

THE HIGH COURT

[2021] IEHC 328
[2019/167 MCA]

BETWEEN

EIRCOM LIMITED

PLAINTIFF

AND

COMMISSION FOR COMMUNICATIONS REGULATION

DEFENDANT

AND

VODAFONE IRELAND LIMITED

AND

THREE IRELAND (HUTCHINSON) LIMITED

AND

THREE IRELAND SERVICES (HUTCHINSON) LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 5th day of May, 2021.

1. These proceedings were listed for hearing on the 20th of October 2020. The trial was due to last three weeks.
2. On the 12th of October, I was informed by the Parties (by which I mean the Appellant and the Respondent, but not the Notice Parties) that they had come to the view that I should make a reference to the Court of Justice for a preliminary ruling, pursuant to the provisions of Article 267 TFEU.
3. I gave directions in respect of the Preliminary Reference Hearing on the same day. The Hearing on this issue took place on the 6th of November 2020; that Hearing lasted for a day. The Hearing was followed by correspondence which was required in order to clarify certain details of the questions proposed by the Appellant. That correspondence concluded on the 13th of November 2020.
4. On the 19th of February 2021, I gave my decision; this was to refer one question to the Court of Justice. I will come back to that question at the conclusion of this judgment.
5. I will now set out the background to my decision, the reason why I have decided to make a reference, and the nature of the question referred.
6. In setting out the background to my decision, I have relied heavily on the agreed statement of facts and positions provided to me by the Parties. As that agreed statement is both comprehensive and focused, I hope to be forgiven for replicating it in detail. The agreed document itself, together with its annexes, will be provided to the Court of Justice.

A. Background

THE SUBJECT MATTER OF THE PROCEEDINGS

1. These proceedings are a statutory appeal to the Irish High Court brought by eir pursuant to Regulation 4 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011 ("the Framework Regulations").

2. eir is seeking relief in respect of five Decisions made by ComReg, which found that the net cost to eir of delivering the Universal Service Obligation ("USO") in respect of the provision of access at fixed locations for the years 2010–2011 to 2014–2015 inclusive was not an unfair burden on eir and that, consequently, eir's applications for funding pursuant to Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (the "Universal Service Regulations") should be refused.

OVERVIEW CHRONOLOGY

3. On 30 June 2010, following a public consultation, ComReg re-designated eir as the Universal Service Provider ("USP") in respect of the provision of access at fixed locations for a period of two years and all other aspects of the USO, from 1 July 2010 to 30 June 2012. Subsequent decisions re-designated eir for certain aspects of the universal service and the conditions and obligations have been altered in light of market conditions. eir remains the sole USP for the provision of access at a fixed location and a voice service and public payphones in Ireland to date.
4. On 31 May 2011, following a number of public consultations, ComReg published Decision 04/11, comprised of a series of numbered Decisions, which set out the principles and methodologies for calculating the USO net costs and revenues, the principles and methodologies for calculating the other benefits of the USO and the approach that would be taken to the determination of whether an unfair burden was being placed on the USP as a result of the net cost.
5. Between September 2014 and March 2016, eir made applications for funding of the net cost of the USO for each of the five years from 2010–2011 to 2014–2015, pursuant to Regulation 11 of the Universal Service Regulations.
6. On 18 April 2019, following a public consultation in respect of each of the five applications, ComReg published its five Decisions (the "Decisions") finding that the positive net cost incurred by eir in delivering the USO in each of the years 2010–2011 to 2014–2015 was in each case not an unfair burden.
7. On 15 May 2019, eir brought a statutory appeal against the Decisions, on the grounds that ComReg erred in its finding that there was no unfair burden on eir.

THE DECISIONS UNDER CHALLENGE

8. ComReg made a separate Decision in respect of each year for which eir sought funding. These decisions were published together and in each case it was decided that the net cost was not an unfair burden on eir.
9. ComReg calculated that the net cost to eir of the USO over the five years was just under €43 million in total.
10. The Earnings Before Interest & Tax of eir in respect of its fixed line business over the five year period in question was €1.397billion.

