OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 16 March 2006 [1]

I — Introduction

1. The Bundesverwaltungsgericht (Federal Administrative Court), Germany, seeks an interpretation of Article 10 EC and Article 11(1) 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. [2]

2. It requires the interpretation by way of a reference for a preliminary ruling in order to resolve two disputes concerning whether it is appropriate to review the respective assessments of the fee payable for the grant of licences in the telecommunications sector, which assessments have become final because they were not challenged in time.

3. Both references contain two identical questions. The first goes to the heart of the case-law on Directive 97/13, in particular the judgments in *Connect Austria*, [3] *Albacom and Infostrada* [4] and *ISIS Multimedia and Firma 02*, [5] the latter two being cases in which I wrote the Opinions. [6] The second question is particularly important, since it provides the Court of Justice with an opportunity to strike a balance between the primacy of Community law and legal certainty, [7] thus changing the course set by the judgment in *Kühne & Heitz*, [8] the rule in which leads to an impasse.

1 — Original language: Spanish.

2 — OJ 1997 L 117, p. 15. This directive has been replaced by Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21).

3 — Case C-462/99 [2003] ECR I-5197.

4 — Joined Cases C-292/01 and C-293/01 [2003] ECR I-9449.

5 — Joined Cases C-327/03 and C-328/03 [2005] ECR I-8877.

6 — Opinions of 12 December 2002 and 9 December 2004, respectively.

7 — Galetta, D.U., 'Autotutela decisoria e diritto comunitario', in *Rivista Italiana di Diritto Pubblico*, 2005, pp. 35 to 59, maintains that any reconsideration of an administrative measure which cannot be challenged requires a careful balancing of values. On one side of the scale is the primacy of Community law, underpinned by the principles of legality, equivalence, effectiveness and loyal cooperation. On the other side is legal certainty (p. 50).

8 — Case C-453/00 [2004] ECR I-837.

4. The Court has a further opportunity to change the direction of its case-law, since it is due to rule on whether to extend the above doctrine to judicial decisions having the force of *res judicata*. [9]

II — Legislative framework

A — *Community law*

1. The 'principle of loyalty'

5. Article 10 EC provides that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community', and shall facilitate 'the achievement of the Community's tasks'. Furthermore, '[t]hey shall abstain from any measure which could jeopardise the attainment of the objectives' of the Community.

2. Directive 97/13

6. This provision forms part of the Community's efforts to liberalise the market for electronic communications, which I described recently in the Opinion in *Nuova società di telecomunicazioni*, delivered on 27 October 2005. [10]

7. The freedom to supply telecommunications services and the opening up of the operation of telecommunications networks are the principles governing the rules laid down in the directive, which aim to ensure that telecommunications services are distributed and used without hindrance or in accordance with 'general authorisations', [11] 'individual licences' [12] being no more than an exception or a supplement to the universal permits (recitals 7 and 13 and Articles 3(3) and 7). Both forms of permit constitute 'authorisations'. [13]

9 — Case C-234/04 *Kapferer*, the Opinion in which was delivered by Advocate General Tizzano on 10 November last year and the judgment in which was given today. A similar issue is raised in Case C-274/04 *ED & F Man Sugar Ltd*, which concerns whether, in an action challenging a sanction relating to export refunds, it is possible to examine whether an exporter actually claimed an amount in excess of that due, even though the recovery order has become final; Advocate General Leger, in his Opinion of 29 September 2005, proposes an affirmative answer.

10 — Case C-339/04, in which judgment has not yet been delivered. See, in particular, points 3 to 6.

11 — According to the first indent of Article 2(1)(a) of the directive, general authorisation is any which, 'regardless of whether it is regulated by a 'class licence' or under general law and whether such regulation requires registration ..., does not require the undertaking concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation'

12 — An individual licence is one 'which is granted by a national regulatory authority and which gives an undertaking specific rights or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority' (second indent of Article 2(1)(a) of the directive)

13 — The directive defines 'authorisations' as 'any permission setting out rights and obligations specific to the telecommunications sector and allowing undertakings to provide telecommunications services' and 'establish and or operate telecommunications networks for the provision of such services ...' (first paragraph of Article 2(1)(a)).

8. That harmonisation is based on the principles of proportionality, transparency and non-discrimination, the aim being to create an environment compatible with the freedom of establishment and the freedom to provide services (recitals 1, 2, 4 and 11; Article 3(2)).

9. To that end, the directive does not restrict the number of individual licences which the Member States may grant, unless this is essential to ensure the efficient use of radio frequencies and the existence of sufficient numbers. In principle, therefore, any organisation which fulfils the conditions laid down and published in national legislation is entitled to receive an individual licence (Articles 10(1) and 9(3)).

10. Articles 6 and 11 of Directive 97/13, which concern fees and charges, are aimed at promoting competition in the telecommunications market and at not imposing on operators more restrictions or charges than are necessary,[14] and therefore satisfy the abovementioned criteria of proportionality, neutrality, non-discrimination and transparency (recital 12).

14 — The conditions to which the authorisations can be made subject are set out in the annex to the directive.

11. Article 6 is entitled '[f]ees and charges for general authorisation procedures'; Article 11,'[f]ees and charges for individual licences'.

12. According to Article 6, '[w]ithout 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'.

13. For its part, Article 11 provides that:

'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.'

14. In accordance with Article 25, the Member States had to comply with the directive before 1 January 1998.

B — *German law*

1. Charges in the telecommunications sector

15. The Telekommunikationsgesetz (Law on Telecommunications; 'the TKG') of 25 July 1996 [15] transposes Directive 97/13 into German law. Under Paragraph 16(1), individual licences are to be granted upon payment of a fee, the rules governing which are to be laid down in a subsequent regulation.

15 — BGBl. 1996 I, p. 1120

16. On the basis of that legislation, the Bundesministerium für Post und Telekommunikation (Federal Ministry of Post and Telecommunications), on 28 July 1977, adopted the Telekommunikations-Lizenzgebührenverordnung (Regulation on Telecommunications Licence Fees; 'the TKLGebV 1997'), [16] which, with retroactive effect, came into force on 1 August 1996.

17. Under that regulation, the fee included not only the administrative costs incurred in granting the licence but also those associated with management of the rights and supervision of the corresponding obligations (Paragraph 1(1)).

18. Class 3 licence [17] fees were charged on the basis of the territory covered by the licence and hence the number of potential users of the services provided, the charge ranging from DEM 2 000 (EUR 1 022.58) to DEM 10 600 000 (EUR 5 419 693.94). [18]

16 — BGBl. 1997 I, p. 1936.

17 — This category includes licences entitling the holder or another person to provide public telecommunications services in a given area (point A.3 of the Annex to Paragraph 1(1) of the TKLGebV 1997.

18 — The fee was calculated by means of a fraction, the numerator representing the product of the number of inhabitants in the licence area (E_G) and the maximum fee for Class 3 licences set out in point A.3 of the Annex to the TKLGebV 1997 (G_D), the denominator being the total population of Germany (E_D). In accordance with that formula, the fee for a Class 3 licence for the entire national territory was DEM 10 600 000, that amount decreasing in proportion to as the number of potential customers (Paragraph 3(4) in conjunction with the Annex to Paragraph 1(1) of the TKLGebV 1997).

19. The Bundesverwaltungsgericht points out in the orders for reference that the preceding calculations were based on a forecast of the general administrative costs which would be incurred by the Regulierungsbehörde für Telekommunikation und Post (Regulatory Authority for Telecommunications and Post) ('the national regulatory authority') over three decades. [19]

20. In its judgment of 19 September 2001, the Bundesverwaltungsgericht held that Class 3 licence fees, which had been calculated in accordance with the TKLGebV 1997, were not covered by Paragraph 16(1) of the TKG, since they included tasks unrelated to authorisation, and also infringed the principle of equality laid down in Paragraph 3(1) of the Basic Law of the Federal Republic of Germany. [20]

21. Once that judgment had been delivered, the TKLGebV 1997 ceased to apply, and was replaced by the Telekommunikations-Lizenzgebührenverordnung of 9 September 2002 ('the TKLGebV 2002'), [21] which introduced for Class 3 licences a fee of EUR 4 260, which could be reduced to a minimum of EUR 1 000 (Paragraph 2(3)).

