



Reports of Cases

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 28 May 2020¹

Case C-49/19

European Commission

v

Portuguese Republic

(Failure of a Member State to fulfil obligations – Directive 2002/22/EC –
Electronic communications – Financing of universal service obligations –
Sharing mechanism – Principles of transparency, least market distortion, non-discrimination
and proportionality)

I. Introduction

1. Directive 2002/22/EC² seeks ‘to create a harmonised regulatory framework which secures the delivery of universal service, that is to say, a defined minimum set of services to all end-users at an affordable price’,³ and reflects the importance of universal access to certain essential telecommunications services. The universal service obligations established by that directive are thus intended to mitigate certain negative effects which liberalisation of the telecommunications market could entail in certain geographical areas or for certain persons within the European Union that would otherwise be deprived of access to essential services.⁴

2. In order to ensure the provision of those essential services, Member States may entrust to one or several undertakings the delivery of universal service. However, in certain circumstances, those universal service obligations can be provided by the undertakings entrusted with them only at a loss or at a net cost which falls outside normal commercial standards.⁵ In such circumstances, Member States are to establish mechanisms for financing those costs relating to the universal service obligations. They are given two options under Article 13(1) of Directive 2002/22: the use of public funds to compensate the universal service provider for the burden it bears or the establishment of a mechanism for sharing the net costs of universal service to which the various telecommunications operators contribute. The Portuguese Republic chose the second option.

¹ Original language: French.

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 Judgment of 19 June 2008, *Commission v France* (C-220/07, not published, EU:C:2008:354, paragraph 28).

⁴ Slautsky, E., ‘Financement du service universel des communications électroniques et autonomie nationale : quelques enseignements récents de la jurisprudence de la Cour de justice de l’Union’, *Cahiers de droit européen*, 2016, vol. 52, No 3, p. 886.

⁵ Recital 18 of Directive 2002/22. See, also, E. Slautsky, *op. cit.*

3. The sharing mechanism provided for by the Portuguese Republic has a particular feature, however. That mechanism provides, *inter alia*, for the introduction of an extraordinary contribution to compensate the costs of universal service incurred before the sharing mechanism was established. It is the compatibility of that particular feature with Article 13(3) of Directive 2002/22 and Part B of Annex IV thereto that is challenged by the European Commission, which takes the view that the extraordinary contribution in question does not comply with the requirements which must be fulfilled by a sharing mechanism according to those provisions, that is to say, the principles of transparency, proportionality, least distortion of competition and non-discrimination.

4. By the present action for failure to fulfil obligations, the Commission thus asks the Court to rule that, by establishing an extraordinary contribution for the purpose of sharing the net cost of universal service obligations from 2007, pursuant to Lei n.º 35/2012 do Fundo de Compensação do Serviço Universal (Law No 35/2012 on the universal service compensation fund) of 23 August 2012,⁶ in the version applicable to the present case, the Portuguese Republic has failed to fulfil its obligations under Article 13(3) of Directive 2002/22 and Part B of Annex IV thereto.

5. The present case therefore provides the Court with the opportunity to clarify the scope of the requirements to be fulfilled by a mechanism for sharing the net costs of universal service.

II. Legal context

A. EU law

6. Recitals 18 to 21 and 23 of Directive 2002/22 state:

- ‘(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 and 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.
- (20) Taking into account intangible benefits means that 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.

⁶ *Diário da República*, Series 1, No 163, of 23 August 2012.

- (21) When a universal service obligation represents an unfair burden on an undertaking, it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs. Recovery via public funds constitutes one method of recovering the net costs of universal service obligations. It is also reasonable for established net costs to be recovered from all users in a transparent fashion by means of levies on undertakings. Member States should be able to finance the net costs of different elements of universal service through different mechanisms, and/or to finance the net costs of some or all elements from either of the mechanisms or a combination of both. 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. 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. Recovery mechanisms should in all cases respect the principles of Community law, and in particular in the case of sharing mechanisms those of non-discrimination and proportionality. Any funding mechanism should ensure that users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another.

...

- (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.'

7. Article 12 of Directive 2002/22, entitled 'Costing of universal service obligations', provides:

'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.'

8. Article 13 of Directive 2002/22, entitled ‘Financing of universal service obligations’, provides:

‘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 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.’

9. Article 14 of Directive 2002/22, entitled ‘Transparency’, provides:

‘1. Where a mechanism for sharing the net cost of universal service obligations as referred to in Article 13 is established, national regulatory authorities shall ensure that the principles for cost sharing, and details of the mechanism used, are publicly available.

