Provisional text

JUDGMENT OF THE COURT (First Chamber)

19 September 2024 (*)

(Reference for a preliminary ruling – Electronic communications networks and services – Universal service and users' rights – Directive 97/33/EC – Article 5 – Directive 2002/22/EC – Article 13 – Financing of universal service obligations – Concept of 'unfair' or 'undue' burden – Definition of the entities participating in the mechanism for financing the net cost of those obligations – National legislation providing for the participation of mobile telephone operators in that mechanism – Criteria – Degree of substitutability between fixed telephony services and mobile telephony services)

In Case C-273/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 18 April 2023, received at the Court on 26 April 2023, in the proceedings

Autorità per le Garanzie nelle Comunicazioni,

Ministero dello Sviluppo Economico

v

Telecom Italia SpA,

Vodafone Italia SpA,

intervening parties:

Fastweb SpA,

Wind Tre SpA,

and

Telecom Italia SpA

v

Vodafone Italia SpA,

Fastweb SpA,

intervening parties:

Ministero dello Sviluppo Economico,

Tiscali Italia SpA,

BT Italia SpA,

Telecom Italia Sparkle SpA,

Autorità per le Garanzie nelle Comunicazioni,

Wind Tre SpA,

and

Telecom Italia SpA

v

Autorità per le Garanzie nelle Comunicazioni,

intervening parties:

Fastweb SpA,

Vodafone Italia SpA,

Tiscali Italia SpA,

BT Italia SpA,

Wind Tre SpA,

and

Autorità per le Garanzie nelle Comunicazioni

v

Telecom Italia SpA,

Tiscali Italia SpA,

BT Italia SpA,

Vodafone Italia SpA,

intervening parties:

Wind Tre SpA,

Fastweb SpA,

THE COURT (First Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, T. von Danwitz, P.G. Xuereb, A. Kumin and I. Ziemele, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Telecom Italia SpA, by F.S. Cantella, M. D'Ostuni, F. Lattanzi and M. Zotta, avvocati,

– Vodafone Italia SpA, by A. Boso Caretta, F. Cintioli and F. Merusi, avvocati,

– Fastweb SpA, by E. Pistis, avvocata,

– Wind Tre SpA, by S. Fiorucci and R. Santi, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by B.G. Fiduccia and E. De Bonis, avvocati dello Stato,

– the Czech Government, by J. Očková, M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by E. Garello, O. Gariazzo and L. Malferrari, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5 of 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), and Article 13 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

2 The request has been made in four sets of proceedings between, first, on the one hand, the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy; 'AGCOM') and the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy) and, on the other hand, Telecom Italia SpA and Vodafone Italia SpA, second, between, on the one hand, Telecom Italia and, on the other hand, Vodafone Italia and Fastweb SpA, third, between Telecom Italia and AGCOM and, fourth, between, on the one hand, AGCOM and, on the other hand, Telecom Italia, Tiscali Italia SpA, BT Italia SpA and Vodafone Italia, concerning the decision by which that authority reviewed whether the net cost of the universal service, the provision of which was imposed on Telecom Italia during the period from 1999 to 2009, was unfair.

Legal context

European Union law

Directive 97/33

3 Recitals 2 and 8 of Directive 97/33 stated:

'(2) Whereas a general framework for interconnection to public telecommunications networks and publicly available telecommunications services, irrespective of the supporting technologies employed, is needed in order to provide end-to-end interoperability of services for Community users; whereas fair, proportionate and non-discriminatory conditions for interconnection and interoperability are key factors in fostering the development of open and competitive markets;

…

(8) Whereas obligations for the provision of universal service contribute to the Community objective of economic and social cohesion and territorial equity; whereas there may be more than one organisation in a Member State with universal service obligations; whereas Member States should encourage the early introduction of new technologies like the integrated services digital network (ISDN) on as broad a basis as possible; whereas at its current stage of development in the Community, ISDN is not accessible for all users and is not subject to the universal service

provisions of this Directive; whereas it may be appropriate in due course to consider whether ISDN should be part of the universal service; whereas the calculation of the net cost of universal service should take due account of costs and revenues, as well as economic externalities and the intangible benefits resulting from providing universal service but should not hinder the on-going process of tariff rebalancing; whereas costs of universal service obligations should be calculated on the basis of transparent procedures; whereas financial contributions related to the sharing of universal service obligations should be unbundled from charges for interconnection; whereas, when a universal service obligation represents an unfair burden on an organisation, it is appropriate to allow Member States to establish mechanisms for sharing the net cost of universal provision of a fixed public telephone network or a fixed public telephone service with other organisations operating public telecommunications networks and/or publicly available voice telephony services; whereas this should respect the principles of Community law, in particular those of non-discrimination and proportionality and should be without prejudice to Article [95 EC]'.

4 Article 1 of that directive provided:

'This Directive establishes a regulatory framework for securing in the Community the interconnection of telecommunications networks and in particular the interoperability of services, and with regard to ensuring provision of universal service in an environment of open and competitive markets.

It concerns the harmonisation of conditions for open and efficient interconnection of and access to public telecommunications networks and publicly available telecommunications services.'

5 Article 2(1)(g) of that directive provided:

'For the purpose of this Directive:

…

(g) "universal service" means a defined minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price.'

6 According to Article 5 of the same directive:

'1. Where a Member State determines, in accordance with the provisions of this Article, that universal service obligations represent an unfair burden on an organisation, it shall establish a mechanism for sharing the net cost of the universal service obligations with other organisations operating public telecommunications networks and/or publicly available voice telephony services. Member States shall take due account of the principles of transparency, non-discrimination and proportionality in setting the contributions to be made. Only public telecommunications networks and publicly available telecommunications services as set out in Part 1 of Annex I may be financed in this way.