11. In respect of each of the Decisions, ComReg relied on an "Unfair Burden Report" provided by Oxera, a firm of economic consultants, in respect of the relevant year.
12. In each Decision it was determined that there was a verifiable and verified direct net cost; that the benefits of the USO did not outweigh the net cost (i.e. that there was a positive net cost); and that the positive net cost was material compared to the administrative cost of a sharing mechanism (therefore satisfying the conditions set forth at (i), (ii) and (iii)(a) in Decision 38.
13. In each of its Reports, Oxera concluded that the USP's profitability and ability to earn a fair rate of return on its capital employed had not been significantly affected by the net cost of the USO in the relevant period (which assessment was required to be undertaken by Decision 40).
14. The benchmark used by Oxera (and adopted by ComReg) to determine whether or not eir was earning a fair rate of return was to compare a return on capital employed ("ROCE") measure of eir's financial returns to a regulated weighted average cost of capital ("WACC"), which cost had been previously determined by ComReg. In the 2014- 2015 Report for example, it was determined that eir's fixed line (retail and wholesale) business ROCE including the net cost was 11.4%, whilst eir's regulated allowed WACC was 8.18% (and the ROCE in the fixed line business including the net cost exceeded the WACC in each year under assessment). Oxera also considered (although eir takes the view that no significance was given to these indicators by Oxera) additional indicators of eir's financial position and economic situation, including eir's own market share of the fixed line market by Revenue, changes in eir's average revenue per user over time, and changes in the number of customers of eir over time as "broader context" for the profitability analysis that it had conducted. Oxera concluded in each year under assessment that eir's profitability and ability to earn a fair rate of return on capital employed had not been significantly affected by the net cost of the USO and, therefore, that the burden of the net cost in the period of application was not excessive in view of eir's ability to bear it.
15. Oxera stated that it had not therefore, on the basis of the analysis carried out, assessed whether the net cost materially impacted eir's ability to compete on equal terms with competitors going forward under Decision 41.
16. ComReg concluded that, in respect of each year of application, the finding as to there being no significant effect on eir's profitability and ability to earn a fair rate of return on capital employed demonstrated that the net cost had not caused a significant competitive disadvantage for eir. ComReg therefore found that there was no need carry out the competitive distortion assessment set out in Decision 41 of Decision 04/11.

17. Neither ComReg nor Oxera carried out any assessment of any of eir's competitors in the marketplace. Both Oxera's reports and the ComReg decisions are focused on the characteristics of eir.

THE FIXED LINE TELECOMMUNICATIONS MARKET IN IRELAND

18. The national market shares of the market participants in the fixed line market in Ireland for the bulk of the relevant period, as they appear from ComReg's 2015 Market Review, are set out at Annex G: as appears therefrom, the national market share of eir (the former incumbent monopolist) in respect of fixed telephony subscription numbers fell from 74.5% (Q1, 2010) to 47.2% (Q4, 2014); while, for example, Virgin increased its national share from 5% to 21.7% in the same period. The ComReg Market Review, 2014, stated that in Dublin the market share for Virgin was 42% against eir's 44% in a 2013 household survey.
19. As eir has been the only undertaking designated with significant market power in a number of fixed line markets (wholesale and retail), such that its wholesale and retail prices are regulated, eir is the only market participant for which a WACC has been applied by ComReg. The amount of the regulated WACC is not in dispute, but the appropriateness of its use in the unfair burden assessment is.
20. The USP is, in particular, obliged to honour any reasonable request by a member of the public to be connected to the public communications network at a fixed location at a single national price decided by the USP (the Geographically Averaged Price or "GAP").
21. Most of the USO net cost (in excess of 85% in the 2014-2015 period) arises out of the provision of USO services to uneconomic customers in economic areas or economic customers in uneconomic areas.
22. Although the relevance of these matters to the appeal is disputed, there is no dispute that, in principle, it is a feature of a competitive telecommunications market that service providers which are not USPs also benefit from having consumers connected to the network who would otherwise remain unserved ("positive externalities") or that it is also a recognised feature of such competitive markets that all service providers may in theory "cherry-pick" in more profitable geographic centres.

THE RELEVANT LEGAL PROVISIONS

23. The EU regulatory framework for electronic communications consists of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive") and four specific Directives, of which Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services ("the Universal Service Directive") is relevant to this appeal.
24. The Framework Directive provides that each Member State shall designate either one or more competent bodies to act as a national regulatory authority ("NRA") and

that this body or bodies shall be charged with the regulatory obligations in the Framework Directive itself and each of the specific Directives. Article 3(3) provides that "Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently."

