OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 27 October 2005 [1]

1. The questions referred to the Court of Justice by the Consiglio di Stato (Council of State) (Italy) for a preliminary ruling in this case are set against the background of the gradual process of opening up the telecommunications market in the Community, which removes national borders and eliminates the obstacles to freedom of establishment and freedom to provide services.

2. It wishes to know, specifically, whether 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] also applies to operators who run a network for private use and who, in that event, benefit from the restriction which the Directive imposes on the power of Member States to charge fees for those authorisation certificates.

1 — Original language: Spanish.

2 — OJ 1997 L 117, p. 15.

I — Community legislation

A — *The liberalisation of telecommunications in the European Community*

3. In the final two decades of the last century electronic communications became one of the driving forces of the economy; the Community institutions decided to foster them, by promoting their liberalisation. [3]

4. With that aim, they took action in two directions: making the markets more flexible and harmonising the national legislations.

3 — In the 'Green Paper on the development of the common market for telecommunications services and equipment' (Brussels, 16 December 1987, COM(87) 290 final) the Commission committed itself to a future single market; it invited all the leading operators to engage in a debate on the subject and called for progressive opening up of the sector, at the same time guaranteeing the right of citizens to benefit from modern communication systems (pp. 6, 16 et seq.).

5. In the first direction, the point of departure was Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, [4] which has been amended on several occasions. [5] That collection of legal provisions has been repealed and replaced by Commission Directive 2002/77/EC of 16 September 2002. [6]

6. In the second direction, the removal of the barriers required the harmonisation of the conditions of access to and use of the networks; this was carried out by Council Directive 90/387/EEC of 28 June 1990, [7] adapted to a competitive environment by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997. [8] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, [9] which has replaced the above Directives, makes further advances in the task of legislative and technical harmonisation.

B — *Directive 97/13*

1. The 'authorising' provisions

7. The desired liberalisation, as I pointed out in the Opinion in *ISIS Multimedia and*

4 — OJ 1990 L 192, p. 10.

5 — The first amendment was made by Commission Directive 94/46/EC of 13 October 1994, especially in relation to satellite communications (OJ 1994 L 268, p. 15). Commission Directive 95/51/EC of 18 October 1995 (OJ 1995 L 256, p. 49) abolished the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services. In the same year, Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 (OJ 1995 L 321, p. 6) established open network provision conditions for the voice telephony service. Directive 90/388 was amended again by Commission Directive 96/2/EC of 16 January 1996 (OJ 1996 L 20, p. 59) in order to include mobile and personal communications services and systems. Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) amended the 1990 provision in order to implement full competition in the sector. The final amendment was made by Commission Directive 1999/64/EC of 23 June 1999 (OJ 1999 L 175, p. 39), whose aim was to ensure that telecommunications networks and cable television networks owned by a single operator are separate legal entities.

6 — Directive on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

7 — Directive on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1).

8 — OJ 1997 L 295, p. 23. The same course is followed by Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32). Council Directive 92/44/EEC of 5 June 1992 (OJ 1992 L 165, p. 27) and Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 (OJ 1998 L 101, p. 24), which extend that offer to leased lines and voice telephony respectively, belong to this group of Directives.

9 — Directive on common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33). The current scenario is completed by two Directives of the European Parliament and of the Council, Directive 2002/19/EC of 7 March 2002 (OJ 2002 L 108, p. 7) on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), and Directive 2002/22/EC of the same date (OJ 2002 L 108, p. 51) on universal service and users' rights (Universal Service Directive).

Firma 02 (point 5),[10] did not imply that the national authorities would be deprived of their powers of control through the relevant authorisation procedures. The Commission itself maintained that those channels were necessary for the proper development of competition, through application of common principles governing the granting of licences.[11]

8. In the Opinion in *Albacom and Infostrada*[12] I suggested that Directive 97/13 responds to that need, by putting forward only one option, based on the principles of proportionality, transparency and non-discrimination, the aim being to create an environment compatible with freedom of establishment and freedom to provide services (recitals 1, 2, 4 and 11; Article 3(2)).