2. Contributions to the cost of universal service obligations if any may be based on a mechanism specifically established for the purpose and administered by a body independent of the beneficiaries, and/or may take the form of a supplementary charge added to the interconnection charge.

3. In order to determine the burden if any which the provision of universal service represents, organisations with universal service obligations shall, at the request of their national regulatory authority, calculate the net cost of such obligations in accordance with Annex III. The calculation of the net cost of universal service obligations shall be audited by the national regulatory authority or another competent body, independent of the telecommunications organisation, and approved by the national regulatory authority. The results of the cost calculation and the conclusions of the audit shall be open to the public in accordance with Article 14(2).

4. Where justified on the basis of the net cost calculation referred to in paragraph 3, and taking into account the market benefit if any which accrues to an organisation that offers universal service, national

regulatory authorities shall determine whether a mechanism for sharing the net cost of universal service obligations is justified.

…’

7 Annex I to Directive 97/33, entitled ‘Specific public telecommunications networks and publicly available telecommunications services’, referred, in Part 1, only to fixed public telephone networks and fixed public telephone services.

8 Annex III to that directive contained rules relating to the calculation of the cost of universal service obligations for voice telephony, referred to in Article 5(3) of that directive.

9 Directive 97/33 was repealed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), with effect from 25 July 2003. Nevertheless, given the date of the facts in the main proceedings, Directive 97/33 applies *ratione temporis* to some of those facts.

Directive 2002/22

10 Recitals 4, 18, 21 and 23 of Directive 2002/22 stated:

‘(4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.

…

(18) Member States should, where necessary, establish mechanisms for financing the net cost of universal service obligations in cases where it is demonstrated that the obligations can only be provided at a loss or at a net cost which falls outside normal commercial standards. It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings, and is compatible with the provisions of Articles 87 and 88 [EC].

…

(21) When a universal service obligation represents an unfair burden on an undertaking, it is appropriate to allow Member States to establish mechanisms for efficiently recovering net costs. Recovery via public funds constitutes one method of recovering the net costs of universal service obligations. It is also reasonable for established net costs to be recovered from all users in a transparent fashion by means of levies on undertakings. Member States should be able to finance the net costs of different elements of universal service through different mechanisms, and/or to finance the net costs of some or all elements from either of the mechanisms or a combination of both. In the case of cost recovery by means of levies on undertakings, Member States should ensure that that the method of allocation amongst them is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle does not prevent Member States from exempting new entrants which have not yet achieved any significant market presence. Any funding mechanism should ensure that market participants only contribute to the financing of universal service obligations and not to other activities which are not directly linked to the provision of the universal service obligations. Recovery mechanisms should in all cases respect the principles of Community law, and in particular in the case of sharing mechanisms those of non-discrimination and proportionality. Any funding mechanism should ensure that users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another.

…

(23) The net cost of universal service obligations may be shared between all or certain specified classes of undertaking. Member States should ensure that the sharing mechanism respects the principles of transparency, least market distortion, non-discrimination and proportionality. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.'

11 Article 1(1) of that directive provided:

'… this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.'

12 Article 3(2) of that directive provided:

'Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.'

13 Article 8(1) of the same directive provided:

'Member States may designate one or more undertakings to guarantee the provision of universal service …'

14 Article 12 of Directive 2002/22 was worded as follows:

'1. Where national regulatory authorities consider that the provision of universal service as set out in Articles 3 to 10 may represent an unfair burden on undertakings designated to provide universal service, they shall calculate the net costs of its provision.

…'

15 Article 13 of that directive provided:

'1. Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

(a) to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds; and/or

(b) to share the net cost of universal service obligations between providers of electronic communications networks and services.

2. Where the net cost is shared under paragraph 1(b), Member States shall establish a sharing mechanism administered by the national regulatory authority or a body independent from the beneficiaries under the supervision of the national regulatory authority. Only the net cost, as determined in accordance with Article 12, of the obligations laid down in Articles 3 to 10 may be financed.

3. A sharing mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles of Annex IV, Part B. Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.

…'

16 Annex IV to that directive contained rules on calculating the net cost, if any, of universal service obligations and establishing any recovery or sharing mechanism in accordance with Articles 12 and 13 of the same directive.

17 Directive 2002/22 was repealed by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36), with effect from 21 December 2020. Nevertheless, given the date of the facts in the main proceedings, Directive 2002/22 applies *ratione temporis* to some of those facts.

Italian law

18 Article 3 of decreto del presidente della Repubblica n. 318 – Regolamento per l'attuazione di direttive comunitarie nel settore delle telecomunicazioni (Presidential Decree No 318 concerning regulations for the implementation of Community Directives in the field of telecommunications) of 19 September 1997 (Ordinary Supplement to GURI No 221 of 22 September 1997) provided:

'…

6. Where, in accordance with the provisions of this article, the universal service provision obligations represent an unfair burden on the organisation or the organisations responsible for providing that service, a mechanism shall be established to share the net cost of those obligations with other organisations operating public telecommunications networks, providers of publicly available voice telephony services and organisations providing mobile and personal communications services. That mechanism shall not be applicable where:

(a) the provision of universal service obligations does not entail a net cost;

(b) the net cost of the universal service provision obligations does not represent an unfair burden;

(c) the amount of the net cost to be shared does not justify the administrative cost of managing the method of sharing and financing the burden of providing universal service obligations.

