it will be necessary to determine next whether an overall, abstract assessment based on data relating exclusively to Belgacom – the former monopoly – may be applied to the other undertakings without taking account of their particular circumstances.

A — *NRAs and the intervention of the Belgian legislature*

31. With a view to carrying out the regulatory tasks assigned by Directive 2002/21, the Member States entrusted those tasks to independent bodies with specialist technical knowledge. That follows from Article 3(2) of the directive, which stipulates that such bodies –NRAs – must be 'legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services'.

32. That measure, which has a profound institutional impact, is rooted in the opening-up of strategic markets that were traditionally

monopolised by the State, such as telecommunications, and it requires the State, for the purposes of European Union law, to separate its roles, on the one hand, as a mediator vested with public authority, and, on the other, as a business with a legitimate expectation of profit.

33. With a view to making those two aspects compatible, the regulatory function is assigned to independent authorities which, in the telecommunications sector, are named national regulatory authorities. The independence of those authorities is strengthened in the enacting terms of the directives, although Member States also have a margin of discretion when it comes to defining the exact scope of that independence. Accordingly, it should be pointed out that there are two levels of protection/definition of the independence of NRAs: one at the level of European Union law, where the directives set the boundaries of the definition in the most general terms, and the other at the level of national law, which is responsible for framing the nature of that independence in more specific terms.

34. The Framework Directive recognises that second level of definition of the independence of NRAs, stating in the preamble that the regulatory boundaries of those bodies must be laid down 'without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty...' [10]

35. To supplement that framework, the Court recently supplied some useful criteria for interpretation, thereby helping to resolve the tension between the independence of NRAs and the institutional autonomy of the Member States.

1. The case-law of the Court on NRAs and the institutional autonomy of the Member States

36. In accordance with a firmly established principle, the decision as to which bodies of the Member States are required to discharge the obligations arising under European Union law is made according to their respective constitutional systems. [11] The allocation of powers by Member States may not jeopardise either the wording or the effectiveness of the provisions of European Union law.

10 — Recital 11.

11 — See, among many others, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28.

37. That tension between institutional autonomy and the effectiveness of European Union law becomes all the more acute where the European Union legislature harmonises a sector and introduces measures of institutional organisation applicable to the Member States. It is well known that this has occurred in the case of the telecommunications directives, whose Framework Directive requires Member States to set up independent, specialist bodies. [12] In that situation, the need for the organisation of institutions at national level to be consistent with European Union law becomes overriding, but that does not mean, however, that Member States have no margin of discretion.

38. The Court has confirmed in its case-law that the creation and organisation of NRAs take place in a general, abstract framework set by the telecommunications directives, and the Member States have considerable latitude when it comes to the definition of that framework. Those and other criteria follow from the two important judgments in this area, *Comisión del Mercado de las Telecomunicaciones* [13] and *Commission* v *Germany*, [14] which are particularly useful for the purposes of disposing of the present preliminary ruling proceedings.

39. Comisión del Mercado de las Telecomunicaciones concerned whether a Member State was entitled to entrust different bodies with assigning national numbering resources and managing national numbering plans. Those functions are referred to in Article 10(1) of the Framework Directive and Spain had divided their performance between the national NRA and the government. The Court resolved the matter by stating that the Framework Directive does not preclude a Member State from assigning to different bodies the functions which the directive allocates to NRAs. However, the judgment included an important qualification to the effect that 'Member States must not only guarantee the functional independence of regulatory authorities in relation to the organisations providing electronic communications networks, equipment or services, but must also publish, in an easily accessible form, the tasks to be undertaken by the national regulatory authorities, and notify to the Commission the names of the regulatory authorities entrusted with carrying out those tasks, and their respective responsibilities.' [15]

40. The dispute between the Spanish NRA and the Spanish Government was finally resolved by the Tribunal Supremo (Supreme Court) in accordance with that case-law, and

12 — In that connection, see Muñoz Machado, S. and Esteve Pardo, J. (Dir.) 'Fundamentos e instrumentos jurídicos de la regulación económica', *Derecho de la regulación económica*, Vol. I, Iustel, Madrid, 2009, p. 133.

13 — Case C-82/07 [2008] ECR I-1265.

14 — Case C-424/07 [2009] ECR I-11431.

15 — Paragraph 25.

judgment was given in favour of the NRA: [16] first, there may be different independent regulatory bodies with the status of NRA; and, second, the Member State concerned must divide the functions in such a way that it complies with a minimum standard of predictability, meaning that it must clearly determine which responsibilities fall to each body and notify them to the Commission without delay. [17]