25. ComReg, as the regulator of the electronic communications sector in Ireland, is the NRA for the purpose of the Framework Directive and the specific Directives.
26. Articles 7 and 8 of the Framework Directive set out the principles to be applied by the NRA including non-discrimination, safeguarding competition, proportionality and transparency.
27. The following provisions of the Universal Service Directive are relevant to the issues in these proceedings that give rise to the parties' request for an Article 267 reference:-
 - Article 1, which sets out the aim and fundamental nature of universal service;
 - Article 3, which places obligations on Member States to ensure the availability of universal service, whilst respecting certain specified principles;
 - Article 12, which sets out the steps to be undertaken where an NRA considers that a USP may be under an unfair burden;
 - Article 13, which provides that where an NRA has found that a USP is subject to an unfair burden that Member States may, upon request from the USP, either introduce a mechanism to compensate the USP for the determined net costs under transparent conditions from public funds and/or share the net cost of universal service obligations between the different providers of electronic communications networks and services in the market;
 - Part A of Annex IV, which governs the correct calculation of the USO net costs
28. At the national level, Regulation 11 of the Universal Service Regulations (S.I. 337/2011) provides that the USP may apply to ComReg for a determination that the net costs of the USO represent an unfair burden.
29. Regulation 12 provides that where ComReg finds there to be an unfair burden on the USP it shall apportion the net cost of the universal service obligation among providers of electronic communications networks and services.

CASE C-389/08 BASE NV

30. There is a disagreement between the parties as to the meaning of the conclusions of the Court of Justice in Case C-389/08 Base and their application to the assessment of an unfair burden where there is only one USP in the market and as to the correct test to be applied in determining an unfair burden more generally. Consequently, a reference needs to be made to the Court of Justice concerning, principally, the application to this appeal of Case C-389/08 *Base NV v. Ministered* ECLI: EU: C: 2010: 584.

31. The factual background for the reference to the Court of Justice in that case was a legislative scheme whereby all operators in the market were potentially USPs if their customers were entitled to social tariffs. Belgian law provided that where an operator was granting a greater proportion of the total social tariffs granted in the market than corresponded to that operator's market share, then the operator would be compensated.
32. The net costs, however, were not calculated by reference to the characteristics of each individual operator but were based on the costs of Belgacom, the former incumbent.
33. At §§42–43 the Court of Justice held as follows as to the meaning of "unfair burden":

"In that regard, it is apparent from recital 21 in the preamble to Directive 2002/22 that the Community legislature intended to link the mechanisms for the recovery of net costs which an undertaking may incur 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 an unfair 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. In those circumstances, the unfair burden which must be found to exist by the national regulatory authority 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.

In the absence of any specific provision in this regard in Directive 2002/22, it falls to the national regulatory authority 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. However, the fact remains that the authority cannot find that the burden of providing universal service is unfair, for the purpose of Article 13 of the directive, unless it carries out an individual assessment of the situation of each undertaking concerned in the light of those criteria."

34. It is common case that both ComReg and the court are bound by the principle of sincere cooperation to apply the findings of the Court of Justice. Where the parties differ as to the correct interpretation of Case C-389/08 *Base NV* and its correct application to the factual situation in the present case.

THE POSITIONS OF THE PARTIES ON THE LEGAL ISSUES

35. The parties agree that ComReg has a statutory obligation to determine whether the cost (net of benefits) of performing the USO represents an unfair burden for the USP. However, there is a disagreement between the parties as to the meaning of the conclusions of the Court of Justice in Case C-389/08 *Base* and their application to the assessment of an unfair burden where there is only one USP in the market and as to the correct test to be applied in determining an unfair burden more generally.