…

11. On the basis of the net cost calculation provided for in paragraph 7 and the report provided for in paragraph 10, [AGCOM], also taking into account the market benefit if any which accrues to the organisation responsible, shall determine whether the mechanism for sharing the net cost of the universal service obligations is justified. In that case, the corresponding burden shall be allocated on the basis of objective, non-discriminatory and proportionate criteria …'

19 Article 62(1) of decreto legislativo n. 259 – Codice delle comunicazioni elettroniche (Legislative Decree No 259 on the Electronic Communications Code) of 1 August 2003 (Ordinary Supplement to GURI No 214 of 15 September 2003) provides:

'Where [AGCOM] considers that the provision of universal service referred to in Articles 53 to 60 of the present code may entail an unjustifiable burden on the undertakings designated to provide that service, it shall provide for the calculation of the net costs of that provision. For that purpose, [AGCOM] may:

(a) proceed to calculate the net cost of the individual components of the universal service obligation, taking into account the commercial benefits if any which accrue to the undertaking designated to provide the universal service, in accordance with the procedures laid down in Annex 11;

…'

20 Article 63 of that legislative decree is worded as follows:

'1. Where, on the basis of the net cost calculation referred to in Article 62, [AGCOM] finds that a designated undertaking is subject to an unjustifiable burden, upon request by that undertaking, it shall

allocate the net cost … between the providers of electronic communications networks and services using the fund for financing the net cost of universal service obligations set up within the Ministry. …

…

3. The system for sharing the costs must respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with Article 2(5), (6) and (7) of Annex 11. …

…'

21 Article 3 of Annex 11 to that legislative decree provides:

'…

2. A cost-sharing mechanism based on the principles of non-discrimination, transparency and proportionality shall be imposed on undertakings operating public communications networks which provide publicly available telephone services, in proportion to the use by those undertakings of the public communications networks, or which provide mobile and personal communications services at national level.

…

6. The mechanism referred to in paragraph 2 shall not be applicable where:

(a) the provision of universal service obligations does not entail a net cost;

(b) the net cost of the universal service provision obligations does not represent an unfair burden;

(c) the amount of the net cost to be shared does not justify the administrative cost of managing the method of sharing and financing the burden of providing universal service obligations.'

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

22 In July 2020, AGCOM, which is the national regulatory authority ('NRA') in Italy, initiated, by Decision 263/20/CIR, a public consultation procedure to review whether the net cost of universal service provision which was imposed on Telecom Italia during the period from 1999 to 2009 was unfair.

23 By Decision 18/21/CIR, AGCOM concluded that procedure, finding, inter alia, that, during the period from 2002 to 2009, the provision of the universal service represented an unfair net cost for Telecom Italia, with the result that the sharing mechanism provided for by the Italian legislation at issue in the main proceedings was applicable and that, therefore, the operators covered by that legislation, including mobile telephone operators, had an obligation to contribute to the financing of that cost.

24 In that decision, AGCOM stated, in essence, that it had carried out a review of whether the net cost of the universal service provided by Telecom Italia during the period referred to in paragraph 22 of the present judgment, with the exception of 2001, was unfair, and that, unlike its previous decisions on that issue, it did not refer, as regards the question whether mobile telephone operators should be required to contribute to that financing, to the criterion of the degree of substitutability between fixed telephony services and mobile telephony services.

25 AGCOM pointed out that, although the market analyses carried out had established that those two types of services were not perfectly substitutable and that, therefore, they did not constitute a single market, the fact remained that mobile telephony services exerted 'increasing competitive pressure' on fixed telephony services. AGCOM found that that competitive pressure took the form of a loss of volumes and revenues on the part of fixed telephone operators, in particular when customers decided to use only their mobile phone or to use their mobile phone and to retain the fixed network service, but to use the mobile telephone service also from their homes. According to AGCOM, that competitive

pressure constitutes a market assessment that makes it possible to determine the extent to which the burden borne by Telecom Italia was unfair.

26 AGCOM then reviewed the unfair nature of the net cost of universal service provision that had been imposed on Telecom Italia by means of an examination of the competitive context, a review of that cost and a study of the economic and financial impact of that cost.

27 As regards the examination of the competitive context, AGCOM considered, taking into account a document drawn up on 24 February 2017 by the Body of European Regulators for Electronic Communications (BEREC), entitled 'BEREC update survey on the implementation and application of the universal service provisions – A synthesis of the results', that it was necessary to assess the level of competition in the market on the basis of indicators such as shares in the market for access by volume and revenues, the volume and market shares of telephone traffic, the degree of interconnection of call origination and termination services on fixed and mobile telephone networks, the diffusion of services on the mobile telephone network, the benefits derived by operators from universal service obligations and the financial situation of those operators.

28 Vodafone Italia, a mobile telephone operator which had already challenged before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) Decision 263/20/CIR, by which AGCOM had opened a public consultation, brought an action before that court against Decision 18/21/CIR, by means of a supplementary application. AGCOM, Telecom Italia, Fastweb and Wind Tre SpA also appeared before that court in the proceedings brought by Vodafone Italia.

29 Telecom Italia also brought an action against Decision 18/21/CIR before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio), claiming, in essence, that AGCOM had erred in finding that, for 1999 and 2000, the net cost of the universal service remained entirely the responsibility of Telecom Italia. Vodafone Italia appeared before that court in the proceedings brought by Telecom Italia and brought a cross-claim. AGCOM, Telecom Italia, Fastweb and Wind Tre appeared before that court in those latter proceedings.

30 For its part, Fastweb also challenged that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio).

31 By judgment No 1963/2022, that court upheld in part Vodafone Italia's action against that decision and annulled the decision on the ground, inter alia, that the review of the unfair nature of the net cost of the universal service was vitiated by a failure to state reasons and to carry out a proper investigation.

32 By judgment No 2047/2022, that court upheld Fastweb's action against the same decision on the same grounds as those set out in judgment No 1963/2022.

33 By judgment No 2218/2022, that court declared inadmissible the action brought by Telecom Italia against Decision 18/21/CIR and upheld Vodafone Italia's cross-claim on the same grounds as those set out in judgment No 1963/2022.