41. The second judgment of the Court which must be taken into account is the one recently given in *Commission* v *Germany*. In that action for failure to fulfil obligations, the Commission claimed that the Federal Republic of Germany had infringed the telecommunications directives by restricting by statute the application of regulation to sensitive markets, and by restricting the powers of guidance and intervention of NRAs with respect to specific regulatory objectives. In its judgment, the Court laid down case-law on two matters of particular relevance to the present proceedings: first, it drew attention to the role of NRAs in analysing relevant markets, the main purpose of which is to enable them to determine whether the undertakings present on the market exercise significant power which gives rise to distortions in the functioning of that market. In so far as the German legislature had excluded NRAs from the definition and analysis of new markets, the Court held that the legislature had deprived those bodies of the powers *expressly* conferred on them by the directives. [18] Second, the Court also found that a legislative provision which sets certain objectives to be pursued by NRAs, while excluding others that are referred to in the directives, is unlawful. In that connection, the Court stated that where the legislature gives priority to only one of the objectives which the Framework Directive requires NRAs to achieve, it 'gives a weighting to those objectives, even though such a weighting exercise is a matter for the NRA when carrying out the regulatory tasks assigned to it'. [19]

42. Advocate General Poiares Maduro analysed that point in detail in his Opinion in *Commission* v *Germany* and pointed out that the legislature may, occasionally, be prohibited from carrying out the tasks assigned to NRAs. As he states in point 63 of that Opinion, 'assigning such balancing to the national legislature has different consequences from assigning it to the NRAs. NRAs have been set up and given particular powers by the Community regulatory framework for a reason: they are expected to be insulated from certain interests and to reach their decisions governed only by the criteria established in that framework.'

16 — Judgment of the Tribunal Supremo, Chamber for Contentious Administrative Proceedings, Third Division, of 10 March 2009.

17 — See Cienfuegos Mateo, M. and Armengol Ferrer, F., 'Cuestión prejudicial comunitaria, pluralidad de organismos nacionales reguladores en el ámbito de las telecomunicaciones y conflicto potencial de competencias entre el Estado y las Comunidades Autónomas', *Unión Europea Aranzadi*, October 2008.

18 — Paragraphs 81 to 83.

19 — Paragraph 93.

43. It is precisely because the legislature performs a specific role in each national constitutional system that I agree with Advocate General Poiares Maduro that there are occasions when that role is not compatible with the tasks which NRAs are required to undertake. The fact that the preparatory tasks of analysing markets, balancing objectives, and adopting individual decisions falls to those bodies means that the directives assign those tasks to them on the understanding that they are the institutions which are, technically and legally speaking, the most suited to assuming responsibility for the obligations laid down in the European Union regulatory framework. [20]

44. The following conclusions may be drawn from the considerations set out above.

45. First, each Member State has a wide discretion when it comes to entrusting to NRAs the tasks assigned to them in the directives. As a result, the directives do not preclude the existence of several NRAs in the same market, where each one carries out separate functions, provided that such a division does not give rise to legal uncertainty. Accordingly, conferring the status of NRA on more than one body must satisfy minimum standards of predictability and transparency.

46. Second, the legislature is not excluded from occasionally taking on some of the tasks assigned to NRAs where the Member State concerned considers it appropriate, provided that the standards of predictability and transparency referred to above are observed. It is even possible for a legislature to adopt decisions which directly affect the functions of NRAs without usurping their role. [21] However, for that intervention to be compatible with the directives, it follows from the judgment in *Commission* v *Germany* that the conduct involved may not limit or abolish tasks which have been expressly assigned to NRAs by the directives. That restriction of the legislative powers of the Member States derives from the rationale for NRAs, which were created and set up to meet specific objectives which Member States, in adopting the directive, wished to be fulfilled by technical bodies that

20 — Komesar, N., *Imperfect Alternatives – Choosing Institutions in Law*, University of Chicago Press, Chicago, 1994, p. 176 et seq.

21 — Recital 13 in the preamble to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37), which amends the 2002 telecommunications directives, recognises that the legislature is not the most appropriate authority to take on the tasks assigned to NRAs but it does not make a definitive assessment in that regard. On the contrary, the ambiguity of the recital, which merely discourages Member States from resorting to the intervention of the legislature, appears to confirm that legislatures may act as NRAs, provided that they satisfy certain conditions: 'To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for *ex ante* market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. *Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework*' (emphasis added).

are functionally separate from the task of governance and from parliamentary activity.

2. The Belgian legal framework in the light of the directives and their interpretation in case-law

47. Having reached this point, it is now necessary to establish whether the Belgian legislature lawfully took on tasks which the Framework Directive and Directive 2002/22 in principle assign to NRAs. If that is not the case, it is also necessary to examine whether, notwithstanding the fact that the Belgian legislature granted itself the status of NRA, it may lawfully act as such.

48. Article 12(1) of Directive 2002/22 expressly provides that it is the responsibility of NRAs to assess whether the provision of universal service constitutes an unfair burden on undertakings which provide that service. For that purpose, they must calculate the net cost of the service taking into account the criteria referred to in Article 12(1)(a) and (b). After doing the calculation, the NRA concerned must decide formally whether an undertaking is subject to an unfair burden in accordance with Article 13 of Directive 2002/22. At that point, the provision stops referring openly to NRAs and provides that '*Member States shall, upon request from a designated undertaking, decide*' [22] to introduce a system of compensation financed from public funds or a system of sharing the costs between providers of telecommunications services.