eir's position

36. eir's position, insofar as relevant to the issues giving rise to this request for an Article 267 reference, is that:
- (i) The determination of whether the USO is an unfair burden in a competitive market requires a competition analysis to assess whether the unilateral imposition of the net USO cost on the USP distorts competition by placing it at a competitive disadvantage vis-à-vis its competitors in the market;
 - (ii) The USP's relative ability to bear the USO net cost should be assessed, account being taken not only of eir's own characteristics, but those of its competitors. The independent expert economist engaged by eir expresses the view that, otherwise there is a significant risk of ending up in a situation where all the communication services providers benefit from the positive externalities of the USO, but only the USP bears its costs, in spite of not being in a significantly better position to do so, which by definition should be considered unfair as there is no objective justification for such difference in treatment;
 - (iii) References in Case C-389/08 *Base NV* to the necessity to consider a USP's own characteristics must be considered in the factual context of that case, where there were multiple USPs and the offending behaviour of the NRA was treating the potential unfair burden placed on each of those USPs in a generic fashion. The Court of Justice's comments must be considered in this light rather than as a mandate to consider the characteristics of only one undertaking in a competitive market;
 - (iv) Further, the characteristics that fall to be considered under the test set out in Case C-389/08 *Base NV*, such as the quality of the equipment and market share, are fundamentally comparative terms and their relevance can only be the advantage or disadvantage that the USP has vis-à-vis its competitors;
 - (v) The findings in Case C-389/08 *Base NV* must also be understood in the context of the binding obligations on NRAs in the Framework Directive and the Universal Service Directive as well as in the light of the general principles of EU law. It is clear from the terms of the Framework Directive and the Universal Service Directive and the general principles of EU law that the

minimisation of distortion to competition is a binding obligation placed on ComReg as NRA;

- (vi) ComReg's setting of a very high threshold to be met before it would consider that there was a "significant effect" on profitability and/or ability to earn a fair rate of return on capital before there is any assessment of whether or not a burden places the USP at a competitive disadvantage fails to meet ComReg's obligations as NRA under the Framework and Universal Service Directives;
- (vii) The methodology of assessing whether the USO net cost has placed the USP at a competitive disadvantage by assessing whether, in the relevant year the USP's ROCE has exceeded its WACC, is flawed. ComReg's approach only considers whether or not the USP has been able to absorb the cost without its ROCE falling to the level of its WACC. Further, the threshold looks at the ROCE of the entire retail and wholesale fixed line business of eir, and not that of its USO business (which is retail business only);
- (viii) The imposition of a unilateral obligation to fund a universal service on one business in a competitive market simply on the basis that the NRA estimates that the business could afford it in the short to medium term could never constitute objective justification for doing so. The fact that the USP has a ROCE that is higher than its WACC does not, without further information, show that the USP is able to absorb the cost without a detrimental impact on its competitive position in the market. It reveals nothing about the market power of the USP or the power of its competitors and is a weak indicator of market conditions and the competitive impact of the USO;
- (ix) The Return on Capital Employed of each of the market participants for the relevant period, as calculated by eir's expert economist, appear at Annex H. The independent expert economist engaged by eir expresses the view that the figures show that eir's average ROCE over the period 2010 – 2015 is the lowest amongst all the operators considered in the analysis;
- (x) The use of the WACC determined by ComReg in respect of eir is not an appropriate benchmark: the independent expert economist evidence is that in many industries firms earn a rate of return above the WACC, and every operator in this market has profitability levels well above the WACC applied to eir. The USO, which is a regulatory obligation aimed at guaranteeing that users have access to a set of basic communication services at affordable prices, is not aimed at curtailing the returns by the USP in a competitive environment. Imposing the cost of the USO unilaterally on a USP, even if that places the USP at a competitive disadvantage, and regardless of the fact that its major competitors have not been the subject of any measures to reduce

their profits to a like level, is contrary to the objectives of the Framework and Universal Services Directives of ensuring proportionality and avoid discrimination and distortion of competition;