34 Telecom Italia and AGCOM each brought an appeal against judgment No 1963/2022 before the Consiglio di Stato (Council of State, Italy), which is the referring court. Vodafone Italia, Wind Tre and Fastweb appeared before that court in each of those appeals. In addition, Vodafone Italia brought a cross-appeal against those parts of that judgment in which the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) dismissed some of its pleas. Fastweb also brought a cross-appeal against that judgment before the referring court.

35 In addition, Telecom Italia and AGCOM each brought an appeal against judgment No 2218/2022. Wind Tre, Fastweb and Vodafone Italia also appeared before the Consiglio di Stato (Council of State) in relation to each of those appeals. Vodafone Italia also brought a cross-appeal against that judgment.

36 The referring court, which joined those four appeals, is of the view that it must first examine the cross-appeals brought by Vodafone Italia, by which that company, in essence, disputes AGCOM's power to

impose on mobile telephone operators an obligation to contribute to the financing of the net cost of the universal service provided by Telecom Italia.

37 In support of its cross-appeals, Vodafone Italia submits, inter alia, in essence, that it follows from the Commission communication of 27 November 1996 on assessment criteria for national schemes for the costing and financing of universal service in telecommunications and guidelines for the Member States on operation of such schemes (COM(96)608 final) ('the communication of 27 November 1996') that the participation of mobile telephony operators in the mechanism for financing the net cost of the universal service is subject to the condition that there is a competitive relationship, that is to say a relationship of substitutability, between fixed telephony services and mobile telephony services. The Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio), the Consiglio di Stato (Council of State) and the Corte di cassazione (Court of Cassation, Italy) had taken the view, in several decisions concerning appeals brought against AGCOM's previous decisions concerning the allocation of the burden of that cost, that there had been no such relationship in 1999, 2000, 2002 and 2003. In Decision 18/21/CIR, AGCOM applied that condition in order to determine the unfair nature of the burden of that cost. Moreover, in those previous decisions, AGCOM had ruled out the existence of such a relationship between 2004 and 2007 and in 2009.

38 AGCOM and Telecom Italia submit that neither EU law nor Italian law makes the participation of mobile telephone operators in the mechanism for financing the net cost of the universal service subject to that condition. Those operators, like fixed telephony operators, are authorised to provide electronic communications services and, therefore, are required to participate in that mechanism. The communication of 27 November 1996 merely allows the Member States to choose whether or not to include mobile telephone operators among those responsible for financing that cost. The Italian Republic, like many other Member States, chose to include them. Furthermore, the other companies in the group to which Vodafone belongs contribute to the financing of that cost in the Member States in which they are established.

39 In addition, AGCOM and Telecom Italia claim that the examination of mobile telephone service diffusion and of the associated interdependence is only one of the six criteria applied by AGCOM in order to demonstrate that the burden resulting from the provision of the universal service is unfair and that, consequently, even if it were held that that interdependence has not been duly demonstrated, the merits of AGCOM's examination of that unfairness should be assessed in the light of the other five criteria applied by AGCOM. AGCOM and Telecom Italia requested the Consiglio di Stato (Council of State) to make a reference to the Court of Justice for a preliminary ruling in the event that it intended to depart from their argument.

40 The referring court observes that, in Italy, the provision of universal service in the telephony sector is provided by Telecom Italia, the former holder of the network monopoly. Where the provision of that service gives rise to a net cost, that is to say, where the costs borne by the provider of that service are greater than the profits it receives from the provision of that service, AGCOM must determine whether that cost constitutes an unfair burden on that service provider and, if it does, apportion that cost between the operators in the sector in question.

41 The referring court points out that, by judgment of 7 July 2015, the Consiglio di Stato (Council of State) upheld the actions brought against AGCOM's decisions reviewing the procedures relating to the applicability of the mechanism for sharing the net cost of the universal service for the years 1999, 2000, 2002 and 2003, namely Decisions 106/11/CIR, 107/11/CIR, 108/11/CIR and 109/11/CIR, holding that the condition relating to the existence of a relationship of substitutability between fixed telephony services and mobile telephony services, to which the participation of mobile telephone operators, such as Vodafone Italia, in the mechanism for financing the net cost of the universal service is subject, had not been established.

42 In a judgment of 8 October 2019, the Consiglio di Stato (Council of State) held, in respect of those years, that that condition was, on balance, 'misleading'.

43 The referring court states that the Italian legislation does not expressly make the participation of mobile telephone operators in the financing of the net cost of the universal service subject to that condition.

44 However, it would appear, inter alia, from the case-law of the Consiglio di Stato (Council of State) that the question whether there is a relationship of substitutability between fixed telephony services and mobile telephony services constitutes a necessary criterion for determining whether the burden resulting from the provision of the universal service, borne by the designated provider, is unfair.

45 In Decision 18/21/CIR, AGCOM expressly referred to that case-law, stating, however, that it no longer used that criterion of substitutability in order to impose on mobile telephone operators the obligation to contribute to the financing of the net cost of the universal service. That said, AGCOM's analysis in that decision of the competitive pressure exerted by mobile telephony services on fixed telephony services largely coincides with the analysis of substitutability between those services.

46 EU law, transposed by the Italian legislation at issue in the main proceedings, does not provide an answer to the question raised in the main proceedings.

47 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Directive [97/33], and in particular Article 5 thereof, and Directive [2002/22], and in particular Article 13 thereof, applicable *ratione temporis*, and the principles of transparency, least market distortion, non-discrimination and proportionality, be interpreted as meaning that:

(a) it is permissible for national legislation to impose by law the extension to mobile telephone operators of obligations to contribute to the financing of unfair burdens arising from the provision of the same universal service, without making such cases subject to verification by the NRA that there is a competitive relationship or substitutability between the contributing operators and the designated operator for the provision of that service within the same relevant market under competition law;

(b) NRAs are permitted, in addition to or as an alternative to the criterion of substitutability between fixed and mobile network services, for the purposes of verifying the unfair nature of the burden, to use other criteria – and if so, which ones – to establish a financing obligation on mobile [telephone] operators?'