49. The system laid down in Directive 2002/22 is perfectly clear and describes the tasks to be carried out by each institution. It is striking that it is NRAs which are expressly called upon to carry out the preliminary tasks of analysing and defining the market and of calculating the costs of universal service. They are entrusted with those tasks so that the market is researched by a body which is technically reliable and functionally independent. That is because, although compensation for the provision of universal service is an acceptable measure from the point of view of the market, there is also a risk of abuse which would have the effect of altering the competitive position of some operators. Accordingly, Directive 2002/22 provides that it is NRAs which must set the rules which will subsequently be used to ensure that capital is transferred to one or more service providers.

50. After that, once adequate technical and legal rules for the payment of compensation have been set, Directive 2002/22 assigns what might be described as the core decision-making role to the Member States. Thus,

22 — Emphasis added.

references to NRAs cease when it comes to adopting what is without doubt the fundamental decision: the system of compensation and its application on a case-by-case basis. Accordingly, Directive 2002/22 has created a two-stage system, the first of which is analytical and technical in nature and is the exclusive responsibility of NRAs, while the second, which is left to the Member States, may be entrusted to the institution which is considered to be the most suitable, in accordance with the institutional autonomy of each State. There is nothing to preclude the legislature from being the competent authority for determining the system of compensation, although it must do so in accordance with the criteria set out in Article 13 of Directive 2002/22.

51. Has Belgium complied with that system?

52. In the light of the events which took place between 2005 and 2007, it is clear that that question may only be answered in the negative.

53. First of all, it must be pointed out that, during the initial stage, which Directive 2002/22 provides is the exclusive responsibility of NRAs, and which, in the instant case, took place in 2005 and was carried out by the legislature, no reference at all was made to an assessment of the costs or to the fact that there was an unfair burden. It was only in 2007, after the Commission commenced a pre-litigation procedure for failure to fulfil obligations, that the Belgian legislature adopted an interpretative measure with retroactive effect, stipulating that the Law of 13 June 2005 had carried out that assessment and had confirmed the existence of an unfair burden. That conduct is incompatible with the very essence of Article 12 of Directive 2002/22, the aim of which is to ensure the predictability and technical nature of the first stage of the procedure. That is because, as the Court held in *Comisión del Mercado de las Telecomunicaciones*, where a body, in this case the legislature, is to undertake tasks that are usually assigned to NRAs, those tasks must first of all be published in an easily accessible form and notified to the Commission, so that the different responsibilities of each body are clearly defined. [23] There is no evidence that Belgium made such a declaration prior to 2005 and instead its conduct was completely the opposite, since the legislature assigned those tasks to itself retroactively, something which is difficult to reconcile with the importance which the directives afford to the value of stability and legal certainty in this area.

54. Even if the legislature had not wished to intervene as an NRA but rather as a sovereign legislative power, such action would also have been incompatible with Directive 2002/22. Article 12 of the directive assigns to NRAs, and to them alone, the task of carrying out a technical-legal analysis in order to determine whether undertakings which are required to

23 — See *Comisión del Mercado de las Telecomunicaciones*, paragraph 25.

provide universal service suffer an unfair burden. Under Article 13 of Directive 2002/22, that requirement of exclusive responsibility may be derogated from only when the time comes to define and apply a particular system of compensation. While the directive grants legislatures full powers to opt for one of the compensation models laid down in the European Union legislation, and in so doing to exercise a wide discretion conferred on them by the institutional autonomy of the Member States at times where there is a close connection with strictly financial decisions, exactly the opposite occurs in the initial analysis and research stages. By taking on both the preliminary task and the decision-making and financial task provided for in Articles 12 and 13 of Directive 2002/22, the Belgian legislature has upset the equilibrium between NRAs and other national authorities laid down therein and has, therefore, infringed European Union law.

B — *Calculation of universal service obligations*

55. The reply to the question renders unnecessary an analysis of the other matters raised by the Grondwettelijk Hof. An answer in the terms set out above will lead the referring court to a categorical conclusion: in so far as both the Law of 13 June 2005 and the Law of 25 April 2007 are incompatible with European Union law, because they establish a system which is not consistent with the procedure laid down in Directive 2002/22, the proceedings brought before it have become devoid of purpose.

56. Accordingly, although the national court has raised additional issues in its reference for a preliminary ruling, the proposal I have made to the Court in this Opinion may be considered to provide a helpful reply to the substantive question in these proceedings, without prejudice to my Opinion in Case C-222/08, to which I refer.

VI — Conclusion

57. In the light of the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling, declaring that:

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 precludes a national legislature from determining the existence of an unfair burden on the basis of a calculation of the costs incurred by the universal service provider, in so far as Directive 2002/22 expressly assigned those tasks to national regulatory authorities. Where a national legislature confers on itself the status of national regulatory authority, the Member State concerned must, before it takes up the tasks usually assigned to the national regulatory authority, state clearly, after consulting the Commission, the specific responsibilities assigned to each authority.