9. Accordingly, the freedom to supply telecommunications services and the liberalisation of the operation of their networks are the guiding principles embodied in the rules of the Directive. The Community legislature intends them to be distributed and used without hindrance or, where appropriate, in accordance with 'general authorisations',[13] reducing 'individual licences'[14] to the status of exceptions or additions to the universal permits (recitals 7 and 13; Articles 3(3) and 7). Both of these are types of 'authorisation'.[15]

10. In order to implement that *favor libertatis* rule, the Directive does not limit the number of individual licences which the Member States may grant, except to the extent necessary to ensure the efficient use of radio frequencies or the existence of sufficient numbers. Therefore, any undertaking

10 — Opinion delivered on 9 December 2004 in Joined Cases C-327/03 and C-328/03 *ISIS Multimedia and Firma 02*; judgment was delivered on 20 October 2005 ([2005] ECR I-8877).

11 — 'Green Paper on the liberalisation of telecommunications infrastructure and cable television networks', part II, Brussels, 25 January 1995, COM(94) 682 final, pp. 61 et seq. Also the Communication from the Commission, 'Towards a new framework for Electronic Communications infrastructure and associated services — The 1999 Communications Review', Brussels, 10 November 1999, COM(1999) 539 final, p. 25.

12 — Opinion delivered on 12 December 2002 in Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449, points 2 to 7 of which are almost literally reproduced in points 8 to 13 of this Opinion and also contained in the Opinion in *ISIS Multimedia and Firma 02*.

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

14 — 'Individual licence' means 'an authorisation 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).

15 — The Directive defines this last term as 'any permission setting out rights and obligations specific to the telecommunications sector and allowing undertakings to provide telecommunications services and, where applicable, to establish and/or operate telecommunications networks for the provision of such services ...' (first subparagraph of Article 2(1)(a)).

which fulfils the conditions published in national legislation is entitled to receive an individual licence (Articles 10(1) and 9(3)).

2. Tax provisions

11. Articles 6 and 11 of the Directive follow the same course of promoting competition in the telecommunications market and not imposing on undertakings more restrictions or charges than necessary,[16] thereby complying with the principle of proportionality. They are headed, respectively, 'Fees and charges for general authorisation procedures' and 'Fees and charges for individual licences'.

12. 'Article 6

...

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.'

13. 'Article 11

...

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

16 — The conditions to which authorisations should be made subject are set out in the Annex to the Directive.

resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

II — Italian legislation

A — *The situation prior to the opening up of the markets*

14. The Postal and Telecommunications Code of 1973 [17] established that telecommunications services belonged to the State, while allowing them to be indirectly managed by means of a franchise (Articles 1, 4 and 183).

15. It covered telecommunications systems for public use and also private systems, for the exclusive use of the holder, which were also subject to franchise (Articles 183 and 213), and Article 214 refers to those whose aim was to support companies operating public services.

17 — Approved by Presidential Decree No 156 of 29 March 1973 (*Gazzeta Ufficiale della Repubblica Italiana* (hereinafter 'GURI'), No 13, 3 May 1973, ordinary supplement, p. 2).

B — *Legislation after liberalisation of the sector*

16. After the process to which I have referred had been initiated in the European Community, Decree-Law No 545 of 23 October 1996 [18] ordered the adjustment of the Italian legislation to Community law and, in particular, to Directive 96/19. The rules were adopted, with amendments, in Law No 650 of 23 December 1996. [19]

17. The new regulation abolished exclusive and special rights. It acknowledged the right of every undertaking to provide telecommunications services, subject to administrative authorisations. Article 4(1) and (2) of Law No 249 of 31 July 1997 [20] on the designation of the supervisory authority and the establishment of rules in the telecommunications and audiovisual sector, confirmed this approach.

18. Presidential Decree No 318 of 19 September 1997 [21] made the announced adjustment of Italian law to the requirements

18 — GURI No 249, 23 October 1996, p. 33.

19 — GURI No 300, 23 December 1996, p. 16.

20 — GURI No 177, 31 July 1997, ordinary supplement, p. 5.

21 — GURI No 221, 22 September 1997, ordinary supplement, p. 5.

imposed by Community law and came into force on 1 January 1999.

1. The authorisations and their tax consequences

19. The procedures for obtaining general authorisations and individual licences are laid down in Article 6 of the aforementioned Decree; Article 6(5), (20) and (21) contain rules on the levying of fees and charges by the State:

5. The charge to be paid by undertakings in respect of the general authorisation procedure shall cover solely the administrative costs arising as a result of carrying out the preliminary investigation, monitoring the management of the service and enforcing compliance with the conditions laid down in the authorisation ... .

...