Admissibility of the request for a preliminary ruling

48 Vodafone Italia, Wind Tre and Fastweb submit that the request for a preliminary ruling is inadmissible.

49 According to Vodafone Italia, a national court may make a reference for a preliminary ruling only where it is essential to the resolution of the dispute before it. Yet, in its view, it is apparent from the order for reference that the disputes in the main proceedings can be resolved without a reference for a preliminary ruling, since it follows from the communication of 27 November 1996 that it is not necessary to require mobile telephone operators to contribute to the financing of the net cost of the universal service, that there are several decisions of the Italian administrative courts which relate to the question referred by the referring court and which have acquired the force of *res judicata*, thus preventing the latter court from adopting a different decision, that Decision 18/21/CIR is inconsistent with previous decisions of AGCOM, from which it is apparent that, in Italy, there was no competitive relationship between fixed telephony services and mobile telephony services during the periods referred to in that first decision, and that AGCOM had been deprived of its power to require mobile telephone operators to contribute to that financing because the time that had elapsed since that power could have been exercised had given rise to a legitimate expectation that it would no longer be exercised.

50 In addition, Vodafone Italia submits that part (b) of the question referred for a preliminary ruling is also inadmissible on the ground that it has no connection with the disputes in the main proceedings, which concern only the legality of the obligation imposed on mobile telephone operators to participate in the mechanism for financing the net cost of the universal service and that, in any event, the Court has already answered that question in the judgments of 6 October 2010, *Commission* v *Belgium* (C-222/08, EU:C:2010:583), and of 10 November 2022, *Eircom* (C-494/21, EU:C:2022:867).

51 Wind Tre claims that the request for a preliminary ruling must be declared inadmissible on the ground that it does not contain a description of all the facts of the disputes in the main proceedings, in particular the disputes relating to that obligation which arose before the adoption of Decision 18/21/CIR, and that it does not contain a statement of the reasons which led the referring court to refer that question, since that court merely referred to the arguments of certain parties to the proceedings pending before it.

52 According to Fastweb, the question referred for a preliminary ruling is inadmissible on the ground that the answer to it follows from judgment No 3388/2015 of the Consiglio di Stato (Council of State), delivered in the context of actions for annulment brought against AGCOM's decisions predating Decision 18/21/CIR, which has acquired the force of *res judicata*. By that judgment, the Consiglio di Stato (Council of State) held that it is not necessary, for the purpose of sharing the burden arising from the universal service, for mobile telephony services and fixed telephony services to be substitutable and preserved AGCOM's power to define another criterion for the purposes of that assessment. EU law does not require a national court to reverse a decision such as that judgment in order to take account of a decision of the Court adopted after that first decision.

53 It must be borne in mind that, pursuant to the settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, which enjoy a presumption of relevance. Therefore, since the question referred concerns the interpretation or validity of a rule of EU law, the Court is, in principle, required to give a ruling, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action, it is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it (judgment of 14 December 2023, *Sparkasse Südpfalz*, C-206/22, EU:C:2023:984, paragraph 19 and the case-law cited).

54 In that regard, it is not obvious from Vodafone Italia's arguments relating to inadmissibility, based on an alleged contradiction between Decision 18/21/CIR and AGCOM's earlier decisions, the alleged loss of AGCOM's power to require mobile telephone operators to contribute to the financing of the net cost of the universal service and the lack of connection between point (b) of the question referred for a preliminary ruling and the disputes in the main proceedings, that the interpretation of EU law sought by the referring court bears no relation to the actual facts or subject matter of those disputes or that the problem is hypothetical.

55 As regards the judgments of 6 October 2010, *Commission* v *Belgium* (C-222/08, EU:C:2010:583), and of 10 November 2022, *Eircom* (C-494/21, EU:C:2022:867), relied on by Vodafone Italia, it should be recalled that, even if the outcome of the disputes in the main proceedings could be deduced from those judgments, that would not lead to the inadmissibility of the request for a preliminary ruling, but, at most, could exempt the referring court from its obligation under the third paragraph of Article 267 TFEU to make a reference to the Court of Justice (see, to that effect, judgment of 7 February 2023, *Confédération paysanne and Others (*In vitro *random mutagenesis)*, C-688/21, EU:C:2023:75, paragraph 35).

56 As regards Vodafone Italia's argument regarding inadmissibility based on the communication of 27 November 1996, it should be noted that it concerns the substance of the question referred for a preliminary ruling and not its admissibility, with the result that it must be examined in the context of the examination of the substance of that question (see, by analogy, judgment of 18 January 2024, *Lietuvos notarų rūmai and Others*, C-128/21, EU:C:2024:49, paragraph 43 and the case-law cited).

57 As regards Wind Tre's arguments regarding inadmissibility, it should be noted that the referring court has, albeit succinctly, set out the reasons which led it to refer its question for a preliminary ruling. In addition, the order for reference contains a summary of the facts of the disputes in the main proceedings, including the main elements of the dispute relating to AGCOM's decisions predating the adoption of Decision 18/21/CIR. A more detailed account of that dispute is not necessary for the purposes of understanding the subject matter of the present disputes.

58 As regards Vodafone Italia and Fastweb's arguments regarding inadmissibility based on the force of *res judicata* of the decisions of the Consiglio di Stato (Council of State) or other Italian courts delivered in those proceedings, it is important to note that the disputes in the main proceedings concern the legality of Decision 18/21/CIR and not that of the earlier decisions of AGCOM, which were the subject of those proceedings. Vodafone Italia and Fastweb have not explained how those courts would be led, in the context of those disputes, to reverse those judicial decisions. It therefore appears that those courts might, at most, be called upon to review their case-law following the Court's judgment in the present case, without calling into question the force of *res judicata* of those previous decisions. In any event, since the action which the referring court will have to take following the Court's judgment in the present case depends on the content of the answer contained in it, those arguments of Vodafone Italia and Fastweb cannot, without prejudging that answer, have any effect on the admissibility of the request for a preliminary ruling.