- (xi) The evidence given by eir's expert economist and not contradicted by ComReg's expert economist that in 2010–2011 the net cost would have had to have been €244 million to have met this test (representing 62% of Earnings Before Interests & Tax) and that in the years in respect of which funding has been sought the lowest sum that would have met this test in one of the years would have been a net cost of €51 million (representing 23% of Earnings Before Interests & Tax);
- (xii) The test embraced by ComReg in its Decisions would mean that there would only be an unfair burden when eir's ROCE for the entire fixed line business had sunk to a point where, if sustained, the expert economics evidence is that it would start to have problems raising new capital. This is inconsistent with the regulatory scheme, which aims to promote effective competition;
- (xiii) Insofar as the findings in Case C-389/08 *Base NV* are relevant to markets with a sole USP, it therefore follows that the NRA must, first, undertake an individual assessment as to the real net costs for a USP without applying any generic assumptions as to the relationship between a positive net cost and an unfair burden, but must then, second, meet its binding obligation under the Universal Service Directive to determine whether or not it is an unfair burden in the full factual context of the market in which the USP is operating; and
- (xiv) eir's profitability and ability to earn a fair rate of return is significantly impacted by the USP Net Cost because it imposes an extra cost on eir that its rivals do not bear without eir possessing any countervailing advantage (such as quasimonopoly market power in the retail market) to offset the disadvantage of the extra cost burden. Whether there is a "significant effect" on profitability and/or ability to earn a fair rate of return cannot be determined by a profitability threshold, thereby excluding considerations of competitive distortion and objective justification.

ComReg's position

37. ComReg's position, insofar as relevant to the issues giving rise to this request for an Article 267 reference, is that:-

- (i) The effect of the findings in Case C-389/08 *Base NV* is to focus on the USP's ability to bear the net cost in light of the USP's own characteristics. The test provides for a unilateral analysis of an entity's own ability to bear the burden, not an analysis of all competitors in the market and their respective abilities to bear the net cost;

- (ii) The Universal Service Directive not only permits NRAs to lay down general and objective criteria to make it possible to determine whether a burden may be regarded as unfair but, in light of Case C-389/08 *Base NV*, positively requires NRAs to do so. These are not fixed in the Directive or by the Court but are to be decided on by each NRA. It is therefore no surprise that each member state has adopted its own criteria and that these vary across member states;
- (iii) The test posited by Case C-389/08 *Base NV* is directed to whether the net cost is excessive in light of the USP's ability to bear it, in light of identified criteria which focus on the characteristics of the USP;
- (iv) Given the test posited in Case C-389/08 *Base NV*, profitability is a critical variable in determining eir's ability to bear the net cost;
- (v) ComReg contends that eir's profitability and ability to earn a fair rate of return on capital employed are measures of its financial position and that they are appropriately used to assess its ability to bear the burden of the net cost. ComReg contends that the regulatory allowed WACC is an appropriate competitive benchmark level of return for use in the assessment. The WACC is commonly used by regulators and authorities in competition cases as a benchmark measure of the return that investors (i.e. equity owners and lenders) can expect from investing in a business. WACC represents an investor's opportunity cost of assuming the risk of investing in a company or, in other words, the return that an investor would require as a benchmark for investing;
- (vi) The Oxera reports and the ComReg decisions focused on eir's characteristics and eir's ability to bear the net cost and concluded that the net cost was not excessive in light of eir's ability to bear it, in line with this test;
- (vii) The ability of an entity to cross-subsidise from profits made is relevant to the ability to bear the net costs of the USO and cross-subsidisation as a principle subtends the reasoning in Case C-389/08 *Base NV*;
- (viii) eir emphasises the unfairness to it of having to bear a burden of €45m over five years, ignoring in the same period that eir's EBIT was €1.397 billion. That is of note given that the unfair burden assessment is directed at the USP's ability to bear the net cost;
- (ix) Critically, eir does not present evidence that its profitability and ability to earn a fair rate of return on capital employed was significantly affected by the net cost of the USO. Nor is it claimed by eir that the net cost of the USO is driving any lack of profitability (as there is no lack of profitability) or, more

importantly, an inability to bear the cost. The absolute level of profits and the ROCE v WACC analysis demonstrate that the net cost was not having a significant effect on Eir's profitability. To take the year 2010-2011 as an example, while operating in a competitive environment, eir's EBIT was €388 million while bearing the positive net cost for that year of €7.5 million;