20. Without prejudice to the financial charges for the provision of universal service in accordance with Article 3, the charge imposed on undertakings for individual licences is intended solely to cover the administrative costs incurred in the issue [of the licence], monitoring the management of the service and enforcing compliance with the conditions laid down in the licences ...

...

21. If scarce resources are to be used, the authority may impose charges designed also to ensure the optimum use of those resources, taking into account the relevant commercial aspects. Those charges shall be non-discriminatory and must reflect, in particular, the need to promote the development of innovative services and competition ... .'

20. In those three situations, the amount of the charge is determined by the Authority designated in Law No 249 of 1997, cited above, by specific decision published in accordance with the law currently in force

and with the requirements of Article 19(3)(b) of Decree No 318 of 1997. [22]

22. Article 4(6) of Law No 249 of 1997 provided that companies entitled to provide public utility services which had established telecommunications networks to meet their own needs were required to set up a separate company to carry out any activity in the sector and to pay the compulsory charges, in accordance with Article 20 of Law No 448 of 1998.

2. Application to franchises for private use

21. Article 21 of Decree No 318 extended the new rules to systems for private use. However, Article 20(4) of Law No 448 of 1998 repealed it, and provided for the adoption of a regulation governing telecommunications for private use and another for the related charges, on the basis of the criteria laid down in Article 6(20) and (21) of Decree No 318 of 1997; however, those charges could under no circumstances be less than those imposed in respect of 1998 increased by a percentage equal to the expected rate of inflation (Article 20(5) and (6)). In the meantime, the Postal Code would apply (Article 20(7)).

III — The facts and the questions referred for a preliminary ruling

23. The Ente Nazionale Idrocarburi (hereinafter 'ENI'), a company entitled to provide the public services of producing and distributing power from hydrocarbons and natural gas, has for a long time been the sole assignee, within the meaning of Articles 213 and 214 of the Postal Code, of radio frequencies franchised for private use in respect of the security and management of its own equipment and operators, and has set up and expanded a complex network of mobile systems, relay systems and fixed stations.

24. The annual cost of the franchise was ITL 26 billion.

22 — The Minister for the Treasury, Budget and Economic Planning, in a Decree adopted on 5 February 1998 (GURI No 63, 17 March 1998, p. 27), pursuant to Article 6 of Presidential Decree No 318 of 1997, ruled that the holder of an individual licence is required to pay to the State: (a) a contribution to the costs of issuing and granting the licence, to be paid at the time the application is made (Article 3); (b) an annual fee for checks and monitoring (Article 4); (c) an annual fee for the use of scarce resources (Article 5); and (d) an annual fee for allocation of the numbers necessary to operate (Article 6). Article 20(3) of Law No 448 of 23 December 1998 introducing public finance measures for stabilisation and development (Budget Law 1999) (GURI No 302, 29 December 1998, ordinary supplement, p. 5) confirms that, from 1 January 1999, Article 188 of the Postal Code shall not be applicable to undertakings providing public services in the market in question. However, Article 20(2) establishes 'a charge in respect of installing and supplying public telecommunications networks, supplying public telephony services and mobile and personal communications services', the amount of which is calculated as a percentage (3% for 1999, 2.7% for 2000, 2.5% for 2001, 2% for 2002 and 1.5% for 2003) of turnover of all telecommunications services provided in the previous year.

25. In December 1997, ENI set up, pursuant to Article 4(6) of Law No 249 of 1997 and through a subsidiary, the Nuova Società di Telecomunicazioni Spa (hereinafter 'NST'), to be responsible for the telecommunications network connected to its business activities.

26. On 12 June 1998, pursuant to Presidential Decree No 318 of 1997, the Minister of Telecommunications issued NST with an individual licence for the provision of services accessible to the public at national level, relating to the fixed relay network already franchised to ENI, excluding mobile systems. In respect of those connections it paid the fee for a franchise for private use (ITL 2 107 190 398) whereas, for the use of the previous connections, it paid the fee for the individual licence, calculated in accordance with the Ministerial Decree of 5 February 1998 (ITL 1 328 838 000).