59 In the light of the foregoing, it must be held that the reference for a preliminary ruling is admissible.

Consideration of the question referred

Part (b) of the question

60 By part (b) of its question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 5 of Directive 97/33 and Article 13 of Directive 2002/22 must be interpreted as meaning that an NRA may take into account, for the purpose of assessing whether the burden resulting from the provision of the universal service is unfair or undue, the degree of substitutability between fixed telephony services and mobile telephony services. It also asks what other criteria an NRA may, where appropriate, apply cumulatively or alternatively for those purposes.

61 It should be noted that, in accordance with Article 5(1) and (3) of Directive 97/33, where a Member State determines, on the basis of the calculation of the net cost of universal service obligations, that those obligations represent an unfair burden on an organisation, it is to establish a mechanism for sharing that cost with other organisations operating public telecommunications networks and/or publicly available voice telephony services. According to Article 5(4), where justified on the basis of that calculation and taking into account the market benefit if any which accrues to an organisation that offers universal service, NRAs are to determine whether such a mechanism is justified.

62 Similarly, the first subparagraph of Article 12(1) of Directive 2002/22 provides that, where NRAs consider that the provision of universal service may represent an unfair burden on undertakings designated as universal service providers, they are to calculate the net cost of its provision. Where NRAs find, on the basis of the net cost calculation, that one or more undertakings designated as universal service providers are subject to an unfair burden, and if so requested by that undertaking or those undertakings, Article 13(1) of Directive 2002/22 requires Member States to adopt the necessary measures, that is to say to introduce a mechanism for compensation from public funds and/or a mechanism for sharing that cost between providers of electronic communications networks and services. It is apparent from the order for reference that, in respect of the period of application of Directive 2002/22, the Italian Republic opted to establish the sharing mechanism provided for in Article 13(1)(b) of that directive.

63 It follows that, in the context of both Directive 97/33 and Directive 2002/22, the implementation of a mechanism for financing the net cost of universal service obligations is subject to the twofold condition that that cost be calculated and that the burden which the provision of that service represents for the designated undertaking be found to be unfair or undue on the basis of that calculation.

64 In addition, it follows from recital 8 and Article 5 of Directive 97/33, and from Part 1 of Annex I to that directive, that only the net cost of universal provision of a fixed public telephone network or fixed public telephone service may be covered by the financing mechanism provided for in that directive.

65 Similarly, the Court has already held, in essence, that only communications services requiring access and a connection at a fixed location to a public communications network, that is to say, to the exclusion of mobile communications services, can be financed by means of the mechanism provided for in

Article 13(1)(b) of Directive 2002/22 (see, to that effect, judgment of 11 June 2015, *Base Company and Mobistar*, C-1/14, EU:C:2015:378, paragraphs 37 and 43).

66 Since the system for sharing the net cost of universal service obligations provided for by Directive 97/33 has not changed significantly following the adoption of Directive 2002/22, the corresponding relevant provisions of those directives must be interpreted in the same way.

67 In that regard, it is not apparent from any of the provisions of Directive 97/33 or Directive 2002/22 that the EU legislature itself intended to prescribe the conditions in which the NRAs are to consider that the provision of universal service may represent an unfair or undue burden. By contrast, it follows both from Article 5(1), (3) and (4) of Directive 97/33 and from Article 13(1) of Directive 2002/22 that it is only on the basis of the calculation of the net cost of the provision of universal service that NRAs may find that an undertaking designated to provide a universal service is in fact subject to an unfair or undue burden and that Member States must then decide to introduce a compensation mechanism on account of that cost (see, to that effect, judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 38).

68 That said, it should be noted that the action taken by the Member States in the context of establishing the mechanism for financing the net cost of universal service provision is circumscribed by the duty to comply with the principles of objectivity, transparency, non-discrimination and proportionality, and to minimise market distortions, while safeguarding the public interest, as is apparent, in essence, from recital 2 and Article 5(1) of Directive 97/33 and from Article 3(2) and Article 13(3) of Directive 2002/22.

69 Although the concepts of ‘unfair burden’ and ‘undue burden’ are not defined by those directives, it is apparent from recital 8 of Directive 97/33 and from recital 21 of Directive 2002/22 that the EU legislature intended to link the mechanisms for recovering the net costs that may be incurred by an undertaking as a result of the provision of universal service to the existence of an unfair burden on that undertaking. In that context, in concluding that the net cost of universal service does not necessarily represent such a burden for all the undertakings concerned, it intended to exclude the possibility that any net costs of universal service provision automatically give rise to a right to compensation. The Court concluded from this that the unfair or undue burden which must be found to exist by the NRA before any compensation is paid is a burden which, for each undertaking concerned, is excessive in view of the undertaking’s ability to bear it, account being taken of all the undertaking’s own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share (see, to that effect, judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 39).

70 Although, in the absence of any specific provision in this regard in Directives 97/33 and 2002/22, it falls to the NRA to lay down general and objective criteria which make it possible to determine the thresholds beyond which – taking account of the characteristics mentioned in the preceding paragraph – a burden may be regarded as unfair, the NRA cannot find that the burden of providing universal service is unfair or undue, for the purpose of Article 5(1) and (4) of Directive 97/33 and Article 13 of Directive 2002/22, unless it carries out an individual assessment of the situation of each undertaking concerned in the light of those criteria (see, to that effect, judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 40).