2. Subject to Community and national rules on business confidentiality, national regulatory authorities shall ensure that an annual report is published giving the calculated cost of universal service obligations, identifying the contributions made by all the undertakings involved, and identifying any market benefits, that may have accrued to the undertaking(s) designated to provide universal service, where a fund is actually in place and working.’

10. According to Part B of Annex IV to Directive 2002/22:

‘The recovery or financing of any net costs of universal service obligations requires designated undertakings with universal service obligations to be compensated for the services they provide under non-commercial conditions. Because such a compensation involves financial transfers, Member States are to ensure that these are undertaken in an objective, transparent, non-discriminatory and proportionate manner. This means that the transfers result in the least distortion to competition and to user demand.

In accordance with Article 13(3), a sharing mechanism based on a fund should use a transparent and neutral means for collecting contributions that avoids the danger of a double imposition of contributions falling on both outputs and inputs of undertakings.

The independent body administering the fund is to be responsible for collecting contributions from undertakings which are assessed as liable to contribute to the net cost of universal service obligations in the Member State and is to oversee the transfer of sums due and/or administrative payments to the undertakings entitled to receive payments from the fund.’

B. Portuguese law

11. Lei n.º 5/2004 das Comunicações Eletrónicas (Law No 5/2004 on electronic communications) of 10 February 2004,⁷ as last amended by Decreto-Lei n.º 92/2017 (Decree-Law No 92/2017) of 31 June 2017⁸ (‘Law No 5/2004’), repealed Decreto-Lei n.º 458/99 (Decree-Law No 458/99) of 5 November 1999⁹ and transposed Directive 2002/22 into Portuguese law.

12. Article 97 of Law No 5/2004 provides:

‘1. After the national regulatory authority has established the existence of net costs of universal service deemed excessive, it is for the government, at the request of the respective providers, to introduce adequate compensation by means of one or both of the following two mechanisms:

(a) recovery via public funds;

(b) sharing of the cost between other undertakings providing publicly available electronic communications networks and services in the national territory.

2. Where the mechanism provided for in point (b) of the preceding paragraph is used, it will be necessary to establish a compensation fund to which undertakings providing publicly available electronic communications networks and services shall contribute, administered by the national regulatory authority or by another independent body designated by the government and placed under the supervision of the national regulatory authority.

3. The criteria for sharing the net cost of universal service between the undertakings required to contribute shall be defined by the government, in accordance with the principles of transparency, least market distortion, non-discrimination and proportionality.

...’

13. Law No 35/2012 established a compensation fund for the universal electronic communications service, in order to finance the net costs arising from compliance with universal service obligations and to ensure the sharing of those costs between undertakings required to contribute to it.

⁷ *Diário da República*, Series 1, No 34, of 10 February 2004.

⁸ *Diário da República*, Series 1, No 146, of 31 July 2017.

⁹ *Diário da República*, Series 1, No 258, of 5 November 1999.

14. Article 1 of that law, which identifies its purpose, provides for the creation of a compensation fund for the universal electronic communications service, referred to in Article 97(2) of Law No 5/2004, and the determination of the criterion for sharing the net costs of that service between undertakings required to contribute.

15. According to Article 2(1) of Law No 35/2012, ‘the compensation fund shall operate in accordance with the principles of transparency, non-discrimination, proportionality and least market distortion’.

16. Article 6 of that law provides:

‘The compensation fund is intended to finance the net costs of universal service determined in the context of the public procurement procedures referred to in Article 99(3) of Law No 5/2004 ..., as amended and consolidated by Law No 51/2011 of 13 September 2011, and deemed excessive by the Autoridade Nacional de Comunicações [(National Communications Authority; ‘Anacom’)] in accordance with the provisions of Article 95(1)(b) and Article 97 of that law, and to finance the net costs of universal service referred to in Chapter V.’

17. Article 17 of that law, entitled ‘Financing of the net costs of the period preceding designation by public tender’, provides:

‘1. The compensation fund established by this Law must also allow compensation of the net costs of universal service incurred up until the start of provision of universal service by the service provider(s) designated pursuant to Article 99(3) of Law No 5/2004 ..., as amended and consolidated by Law No 51/2011 of 13 September 2011, provided that the following cumulative conditions are met:

- (a) the existence of net costs is established following an audit and those costs are deemed excessive by [Anacom] pursuant to the provisions of Article 95(1)(a), Article 95(2) and Articles 96 and 97 of Law No 5/2004 ..., as amended and consolidated by Law No 51/2011 of 13 September 2011;
- (b) the universal service provider requests from the government compensation of the costs referred to in the preceding point.

2. The amount of net costs to be compensated in respect of the period preceding the designation by public tender shall correspond to the amount approved by [Anacom], in the terms provided for in the point (a) of the preceding paragraph’.