27. Albacom, in which ENI has a 35% holding, acquired NST on 30 June 1998.

28. On 26 February 1999 the aforementioned minister claimed from NST and ENI, as well as the amounts paid in respect of the individual licence, the fee owed in respect of 1999 in connection with the allocation for private use, including the fixed connections, that is to say, the network frequencies intended for consumers in general. The Italian Authorities consider that NST's activity supports ENI, and that therefore those connections, which are common property, are being used for restricted and specific purposes, a public service coexisting with a private system in its business activity. [23]

29. NST contested that demand before the Tribunale Amministrativo Regionale (Regional Administrative Court) per il Lazio, which dismissed its claims by judgment of 26 August 2002.

30. An appeal has been brought before the Consiglio di Stato, which has stayed the proceedings in order to ask the Court of Justice:

'Is a national provision which — having required companies entitled to provide pub-

23 — The Consiglio di Stato states, in the order for reference: 'As regards the facts, it emerged following the measures of inquiry ordered in both sets of proceedings regarding the characteristics and structuring of the network already operated by the appellant and licensee NST (and thus transferred to it by its successor in title Albacom) that since the initial configurations the network has, on account of technological and commercial developments, undergone changes as a result of additions, removals and alterations of radio connections which are, furthermore, interconnected and integrated with the Albacom network which consists, in addition to radio connections, also of cable and fibre optic connections. Again as regards the facts, it should be noted that ENI had to declare that the use of the network by third parties had not impaired the activities already carried out and that all equipment already installed for institutional purposes, and in particular for performing functions relating to the safety of human life, were compatible in functional and structural terms with the new uses requested'.

lic utility services, which have established telecommunications networks in the past to meet their own needs under a system of paid franchises, to set up a separate company to carry out any activity in the field of telecommunications — provides that the separate company, although licensed to provide public services, must pay, albeit only on a temporary basis, an additional fee for the allocation of the telecommunications network to the parent company, compatible with the basic principles laid down in the abovementioned Directive 97/13?

31. If the answer is in the affirmative, the Court asks:

'Is a national provision which calculates (it should be stressed, on a temporary basis) the second and additional fee charged for the activity carried out for the parent company on the basis of what was paid in the past by the parent company under the previous system of exclusive rights, with separate franchises for telecommunication systems for public use and franchises for systems for private use, consistent with Community law and the interpretation placed thereon by the Fifth Chamber of the Court of Justice in its judgment of 18 September 2003?'

IV — Procedure before the Court of Justice

32. Written observations have been presented in these preliminary ruling proceedings by the company which is the applicant in the main action, the Italian Government and the Commission, whose representatives presented oral argument at the hearing held on 28 September 2005.

V — Assessment of the questions referred for a preliminary ruling

A — *Definition of the issue*

33. In order to provide the Consiglio di Stato with a ruling in the proceedings, it is necessary to eliminate the matters of fact or of law which prevent us understanding the crux of the dispute.

34. In the order for reference, the national court sets out the facts on which it has to give its ruling, without mentioning any controversy in that regard. It states that, in the transition from a closed telecommunications market to a market governed by the principle of free competition, ENI, a company which had the monopoly on the production and supply of hydrocarbons and

which operated a private network for its own use, set up a subsidiary (NST) in order to continue using the network in accordance with Italian law; this company which, at the same time, operated in the market available to the public, was subsequently acquired by a third company (Albacom), which provides ENI with the data transmission services originally franchised for private use.

35. This account, which is a brief summary of the facts set out in the order, explains why the Consiglio di Stato, in the first question, merely expresses doubts regarding the compatibility with Directive 97/13 of a national provision which requires the separate company, which in turn is licensed to provide public telecommunications services, to pay, on a temporary basis, an additional fee for the allocation of the network to the parent company, without defining the nature of that relationship or unravelling the links between the companies. The arguments put forward by the Italian Government and NST in their statements in respect of these two points are therefore irrelevant.

36. For the Commission, it is a question of determining whether the aforementioned Directive also applies to individual licences for private use of the networks. This approach to the dispute, which leaves aside the particular circumstances of the main action, is more in keeping with the purpose of the preliminary ruling procedure. However, it could be made even more precise, because the classification of the certificate (which ENI held in the past for that kind of use and which has enabled NST and subsequently Albacom to carry on doing so for the benefit of that undertaking) as an 'individual licence' presupposes an analysis of the Italian legislation, which is not a matter for the Court of Justice.

37. What the national court really needs to know is whether the private use of a telecommunications network falls under the aegis of Directive 97/13, irrespective of the kind of certificate on which it is based. In this regard, very precise definitions are necessary.