- (x) Nowhere does Case C-389/08 *Base NV* state, or support, the proposition that ComReg must carry out an assessment of the USP's competitors, their profit, their market share, and the benefit which they obtain from the USO. Nowhere in Case C-389/08 *Base NV* is it suggested that such a type of market analysis has to be carried out, or that any kind of comparison between eir and its competitors must be conducted, before determining whether eir can bear the net cost burden;
- (xi) ComReg contends that the competitors' market shares and their progression trends (as advanced by eir) are not indicative, still less determinative, of eir's ability to bear the net cost. In relation to the Return on Capital Employed of other market participants set out by eir at Annex H, ComReg contends that this ROCE analysis presents volatile and contradictory data points on competitors' profitability and, in any event, is irrelevant to the assessment;
- (xii) If an unfair burden assessment required such a market analysis one could reasonably expect that the Framework or Universal Services Directive to have set this out in similar or like terms, or the Court of Justice could have stated this in the Base case; it did not do so;
- (xiii) ComReg's methodology does take into account the competitive situation in the market as, where it is established that a positive net cost significantly affects a USP's profitability, ComReg will assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward. In addition, in the context of the Decision 40 analysis, ComReg and Oxera did consider aspects of the market as broader context for the profitability assessment (including eir's pricing and its fixed-line market share), as can be seen in, for example, Table 5.1 and the conclusion of the Oxera reports appended to each of the Decisions, an example of which for 2014-2015 is at Annex D;
- (xiv) Profitability is a strong indicator of the competitive environment and the outcome of a profitability assessment is not divorced from competitive considerations;
- (xv) At issue in this appeal is the net cost of the USO – the impact of a monetary sum - not other qualitative requirements of the USO that might have

competitive effects, such as Geographic Averaged Pricing ("GAP");

(xvi) In deciding Case C-389/08 *Base NV* there can be no doubt that the Court of Justice had the requirements of non-discrimination, proportionality and minimisation of market distortions, and the departure from market conditions that the USP might entail, when it determined the appropriate test to determine the presence of an unfair burden; and

(xvii) The expert economist retained by ComReg is satisfied that the comparison of ROCE and WACC is appropriate as part of the assessment of a USP's economic and financial position.

GROUNDS FOR A REFERENCE

38. There is a disagreement between the parties as to the meaning of the conclusions of the Court of Justice in Case C-389/08 *Base* and their application to the assessment of an unfair burden where there is only one USP in the market and as to the correct test to be applied in determining an unfair burden more generally.
39. The parties submit that these are questions of EU law that can only be definitively settled by a reference being made to the Court of Justice.

B. *Should Any Reference Be Made?*

7. While the Parties agreed that at least one question should be referred, and a neutral position was taken by two Notice Parties (the Three Ireland interests), one Notice Party (Vodafone Ireland Limited) resisted the making of a reference in respect of any issue.
8. Vodafone submitted that the proceedings were time barred and that, if this transpired to be the case, none of the questions proposed to be referred needed to be answered. However, at the end of his submission counsel for Vodafone accepted that at least one of the questions being debated would have to be decided in the appeal to this court in the event that the proceedings were not time barred. That question is, in substance, the question which I have decided to refer.
9. I have decided that this is the time to seek the assistance of the Court of Justice. In these proceedings, no preliminary issue has been fixed as to the time bar objection. Presumably, this is because the Parties felt that this would not be an approach which would have involved the best use of court time or resources, or of the Parties' own efforts. Equally, as these are proceedings being managed by the Commercial Court, it is instructive that fixing a preliminary issue of this type was not something which was not thought to be appropriate by the Court itself. If I do not refer the relevant question now, then a lengthy trial will proceed which may ultimately be decided against the Appellant on the time bar issue but, even if it is, will involve both evidence and submissions on the substantive matters which will proceed in the absence of guidance from the Court of Justice which I feel is required in order to decide such disputes on the merits of the case. In coming to this view, I have followed the Recommendations issued by the Court of Justice (2019/C 380/01 at paragraphs 12 and 13).

C. What Question Should Be Referred?

10. I will refer the following question:-

“In circumstances where:-

- (i) the telecommunications market has been liberalised and there are multiple telecommunication services providers operating in the market;
- (ii) one service provider (the “Universal Service Provider” or “USP”) has been selected by the National Regulatory Authority (“NRA”) to perform Universal Service Obligations (“USOs”);
- (iii) it has been determined by the NRA that there is a positive net cost associated with the performance of the USOs (“USO Net Cost”); and
- (iv) it has been determined by the NRA that the USO Net Cost is material compared to the administrative costs of the establishment of a sharing mechanism in respect of the USO Net Cost amongst participants in the market;

If the NRA is required, pursuant to its obligations under the Universal Services Directive 2002/22, to consider whether the USO Net Cost is excessive in view of the ability of the USP to bear it, account being taken of all the USP's characteristics, in particular, the quality of its equipment, its economic and financial situation and its market share (as referred at para. 42 of *Base*) is it permissible under the Directives for the NRA to conduct that assessment by having regard exclusively to the characteristics/situation of the USP, or is it required to assess the characteristics/situation of the USP relative to its competitors in the relevant market?”