18. Pursuant to Article 18(1) of that law, ‘undertakings providing public communications networks and/or publicly available electronic communications services in the national territory shall be required to pay an extraordinary contribution to the compensation fund for each of the financial years 2013, 2014 and 2015. That extraordinary contribution is exclusively intended for the financing of the net costs referred to in the preceding article and approved by [Anacom] in those years’.

19. In accordance with Article 18(5) of Law No 35/2012, the ‘extraordinary contribution referred to in paragraph 1 shall amount to 3% of each entity’s eligible annual turnover, subject to the limits set out in the following points’.

20. According to Article 18(6) of that law, the ‘amount of the extraordinary contribution to be paid by each undertaking may never exceed the amount which would be arrived at by sharing the net costs in the manner referred to in Article 17(2) between undertakings required to contribute, in proportion to their eligible turnover’.

21. According to Article 20 of that law, the extraordinary contribution for each financial year may be paid over a period of five years.

III. Background to the dispute

A. Facts giving rise to the dispute

22. By Decreto-Lei n.º 31/2003 (Decree-Law No 31/2003) of 17 February 2003, which amended the basis for the concession of the public telecommunications service in Portugal, the company PT Comunicações (‘PTC’) was designated as the universal service provider until 2025.

23. As the universal service provider, PTC has on several occasions submitted estimates of the net costs of universal service, as well as claims for compensation for losses incurred in the years 1996 to 1999, 2000, 2001, 2002 and 2003. However, Anacom rejected those various claims for compensation.

24. Following the adoption of Law No 5/2004 and a request made by PTC in July 2007, and after a procedure involving public consultations and prior hearings of interested parties, Anacom adopted two decisions on 9 June 2011 determining, first, the concept of ‘unfair burden’ for the purposes of Article 97 of Law No 5/2004 and, secondly, the methodology to be used to calculate the net costs of universal service.

25. On the basis of the foregoing, Anacom took the view that the provision of universal service by PTC up until 2006 did not constitute an unfair burden. Anacom also decided to apply, with respect to the period subsequent to 1 January 2007 and until the universal service provider(s) designated by public tender started to provide universal service, the approved methodology for calculating the net costs of universal service.

26. Law No 35/2012 was then adopted, providing a basis for establishing the compensation fund for the universal electronic communications service and necessitating the implementation of an extraordinary contribution to enable compensation of the net costs which PTC had incurred prior to the designation by public tender.

27. In accordance with the decisions adopted by Anacom and Law No 35/2012, and following submission of the corresponding estimates by PTC, the net costs of universal service for the period from 2007 to 2009 were reviewed and the final amount was approved by Anacom on 19 September 2013. The net costs for 2010 and 2011 were approved on 20 November 2014, while Anacom adopted in 2015 a final decision on the results of the audit of net costs for the years 2012 and 2013.

28. Anacom subsequently adopted three other decisions, identifying the entities required to contribute to the compensation fund for the universal electronic communications service and setting the amount of the extraordinary contributions relating to the net costs of universal service to be compensated for the periods from 2007 to 2009, 2010 to 2011, and 2012 to 2013.

29. Accordingly, the extraordinary contributions for the years 2013, 2014 and 2015 were intended to compensate the final amount of net costs for financial years 2007, 2008 and 2009, financial years 2010 and 2011 and financial years 2012 and 2013, respectively.

30. At the same time, the Portuguese Republic launched three calls for tenders to select the operator(s) to be designated as universal service provider(s); new operators were also chosen as universal service providers in so far as concerns connection to the public communications network at a fixed location and the provision of publicly available telephone services. PTC was, for its part, selected to deliver the universal service of providing public pay telephones in the national territory.¹⁰ The contracts with those operators entered into force no later than 1 June 2014, the date on which the preceding universal service concession contract concluded with PTC ceased to have effects.

B. Pre-litigation procedure

31. On 13 December 2012, the Commission sent a letter to the Portuguese Republic, via the EU Pilot system, requesting clarification as to whether the universal service compensation fund provided for by Law No 35/2012 was compatible with Article 13 of Directive 2002/22 and Part B of Annex IV thereto, in particular so far as concerns compensation of the net costs incurred by the universal service provider, PTC, in the past and during a period prior to its further designation by public procurement procedure as universal service provider.

32. On 21 February 2013, the Portuguese authorities replied to that request. They provided additional information at a meeting with the Commission services on 23 October 2014 and subsequently by a letter of 5 December 2014.

33. On 27 February 2015, the Commission sent the Portuguese Republic a letter of formal notice. In their reply of 29 April 2015, the Portuguese authorities maintained that the Portuguese legislation and its implementation should be regarded as compatible with the requirements of Directive 2002/22 and, in particular, with the principles of transparency, least market distortion, non-discrimination and proportionality.