B — *A few points regarding terminology*

38. In the legal documents there is some confusion over vocabulary. They speak of telecommunications networks and services, of the establishment of and access to those networks and services, calling them 'public' or 'private' indiscriminately, as if they were generally applicable in the same way.

39. It is necessary to study these terms in depth so as to fix the right course for the preliminary ruling.

40. A *telecommunications network* means transmission systems and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means. [24]

41. *Telecommunications services* means services the provision of which consists in the transmission and routing of signals via the networks. [25]

42. The latter may be labelled public or private according to the scope of the offering; [26] the first adjective is ascribed to those providing services available to users indiscriminately. [27] Directive 97/33 throws light on this point when it states, at the end of the fifth recital, that '"public" does not refer to ownership, nor does it refer to a limited set of offerings designated as "public networks" or "public services", but means any network or service that is made publicly available for use by third parties'.

43. In short, a network in private hands may be public, in order that it may provide services of that kind, available to all consumers.

44. In this approach, the task of ascertaining whether Directive 97/13 only affects that kind of network or if it also concerns private ones requires an examination of the aims ascribed by the legislature to the body of Community law relating to the sector.

24 — Article 2(2) Of Directive 90/387, in the wording of Directive 97/51. Directive 2002/21, which reflects the technological innovations, includes, among those electromagnetic means, satellites and, within the terrestrial networks, mobile systems (Article 2(a)).

25 — Article 2(3) of Directive 90/387 (in the version of Directive 97/51); Article 2(1)(d) of Directive 97/33; Article 2(c) of Directive 2002/21; and Article 1(3) of Directive 2002/77.

26 — This ambiguity of terms originated in the wording of Directives 90/387 and 90/388, which initially defined 'public telecommunications network' as 'the public telecommunications infrastructure which permits the conveyance of signals ...' (Articles 2(3) and 1(1), third indent, respectively), using the criterion of ownership. However, the wording of those provisions, in accordance with the amendments made by Directives 97/51 and 96/19, refers (in the second subparagraph of Article 2(2) and in the third indent of Article 1(1) respectively) to networks used, 'wholly or in part', for the provision of *publicly available telecommunications services*'. This description is retained in Directives 97/33 (Article 2(1)(b)), 2002/21 (Article 2(d)) and 2002/77 (Article 1(2)).

27 — A network is public if it provides public services, which means services available to everybody (the third and fourth indents of Article 1(1) of Directive 90/388, as amended by Directive 96/19). Directive 2002/77 considers 'publicly available electronic communications services' to be those 'available to the public' (Article 1(4)). The 'user' is defined in Article 2(1) of Directive 90/387 (in the version of Directive 97/51); Article 2(1)(e) of Directive 97/33; and Article 2(h) of Directive 2002/21, which refers to a legal entity or natural person using or requesting a publicly available electronic communications service.

C — *A teleological interpretation of the Directives concerning telecommunications*

45. The course followed in Directives 90/387 and 90/388 reflected the intention to establish a common market for telecommunications, in which the free movement of services was ensured, with no restrictions other than for reasons of general public interest. The aim was to achieve a competitive market for both operators and users. [28]

46. However, since the starting point was very different, beset with exclusive or special rights in favour of certain undertakings, [29] it seemed advisable to promote a gradual process of liberalisation, which, with periods of transition, was accomplished on 1 January 1998, in relation to the offer of services and infrastructures. [30]

47. That is the troubled background to Directive 97/13, which, according to the judgment in *Albacom and Infostrada*, referred to above, aims to facilitate the entry of new operators into the market, by limiting the power of the Member States to impose financial charges on undertakings for the grant of the relevant authorisations (paragraphs 35 and 36).

48. Thus, when Member States grant a general authorisation or an individual licence, they may only impose the fees provided for in the Directive (points 28, 47 and 50 of the Opinion in *Albacom and Infostrada*).

49. This is what the judgment in *Albacom and Infostrada* means when it says that Directive 97/13 precludes any national provision which requires the holders of licences to pay charges other than and in addition to those provided for in Articles 6 and 11, solely because they hold such licences. [31]

50. However, if the authorisation covers the private use of a telecommunications network, wholly or in part, in which, by definition, there are neither competitors nor free competition, and where the holder operates on its own, because the services, which are under an 'autoservice' or 'heteroservice' scheme, have a sole administrator

28 — This is stated in recitals 1, 4 and 6 of Directive 90/387 and in recital 1 of Directive 90/388.