22. The German Government states [22] that the assessments which were open to challenge when the judgment of 19 September 2001 was delivered were automatically annulled and that certain undertakings agreed with the national regulatory authority to waive the right to take legal action, in which cases the fees paid were reimbursed. [23]

23. The TKLGebV 2002 thus has retroactive effect in relation to fees which have not become final. Paragraph 4 expresses this idea by stating that, where an assessment is still open to challenge on the date of publication of the new legislation, the latter is to apply to licence holders as from 1 August 1996.

2. Reconsideration of administrative measures

24. This general heading covers three different, though related, procedures, set out in the Verwaltungsverfahrensgesetz (Law on Administrative Procedure; 'the

19 — To be more precise, in its judgment of 19 September 2001 (Case 6 C 13.00, BVerwGE Volume 115, p. 125), to which I shall refer later, the Bundesverwaltungsgericht stated that the amount of the general administration costs was calculated from the personnel and equipment costs for 52.1 posts over a period of 30 years.

20 — The finding of illegality also extended to the fees for Class 4 licences, which entitle holders to provide telephony services through telecommunications networks operated by the holder within a particular area (point A.4 of the Annex to Paragraph 1(1) of the TKLGebV 1997).

21 — BGBl. 2002 I, p. 3542.

22 — Paragraph 13 et seq. of its statement in intervention.

23 — Footnote 26 and point 101 of this Opinion.

VwVfG') of 25 May 1976.[24] The first, the 'reopening of proceedings' (Wiederaufgreifen des Verfahrens), provided for in Paragraph 51, which, on application by the person concerned, provides a means of annulling or amending a measure on grounds arising subsequently, constitutes review *stricto sensu*.

25. The other two procedures are distinguished by the lawful or unlawful nature of the decision being analysed. The second, set out in Paragraph 49, is concerned with 'revocation of a lawful administrative measure' (Widerruf eines rechtmäßigen Verwaltungsaktes), whereas the third, contained in Paragraph 48, provides for 'withdrawal of an unlawful administrative measure' (Rücknahme eines rechtswidrigen Verwaltungsaktes), and states that 'an unlawful administrative measure may, even after it has become final,[25] be withdrawn, wholly or in part, with prospective or retrospective effect'.

26. According to the orders for reference, the German courts interpret the power provided for in Paragraph 48 as one the discretionary nature of which is minimal, not to say non-existent, in certain circumstances. Thus, it confers the right to have an administrative measure 'withdrawn' if maintaining it in force is 'simply untenable', that is to say where it infringes the general principle of equality, is contrary to public policy or good faith, or is manifestly unlawful, or where its withdrawal is dictated by the specific legal situation of the addressee.

III — Facts and questions referred

27. ISIS Multimedia Net GmbH & Co. KG and i-21 Germany GmbH ('ISIS' and 'i-21') both hold Class 3 Telecommunications Licences in Germany for which they were charged DEM 131 660 (EUR 67 316.69) and DEM 10 600 000 (EUR 5 419 693.94) respectively, pursuant to Paragraph 16(1) of the TKG and the TKLGebV 1997.

28. Each company assented to and paid the corresponding fee, which thus became unchallengeable.

29. However, other companies holding telecommunications licences challenged the assessments issued to them and obtained before the Bundesverwaltungsgericht the

24 — BGBl. 1976 I, p. 1253. Version of 21 September 1998 (BGBl. 1998 I, p. 3050).

25 — The German legislation uses the word 'unanfechtbar', which may be translated into Spanish as 'inimpugnable' ('unchallengeable') or 'inatacable' ('incontestable'). I prefer to use the qualifier 'firme' ('final'), which refers in continental administrative law to decisions which, for whatever reason (exhaustion of the relevant remedies or expiry of the time-limits for pursuing them), cannot be reviewed in ordinary proceedings, rather than the term 'definitiva' ('definitive'), which describes decisions representing the final word of the Administration, although proceedings may be brought before the courts.

judgment of 19 September 2001 [26] to which I have already referred, which annulled those assessments on the ground that they were based on a regulation — the TKLGebV 1997 — which was contrary to higher-ranking law, and ordered that the claimants be reimbursed for the sums which they had paid to the State.

30. Having been notified of that judgment, ISIS and i-21 applied to the national regulatory authority to recover the amount paid. After their applications had been refused, they each brought judicial actions before the Verwaltungsgericht, the administrative court of first instance, which dismissed their applications on the grounds that the amounts claimed could not be reimbursed because the assessments were final and that re-examination was not possible under Paragraph 51(1) or Paragraph 48(1) of the VwVfG.

31. They then brought leap-frog appeals on points of law before the Bundesverwaltungsgericht. That court found that the claims had no prospect of succeeding under German law but was uncertain as to the impact of Community law in this regard, and therefore stayed proceedings and referred the following questions for a preliminary ruling in both cases:

'Is Article 11(1) of Directive 97/13/EC ... to be interpreted as precluding ... a licence fee calculated to anticipate the amount of a national regulatory authority's general administrative costs over a period of 30 years, to be charged in advance?'

If the answer is in the affirmative:

'Are Article 10 EC and Article 11 of the licensing directive to be interpreted as meaning that a fee assessment that determines fees within the meaning of Question 1 and which has not been contested, although it could have been, must be set aside where that is permissible under national law but not mandatory?'

IV — Procedure before the Court of Justice

32. By order of 6 December 2004, the President of the Court of Justice joined the two cases, since they share the same subject-matter.

26 — In fact, nine substantively identical judgments were delivered on that day. Thirty-seven companies brought legal proceedings, nine of which (Storm Telecommunications Limited, KDD-CONOS AG, Carrier 1 International GmbH, TelePassport Service AG, Airdata Holding GmbH, ECN Telekommunikation GmbH, BerliKomm Telekommunikationsgesellschaft GmbH, Telegate Aktiengesellschaft für telefonische Informationsdienste and First Telecom GmbH) obtained judgments in their favour. The other 28 reached agreement with the Administration on reimbursement of the fee.

33. Observations were submitted, within the period laid down in Article 23 of the EC Statute of the Court of Justice, by the Commission, the German and Netherlands Governments and the appellants in the main proceedings.

34. At the hearing held on 1 February 2006, oral argument was presented by representatives of the parties which had participated in the written procedure.

V — Analysis of the questions referred

A — *Premiss*

35. The Bundesverwaltungsgericht confirms that, under German law, fees for the grant of Class 3 and 4 individual licences in the telecommunications sector are capable of being annulled because the TKLGebV 1997, under which they were introduced, was unlawful. It so held in its judgment of 19 September 2001.

36. It is equally convinced that there is no discretion under national law to reconsider final assessments, and that the persons to whom those assessments are addressed cannot therefore obtain reimbursement of the sums incorrectly paid.

37. However, it wishes to ascertain whether the same solution holds good under Community law or whether, on the contrary, Community law requires that the unlawful fees be revoked, with all the consequences this entails, even when they are no longer open to challenge (second question). This question presupposes that such fees also infringe the Community legal order, which means that an examination of their possible 'Community illegality' is a prerequisite for the reference for a preliminary ruling (first question). [27]

38. The preliminary ruling procedure has been clearly defined as operating within the ambit of Community law and precludes any discussion of the relevant national legislation, although the latter does serve as a counterpoint and framework for the proceedings. Crucially, as regards the first question, the TKG, which has been found

27 — In its written observations, the German Government proposes that the Court of Justice refrain from carrying out the latter examination, on the ground that Directive 97/13 has been repealed, that the new Directive 2002/20 abolishes individual licences and that its charging provisions entered into force on 25 July 2003 and are not applicable to prior events. This approach seems erroneous since the disputes in the main proceedings concern whether a fee assessed under the first of the directives cited, in accordance with rules adopted in implementation of the national legislation transposing the directive, is consistent with Community law, and it therefore seems manifestly appropriate to undertake the examination proposed by the Bundesverwaltungsgericht. In short, the national events and rules to be adjudicated on must be examined by reference to the Community legislation applicable at the material time.

to have been infringed by the TKLGebV 1997, transposes Directive 97/13 into German law, and, as regards the second, in the absence of specific legislation, the rights conferred by European law must be protected in accordance with the rules of procedure applicable under German law. [28]

B — *The first question*

39. The national court seeks to ascertain whether Article 11(1) of Directive 97/13 allows a fee which is calculated on the basis of a forecast of the ordinary administrative costs which will be incurred by the national regulatory authority over a period of thirty years.