34. After examining that reply, the Commission sent the Portuguese Republic a reasoned opinion by a letter of 29 April 2016, requesting that that Member State adopt the measures necessary to comply with the reasoned opinion within two months of receiving it.

35. The Portuguese authorities responded to the reasoned opinion by letter of 1 July 2016, which was supplemented by a second letter of 14 October 2016 following a meeting with the Commission services on 7 September 2016. The Portuguese authorities provided new information to the Commission concerning hearing procedures for operators, disputes in the field in question, the amount of the contribution as a percentage of operators' turnover and sector turnover, the operators active on the market in 2007 as compared with the current situation and the payment status of the extraordinary contribution.

36. Two further meetings took place between the Commission and the Portuguese authorities in January and July 2017. During the latter meeting, several solutions were considered with a view to settling the dispute between the parties. The Commission subsequently requested that a proposal

¹⁰ Resolução do Conselho de Ministros n.º 66-A/2013 (Resolution of the Council of Ministers No 66-A/2013) of 18 July 2013, Diário da República, Supplement 1, Series 1, No 202, of 18 October 2013.

for a solution be submitted to it, together with an indication of a time limit for implementation. In two letters of 14 March 2017 and 12 September 2018, the Portuguese authorities, first, proposed the organisation of a further meeting and, secondly, pointed out that they considered it prudent to await the outcome of the proceedings brought by certain operators before the national courts concerning the interpretation of Law No 35/2012 in question.

C. Procedure before the Court

37. The Commission does not share the view of the Portuguese Republic and accordingly brought the present action by an application dated 25 January 2019.

38. The Portuguese Government and the Commission presented oral argument at a hearing held on 11 March 2020.

IV. Analysis

39. By its action, the Commission challenges the compatibility of the extraordinary contribution for the purpose of sharing the net cost of universal service obligations provided for in Article 18 of Law No 35/2012 with Article 13 of Directive 2002/22 and Part B of Annex IV thereto. More specifically, the Commission maintains that that contribution does not comply with the principles of transparency, non-discrimination, least market distortion and proportionality laid down in the aforementioned provisions.

A. Principle of transparency

1. Arguments of the parties

40. The Commission argues that the principle of transparency is not limited to the obligation to publish and make available information relating to the sharing of the net costs of universal service and goes beyond the sole requirements of Article 14 of Directive 2002/22.

41. In the Commission's view, it follows from the Court's case-law that the principle of transparency also covers other matters. First, the Court has held that, in order for a mechanism for sharing the net cost of universal service obligations to comply with the principle of transparency, it is important that the values used to calculate contributions are 'set in accordance with objective criteria and that like is compared with like so as to ensure transparency; this will enable new entrants to calculate their probable costs and income'.¹¹ In those circumstances, the Commission takes the view that the requirements of clarity and precision are an integral part of the principle of transparency.

42. Secondly, the Commission maintains that the principle of transparency is linked to the principle of legal certainty which it is intended to safeguard, with the result that the principle of transparency requires that the rules for financing universal service, which may have a financial impact on undertakings, should be clear, precise and predictable in their effects. More

¹¹ Judgment of 6 December 2001, *Commission v France* (C-146/00, EU:C:2001:668, paragraphs 48 and 49).

specifically, the principle of transparency, in so far as it must be read in the light of the principle of legal certainty, requires that interested parties must know precisely the extent of the obligations which are imposed on them.

43. The Portuguese Republic challenges the Commission's interpretation of the principle of transparency, which it regards as maximalist and formalistic. In its view, the principle of transparency serves to ensure that Member States comply with obligations under EU law and is thus concerned with whether objective criteria and comparable elements are used in calculating the net cost of universal service obligations, since the predictability of costs is a consequence of those elements.

44. Moreover, according to the Portuguese Republic, the principle of legal certainty cannot be confused with the principle of transparency. The arguments relied on by the Commission primarily concern the principle of legal certainty and the principle of the protection of legitimate expectations. The Commission's arguments are tantamount to a presumption that the extraordinary contribution is retroactive and thus incompatible with the principle of legal certainty.

45. The Portuguese Republic notes, first, that this would mean that the universal service provider could not be compensated for the net costs already incurred, audited and approved by Anacom, even though recovery of those costs is provided for by the national legislation. Secondly, the Portuguese Republic points out that a distinction must be drawn between the apparent and actual retroactivity of a provision. In the present case, Law No 35/2012 only appears to be retroactive, since the effects it produces are based on the year in which the net cost of universal service is cleared in the accounts, that is to say, a period after the date of entry into force of that law. The case-law of the Court is extremely restrictive as regards the protection of individuals' expectations in cases of apparent retroactivity,¹² with the consequence that operators could not have any legitimate expectations as to how the net costs of universal service would be financed.