71 In that regard, the Court has held, with regard to Directive 2002/22, that any consideration of the market share of the universal service provider implies that the process of determining whether the burden on that provider by virtue of its universal service obligations may be unjustified has an integral comparative component which cannot be disregarded by the NRA. The mere finding of facts relating to the market share of that provider, considered in isolation, does not allow any useful conclusions to be drawn in the absence of a comparison with the market shares held by its competitors. Those conclusions may vary according to the number of competitors present in the market, the links which may exist between them, or even the different sectors of the relevant market in which those competitors are present (judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 43).

72 The Court concluded from this that the competent NRA is required, in the context of that process, to take account of the situation of the universal service provider relative to that of its competitors in the

relevant market, and that the assessment of the competitive situation in the relevant market forms an integral part of the conditions for the application of Articles 12 and 13 of Directive 2002/22 (see, to that effect, judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraphs 44 and 47).

73 The Court has also held that an assessment of the characteristics particular to a universal service provider in the light of the competitive environment in which that provider operates is consistent with the objectives of that directive (judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 48).

74 That is the case, in particular, as regards facts relating to the economic and financial situation of a universal service provider. The mere finding that such a provider remains profitable despite the burden on it by virtue of the net cost of its universal service obligations does not allow conclusions to be drawn as to the repercussions of that net cost on that provider's ability to compete with the other operators present in an evolving market. It cannot be ruled out that that burden prevents, or makes more difficult or more complicated, the financing of investments in new technologies or related markets, investments which its competitors might possibly be in a position to make and which are therefore likely to procure significant competitive advantages for those competitors (judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 49).

75 Thus, by taking account of the situation of a universal service provider relative to that of its competitors, it is possible for the NRA to determine whether the net cost of its universal service obligations constitutes, by reason of the resulting distortions of competition in the relevant market to the detriment of that provider, an unfair burden on the latter, within the meaning of Articles 12 and 13 of Directive 2002/22 (judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 50).

76 In so far as the deterioration in the competitive position of a universal service provider on account of the unfair nature of the burden imposed on that provider by virtue of its universal service obligations would adversely affect effective competition in the relevant market, such a circumstance would be liable to undermine the conditions for providing the universal service and, ultimately, the achievement of the objective to ensure the availability, throughout the European Union, of good-quality, publicly available services through effective competition and choice, set out in Article 1(1) of that directive (judgment of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 51).

77 In that regard, it should be noted that the assessment of the substitutability between the various telecommunications services, in particular between fixed telephony services and mobile telephony services, may be one element of the examination of the competitive environment in which a universal service provider operates, since it involves identifying the competitors of that provider, determining the market shares of the various players and assessing the competitive pressure which other operators exert on that provider.

78 However, the examination of the competitive environment in which a universal service provider operates cannot be conditional on an assessment of the substitutability between fixed telephony services and mobile telephony services, but must take into account all the competitive constraints to which that provider is subject, including those which are less effective and immediate than demand substitution.

79 For the reasons referred to in paragraph 66 of the present judgment, the considerations set out in paragraphs 71 to 78 of the present judgment are applicable *mutatis mutandis* to Article 5 of Directive 97/33.

80 In the present case, it is apparent from the order for reference that, in Decision 18/21/CIR, AGCOM, first, took into account, inter alia, the considerations set out in paragraphs 74 to 78 of the present judgment, since it considered that, although fixed telephony services and mobile telephony services were not perfectly substitutable and, therefore, they did not constitute a single market, mobile telephony services nevertheless exerted increasing competitive pressure on fixed telephony services in the form of a loss of volumes and revenues on the part of fixed telephone operators, in particular when customers decided to use only their mobile phone or to use their mobile phone and to retain the fixed network service, but to use the mobile telephone service also from their homes, and, second, examined other elements of the competitive context.

81 In the light of all the foregoing considerations, the answer to part (b) of the question referred is that Article 5 of Directive 97/33 and Article 13 of Directive 2002/22 must be interpreted as meaning that:

– it is for the Member States, while respecting the principles of objectivity, transparency, non-discrimination and proportionality, as well as the need to minimise market distortions, and while safeguarding the public interest, to lay down criteria that enable NRAs to assess, by carrying out an individual assessment of the situation of each undertaking concerned, whether the burden resulting from the net cost of universal service obligations may be regarded as excessive and, accordingly, as being an unfair or undue burden on an operator entrusted with such obligations;

– as part of that assessment, the competent NRA must examine all the characteristics particular to the operator in question, taking account of its situation relative to that of its competitors in the relevant market;

– the degree of substitutability between fixed telephony services and mobile telephony services is capable of constituting a relevant factor for the purposes of that assessment, as are all the competitive constraints to which the universal service provider is subject.

Part (a) of the question

82 By part (a) of its question, the referring court asks, in essence, whether Article 5 of Directive 97/33 and Article 13 of Directive 2002/22 must be interpreted as precluding national legislation which does not make the participation of mobile telecommunications service operators in the mechanism for sharing the net cost of universal service obligations between providers of electronic communications networks and services subject to the existence of a certain degree of substitutability between fixed telephony services and mobile telephony services.

83 In that regard, in respect of the wording of the provisions in question, it should be noted that it is clear from Article 5(1) of Directive 97/33 that, where a Member State establishes a mechanism for sharing the net cost of the universal service obligations with ‘other organisations operating public telecommunications networks and/or publicly available voice telephony services’, they are to take due account of the principles of transparency, non-discrimination and proportionality.

84 Similarly, Article 13(1) of Directive 2002/22 provides that, where, on the basis of the calculation of the net cost of universal service obligations, NRAs find that an undertaking is subject to an unfair burden, Member States are to decide, upon request from a designated undertaking, to introduce a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds and/or to share that net cost between ‘providers of electronic communications networks and services’.

85 It follows from the expressions ‘organisations operating public telecommunications networks and/or publicly available voice telephony services’ and ‘providers of electronic communications networks and services’, used in those provisions, that the EU legislature did not intend to exclude from the outset certain providers of electronic communications networks and services, in particular mobile telecommunications service operators, from the mechanism for sharing the net cost of universal service obligations.