40. The answer requires an analysis of the nature of the fees and charges provided for in the above directive.

1. Articles 6 and 11 of Directive 97/13

41. Although apparently similar in content, the two articles, as I stated in the Opinion in *Albacom and Infostrada,* [29] are different in scope because they relate to different schemes.

42. General authorisations are permits defined in advance in a general way, [30] which allow undertakings to operate in the telecommunications market without an express decision by the competent body, although such operations may be subject to subsequent monitoring, as set out in Article 5.

43. On the other hand, individual licences, which are specific authorisations for holders to operate, require a particular decision for which there is an *ad hoc* procedure (the second indent of Article 2(1)(a) and Article 9 of the directive support this definition).

44. Those differences explain the fact that, whereas Article 6 is concerned with '[covering] the administrative costs incurred in the issue, management control and enforcement of the *applicable general authorisation*

28 — The Court has consistently taken this view since its judgment in Case 33/76 *Rewe* [1976] ECR 1989.

29 — The following lines reproduce point 29 et seq. of that Opinion.

30 — They may be predetermined either by the Administration ('class licences') or by the legislature itself (this follows from recital 8 and the first indent of Article 2(1)(a) of Directive 97/13).

scheme', Article 11(1) refers to similar disbursements in connection with 'the issue, management, control and enforcement of the applicable *individual licences*'. [31] For this reason, Article 11 requires that the fee for an individual licence should be proportionate to the work involved, a qualification which does not appear in general authorisations.

45. Consequently, Articles 6 and 11(1) of the directive both provide for devices which, irrespective of the name given to them, [32] are remunerative and parafiscal in nature, since they are intended to offset the costs of an act or service which affects the taxpayer. However, owing to the diverse origins of the charge, the fee defined in the first article is used, in a non-specific manner, to cover the cost of operating the 'applicable general authorisation scheme', [33] whereas that for individual licences is used exclusively to offset the costs incurred by the Administration in connection with the issue, management, control and enforcement of each particular licence.

46. Article 11(2), on the other hand, provides for a fee in which there is no element of remuneration and which can be classified as a tax, albeit for a particular purpose. [34]

2. The individual licence fee under Article 11(1) of Directive 97/13

47. The event giving rise to this fee is the completion of a procedure for granting the licence, or for its management, control or enforcement.

31 — Article 11(1) of the Spanish version of the directive refers to 'régimen de licencias individuales aplicable' (applicable individual licence scheme) but the German, Italian, English and French texts do not contain the word 'scheme'. The first reads 'die Ausstellung, Verwaltung, Kontrolle und Durchsetzung der jeweiligen Einzelgenehmigungen'; the second, 'il rilascio, la gestione, il controllo e l'esecuzione delle relative licenze individuali'; the English, 'in the issue, management, control and enforcement of the applicable individual licences'; and the French, 'à la délivrance, à la gestion, au contrôle et à l'application des licences individuelles applicables'.

32 — 'Tasas' (fees) or 'precios públicos' (public charges). Some years ago, there was heated debate among Spanish legal commentators as to the respective definitions of those two terms. See Aguallo Avilés, A., *Tasas y precios públicos: análisis de la categoría jurídica del precio público y su delimitación con la tasa desde la perspectiva constitucional*, Editorial Lex Nova, Valladolid, 1992, and Martín Fernández, F.J., *Tasas y precios públicos en el derecho español*, Instituto de Estudios Fiscales — Marcial Pons, Ediciones Jurídicas, S.A., Madrid, 1995.
In the German, English, French and Italian versions of the directive, the words 'Gebühren', 'fees', 'taxes' and 'diritti' are used respectively.

33 — Directive 2002/20 endorses this interpretation when it states, in recital 31, that '[w]ith a general authorisation system it will no longer be possible to attribute administrative costs and hence charges to individual undertakings except for the granting of rights to use numbers, radio frequencies and for rights to install facilities', that is to say [except] for the permits referred to in the 1997 directive as 'individual licences' and in the new one as 'rights of use for radio frequencies and numbers' (Article 5).

34 — In points 40 to 43 of the Opinion in *Albacom and Infostrada*, I examined the elements and properties of that tax, which fosters equal treatment and encourages innovative services and competition. In the Opinion in *Isis Multimedia and Firma 02*, I considered those requirements at length, specifically in relation to the situation on the German market (points 33 et seq.).

48. It serves to cover the cost of carrying out the necessary formalities, which means that the revenue from it must not be used to finance other activities of the national regulatory authority.

49. The proportionality of the fee to the work carried out is a requirement of the scheme, and the fee must therefore correspond to the amount of the costs incurred, but must never exceed that amount. This is dictated by its nature as remuneration. If the fee were to exceed that amount, it would become a tax.

50. The rules governing this fee are based on the principles of neutrality, non-discrimination, transparency and publicity.

51. The foregoing considerations provide a framework for answering the first question raised by the Bundesverwaltungsgericht. That answer must determine whether it is appropriate to calculate the amount of the fee on the basis of a prospective analysis of the costs that will be incurred by the national regulatory authority over a particular period.

3. Method of assessing and levying the individual licence fee

52. The fee provided for in Article 11(1) of Directive 97/13 thus serves only to cover the costs incurred in the issue, management, control and enforcement of individual licences, and must be commensurate with the work involved in those tasks.

53. Subject to compliance with those requirements, the Member States are free to choose the methods and procedures for charging, and to determine the amount of the fee.

54. The purpose of the fee requires that it be levied only when the chargeable event occurs, that is to say after the licence has been issued, and once the administrative act of management, control or enforcement has been performed. This approach helps make the fee as accurate as possible, because, when the assessment is carried out *a posteriori*, all the components of the work undertaken are known, the charge being calculated from a flat-rate assessment of the number and qualification of the officials involved, the

time taken and the unavoidable costs incurred in carrying out the operation.[35] However, this formula has the disadvantage of subjecting the taxpayer to repeated payments, thus creating endless work for the tax administration, which increases costs and undermines efficiency.

55. Since the intention is to compensate the tax authorities for the costs incurred in an extended process of public administration for the benefit of the licence holder, there is no reason why the fee should not be charged in advance and determined by means of a careful calculation of its amount. If it is charged in this way, it makes no difference whether the fee is collected in a single payment or in instalments.

56. In the judgment in *Fantask and Others* (paragraph 32), which I have just cited in footnote 35, concerning indirect taxes on the raising of capital, the Court accepted that the fee at issue in that case could be fixed in advance, on the basis of a projection of costs, and levied at regular intervals. There is no reason why that view cannot be extended to the fee for individual licences in the telecommunications sector, provided that, as pointed out in the judgment itself (paragraphs 32 to 34), the Member States check at regular intervals that the amount does not exceed the costs incurred, and ensure the payment of any refunds necessary.

4. The period covered by the fee: its limits

57. The longer the period to which the calculation relates, the greater the risk of error, since the projection becomes more complex as it extends over time. Objectivity declines as uncertainty grows, and the risk of disproportion is greater when the data being used is less reliable.

58. The situation is worse if the length of the period is not only used to determine the amount of the fee but also affects its payment, which must be made in a single instalment so that it is effective over the entire period of the projection. In those circumstances, the principles of proportionality and neutrality contained in Directive 97/13 are largely undermined, since payment is made today for services which will not be received until long into the future. Those principles would suggest, though they do not require, that the administrative service and the determination and payment of the fee should be effected more contemporaneously.

35 — The Court applied the same criteria in relation to indirect taxes on the raising of capital, harmonised by Directive 69/335/EEC of the Council of 17 July 1969 (OJ English Special Edition 1969 (II), p. 412), in the judgment in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadina Costruzioni* [1993] ECR I-1915, paragraph 43. In its judgment in Case C-188/95 *Fantask and Others* [1997] ECR I-6783, the Court held that account may be taken not only of the material and salary costs which are directly related to the service paid for by the charge, but also of the proportion of the overheads of the competent authority which can be attributed to it (paragraph 30).

59. The nature of the sector, its development and the extent to which it is open are also important factors. The scope for projection in a stable market in which competition has long been well established and in which, logically, no major surprises are to be expected and events are easily predicted is not the same as in a fluctuating market which has recently been liberalised and in which unforeseen changes are anticipated.