2. Assessment

46. The Commission argues that the principle of transparency must be read in the light of the principle of legal certainty and that this means that the principle of transparency encompasses requirements of clarity, precision and predictability, as well as an obligation to publish and make available information relating to the calculation and the sharing of the net costs of universal service. As thus conceived, the principle of transparency has not been observed, since the operators required to contribute to the financing of costs of universal service were unable, before the extraordinary contribution was actually established by Law No 35/2012, to foresee the extent of their obligations.

47. In other words, according to the Commission, the mechanism established by the Portuguese Republic is contrary to the principle of transparency in so far as, before that mechanism was implemented, operators were unable to foresee the extent of the obligations which it would impose on them.

¹² Judgment of 29 June 1999, *Butterfly Music* (C-60/98, EU:C:1999:333, paragraph 25).

48. Such an approach would mean that the principle of transparency would be observed only if operators were able to ascertain the extent of obligations deriving from the mechanism for sharing the net costs of universal service obligations before that mechanism had even been adopted. It is plain that this could never be the case.

49. The principle of transparency, according to Article 13(3) of Directive 2002/22, is not in fact intended to apply until there is a mechanism for sharing the net costs of universal service. Accordingly, a mechanism which has not yet been adopted cannot be held to lack transparency.

50. It is irrelevant in that regard whether the costs which the mechanism seeks to compensate were incurred before the adoption of that mechanism, provided that the extraordinary contribution, once it has been established, observes the principle of transparency. I am of the view that this is the situation in the present case.

51. The principle of transparency referred to in Article 13(3) of Directive 2002/22, although not clearly defined, is clarified in Article 14 of that directive. Thus, the principle of transparency means that the rules for sharing the costs of universal service and details of the mechanism for sharing those costs should be made publicly available. Moreover, Article 14 also provides that, where a mechanism for sharing costs has been established and is actually operating, it is necessary for an annual report to be published giving the calculated cost of universal service obligations, setting out the contributions made by the operators involved and identifying any market benefits enjoyed by the universal service provider. In those circumstances, the principle of transparency essentially encompasses an obligation to publish and make available to the public information relating to the establishment and operation of the mechanism for sharing the costs of universal service.

52. The Court has also stated that the purpose of the requirement to publish and make available to the public information concerning the detailed rules for implementing a mechanism for sharing the costs of universal service is to ‘enable [the operators contributing to it] to calculate their probable costs and income’.¹³

53. In that regard, I must nevertheless point out that such a requirement cannot mean that operators who are required to contribute should be able to foresee the amount of their contribution with certainty and precision. Indeed, since the exact amounts of the net costs of universal service cannot be known before they are calculated by the regulatory authority, it is also impossible precisely to anticipate the exact amounts of the contribution. In order to comply with the principle of transparency, it is therefore sufficient for operators to be aware of the way in which the mechanism for sharing the net costs of universal service operates. Mere knowledge of the way in which that mechanism operates allows operators to make a reasonable assessment of the likely, though uncertain, amount of the contribution which they will be required to pay.

54. However, I note that Law No 35/2012 not only provides for the introduction of the extraordinary contribution, but also sets out the detailed rules for implementing it. That law thus specifies the conditions which trigger the extraordinary contribution,¹⁴ the financial years during

¹³ Judgment of 6 December 2001, *Commission v France* (C-146/00, EU:C:2001:668, paragraphs 48 and 49). Although that clarification was made in relation to Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32), which was repealed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), it seems to me to continue to be relevant to the universal service as governed by Directive 2002/22.

¹⁴ Article 17 of Law No 35/2012.

which it must be paid,¹⁵ the costs it is intended to compensate and its maximum amount.¹⁶ Moreover, Law No 35/2012 sets out the precise role of Anacom in determining the contributors and the amount of the extraordinary contribution, as well as the payment arrangements with which operators must comply.¹⁷

55. Thus, I am of the view that the extraordinary contribution established by the Portuguese Republic in Law No 35/2012 is consistent with the principle of transparency, since that Member State publicises the principles relating to the sharing of costs of universal service and the necessary details as regards operation of the sharing mechanism. Moreover, as from the creation of the sharing mechanism in 2012, those elements undoubtedly enable operators required to contribute to assess the extent of the obligations incumbent on them under the extraordinary contribution for which they are liable for the years 2013, 2014 and 2015.

56. Accordingly, the implementation by the Portuguese Republic of the extraordinary contribution provided for by Law No 35/2012 cannot constitute an infringement of the principle of transparency.

