Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 March 2020*

(Reference for a preliminary ruling — Approximation of laws — Telecommunication services — Implementation of provision of an open telecommunications network — Directive 97/13/EC — Fees and charges for individual licences — Transitional arrangements establishing a charge beyond those authorised by Directive 97/13/EC — Force of *res judicata* attaching to a higher court judgment considered contrary to EU law)

In Case C-34/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 11 December 2018, received at the Court on 17 January 2019, in the proceedings

Telecom Italia SpA

v

Ministero dello Sviluppo Economico,

Ministero dell'Economia e delle Finanze,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, M. Safjan, C. Toader and N. Jääskinen, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Telecom Italia SpA, by F. Lattanzi, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the European Commission, by L. Malferrari and L. Nicolae, acting as Agents,

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

* Language of the case: Italian.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 22 of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15).

2 The request has been made in proceedings between, on the one hand, Telecom Italia SpA and, on the other hand, the Ministero dello Sviluppo Economico (Ministry of Economic Development, Italy) and the Ministero dell'Economia e delle Finanze (Ministry of the Economy and Finance, Italy) concerning the obligation imposed on the former to pay a charge based on its turnover for 1998.

Legal context

European Union law

3 Recitals 2, 12 and 26 of Directive 97/13 state as follows:

'(2) Whereas the Commission communication of 25 January 1995 on the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks has confirmed the need for rules at Community level, in order to ensure that general authorisation and individual licensing regimes are based on the principle of proportionality and are open, non-discriminatory and transparent; whereas the Council resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications … recognises as a key factor for this regulatory framework in the Union the establishment, in accordance with the principle of subsidiarity, of common principles for general authorisations and individual licensing regimes in the Member States, based on categories of balanced rights and obligations; whereas those principles should cover all authorisations which are required for the provision of any telecommunications services and for the establishment and/or operation of any infrastructure for the provision of telecommunications services;

…

(12) Whereas any fees or charges imposed on undertakings as part of authorisation procedures must be based on objective, non-discriminatory and transparent criteria;

…

(26) Whereas this Directive applies to both existing and future authorisations; whereas certain licences have been granted for periods which go beyond 1 January 1999; whereas clauses in such authorisations contrary to Community law, in particular those conferring on the licensees special or exclusive rights, are, according to the case-law of the Court of Justice, inoperative from the date indicated in the relevant Community measures; whereas regarding other rights which do not affect the interests of other undertakings under Community law, Member States could extend their validity in order to avoid claims for compensation'.

4 Article 3(3) of that directive states:

‘Member States shall ensure that telecommunications services and/or telecommunications networks can be provided either without authorisation or on the basis of general authorisations, to be supplemented where necessary by rights and obligations requiring an individual assessment of applications and giving rise to one or more individual licences. …’

5 Article 6 of that directive, entitled ‘Fees and charges for general authorisations procedures’, provides as follows:

‘Without prejudice to financial contributions to the provision of universal service in accordance with the Annex, Member States shall ensure that any fees imposed on undertakings as part of the authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme. Such fees shall be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.’

6 Article 11 of that directive, entitled ‘Fees and charges for individual licences’, is worded as follows:

‘1. Member States shall ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences. The fees for an individual licence shall be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.

2. Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.’

7 Article 22 of Directive 97/13, entitled ‘Authorisations existing at the date of entry into force of this Directive’, provides as follows:

‘1. Member States shall make all necessary efforts to bring authorisations in force at the date of entry of this Directive into line with its provisions before 1 January 1999.

2. Where application of the provisions of this Directive results in amendments to the terms of authorisations already in existence, Member States may extend the validity of terms, other than those giving special or exclusive rights which have been or are to be terminated under Community law, provided that this can be done without affecting the rights of other undertakings under Community law, including this Directive. In such cases, Member States shall notify the Commission of the action taken to that end and shall state the reasons therefor.

3. Without prejudice to the provisions of paragraph 2, obligations in authorisations existing at the date of entry into force of this Directive which have not been brought into line by 1 January 1999 with the provisions of this Directive shall be inoperative.

Where justified, Member States may, upon request, be granted a deferment of that date by the Commission.’

8 Article 25 of that directive, entitled 'Implementation' sets out in the first paragraph thereof:

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive and publish the conditions and procedures attached to authorisations as soon as possible and, in any event, not later than 31 December 1997. They shall immediately inform the Commission thereof.'