60. Consequently, Directive 97/13 does not preclude the calculation or collection in advance of a fee such as that at issue, provided that these acts do not adversely affect the aforementioned guarantees of neutrality and proportionality which the directive itself lays down.

61. Adverse effects do arise where a fee determined on the basis of a forecast of costs for the next thirty years is levied at a time when the telecommunications market is becoming more flexible.

62. In my Opinion in *Nuova società di telecomunicazioni*, referred to above, I pointed out that the 1990s saw the beginning of the process of opening up the telecommunications market and harmonising national laws through the development of a collection of legislative provisions which were constantly being updated. [36] That legislation is still not final. Accordingly, the fact that, in 1997, at the height of this process of upheaval, a fee was fixed on the basis of a forecast of the general costs that would be incurred by the national regulatory authority until the year 2027 is beyond all reason and, for the reasons already given, runs counter to the spirit of Directive 97/13. [37] Proof of the foregoing lies not least in the fact that that directive, adopted in 1997, was superseded five years later by Directive 2002/20, cited above, which replaces individual licences with 'rights of use', contains more detailed rules on the assessment of charges [38] and leaves out of the scheme fees such as that at issue in the main proceedings.

63. The foregoing analysis coincides with that of the Bundesverwaltungsgericht in the aforementioned judgment of 19 September 2001, since, crucially, the TKG, which was

36 — In points 3 et seq., I explained the changes in the legislation governing telecommunications in the Community.

37 — The individual licence fee scheme presupposes that, on the basis of an economy of scale, the more licence holders there are, the lower the fee which each has to pay will be (opening facilities and taking on staff to serve 4 undertakings is not the same as doing so for 25). Consequently, a method which disregards the increase in the number of operators in an expanding sector, and requires the charging of a fee which, because of the length of the period prescribed, bears no relation to reality, must be rejected.

38 — Article 12(1)(a) concerns costs incurred in the management, control and enforcement of rights of use; it also concerns costs resulting from 'international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement', and goes on to state, after reiterating the requirements of neutrality, transparency and proportionality, that national regulatory authorities 'shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made' (Article 12(2)).

implemented by the TKLGebV 1997, transposes Directive 97/13. [39] German legal commentators take the same view. [40]

64. In the light of the foregoing considerations, I propose that the Court answer the first question to the effect that Article 11(1) of Directive 97/13 and, in particular, the principles of neutrality and proportionality preclude the imposition of a fee for the issue, management, control and enforcement of individual licences which is calculated on the basis of a forecast of the general administrative costs that will be incurred by the national regulatory authority over a period of 30 years.

C — *The second question*

1. Preliminary considerations: the appropriate approach

65. It being established that the contested assessments are contrary not only to German law, as the Bundesverwaltungsgericht held, but also to Community law, it remains to be determined whether Community law requires a review of their validity, even if they were not challenged at the appropriate time.

66. The relevant German legislation is the VwVfG, under which, as is apparent from points 24 to 26 of this Opinion and from the orders for reference, it is not permissible either to annul the administrative measures in question or to grant the claims of ISIS and i-21.

67. This gives a clear picture of the substance of the dispute and reveals the error in the rule in *Kühne & Heitz*, which, in making reconsideration of a final decision conditional upon the existence of an express legislative provision to that effect in national law, perplexes the Bundesverwaltungsgericht, which could have arrived at the same unsatisfactory conclusion without having to make a reference for a preliminary ruling. Moreover, reliance on national law, as advocated by the Court of Justice in such cases, raises serious problems, including, in particular, disparities in the protection of

39 — The judgment refers to the dynamics of telecommunications and to the three decades to which the forecast relates. The Bundesverwaltungsgericht finds that, in 1997, it was not possible to imagine how that sector would develop, since it was not known how many national and foreign companies would be in a position to compete with the dominant, formerly monopoly-holding, undertaking, or what the consequences would be for licensing.

40 — Schutz, R. and Nusken, J.P., 'Gebuhr fur Telekommunikationslizenz — Rechtswidrige Haushaltssanierung auf Kosten des Wettbewerbs?', in Multimedia und Recht, 1998, pp. 523 to 528. Von Roenne, H., 'Gebuhr fur TK-Lizenzen', in Multimedia und Recht, 1998, pp. XIV to XVI, asks whether a period of 30 years is relevant in a rapidly-developing market and whether licences will survive for that length of time or even less.

rights derived from the Community legal order. [41]

68. The cases at issue here concern not whether, under German law, it is possible to reconsider and, if appropriate, to annul the now unchallengeable fees imposed on the abovementioned undertakings, since the courts have already ruled that that is not so, but whether, notwithstanding such an obstacle, Community law requires that those fees be reviewed and, if so, under what conditions.

69. It was that dilemma which prompted the question referred by the College van Beroep von het bedrijfsleven of the Netherlands in *Kühne & Heitz* and Advocate General Léger found the correct way to resolve it in his Opinion of 17 July 2003, in which he proposed that it be approached from the standpoint of the primacy of European law and its direct applicability.

41 — Coutron, A., 'Cour de Justice, 13 janvier 2004, Kühne & Heitz NV/Productschap voor Pluimvee en Eieren', in *Revue des affaires européennes*, 13th year (2003-2004), 3, pp. 417 to 434, criticises the Court of Justice for relying on national law, because, in so doing, it runs the risk of creating differences in the protection of the rights of individuals (pp. 525 and 427). Peerbux-Beaugendre, Z., 'Une administration ne peut invoquer le principe de la force de chose définitivement jugée pour refuser de réexaminer une décision dont une interprétation préjudicielle ultérieure a révélé la contrariété avec le droit communautaire (Commentaire de l'arrêt de la CJCE du 13 janvier 2004)', in *Revue du droit de l'Union européenne*, 3-2004, pp. 559 to 567, fears that this judgment will be a source of further divergence in the application of Community law (p. 566). Martín Rodríguez, P., 'La revisión de los actos administrativos firmes: ¿Un nuevo instrumento de garantía de la primacía y efectividad del derecho comunitario? Comentario a la sentencia del TJCE de 13 de enero de 2004, C-453/00, Kühne & Heitz NV', in *Revista General de Derecho Europeo*, No 5, October 2004 (www.iustel.com), maintains that a literal interpretation of that judgment makes it worthless since few legal systems entitle the Administration to review an administrative decision which has been endorsed by a judgment.

70. The Court must consider that proposal, and, in so doing, balance the requirements of legal certainty against those of Community legality in order to determine whether the former always represent an insurmountable barrier or whether, on some occasions, they must yield to the latter.

2. The principle of legal certainty: its limits

71. The importance of this principle to the proper functioning of any political entity is clear. In my Opinion in *Commission* v *AssiDomän Kraft Products and Others* (*'AssiDomän'*), [42] I pointed out that the law abhors disorder, and therefore equips itself with arms to fight its root cause: instability (point 55).

72. Of particular significance among those arms is legal certainty, one instrument for ensuring which is 'finality'; administrative decisions become unchallengeable on expiry of the prescribed periods for contesting them or once they have been confirmed after all means of challenging them have been exhausted.

42 — Case C-310/97 P [1999] ECR I-5363.

73. Consequently, on expiry of the period for contesting it, a decision, even if vitiated, cannot be challenged and the defect becomes a permanent part of the legal order.

74. The incontestability of final measures, even unlawful ones, is therefore the general rule, [43] since no system permits the validity of legal situations to be the subject of indefinite dispute.

75. The Court has shown itself to be sensitive to this structural rule and has taken it into account since its first decisions. [44] In the judgment in *Kühne & Heitz*, it held that rule to be a general principle of Community law (paragraph 24), which finding it reiterated in the judgment in *Gerekens and Procola* (paragraph 22). [45] In its judgment in *AssiDomän*, the Court held that a Community institution is not required to reconsider decisions which have been assented to when other, identical decisions, which were contested at the appropriate time, have been annulled by the courts (paragraph 63).

76. However, that principle may become an obstacle to the uniform and correct application of Community law, [46] and the Court has therefore refused to recognise it as being absolute [47] and as taking precedence in every situation. In its judgment in *SNUPAT* v *High Authority*, [48] the Court held that it must be reconciled with other values worthy of protection.