B. The principles of least market distortion and proportionality

1. Arguments of the parties

57. The Commission takes the view that the compensation mechanism provided for by Law No 35/2012 cannot be regarded as compatible with the principle of least market distortion. First, it is impossible for operators to foresee those costs or to take them into account in their activities in the years for which those costs are claimed. Secondly, the amounts to be financed are significant in that the extraordinary contribution represents 3% of the eligible turnover of each operator for each of the years in question and must be added to the contribution normally payable to finance the net costs of universal service incurred by operators designated in the public procurement procedure. Thirdly, the extraordinary contribution imposes a greater burden than would normally be expected if the annual contribution took into account the net cost incurred in providing universal service over the same period, in that the impact on turnover would have been significantly reduced and would have allowed operators to spread the financial burden over a longer period.

58. As regards the principle of proportionality, the Commission is of the view that that principle is not observed since operators are required to contribute to compensation of the net costs of the undertakings designated following the public procurement procedure and, at the same time, to pay the extraordinary contribution. According to the Commission, that obligation results in a 'double contribution' or at least an increase in the financial burden which must be borne by operators. Moreover, the Commission pointed out at the hearing that the amounts of the extraordinary contribution were significant by comparison, in particular, with the amount of the contribution for the same period in Spain.

¹⁵ Article 18(1) of Law No 35/2012.

¹⁶ Article 18(5) and (6) of Law No 35/2012.

¹⁷ Article 20 and Article 21(1) of Law No 35/2012.

59. As regards the principle of least market distortion, the Portuguese Republic submits that that principle, explained in recital 23 of Directive 2002/22, refers above all to the manner of sharing the burden incurred by universal service providers in order to minimise the financial impact on end-users. However, the Commission puts forward no evidence to support the conclusion that the financial impact on users has not been minimised. Moreover, the alleged unpredictability of costs for operators which is relied on by the Commission does not fall within the sphere of the principle of least market distortion.

60. Furthermore, the Portuguese Republic disputes that the amounts to be financed by the extraordinary contribution are significant. The threshold of 3% of turnover is the upper limit of the total amount of contributions, it being understood that that amount is also subject to other limits. In particular, the amount of net costs to be compensated is to correspond in any event to the amount approved by Anacom. In addition, the extraordinary contribution, which is intended to reimburse the net costs incurred by the universal service provider, is spread over four years and it is possible to pay the amount for each year over a five-year period.

61. As regards the principle of proportionality, the Portuguese Republic argues that, in so far as that extraordinary contribution, first, is intended to minimise, as much as possible, interference in the sector by sharing the burden of compensation as widely as possible, and, secondly, thus entails an appropriate balancing of costs and benefits in the light of the objective pursued, the principle of proportionality is fully observed, since that contribution is a suitable means of achieving the required objective of compensating the net costs of universal service. With regard to the argument raised by the Commission at the hearing that the amounts of that contribution are significant, the Portuguese Republic adds that the Commission cannot call those amounts into question while not contesting Anacom's method of calculating the net costs.

2. Assessment

62. At the outset, I must point out that the argument raised by the Commission that operators were not in a position to foresee the net costs to be compensated does not appear to me to be relevant in determining whether the mechanism established by the Portuguese Republic is consistent with the principle of least market distortion.

63. That principle is explained in recital 23 of Directive 2002/22, according to which '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'. Accordingly, when establishing the impact of the financial burden falling on end-users and resulting from that contribution, the question whether operators were able to take the extraordinary contribution into account in their activities is immaterial.

64. The Commission also raises other arguments relating, on the one hand, to the size of the amounts in question and, on the other hand, to the existence of a 'double contribution' in that operators were required, from 2013 onwards, both to contribute to the financing of costs of universal service for the period following the public tender and to pay the extraordinary contribution for the costs incurred by PTC prior to the public tender. The Commission claims that those elements show, first, an infringement of the principle of least market distortion and, secondly, an infringement of the principle of proportionality.

65. While those arguments certainly seem to me more relevant than that relating to the predictability of costs, I nevertheless do not believe that they suffice to show that both the principle of least market distortion and the principle of proportionality have been infringed.

66. With regard to the amounts of the extraordinary contribution, Article 18(5) of Law No 35/2012 indeed provides that they are to correspond to 3% of the eligible annual turnover of each entity required to contribute. However, Article 18(6) of that law also provides that the amount of the extraordinary contribution to be paid by each undertaking may never exceed the amount which would be arrived at by sharing the net costs incurred by the universal service provider and deemed excessive by Anacom.

67. The amount of the extraordinary contribution, while it may amount to up to 3% of the eligible annual turnover of the contributing companies, must nevertheless always correspond to the amount of the net costs incurred by the universal service provider, as approved by Anacom.