9 Article 26 of that directive, entitled 'Entry into force', provides as follows:

'This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.'

Italian law

The Postal and Telecommunications Code

10 Until Directive 97/13 was transposed, the public telecommunications service was provided by the State, by virtue of the first paragraph of Article 1 of the Codice postale e delle telecomunicazioni (Postal and Telecommunications Code), annexed to decreto del presidente della Repubblica n. 156 — Approvazione del testo unico delle disposizioni legislative in materia postale, di bancoposta e di telecomunicazioni (Decree of the President of the Republic No 156 approving the consolidated act containing postal, post bank and telecommunications legislation) of 29 March 1973 (ordinary supplement to GURI No 113 of 3 May 1973).

11 Under Article 188 of the Postal and Telecommunications Code:

'Concession holders are required to pay the State an annual charge in the amount prescribed in the present decree or in the instrument granting the concession.'

12 That charge was calculated in proportion to the gross receipts or profits obtained from the service licensed, less the amounts paid to the operator of the public network.

Decree No 318/1997

13 Directive 97/13 was transposed, inter alia, by decreto del presidente della Repubblica n. 318 — Regolamento per l'attuazione di direttive comunitarie nel settore delle telecomunicazioni (Presidential Decree No 318 concerning regulations for the implementation of Community Directives in the field of telecommunications), of 19 September 1997 (Ordinary Supplement to GURI No 221 of 22 September 1997; 'Decree No 318/1997').

14 Article 2(3) to (6) of Decree No 318/1997 provides as follows:

'3. Until 1 January 1998, the special and exclusive rights for the provision of voice telephony services and the related installation and supply of public telecommunications networks shall be maintained. …

4. The concessions for public use and the authorisations referred to in Article 184(1) of the Postal and Telecommunications Code existing at the time of the entry into force of these regulations shall be amended, on the initiative of the [national regulatory authority], before 1 January 1999, with a view to bringing them into line with the provisions contained herein.

5. Where application of the provisions of this regulation makes amendments to the terms of existing concessions and authorisations, terms other than those giving special or exclusive rights which have been abolished or are to be abolished under these regulations, shall remain valid, subject to the rights which other undertakings derive, in particular, from Community law.

6. Except for subparagraphs (4) and (5), obligations arising from concessions and authorisations existing on the date on which these regulations came into force which have not been brought into line with the provisions of the latter shall be void from 1 January 1999.'

15 Article 6(20) of that decree provides:

'… the contribution payable by undertakings in respect of the procedures for the grant of individual licences shall cover solely the administrative costs incurred in the preliminary investigation, control of the management of the service and maintenance of the conditions imposed for the licences themselves …'

16 The wording of Article 21(2) of that decree is as follows:

'Unless otherwise provided in this regulation, the provisions in force in the field of telecommunications shall continue to apply. In particular, the provisions referred to in Article 188 of the Postal and Telecommunications Code shall continue to apply, for the purposes referred to in Article 6(20) and (21) and pending a decision to the contrary by the [national regulatory authority].'

Law No 448 of 23 December 1998

17 Article 20(3) of legge n. 448 — Misure di finanza pubblica per la stabilizzazione e lo sviluppo (Law No 448 introducing public finance provisions for stabilisation and development), of 23 December 1998 (Ordinary Supplement to GURI No 302 of 29 December 1998) provides as follows:

'From 1 January 1999, Article 188 of the [Postal and Telecommunications Code] shalll cease to be applicable to the providers of public telecommunications services.'

18 Pursuant to Article 20(4) of that law, Article 21(2) of Decree No 318/1997 is repealed.

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

19 Telecom Italia was the holder of the exclusive concession to provide public telecommunications services, under Article 188 of the Postal and Telecommunications Code.

20 By notice of the Ministero delle Comunicazioni (Minister for Communications, Italy) of 9 July 2003, Telecom Italia was requested to pay the sum of EUR 31 118 630.05, representing the outstanding balance of the concession charge for the 1997 financial year and the sum of EUR 41 025 043.06, representing the outstanding balance of the concession charge for the 1998 financial year.

21 Telecom Italia challenged that notice before the Tribunale amministrativo regionale per il Lazio (the Regional Administrative Court, Lazio, Italy) which referred a question to the Court for a preliminary ruling that gave rise to the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106).