77. The first of those values limiting legal certainty is equity, [49] an assessment of which I proposed in my Opinion in *AssiDomän*, not with a view to finding a solution to the dispute in that case but in order to clarify, generally, the scope of legal certainty in the Community context. Although the Court of Justice concurred with the view put forward in my Opinion, it omitted to refer to the limit represented by equity. The finality of a decision must not constitute an obstacle to further analysis of its substance if maintain-

43 — In German legal commentary, Potacs, M., 'Bestandskraft staatlicher Verwaltunsakte oder Effektivität des Gemeinschaftsrechts? — Anmerkung zum Urteil vom 13. Januar, Kühne & Heitz NV/Productschap voor Pluimvee en Eieren, Rs C-453/00', in *Europarecht*, 2004, pp. 595 to 603, points out that, in such situations, Community law takes precedence only exceptionally and only if national law does not provide sufficient mechanisms for resolving the dispute.

44 — In Joined Case 7/56 and 3/57 to 7/57 *Algera and Others* [1957] ECR 39, the Court annulled decisions relating to staff which had been adopted by the Common Assembly of the European Coal and Steel Community by reference to rules common to the national laws of the Member States concerning the revocation of unlawful measures, which allow such measures to be reconsidered within a reasonable period of time.

45 — Case C-459/02 [2004] ECR I-7315.

46 — Hatje. A.,'Die Rechtskraft und ihre Durchbrechungsmöglichkeiten im Lichte des Gemeinschaftsrechts', in *Das EuGH-Verfahren in Steuersachen*, Vienna, 2000, pp. 133 to 149, in particular, p. 135.

47 — Peerbux-Beaugendre, Z., 'Autorité de la chose jugée et primauté du droit communautaire', in *Revue française de droit administratif*, No 3, May-June 2005, pp. 473 to 481, supports that view, since a definitive judgment is no more than the expression of a relative 'legal truth' the consequences of which must be restricted in certain circumstances.

48 — Joined Cases 42/59 and 49/59 [1961] ECR 53.

49 — In its written observations, the Commission calls this the 'principle of substantive justice'.

ing it in force leads to intolerable injustice. For similar reasons, most, if not all, Member States make it possible to breach the incontestability of administrative decisions when the periods for challenging them have expired. The German system provides a good example. According to the orders for reference, the German courts have reduced the element of discretion which Paragraph 48 of the VwVfG grants to the Administration by conferring on individuals the right to apply to have a decision withdrawn where maintaining it in force is 'simply untenable'. [50]

78. That curb on legal certainty is thus distinctly subjective. It is intended to abolish adverse measures which offend against the most elementary sense of justice and to eliminate discrimination and other breaches of equality. [51]

79. The other limit I should now like to mention, which is more objective, operates at the level of 'supralegality' and has to do not only with the foundations which underpin the legal system and give life to all other rules of law, but also with the direction that system is to follow. [52] Where maintaining a final measure in force undermines the essence of the system or leads it to an impasse, annulment of the measure is inevitable.

80. In fact, both boundaries are partially 'co-extensive', since many of the values which underpin equity represent general principles common to the legal systems of the Member States and some of them have been enshrined in positive law at the highest level as fundamental rights of the individual. In short, measures which diminish protection more than they serve to enhance it must be rejected, since there is no greater uncertainty than that arising from injustice or manifest unlawfulness.

81. Consequently, in the Community legal order, legal certainty would, exceptionally,

50 — This occurs, as I have already pointed out (point 26 of this Opinion), if the continued existence of the decision infringes the principle of equality, is contrary to public policy or the principle of good faith or is manifestly unlawful, or if, in the circumstances, discretion can be properly exercised only by annulment of the decision.

51 — Spanish law requires the public authorities automatically to declare void, on their own initiative or at the request of the person concerned, measures which have concluded administrative proceedings or which have not been contested within the prescribed period, if they adversely affect rights and freedoms capable of protection under the Constitution, such measures being fundamentally void (Article 102(1) in conjunction with Article 62(1)(a) of Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law No 30/1992 of 26 November 1992 on the rules governing the public authorities and the common administrative procedure) (*Boletín Oficial del Estado* of 27 November 1992)).

52 — The Spanish Constitution of 1978 is very expressive in this regard. After stating in Article 9(1) that all persons, citizens and public authorities alike, are bound by the Constitution and all other legal provisions, it qualifies that assertion, when defining the status of the Administration, to the effect that the latter is to serve the general interest in a spirit of objectivity, in full subordination to written law and '[the principles of] law' (Article 103(1)), and makes the Administration subject to judicial review as to both the lawfulness of its activity and its adherence to the purposes for which it was created (Article 106(1)).

not apply if there were a need to safeguard the foundations of that order, and the reconsideration of unchallengeable decisions would be permitted. [53] However, it is appropriate to specify the circumstances in which that exemption would apply. To that end, it seems advisable to look to the past to find confirmation that the structure of that legal order, in large measure the creation of case-law, is intended to ensure its effectiveness and attain the objectives of the Treaties.

82. None the less, it is necessary to point out that there is one limit which is always unbreachable: the rights of third-parties. [54] Where such rights are adversely affected, stability, even if unjust, must prevail, the injured party being compensated by other slightly more indirect means, such as State liability for infringement of Community law.

3. A continuing effort to protect Community law

83. In its judgment in *Van Gend & Loos*, [55] the Court conferred on Community law the status of an independent legal order for the benefit of which the Member States have limited their sovereignty. It held that Article 12 of the EEC Treaty (now, after amendment, Article 25 EC) has direct effect and creates for individuals subjective rights which are capable of protection by the national courts. The judgment concerned a conflict between the abovementioned provision of the EEC Treaty, which prohibited the raising of customs duties, and a new tariff approved by the Netherlands Government in 1960, which increased from 3% to 8% the rate of tax on a number of products.

84. By conferring direct effect on Community provisions, the Court was implicitly recognising their primacy over national systems, which was intimated in its judgment of 27 February 1962 in *Commission* v *Italy*, [56] and made explicit in its judgment in *Costa* v *ENEL*. [57] In that decision, echoing the reasoning of the judgment in *Van Gend & Loos* concerning the transfer of sovereignty and the distinctive characteristics of the Community legal order, the Court held that it was impossible for the Member States to give precedence over a system accepted on the basis of the principle of reciprocity to a unilateral measure adopted subsequently, and went on to say that the objectives of that legal order would be called into question if its binding force varied from one place to another by reason of subsequent national legislation. That decision was also based on Article 189 of the EC Treaty (now, after

53 — Hatje, A., op. cit. in footnote 46, p. 146, adopts a similar position by defending the primacy of Community law if formal finality presents an obstacle to its implementation.

54 — Budischowsky, J., 'Zur Rechtskraft gemeinschaftswidriger Bescheide', in *Zeitschrift fur Verwaltung*, 2000, pp. 2 to 15, and Urlesberger, F., 'Zur Rechtskraft im Gemeinschaftsrecht', in *Zeitschrift fur Rechtsvergleichung, Internationales Privatrecht und Europarecht*, 2004, pp. 99 to 104, take the view that powers of review must end where the rights of others begin. Article 106 of Spanish Law No 30/1992 prohibits those powers where, because of the passage of time or on other grounds, they are contrary to *equity*, good faith, the *rights of individuals* or legislation.

55 — Case 26/62 [1963] ECR 1

56 — Case 10/61 [1962] ECR 1.

57 — Case 6/64 [1964] ECR 585.

amendment, Article 249 EC), which, by making regulations binding, prevents national provisions from standing in their way, since the foundations of the Community would otherwise be called into question.

85. Direct effect and primacy are not simply means of organising relations between different legal systems, but the expression of the Community as an association of States, peoples and citizens. [58] However, given the context in which the judgments in *Van Gend & Loos* and *Costa* v *ENEL* were delivered, doubts remained as to whether those findings applied to directives. In its judgment in *Ratti*, [59] however, the Court conferred the same primacy on directives, holding that, upon expiry of the period for its transposition, a person who complies with the provisions of a directive cannot be made subject to national legislation which has not been adapted in accordance with that directive.