68. However, the fact remains that the Commission disputes neither Anacom's method of calculating net costs nor the results it obtained in the decisions relating to 2012, 2013 and 2014. The Commission therefore does not call into question the amounts of the net costs which the extraordinary contribution is intended to compensate and to which that contribution must correspond exactly.

69. Thus, the mere fact that the amounts of that contribution are significant does not show that the contribution is, in itself, disproportionate or does not observe the principle of least market distortion. Since that contribution exactly matches the amount of the net costs incurred by the universal service provider, the calculation of which is not called into question by the Commission, it appears to me to be both limited to what is necessary to achieve the objective of compensating the costs of universal service and appropriate for minimising the impact of the financial burden.

70. As regards the existence of a double contribution imposed on operators, who are required to contribute not only to financing costs subsequent to the public tender but also to financing costs incurred by PTC when the latter was the sole provider of universal service, that double contribution entails an increase in the financial burden on operators, as the Commission notes. The burden is further increased because operators must compensate the net costs of several years in a single year.¹⁸

71. However, I do not believe that that element is in itself capable of constituting an infringement of the principle of least market distortion or the principle of proportionality. First of all, a contribution intended to compensate the costs incurred by the universal service provider will always involve for operators who are obliged to pay that contribution a greater financial burden than would exist in the absence of such compensation. Since such an increase in the financial burden on operators required to pay the contribution is inherent in the very mechanism for compensating the costs of providing universal service, that element alone does not appear to me to be sufficient to constitute an infringement of the principles of least market distortion and proportionality.

¹⁸ See point 29 of this Opinion.

72. Next, in so far as the amount of the extraordinary contribution corresponds exactly to the amount of the costs incurred by the universal service provider, it must be stated that that amount is limited to what is strictly necessary to achieve the objective of compensating the net costs of universal service. In those circumstances, I do not believe that it is possible to conclude that that contribution places a disproportionate financial burden on the operators who are subject to it, even if that contribution relates to several financial years or involves a double contribution.

73. Moreover, as the Portuguese Republic points out, facilities for paying the extraordinary contribution are available to the operators required to pay it. More specifically, it follows from Article 20(4) of Law No 35/2012 that the payment of that contribution may, for each year, be spread over a five-year period. Such a possibility thus allows operators to adjust the financial burden which payment of that contribution places on them, so as to reduce its impact as much as possible. Such an arrangement seems to me to ensure, first, that the financial burden passed on to end-users is minimised and, secondly and more generally, that that contribution is proportionate.

74. Finally, as the Portuguese Republic argues, the fact that the extraordinary contribution must be paid by all operators whose turnover exceeds 1% of the sector's annual turnover, including the universal service provider, clearly demonstrates that the impact of the financial burden falling on end-users is minimised and that the extraordinary contribution is proportionate. It thus appears that that contribution was spread between operators as widely as possible and in a manner appropriate for the purpose of minimising its impact on end-users.

75. In any event, the Commission's position implies that a mechanism for sharing the costs of universal service can be implemented only to the extent that operators' contributions are calculated on the basis of the costs incurred by the universal service provider in a single year.

76. However, I must point out that nothing in the wording of Directive 2002/22 requires Member States to opt for compensation on an annual basis. It is not possible from the silence of the EU legislature to infer any detailed rules for the implementation of mechanisms to compensate the costs of universal service. Since the EU legislature did not seek to impose such requirements, I do not believe that a mechanism for compensating the costs of universal service can be regarded as disproportionate or as not complying with the principle of least market distortion, solely on the ground that that mechanism does not operate on an annual basis.

77. In those circumstances, I am of the view that the implementation by the Portuguese Republic of the extraordinary contribution provided for by Law No 35/2012 does not constitute an infringement of the principles of least market distortion and proportionality.

C. The principle of non-discrimination

1. Arguments of the parties

78. According to the Commission, the principle of non-discrimination requires that only the turnover of operators who were present on the market at the time the net costs were incurred should be taken into account. However, Law No 35/2012 applies to all operators present on the market between the years 2013 and 2015, that is to say, operators who were not present on the market between the years 2007 and 2012. Moreover, those operators are subject to the obligation to contribute based on revenues which they obtained in financial years other than those in which the net costs were incurred and have therefore been discriminated against.

79. The Portuguese Republic argues, first of all, that the Commission's line of argument that only operators present on the market at the time when the costs were incurred should contribute to the compensation fund, based on turnover for the year in which the costs were incurred, confers an advantage on operators not bearing the costs of universal service and discriminates against the universal service provider.

80. Next, the Portuguese Republic argues that although the structure of the market was different in the years 2013 and 2007, this does not mean that the operators present on the market in 2013 were not already present previously. In that regard, the Portuguese Republic argues that the concept of 'undertaking' should be interpreted in functional terms, making it possible to look beyond changes in the internal structure of operators when they are linked as one economic unit or where one operator exercises economic control over another.