22 In paragraph 45 of that judgment, the Court held that Directive 97/13 precludes a Member State from requiring an operator, formerly the holder of an exclusive right to provide public telecommunications services to pay a charge corresponding to the amount previously demanded for that exclusive right, for one year from the final date laid down for transposition of that directive into national law, that is to say, up to 31 December 1998.

23 In the light of that judgment, the referring court held, by judgment No 11386 of 15 December 2008 that the payment of the charge was payable for 1998.

24 That judgment was challenged by Telecom Italia before the Consiglio di Stato (Council of State, Italy) which, by judgment No 7506 of 1 December 2009, confirmed that the requirement for payment of the charge for 1998 was consistent with EU law, in particular in the light of the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106).

25 Considering that it suffered damage as a result of the incorrect interpretation of the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106) by the Consiglio di Stato (Council of State), Telecom Italia brought civil proceedings against the Italian State, alleging its liability for incorrect exercise of the judicial function, before the Corte d'appello di Roma (Court of Appeal, Rome, Italy), which, by decision of 31 January 2012, upheld the complaint made by that company and found that a manifest infringement of EU law had taken place.

26 Following that decision, Telecom Italia, by the action in the main proceedings, asks the referring court in addition to declare undue the sums demanded in respect of the 1998 charge and consequently to disapply the force of *res judicata* in respect of the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009.

27 In that context, the referring court has doubts as to the scope of Directive 97/13 and whether the national legislation and the interpretation of that legislation by the Consiglio di Stato (Council of State) are compatible with EU law.

28 It follows from the request for a preliminary ruling that, in accordance with the interpretation of the Consiglio di Stato (Council of State) in judgment No 7506 of 1 December 2009, Telecom Italia was required to pay the charge for 1998 since that charge constituted the consideration for the telecommunications service concession and since it is not disputed that, during that year, Telecom Italia continued to hold the concession and to provide such a service, although not exclusively.

29 In that regard, it follows from the order for reference that the charge for 1998 was calculated on the basis of Telecom Italia's turnover and not the administrative and supervisory costs referred to in Articles 6 and 11 of Directive 97/13. However, according to the referring court, it is conceivable that it follows from the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106) that, after the entry into force of that directive, the charges imposed on undertakings in the telecommunications services sector were governed exclusively by those articles.

30 It follows, according to the referring court, that the interpretation of the Consiglio di Stato (Council of State) could be contrary to the case-law established by the Court of Justice in its judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106), and, if that were the case, the referring court asks what the consequences would be, in so far as the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009 became final, and accordingly, in accordance with national law, acquired the force of *res judicata*.

31 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May Article 22(3) of Directive 97/13/EC be interpreted as permitting, including for 1998, the maintenance of an obligation to pay a fee or a charge corresponding (in so far as it is based on the same proportion of turnover) to that which had to be paid under the regime which existed prior to that directive?

(2) In light of the Court's judgments of 18 September 2003, [*Albacom and Infostrada* (C-292/01 and C-293/01, EU:C:2003:480)], and of 21 February 2008, [*Telecom Italia* (C-296/06 EU:C:2008:106)], does Directive 97/13/EC preclude a final national judgment given on the basis of an incorrect interpretation or misconstruction of that directive, with the result that the ruling in that judgment may be disapplied by a different court hearing a dispute which concerns the same substantive legal relationship but is different in that it concerns a demand for payment that is merely ancillary by comparison with that which was the subject of the case which led to the incorrect ruling?'

Consideration of the questions referred

The first question

32 By its first question, the referring court asks, in essence, whether Article 22(3) of Directive 97/13 must be interpreted as precluding national legislation extending the obligation, in respect of 1998, imposed on a telecommunications undertaking holding an existing authorisation on the date of entry into force of that directive to pay a charge calculated on the basis of turnover and not merely the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme and individual licences.

33 The Court has previously had occasion to examine the compatibility with Directive 97/13 of an annual charge imposed on Telecom Italia, the former holder of an exclusive right in respect of public telecommunications services in Italy, in the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106).

34 In that judgment, the Court held that Directive 97/13 must be interpreted as precluding a Member State from requiring an operator, formerly the holder of an exclusive right to provide public telecommunications services and then the holder of a general authorisation, to pay a charge such as that in the main proceedings, corresponding to the amount previously demanded for that exclusive right, for one year from the final date laid down for transposition of that directive into national law, that is to say, up to 31 December 1998.