86. The opportunity to give a ruling on the other characteristic was provided by a German citizen, Mrs Becker, who refused to pay the value added tax on certain credit transactions, even though they were liable to VAT under the German legislation in force. She relied on the first paragraph of Article 13B(d) of the Sixth VAT Directive, [60] which the Member States had undertaken to transpose before 1 February 1979, in order to claim that such legal transactions were exempt. In the judgment in *Becker*, [61] the Court held that, from that date, the provisions of the Sixth Directive which are unconditional and sufficiently precise could be relied on directly in the Federal Republic of Germany, since such provisions, though not directly effective, do have direct effect where Member States fail to transpose them or do so incorrectly. In those circumstances, they cannot be divested of the binding nature which is conferred on them by Article 189 of the EEC Treaty.

87. That quality is thus constructed as an automatic 'penalty' for failure by the Member States to fulfil their obligations, and doubts therefore arose as to whether the same applies where directives govern horizontal relationships from which the public authorities are absent. The answer, in the negative, was given by the Court in its judgment in *Marshall*, [62] which heads a long list of decisions on which the judgment in *Pfeiffer and Others* [63] is one of the latest entries.

88. However, the abovementioned characteristics of Community law advised against

58 — Rodríguez Iglesias, G.C., 'El Poder Judicial en la Unión Europea', in *La Unión Europea tras la Reforma*, Universidad de Cantabria, 1998, p. 15.

59 — Case 148/78 [1979] ECR 1629.

60 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

61 — Case 8/81 [1982] ECR 53.

62 — Case 152/84 [1986] ECR 723.

63 — Joined Cases C-397/01 to C-403/01 [2004] ECR I-8835.

resignation to the non-application of its provisions, since that would undermine the purposes of the Treaty. The Court pointed out that the principle of loyalty laid down in Article 5 of the EC Treaty (now Article 10 EC) requires the Member States to take all appropriate measures, whether general or particular, to attain the aims of directives, a duty incumbent upon all national authorities, including the courts. That idea, set out in the judgment in *Von Colson and Kamann*,[64] has mitigated the refusal to confer direct effect on directives in disputes between individuals, and prompted the doctrine of 'interpretation in conformity with Community law', according to which, when interpreting Community law, national courts must give meaning to the Community provision, in accordance with the third paragraph of Article 189 of the EC Treaty.

89. In the judgment in *Marleasing*,[65] the Court developed that line of reasoning further and showed exactly how Community law could be enforced. The dispute concerned whether a contract of incorporation was void on grounds of lack of cause, a ground absent from Article 11 of Directive 68/151/EEC,[66] which had not been implemented in Spanish law, but provided for in Articles 1261 and 1275 of the Spanish Civil Code. The Court held that the national law should be interpreted in the light of the wording and purpose of the directive, and that a company could not be declared void on any ground other than those listed in Article 11 of that directive. The national court settled the dispute[67] by applying the Community provision in the place of the articles of the Civil Code.

90. That consequence had been recognised by the Court in its case-law. The judgment in *Simmenthal*[68] imposed on the courts of the Member States the obligation to give full effect to Community law, if necessary by discarding contrary provisions of national law, even if adopted subsequently, without waiting for them to be repealed or removed from the statute book by constitutional means. The flip side of that coin is provided by the judgment in *Fratelli Costanzo*,[69] in which the Court held that a directive must be applied, even *ex officio*, notwithstanding the existence of national rules which are contrary to it.

91. The objective is always the same: to ensure the effectiveness of Community law. The doctrine of interpretation in conformity with Community law and the power to annul national law are derogations prompted by the fact that directives have not been given horizontal direct effect. A good example is provided by the judgment in *Arcaro*,[70] in which the Court condemned the fact that there is no mechanism for eliminating

64 — Case 14/83 [1984] ECR 1891.

65 — Case C-106/89 [1990] ECR I-4135.

66 — First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ English Special Edition 1968 (I), p. 41).

67 — Judgment of 23 February 1991 of the Juzgado de Primera Instancia e Instrucción (Court of First Instance and Examining Magistrates' Court) No 1, Oviedo.

68 — Case 106/77 [1978] ECR 629.

69 — Case 103/88 [1989] ECR 1839.

70 — Case C-168/95 [1996] ECR I-4705.

national rules which are contrary to a directive and conceded that the commitment incumbent on national courts to interpret national rules in the light of the relevant Community legislation comes up against insurmountable obstacles where those rules subject an individual to an obligation which has not yet been incorporated into national law. Not even the judgment in *Pfeiffer and Others*, cited above, provided a definitive solution to the problem, since, following the suggestions made in my Opinion of 27 April 2004, the second one delivered in the case, the Court proposed that, in carrying out such an interpretation, national courts should not confine themselves to examining the provisions of law specifically adopted to transpose a directive, but should also consider the rest of national law in order to help achieve an outcome which does not infringe Community law.

92. The Court of Justice, ever at pains to secure the effectiveness of Community law, sought to close the circle in order to prevent the difficulties arising from its connection with national legal systems from leading to an impasse. The judgment in *Francovich and Bonifaci* [71] established the principle that, where the purpose of a directive cannot be attained by means of interpretation, the Member State must make good the loss occasioned to individuals as a result of its failure to incorporate the provisions of that directive into national law within the prescribed period or the failure to do so correctly. The full effect of Community provisions would be called into question and the protection of the rights they confer would be weakened, if those afforded such protection were denied compensation where those rights are infringed through the fault of a Member State; this is particularly true if the effectiveness of such rights is subject to action by the State and, as a consequence, individuals cannot, in the absence of such action, rely on them before their national courts. The Court also justified that idea by reference to Article 5 of the EC Treaty, cited above, which lays down the obligation to nullify the unlawful consequences of an infringement of Community law.

93. The latter judgment outlined the conditions governing the incurrence of the duty to compensate. Subsequent decisions have refined those conditions by specifying the national authorities which are to be held liable. In its judgment in *Brasserie du Pêcheur and Factortame*, [72] the Court recognised the existence of such State liability, even though the infringement had been committed by the legislature, while in the judgment in *Köbler* [73] it did likewise in relation to the judiciary. In the judgment in *Commission* v *Italy*, [74] the Court also held that the State as legislature was liable for failing to amend legislation that the Italian courts interpreted in a manner contrary to the effectiveness of Community law. [75]

71 — Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357.

72 — Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029.

73 — Case C-224/01 [2003] ECR I-10239.

74 — Case C-129/00 [2003] ECR I-14637.

75 — Martín Rodríguez, P., op. cit., in footnote 40, describes the judgments in *Kühne & Heitz*, *Köbler* and *Commission* v *Italy* as a 'carta de la responsabilidad judicial' (roadmap of judicial liability).

4. The requirements governing the reconsideration of administrative measures

94. The foregoing points of this Opinion show that the criteria governing the application, repeal, interpretation and hierarchy of provisions, or that which places the courts under strict adherence to the written law, the importance of which in the constitutional systems of the Member States is similar to that of the criterion of legal certainty, have given way where there has been a need to ensure the effectiveness of Community law, without undermining the foundations of the national legal systems.

95. Since, as I have already pointed out, equity and general principles of law sometimes temper the impact of legal certainty, it is reasonable to suggest that this should be the case where its strict application undermines the essence of Community law and gives rise to situations which infringe those principles. If that view is applied to the specific circumstances of ISIS and i-21, it follows that a further examination of the final assessments would be appropriate if maintaining them in force adversely affected the objectives of Community law and gave rise to injustices contrary to its foundations, in particular the requirement of proportionality. [76]

76 — Galletta, D.U., op. cit. in footnote 7, p. 58, emphasises the role of proportionality in this regard, which requires an assessment of the circumstances of each case.

(a) An outcome which impedes the opening up of telecommunications

96. The first step would therefore be to ascertain whether the maintenance in force in relation to ISIS and i-21 of the high fees which they paid without challenge, while such fees were refunded to other operators following legal action or negotiation, calls into question the objectives of Directive 97/13 and, in general, the body of provisions aimed at liberalising the telecommunications market.

97. The proposed solution to the first question provides some guidance in this regard, since, as I have said, Article 11(1) precludes a charge such as that provided for in the TKLGebV 1997. However, this abstract finding is insignificant because mere nonconformity is not indicative of an insurmountable obstacle to the will of the legislature.