81. Finally, the Portuguese Republic maintains that the Commission's argument fails to take into account that the method of calculating net costs is a long and complex procedure, which is initiated only at the request of the universal service provider, so that a time-lag between the period in which the net costs were incurred and the period in which they must be compensated cannot constitute evidence of discrimination.

2. Assessment

82. According to the Commission, the alleged infringement of the principle of non-discrimination stems from the application of Law No 35/2012 and the extraordinary contribution by undertakings which were not present on the market at the time when the universal service costs being compensated were incurred.

83. I would recall that, in accordance with the settled case-law of the Court, discrimination consists solely in the application of different rules to comparable situations or in the application of the same rule to differing situations.¹⁹ Application of the extraordinary contribution to companies which were not present on the market at the time when the costs covered by the compensation were incurred could therefore, in theory, entail discrimination.

84. Nevertheless, I do not believe that this is the situation in the present case. Contrary to what the Commission argues, I am of the view, for the reasons set out below, that the changes which took place on the market for telecommunications operators between the years 2007 and 2012 did not involve the appearance on the market of *new* companies which may be regarded as not having been present when the costs of universal service covered by the extraordinary contribution were incurred.

85. In the first place, it is apparent both from the Portuguese Republic's defence and from the Commission's observations at the hearing that the restructuring which took place on the market for telecommunications operators involved intra- and inter-group restructuring. The *new* companies referred to by the Commission appear in reality to have been created by mergers between companies already operating on that market.

¹⁹ Judgments of 13 November 1984, *Racke* (283/83, EU:C:1984:344, paragraph 7); of 2 April 2009, *Bouygues and Bouygues Télécom v Commission* (C-431/07 P, EU:C:2009:223, paragraph 114); and of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 30).

86. The companies arising out of those mergers ensure the legal continuity of the rights and obligations of the companies which were merged. Those merger operations transferred the property of the latter companies, that is to say, all their assets and liabilities. More generally, such a merger cannot freeze the rights and obligations of the merged company at the time that merger takes place, since those rights and obligations change depending on both economic and legal circumstances.

87. In that context, the only question which arises is whether the transferred liabilities include the extraordinary contribution obligation provided for in Law No 35/2012, an obligation to which the merged companies would have been subject in the absence of restructurings.

88. I consider that the answer to that question is in the affirmative. There is no reason to exclude from those liabilities the obligation to contribute to compensating the costs of universal service. The consequence of such an exclusion would be that any restructuring operation would allow a company to circumvent its obligation to contribute to the compensation fund for the costs of universal service and, thereby, to frustrate the application of Directive 2002/22. In that situation, a restructuring would operate as a ground for extinguishing obligations to contribute to financing of the universal service and might even occur solely for that purpose.

89. In those circumstances, the restructuring which took place on the market for telecommunications operators cannot be regarded as having led to the appearance on the market of *new* companies which would not have been required to pay the extraordinary contribution in the absence of that restructuring and which are discriminated against on the basis of the obligation to contribute to the financing of universal service.

90. In the second place, contrary to what the Commission argued at the hearing, changes in ownership structure or the purchase by new investors of holdings which enable them to acquire a stake in the capital of telecommunications operators cannot provide a sufficient basis for a finding that such companies are *new* on the market. Once again, such an approach would mean that any change in a company's capital would be a ground for extinguishing the obligations of companies and would therefore make it possible to frustrate the application of Directive 2002/22.

91. That conclusion cannot be called into question by the Commission's argument at the hearing that any investment decision is based on the situation of the company at the time when the investment is made. In that regard, the Commission considers, with regard to investments prior to Law No 35/2012, that it was not possible for investors to foresee the obligation to contribute to the financing of the costs of universal service for the period from 2007 to 2012. First, I note that the possibility of a mechanism for contributing to the financing of the costs of universal service had existed since the adoption of Law No 5/2004 and could therefore not be disregarded by operators. Secondly, and in any event, that argument, if it were well founded, *quod non*, would constitute not an allegation of infringement of the principle of non-discrimination against the companies in question, but an allegation of infringement of the principle of the protection of investors' legitimate expectations, which is not relied on by the Commission.

92. In those circumstances, I am of the view that the implementation by the Portuguese Republic of the extraordinary contribution provided for by Law No 35/2012 does not constitute an infringement of the principle of non-discrimination.

V. Conclusion

93. In the light of all the foregoing considerations, I propose that the Court should dismiss the present action. In accordance with Article 138(1) of the Rules of Procedure of the Court of Justice, the European Commission should be ordered to pay the costs.