35 Following that response, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) nevertheless considered, by judgment No 11386 of 15 December 2008 that the payment of the charge for 1998 was compatible with Directive 97/13, which was confirmed by the Consiglio di Stato (Council of State) in judgment No 7506 of 1 December 2009.

36 In that context, the referring court has doubts as to the scope of Directive 97/13, in particular Article 22 thereof and is uncertain whether the national legislation, as interpreted by the Consiglio di Stato (Council of State) in judgment No 7506 of 1 December 2009, is compatible with EU law.

37 In that regard, it should be recalled, first, that, according to Article 26 of Directive 97/13, it was to enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*, that is to say, 27 May 1997. Article 25 of that directive required Member States to implement the provisions necessary to comply with that directive by 31 December 1997 at the latest.

38 Secondly, according to Article 3(3) of Directive 97/13, Member States are to ensure that telecommunications services and/or telecommunications networks can be provided either without authorisation or on the basis of a general authorisation or individual licence. Article 6 of that directive provides, as regards general authorisations, that, besides financial contributions to the provision of universal service in accordance with the annex to that directive, Member States are to ensure that any fees imposed on undertakings as part of the authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of those authorisations. The same applies to the charges provided for in Article 11 of that directive for individual licences, with the sole exception concerning the possibility of imposing charges when using scarce resources, as provided for in paragraph 2 of that article.

39 Moreover, given that Directive 97/13 applies both to existing and future authorisations, as is apparent from recital 26 thereof, Article 22 of that directive established transitional rules for authorisations existing on the date of its entry into force. Thus, first, in accordance with paragraph 1 of that article, an additional period of one year was granted, expiring on 1 January 1999, in order to bring existing authorisations into line. Secondly, paragraph 2 of that article provides for the possibility of extending the validity of the terms linked to the existing authorisations, except, however, where those terms give special or exclusive rights which have been or are to be terminated under EU law and where that extension of validity does not affect the rights of other undertakings under EU law. Finally, paragraph 3 of that article provides that the obligations referred to must be brought into line with that directive by 1 January 1999, on pain of becoming inoperative, unless the Member State concerned has, upon request, been granted a deferment of that date by the Commission.

40 Accordingly, in accordance with the transitional rules laid down in Article 22 of Directive 97/13, in 1998, Member States could, either extend the validity of the terms laid down for existing authorisations, other than those giving special or exclusive rights, or be granted by the Commission a deferment of the date for compliance with Directive 97/13.

41 In the present case, it follows from the request for a preliminary ruling that, by notice of the Ministry of Communications of 9 July 2003, Telecom Italia was required to pay the sum of EUR 41 025 043.06 representing the outstanding balance of the concession charge for the 1998 financial year. That notice was confirmed by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) by judgment No 11386 of 15 December 2008, then by the Consiglio di Stato (Council of State) in judgment No 7506 of 1 December 2009, those courts having considered that the payment of the charge for 1998 was compatible with Directive 97/13.

42 However, that interpretation made by those courts has no basis in the provisions of Directive 97/13 and cannot be upheld.

43 In the first place, the Court held, in paragraph 28 of the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106), that Article 22 of Directive 97/13 does not deal explicitly with the charges applicable to telecommunications undertakings which are holders of authorisations, be they general authorisations or individual licences. Only Articles 6 and 11 of that directive expressly address that issue.

44 In the second place, in paragraphs 32 and 34 of that judgment, the Court held, first, that the purpose of Article 22 of Directive 97/13 appears to have nothing to do with the continuation of a charge connected with a former exclusive right and, secondly, that if a Member State has not obtained an authorisation from the Commission to maintain special or exclusive telecommunications rights,

Article 22(2) of that directive precludes the continuation of conditions giving such rights beyond 31 December 1997. If an exclusive right is withdrawn, that withdrawal must generally affect the application of the charge which is the consideration for it.

45 In the third, place, the Court considered, in paragraph 36 of that judgment, that an obligation taking the form of a charge linked to a former exclusive right does not come within the scope of the obligations referred to in Article 22(3) of Directive 97/13 and such a charge cannot be continued beyond 31 December 1997 pursuant to Article 25 of that directive.

46 It is true that the Court held, in paragraph 38 of the judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106), that it was for the national court to determine whether the charge at issue in the main proceedings was linked to the exclusive right relating to the public telecommunications service granted to Telecom Italia before the entry into force of Directive 97/13.