98. The answer becomes clearer on closer examination of the provisions relating to fees and charges in Directive 97/13 and the way in which events have unfolded.

99. Article 11 and Article 6 promote competition in telecommunications by prohibiting the imposition on undertakings of fees

other than those for which they provide in order to facilitate the entry of new operators; they thus contribute to the establishment of a common market in that sector and guarantee the freedoms of movement by permitting only those restrictions that are necessary for the general interest. [77]

100. Consequently, if fees other than those expressly laid down in Directive 97/13 are charged (*Albacom and Infostrada*) or if fees in conformity with the provisions of the directive are not charged on the basis of equal treatment (*ISIS Multimedia and Firma O2*), the purposes of the Community are frustrated. It is just such a situation which ISIS and i-21 are challenging.

101. When the measures now being contested were adopted (the first on 18 May 2001, the second on 14 June 2000), three hundred and five undertakings holding Class 3 and 4 licences were operating on the German market. Of those, nine obtained reimbursement following the successful pursuit of legal action; however, one hundred and forty-nine achieved the same result through negotiation. Another group of five secured reimbursement because their assessments were automatically annulled on the ground that they were not final when the Bundesverwaltungsgericht delivered its judgment of 19 September 2001. Eight companies are in the same situation as ISIS and i-21.

102. Thus, while a small group of Class 3 and 4 licence holders have paid the fees applicable under the repealed TKLGebV 1997, which are indisputably high (in particular, ISIS paid EUR 67 316.69, and i-21 paid EUR 5 419 693.94), the rest are operating on the market for the price of the fees contained in the TKLGebV 2002, which vary from EUR 1 000 to EUR 4 260. The differences are enormous and illogical, and are necessarily reflected in the balance sheets of the undertakings concerned.

103. During the transition from a stage characterised by a closed market governed by exclusive and special rights for certain companies to another stage characterised by efforts to establish a competitive market open to all, any curb on the incorporation of new operators consolidates the *status quo* and restricts competition, particularly if it involves discrimination. In its judgment in *Connect Austria*, cited above, the Court is very explicit in this regard when it reiterates that a system of undistorted competition can be guaranteed only if equality of opportunity is secured between economic operators (paragraph 83), an assertion which enabled the Court, in its judgment in *ISIS Multimedia and Firma O2*, also cited above, to

77 — For a teleological interpretation of the directives adopted since 1990, see points 45 et seq. of the Opinion in *Nuova società di telecomunicazioni*.

hold that Directive 97/13 does not permit the favourable treatment of a former monopoly which now occupies a dominant position. As a consequence, regulatory authorities must act with neutrality and must not introduce arbitrary disparities.

104. In short, the continued existence of the unlawful measures at issue in this case (the impact of which, it should not be forgotten, will last for thirty years) reinforces a situation which is contrary to Community law in that it impedes the completion of the gradual process of opening-up initiated by Directives 90/387 [78] and 90/388. [79]

105. It would also be necessary to determine whether the effect described above is essentially unfair and contrary to the principles underlying Community law.

(b) An unacceptable consequence

106. First of all, the effect of the measures at issue is the unequal treatment of persons who appear to be in an identical situation, all of them being holders of Class 3 and 4 licences to operate on the German market. [80] If there were no objective and reasonable justification for this consequence, its fundamental incompatibility with a basic rule of Community law [81] would necessitate a re-examination of the disputed assessments, notwithstanding that they have become final. If, however, there were a satisfactory explanation for that consequence, legal certainty would preclude further analysis.

107. It could be argued that the route taken by ISIS and i-21 was not the same as that taken by the other organisations, since ISIS and i-21 did not challenge the assessments issued to them, and that this therefore excuses the difference in treatment. However, that assertion is not entirely correct, since at least some of those organisations that obtained reimbursement did not challenge the assessments either, in particular those which concluded 'equal treatment' agreements with the national regulatory authority, which organisations, according to the German Government, waived the right to bring legal proceedings following reimbursement of the fees paid. Other companies did not even appeal, because their fees were annulled automatically.

78 — Council Directive 90 387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1).

79 — Commission Directive 90 388 EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10).

80 — Reimersddorff, W., 'Ruckforderung gezahlter Lizenzgebuhren trotz Rechtskraft des Gebuhrenbescheids', in *Multimedia und Recht*, 2002, pp. 299 to 300, draws attention to the complicated paradox of undertakings which paid the fee without taking legal action, and proposes that, in order to obtain reimbursement of the sums unduly paid, they should bring actions for damages against the State for the incorrect transposition of Directive 97/13.

81 — The prohibition against any unjustified unequal treatment forms part of the legal systems of the Member States and, through Article 6(2) TEU, constitutes a general principle of Community law.

108. The reasons why ISIS and i-21 remained outside the negotiations are of little importance, [82] because their failure to act, which rendered the unlawful fees imposed on them unchallengeable, does not justify the different, unfavourable and disproportionate treatment afforded to them. A number of considerations support that assessment.

109. Firstly, from a purely practical point of view, their passivity does not amount to a lack of diligence, since, at the time when they were required to pay, the TKLGebV 1997 and the administrative measures adopted to implement it had not been declared unlawful. [83] In other words, at that time, they could not have been expected to take such precautionary measures, since the defect later held to exist was not then manifest.

110. Secondly, from a broader perspective, the fact that, under the legislation applicable in these cases, the coming into being within the legal system of an irregularity incompatible with the objectives of that legal system should depend on a random event such as the date of a judgment, that is to say 19 September 2001, is unacceptable. Such discrimination between operators, which adversely affects both equal opportunity of access to the telecommunications market and the liberalisation of that market, and is based on the date on which the Bundesverwaltungsgericht annulled the TKLGebV 1997, should not result in a refusal to re-examine the fees which were no longer open to challenge at that time or the automatic revocation of the other fees and their replacement by the lower ones applicable under the TKLGebV 2002. The undertakings fortunate enough to have been charged the fee at a later date received an unexpected gift which they had done nothing to deserve.

111. Finally, from a more fundamental point of view, maintaining an unlawful measure in force, irrespective of its scope and effects on the legal system, on the basis of the argument that it was 'assented to' by its addressee, not only raises to the highest level a technical device intended to safeguard the law but is an approach specific to private law which fails to take into account the essential fact that the Administration is bound by the public interest and legality. I made this point in the Opinion in *AssiDomän*, cited above (point 49).

112. It is appropriate to mention, in the interests of a rigorous examination of the concept, some cases of 'finality' which differ in terms of their lawfulness, their substance and their subjection or otherwise to review. The requirements of legal certainty are

82 — According to their oral submissions, i-21, a British undertaking established in the United Kingdom, was unaware of the possibility of reaching an agreement, whereas ISIS was aware of it but only partially.

83 — At the hearing, it was pointed out that the Oberverwaltungsgericht (Higher Administrative Court), Nordrhein-Westfalen, in an order granting interim relief of 27 October 1999, assumed the legislation and implementing measures to be lawful (Case 13 B 843/99, published in *Multimedia und Recht*, 2000, p. 115 et seq.).

greater if the administrative decision has been subjected to judicial review, which adds to the 'finality' of the measure the force of '*res judicata*'. In the tension between stability and legality, the latter holds greater sway where, as in the main proceedings,[84] the former is exclusively administrative.

113. However, some would argue that the difference in the approaches adopted by the undertakings concerned none the less excuses a slight difference in treatment, those undertakings having followed separate courses in order to reach the same destination. Those that challenged the assessment issued to them or negotiated a solution took a direct route: annulment following automatic review. Those that took a passive approach and allowed the time-limit for appeal to expire followed a far more tortuous route: proceedings for pecuniary damages against the State. However, this view disregards the choice of those which, while wishing to remain inactive, benefited from an event beyond their control (delivery of the judgment of the Bundesverwaltungsgericht before their assessments had become final) and thus won an advantage which they had likewise done nothing to bring about themselves. It is also a purely subjective point of view which fails to take account of the objective dimension of the public interest, which requires equal treatment in order to remove any obstacle to the opening-up of the telecommunications market.

84 — In which respect these proceedings differ from those in *Kuhne & Heitz*, in which the administrative decision was endorsed by the courts in a judgment at final instance.

114. In short, in the circumstances of both references for a preliminary ruling, there has been an infringement of Community law which is contrary to equity and to the general principles underlying Community law, and the solutions adopted should therefore be reconsidered.