29 — Recitals 2 to 4 of Directive 90/388 give a brief description of the scenario existing at the time.

30 — First recital of Directive 97/33.

31 — The judgment only refers to individual licences and to Article 11 of Directive 97/13, but its reasoning also applies to general authorisations and to Article 6.

and a sole user, the reasons for limiting the power of the State to impose charges disappears. Therefore, Directive 97/13 does not apply to this situation, which lies outside its own objectives; its application would infringe the principle of subsidiarity, which the Community seeks to observe in the field of telecommunications, as is stated in the second recital of that Directive.

51. It is appropriate to recall what I wrote in point 51 of the Opinion in *Albacom and Infostrada*: the basis for the harmonising role of Directive 97/13 is to be found in Article 2 EC, in that differences between the tax laws of the Member States jeopardise the achievement of the objectives it pursues. Tax harmonisation is not an aim of the European Union, but a tool for its construction. Disparities in the tax treatment of the same taxable event by the Member States are likely to cause significant distortions of competition, which would affect the freedom of movement of persons, capital and goods, and the freedom to provide services.

52. In short, I consider that Directive 97/13 does not preclude a Member State imposing a charge on a company holding the franchise of a network in which, exceptionally, the conditions for a free and open market are not present and its application to just one user is therefore favoured. It is for the Consiglio di Stato to analyse whether that is the case in the main action. In view of the arguments which flow into this port, it is not for Community law to interfere in the parameters which the national legislation uses to calculate the amount of the charge.

53. The alternative solution, proposed by the Commission and by the company which was the plaintiff in the original proceedings, would lead to the paradoxical result that provisions introduced to safeguard new undertakings aiming to establish themselves in the sector would benefit an undertaking which occupies a special or exclusive position in one part of it, closed to competitors, and which removes potentially scarce resources, such as radiofrequencies or numbers, from public availability.

54. This illogical outcome would undermine the objectives of the harmonised legislation and invalidate the arguments they have developed to justify their proposal by reference to an interpretation of the Directives which is in any event inappropriate.

D — *The inappropriateness of a systematic or literal interpretation*

55. The terms used by the Community legislature do not offer firm guidelines because, as I pointed out in footnote 26 of this Opinion, they are somewhat inconsistent.

56. Furthermore, the analysis of certain passages in these Directives — specifically, the Directives which promoted the opening up of the market on 1 January 1998 — cannot take precedence over the avowed aim of devoting their resolutions to the liberalisation of the telecommunications market. [32]

57. Finally, it is inappropriate to use the group of provisions adopted for a free competition environment as a guiding light for interpreting rules designed to direct a gradual process to make the markets more flexible, which also include the Italian legislation which the Consiglio di Stato has to interpret in the main action. [33] The first recital of Directive 2002/21 states that '[t]he current regulatory framework for telecommunications has been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition'. The particular features which, in the past, were justified because of the existence of exclusive or special rights have no place in a scenario with no exempt areas, because, irrespective of whether they apply to everybody, [34] free competition and the fundamental freedoms of movement within the Community are ensured.

32 — The fact that Directive 90/387, to which Directive 97/13 refers, draws a distinction (in Article 2 of the version contained in Directive 97/51) between telecommunications networks in general and public telecommunications networks in particular, while the original version only referred to the former, does not indicate, as the Commission suggests, that, since that amendment, it applies to all those kinds of telecommunications indiscriminately. Article 1(1) of Directive 90/387, which states the intention to harmonise 'conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services', remained unaltered. It is also irrelevant that Directive 97/13, at the end of the second recital, refers to common principles to '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'. Those adjectives must be regarded as compatible with the aims of the Directive, provided that the framework of reference is a competitive market, not a private one, reserved for one undertaking in particular.

33 — The national court stresses in both questions that the charge is temporary.

34 — Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 (OJ 2002 L 108, p. 21) provides for the authorisation of all electronic communications networks and services, 'whether they are provided to the public or not' (fourth recital).

VI — Conclusion

58. In the light of the foregoing considerations, I suggest that the Court of Justice give the following reply to the Consiglio di Stato:

'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 does not preclude a Member State from requiring, on a temporary basis, payment of a fee other than those provided for in the Directive, for operating a network for private use, in which the conditions for a free and open market are not present, and the criteria applied by the national legislature when calculating the charge are irrelevant from the point of view of Community law.'