47 Nevertheless, that reference to the national court must take into account the fact that, as the Court held in paragraph 39 of that judgment, assuming such a charge is not linked to an exclusive right granted before the entry into force of Directive 97/13, it must be examined whether it constitutes an 'obligation' within the meaning of Article 22(3) of that directive, eligible for the derogation laid down in that provision.

48 However, as was stated in paragraph 43 of the present judgment, only Articles 6 and 11 of Directive 97/13 deal with the charges applicable to undertakings which hold authorisations in the telecommunications services sector. As regards individual licences, Article 11(1) of that directive provides that the fees imposed by the Member States on undertakings which hold those licences seek only to cover the administration costs generated by the work involved in implementing those licences. The same consideration applies to the fees imposed by the Member States for general authorisations pursuant to Article 6 of Directive 97/13, which provides in addition for only one other form of financial contribution, namely contributions to the provision of universal service (judgment of 21 February 2008, *Telecom Italia*, C-296/06, EU:C:2008:106, paragraph 42 and the case-law cited).

49 In that regard, it follows from the case-law of the Court that Directive 97/13 not only lays down rules for authorisation procedures and the content of authorisations, but also sets out the nature and scope of the charges relating to those procedures which Member States may impose on undertakings in the field of telecommunications services. However, that directive would be rendered redundant if Member States were free to establish the financial charges to be borne by undertakings in that sector (see, to that effect, judgment of 18 September 2003, *Albacom and Infostrada*, C-292/01 and C-293/01, EU:C:2003:480, paragraphs 36 and 38).

50 Such charges, other than those laid down in Articles 6 and 11 of Directive 97/13, would have the effect of considerably increasing the fees and charges that Member States are expressly authorised to impose under that directive and would create a significant obstacle to the freedom to provide telecommunications services, which is contrary to the objectives sought by the EU legislature and goes beyond the common framework established by that directive (see, to that effect, judgment of 18 September 2003, *Albacom and Infostrada*, C-292/01 and C-293/01, EU:C:2003:480, paragraphs 40 and 41).

51 Consequently, the concept of 'the terms of authorisations already in existence', within the meaning of Article 22(2) of Directive 97/13, whose validity could be extended during 1998, covers different rights and obligations, without however covering the charges imposed on telecommunications undertakings which hold authorisations. That concept includes the 'obligations', within the meaning of Article 22(3) of that directive, which, consequently, cannot cover a charge imposed on a telecommunications undertaking without any link to the conditions of exercise of the authorisation granted to it (see, to that effect, judgment of 21 February 2008, *Telecom Italia*, C-296/06, EU:C:2008:106, paragraphs 41, 43 and 44).

52 In the light of the foregoing considerations, the answer to the first question is that Article 22(3) of Directive 97/13 must be interpreted as precluding national legislation extending the obligation, in respect of 1998, imposed on a telecommunications undertaking holding an existing authorisation on the date of entry into force of that directive to pay a charge calculated on the basis of turnover and not merely the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme and individual licences.

The second question

53 By its second question, the referring court asks, in essence, whether EU law must be interpreted as requiring a national court to disapply domestic rules of procedure conferring finality on a decision, where that would make it possible to remedy an infringement of a provision of EU law.

54 It should be noted, at the outset, that it is not clearly apparent from the file before the Court that the force of *res judicata* attaching to the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009, is, as regards the case in the main proceedings, capable of binding the referring court.

55 In that regard, Telecom Italia and the Commission consider that the subject matter of the case giving rise to the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009 and that of the case in the main proceedings are different, since the first case concerned the existence of a debt, whereas the case in the main proceedings concerns the balance of that debt so that, accordingly, the matter of *res judicata* does not arise. On the contrary, the Italian Government maintains that the identity of the parties and the questions raised in the case in the main proceedings and those settled by the Consiglio di Stato (Council of State) oblige the referring court to be consistent with the latter by virtue of the force of *res judicata*.

56 It should be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. According to settled case-law, the Court does not have jurisdiction to interpret the national law of a Member State (judgment of 10 January 2019, *ET*, C-97/18, EU:C:2019:7, paragraph 24).

57 It follows from the order for reference that the dispute in the main proceedings is based on the same substantial legal relationship as that giving rise to the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009 but differs from the case giving rise to that judgment in that it concerns a demand for payment that is merely ancillary by comparison with that to which that case related. In any event, it is for the referring court to ascertain whether, according to national law, the force of *res judicata* attaching to that judgment covers the present case or elements of it and, if required, to examine the consequences laid down by that law.