5. Proper extent of the procedural autonomy of the Member States

115. The answer is self-evident: where appropriate, national courts must review administrative measures in accordance with the procedures contained their respective legal systems.[85] It should be recalled that, in the absence of harmonising measures,[86] it is for the Member States to lay down the procedures for protecting the rights conferred by Community law, though that power is subject to two limits: firstly, the rules introduced must not be less favourable than those established for similar domestic actions (the principle of equivalence);

85 — According to Galetta, D.U., op. cit., in footnote 7, the public authorities must, within the context of the procedural autonomy conferred on the Member States, use the instruments at their disposal to eliminate the consequences of a breach of Community law (p. 49).

86 — Soriano, J.E., 'Dos vivas por el triunfo de los principios generales en el derecho administrativo de la Comunidad (Nota sobre las conclusiones del abogado general Ruiz-Jarabo sobre la aplicacion de la equidad como criterio justificador de una nueva via de revisión de oficio. Asunto C-310/97 P)', in *Gaceta Juridica de la Union Europea y de la Competencia*, No 200, April-May 1999, pp. 49 to 54, argues that a provision laying down a 'Community administrative procedure' should be drawn up.

secondly, they must not be framed in such a way as to make the bringing of such actions excessively difficult or impossible in practice (principle of effectiveness). [87]

116. The legal systems of the Member States make provision, under various names, for the possibility of conducting a further review of unchallengeable administrative measures if they are vitiated by certain defects. In German law, Paragraph 48 of the VwVfG confers on the Administration the power to withdraw an unlawful decision, even if it is final. Where maintaining such a decision in force is regarded as being 'simply untenable', the national courts have curbed that power to such an extent that it has ceased to be discretionary and now constitutes an obligation to annul.

117. It is therefore for the referring court to interpret and apply that provision in a way which, having due regard for the aforementioned principles, and while guaranteeing the rights of third parties and preventing the adoption of measures having unlawful outcomes, gives full effect to Article 11(1) of Directive 97/13.

118. It must not be forgotten that Article 11(1), like Article 11(2), is, from the point of view of its content, unconditional and sufficiently precise and therefore has direct effect, [88] a fact which places on the national court an obligation to ensure that the domestic procedural provisions facilitate a solution which is consistent with that feature of the Community provision. The duty to interpret national law in a manner consistent with the requirements of Community law, which was established by the Court in the judgment in *Marleasing* and defined in the judgment in *Pfeiffer and Others*, both cited above, is eminently applicable here.

119. Moreover, beyond the context of the specific features of the German legal system, which provides the national court with a provision on which to base its task of giving effect to Community law, the difficulty could be resolved by means of interpretation. [89] In

87 — The judgments in *Rewe* and Case 45/76 *Comet* [1976] ECR 2043 were the first in a long list of judgments in which the Court ruled to that effect. The judgment in Case C-201/02 *Wells* [2004] ECR I-723 used the foregoing doctrine to revoke or suspend an authorisation to operate a quarry which had been granted without the relevant environmental impact assessment.

88 — In the abovementioned judgment in *Connect Austria*, the Court conferred this characteristic on Article 11(2) of the directive.

89 — Frenz, W., 'Rücknahme eines gemeinschaftsrechtswidrigen belastenden VA', in *Deutsches Verwaltungsblatt*, 2004, pp. 373 to 376, supports the application of national legislation if it provides for the withdrawal of final administrative measures, any discretion which it recognises becoming an obligation. However, if national law is silent on the matter, he argues that domestic procedural rules should be discarded in order to prevent disparities between the Member States. He points out that this feature of finality is capable of blocking Community law, a consequence which is prohibited by the Court, as is demonstrated by its case-law on the direct effect of directives and State liability. Budichowsky, J., 'Zur Rechtskraft gemeinschaftswidriger Bescheide', in *Zeitschrift für Verwaltung*, 2000, pp. 2 to 15, concurs with that position, taking the view that the Community legal order must take precedence over domestic rules which automatically prevent review. According to Antonucci, M., 'Il primato del diritto comunitario', in *Il Consiglio di Stato*, 2004, pp. 225 to 233, national authorities have no option but to reconsider previous decisions adopted by them which are contrary to Community law as interpreted by the Court of Justice. Gentili, F., 'Il principio comunitario di cooperazione nella giurisprudenza della Corte di Giustizia C. E.', in *Il Consiglio di Stato*, 2004, pp. 233 to 238, points out that the principle in question (cooperation) requires that any administrative decision contrary to Community law should automatically be annulled, and that the exercise of review by the administrative authorities of measures which they themselves have adopted should cease to be discretionary, as it is in many national legal systems.

the judgment in *Ciola*, [90] the Court held that a final administrative measure which is incompatible with Community law cannot reduce the legal protection afforded to individuals. Under the third pillar of the European Union, where decisions do not have direct effect (Article 34(2)(b) TEU), the Court, in the recent judgment in *Pupino*, [91] allowed the national court to apply an exceptional procedural formality (taking evidence before the trial in criminal proceedings) in a situation which had not been provided for by the national legislature, in order to fulfil the objectives of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. [92]

120. For the same purpose, the Court has supported, even in the context of judicial proceedings, although exceptionally so, interpretations which are inconsistent with the wording of national legislation, the rule in *Simmenthal and Factortame and Others* [93] requiring courts to dispense with any provision which represents a barrier to the full effectiveness of Community law. To that effect, in the judgment in *Peterbroeck*, [94] the Court held that Community law precludes a national procedural rule which, in the circumstances of the main proceedings, [95] prohibited the national court from assessing of its own motion the compatibility of a national legal measure with a Community provision if it had not been relied on by the individual within a certain period. In the judgment in *Océano Grupo Editorial and Salvat Editores*, [96] the Court held that interpretation in conformity with Community law requires the national court to favour the interpretation which gives effect to Council Directive 93/13/EEC of 5 April 1993 [97] on consumer protection and to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term. Similarly, the Court held in the judgment in *Cofidis* [98] that that directive precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion [or] following a plea raised by the defendant, that a term of the contract is unfair. In the judgment in *Larsy*, [99] the Court found that national rules (in that case, the principle of the authority of *res judicata*) are to be excluded in so far as they hinder the effective protection of rights deriving from the direct effect of Community law.

121. Consequently, by virtue of the undertaking of loyalty to the Community contained in Article 10 EC, Article 11 of Directive 97/13 requires that assessments which are contrary to it and which have become final because they were not challenged in time should be reviewed, if

90 — Case C-224/97 [1997] ECR I-2517.

91 — Case C-105/03 [2005] ECR I-5285.

92 — OJ 2001 L 82, p. 1.

93 — Case C-213/89 [1990] ECR I-2433.

94 — Case C-312/93 [1995] ECR I-4599.

95 — Situation described in paragraphs 17 to 21 of the judgment.

96 — Joined Cases C-240/98 to C-244/98 [2000] ECR I-4941.

97 — Directive on unfair terms in consumer contracts (OJ 1993 L 95, p. 29)

98 — Case C-473/00 [2002] ECR I-10875

99 — Case C-118/00 [2001] ECR I-5063.

maintaining them in force is at odds with the spirit of that provision and gives rise to situations which are unfair and contrary to equity or to the other principles underlying Community law. National courts must interpret their national law in such a way as to ensure that, in such circumstances, it allows the aforementioned measures to be re-examined, provided that the rights of third parties are respected.

VI — Conclusion

122. In the light of the foregoing considerations, I propose that the Court of Justice should answer the questions raised by the Bundesverwaltungsgericht as follows:

(1) Article 11(1) 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 precludes a fee for the issue, management, control and enforcement of individual licences which is calculated on the basis of a forecast of the general administrative costs that will be incurred by the national regulatory authority over a period of 30 years.

(2) Having regard to the duty of loyal cooperation contained in Article 10 EC, Article 11(1) of Directive 97/13 requires that assessments to individual licence fees which infringe that provision and have become final because they were not challenged within the prescribed periods should be capable of being reconsidered if, by impeding the attainment of the objectives pursued by the directive, they consolidate situations which are contrary to equity or to the principles underlying Community law. It is for the national courts to interpret their national law in a way which ensures that it facilitates such review, without prejudice to the rights of third parties.