86 Moreover, by contrast with the exclusion of mobile telecommunications from the concept of ‘universal service’ in Article 4 of Directive 2002/22, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) (see, to that effect, judgment of 11 June 2015, *Base Company and Mobistar*, C-1/14, EU:C:2015:378, paragraphs 32 to 37), the EU legislature did not exclude providers of those services from participating in that mechanism for sharing the net cost of universal service obligations.

87 As regards the context of the provisions in question, it should be noted that it is apparent, in essence, from recital 23 of Directive 2002/22 that the net cost of universal service obligations may be shared, subject to compliance with the principles of transparency, least market distortion, non-discrimination and proportionality, between all undertakings or certain specified classes of undertakings, and that the concept of ‘least market distortion’ requires that contributions to the financing of that cost should be

recovered in a way that as far as possible minimises the impact of the financial burden falling on end users, for example by spreading contributions as widely as possible.

88 Moreover, recital 21 of that directive states that Member States must ensure that the method of allocating the net cost of universal service obligations is based on objective and non-discriminatory criteria and observes the principle of proportionality, without that principle preventing them from exempting new entrants which have not yet achieved any significant market presence.

89 It is thus apparent from the wording and context of the provisions in question that the EU legislature intended to allow Member States to define the circle of participants in the mechanism for sharing the net cost of universal service obligations, subject to compliance with a number of requirements that are expressly referred to in those provisions.

90 In that regard, while it is not ruled out that allocation criteria which take account of the intensity of the competitive pressure exerted by mobile telecommunications services on fixed telecommunications services on account of the greater or lesser degree of substitutability between those services, of the proportion of use that mobile telecommunications service providers make of public telecommunications networks or of the benefits which the latter service providers derive from the provision of universal service may be regarded as complying with the principles referred to in paragraphs 83, 84, 87 and 88 of the present judgment, in particular with the principles of proportionality and non-discrimination, it cannot be inferred from the provisions of Directives 97/33 and 2002/22 that those directives make the participation of mobile telephony service providers in the mechanism for sharing the net cost of the universal service subject to the existence of a certain degree of substitutability between mobile telephony services and fixed telephony services.

91 That conclusion is not called into question by Vodafone Italia's argument based on the communication of 27 November 1996 or by its argument that there is a similarity between the EU rules on electronic communications and those relating to postal services, with the result that it is appropriate to apply to the disputes in the main proceedings, by analogy, recital 27 of Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3), from which it follows that the determination of the undertakings required to contribute to a compensation fund designed to finance the universal service involves considering whether the services provided by those undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service because they display interchangeability to a sufficient degree with the universal service, and the case-law of the Court relating to it.

92 As regards, first, the communication of 27 November 1996, it should be noted that it does not set out a general obligation on Member States to make the participation of mobile telephony service providers in the mechanism for sharing the net cost of the universal service subject to a finding that there is a certain degree of substitutability between mobile telephony services and fixed telephony services.

93 As is apparent, in essence, from point 8 of Part 3 of that communication, the European Commission had merely stated therein that, in the framework of its assessment of the licensing or declaration procedure as regards voice telephony and the provision of public networks which Member States had to notify no later than 1 January 1997 under Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13), it would, as regards the contribution of new entrants and/or mobile telephone operators to the net cost of universal service provision, assess whether the burden on those operators was allocated according to objective and non-discriminatory criteria and in accordance with the principle of proportionality, inter alia as regards the degree of substitutability between mobile telephony and the fixed voice telephony service.

94 It follows that the Commission had envisaged taking that degree of substitutability into account, at most, as one factor among others in its assessment of compliance with the principle of proportionality.

95 As regards, second, recital 27 of Directive 2008/6, it is sufficient to note that Directives 97/33 and 2002/22 do not contain any recital or provision the wording of which is similar to that of recital 27 of Directive 2008/6.

96 In the light of all the foregoing considerations, the answer to part (a) of the question is that Article 5 of Directive 97/33 and Article 13 of Directive 2002/22 must be interpreted as not precluding national legislation which does not make the participation of mobile telecommunications service operators in the mechanism for sharing the net cost of universal service obligations between providers of electronic communications networks and services subject to the existence of a certain degree of substitutability between fixed telephony services and mobile telephony services, provided that that legislation complies with, inter alia, the principles of transparency, non-discrimination, proportionality, objectivity and minimisation of the impact of the financial burden falling on end users.

Costs

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

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

Article 5 of 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), and Article 13 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive),

must be interpreted as meaning that:

– **it is for the Member States, while respecting the principles of objectivity, transparency, non-discrimination and proportionality, as well as the need to minimise market distortions, and while safeguarding the public interest, to lay down criteria that enable national regulatory authorities to assess, by carrying out an individual assessment of the situation of each undertaking concerned, whether the burden resulting from the net cost of universal service obligations may be regarded as excessive and, accordingly, as being an unfair or undue burden on an operator entrusted with such obligations;**

– **as part of that assessment, the competent national regulatory authority must examine all the characteristics particular to the operator in question, taking account of its situation relative to that of its competitors in the relevant market;**

– **the degree of substitutability between fixed telephony services and mobile telephony services is capable of constituting a relevant factor for the purposes of that assessment, as are all the competitive constraints to which the universal service provider is subject;**

– **those provisions do not preclude national legislation which does not make the participation of mobile telecommunications service operators in the mechanism for sharing the net cost of universal service obligations between providers of electronic communications networks and services subject to the existence of a certain degree of substitutability between fixed telephony services and mobile telephony services, provided that that legislation complies with, inter alia, the principles of transparency, non-discrimination, proportionality, objectivity and minimisation of the impact of the financial burden falling on end users.**

[Signatures]

---

* Language of the case: Italian.