58 In the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, such procedural rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24).

59 In that context, if the referring court considers that the force of *res judicata* in respect of the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009 is not relevant to the assessment of the main proceedings, that court will be called upon to interpret the national law applicable as far as possible in the light of the wording and the purpose of Directive 97/13 in order to comply with the obligations arising therefrom. As is apparent from the Court's settled case-law, this

obligation to interpret national law in conformity with EU law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for matters within their jurisdiction, to ensure the full effectiveness of EU law when they rule on the disputes before them. It requires that the national court consider, where necessary, the whole body of national law in order to assess to what extent it may be applied so as not to produce a result contrary to EU law, in particular Directive 97/13 (see, to that effect, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835 paragraphs 59 and 66).

60 It must be made clear that the requirement to interpret national law in conformity with EU law includes the obligation, on national courts, including those ruling as courts of last instance, to change their established case-law where necessary if that case-law is based on an interpretation of national law that is incompatible with EU law (see, to that effect, judgment of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 64 and the case-law cited).

61 Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has been interpreted in a manner that is incompatible with EU law or is applied in such a manner by the relevant national authorities (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 79).

62 In the present case, as follows from the reply to the first question, the Consiglio di Stato (Council of State), by holding, in judgment No 7506 of 1 December 2009, that the charge required for 1998 from Telecom Italia, the holder of an existing authorisation on the date of entry into force of Directive 97/13, was due, interpreted, as follows from the reply to the first question referred for a preliminary ruling, national law in a way that is not compatible with EU law, as the Court interpreted it in its judgment of 21 February 2008, *Telecom Italia* (C-296/06, EU:C:2008:106).

63 Consequently, in the context of the scenario envisaged in paragraph 59 of the present judgment, it would be for the referring court to ensure that EU law is given full effect and if necessary to disapply, on its own authority, the interpretation adopted by the Consiglio di Stato (Council of State) in judgment No 7506 of 1 December 2009, since that interpretation is not compatible with EU law (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 70).

64 By contrast, if the referring court considers that, under national law, the force of *res judicata* attaching to the judgment of the Consiglio di Stato (Council of State) No 7506 of 1 December 2009 covers the case in the main proceedings and thus determines its outcome, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure stability of the law and of legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the passing of the time limits provided for in that connection can no longer be called into question (judgments of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 22 and the case-law cited, and of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 26).

65 In that regard, it is settled case-law that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision of EU law, regardless of its nature (see, to that effect, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 68).

66 Consequently, EU law does not require a national judicial body automatically to go back on a judgment having the force of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court (judgment of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 28).

67 In any event, it must be recalled that the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of EU law for which the State is responsible is inherent in the system of the Treaty, irrespective of whether the origin of the damage is attributable to the legislature, the judicature or the executive (judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraphs 30 and 32).

68 In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from EU rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of EU law attributable to a decision of a court of a Member State adjudicating at last instance (judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 33).

69 Moreover, given, inter alia, that an infringement, by a decision that has become final and thus gained the force of *res judicata*, of rights deriving from EU law cannot normally be corrected thereafter, individuals cannot be deprived of the possibility of holding the State liable in order to obtain legal protection of their rights recognised by EU law (judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58).

70 Thus, it follows from the request for a preliminary ruling that, in the main proceedings, Telecom Italia brought civil proceedings against the Italian State, alleging its liability for incorrect exercise of the judicial function and that the Corte d'appello di Roma (Court of Appeal, Rome) upheld the action brought by that company and found that the Consiglio di Stato (Council of State) had committed a manifest infringement of EU law.

71 In the light of all the foregoing considerations, the answer to the second question is that EU law must be interpreted as not requiring a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy an infringement of a provision of EU law, without prejudice to the possibility for the parties concerned of rendering the State liable in order to obtain legal protection of their rights under EU law.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 22(3) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services must be interpreted as precluding national legislation extending the obligation, in respect of 1998, imposed on a telecommunications undertaking holding an existing authorisation on the date of entry into force of that directive to pay a charge calculated on the basis of turnover and not merely the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme and individual licences.**

2. **EU law must be interpreted as not requiring a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy an infringement of a provision of EU law, without prejudice to the possibility for the parties concerned of rendering the State liable in order to obtain legal protection of their rights under EU law.**

[Signatures]