11. The decision in *Base* does not address a situation where there are multiple telecommunication services providers in the relevant market. Such a situation arises here. In deciding the issues in this appeal, the guidance of the Court of Justice is necessary. In addition, it is likely that the guidance of the Court of Justice will be of interest to courts in other Member States; Ireland is unlikely to be the only Member State which has a liberalised telecommunications market where this issue may arise.

12. While the idea of making a reference was one raised by the Parties, and while I have heard not only the Parties but also the Notice Parties on the making of a reference and the questions to be referred, the question which I have chosen to refer for a preliminary ruling is one which I feel is required in order to enable me to deliver my decision on the appeal to this court. Other questions were proposed by the Appellant, but I do not believe that these questions which I should refer to the Court of Justice.

13. The first of these proposed questions was:-

“Specifically, in the circumstances set out in Question 1, if the NRA is required, pursuant to its obligations under the Universal Services Directive 2002/22, to consider whether the USO Net Cost is excessive in view of the ability of the USP to bear it, account being taken of all the USP's characteristics, in particular, the quality

of its equipment, its economic and financial situation and its market share (as referred at para. 42 of the Judgment of the Court in Case C-389/08 *Base NV v. Ministered* ECLI: EU: C: 2010: 584), is it permissible under the Directives for the NRA to conduct that assessment by having regard exclusively to the situation of the USP, or is it required to assess the situation of the USP relative to its competitors in the relevant market? If the latter, is the NRA obliged under the Directives to assess whether the unilateral bearing of the USO Net Cost by the USP distorts competition in the relevant market by placing the USP at a competitive disadvantage?"

14. I will not refer this question, either in its proposed form or any version of it. This is, in effect, a request for a general opinion which runs contrary to the Recommendations of the Court itself (at paragraph 26).

15. The second and third other proposed question were: -

"(ii) Is it permissible, in the same circumstances as set forth in Question 1, having regard to the NRA's obligations pursuant to the Directives, for an NRA to determine whether the USO Net Cost represents an unfair burden for the USP primarily by reference to a threshold in respect of material affect of the USO Net Cost upon the USP's profitability and/or the ability to earn a fair rate of return?

(iii) Is it permissible for the NRA, having regard to its obligations pursuant to the Directives, in determining whether the USO Net Cost represents an unfair burden for the USP, to use a threshold of whether the USO Net Cost causes the Return on Capital Employed of the USP in respect of its fixed line business in the relevant year to fall to the level of the regulated Weighted Average Cost of Capital applicable to the USP for the purpose of wholesale and retail price regulation? Further, is it permissible for the NRA, if considering the impact of the USO obligations on profitability of the USP across the USP's entire fixed line business (retail and wholesale) in a given year when making an unfair burden assessment, to use a profitability threshold that does not require the calculation of the USO Net Cost?"

16. The second of these questions is a more refined version of the first. If either is to be referred, it would be the second. However, I do not believe that I require the answer to either question in order to be able to decide the appeal. This court will have the advantage of the Court of Justice's answer to the issue which I have chosen to refer, and that should be sufficient to enable this court to decide the more specific issues described in these proposed further questions.

17. The final proposed question was: -

"In the circumstances set forth at Question 1: -

(i) is the NRA required, in accordance with the obligations of the NRA pursuant to the Directives, Article 16 of the Charter of Fundamental Rights of the EU and/or the general principles of EU law, to identify circumstances constituting objective

justification for the determination that the USP should unilaterally bear the USO Net Cost for a given year?

- (ii) if so, can that objective justification be found in the capacity of the USP to meet that cost from the excess of its Return on Capital Employed over the applicable regulated Weighted Average Cost of Capital?
 - (iii) alternatively, must objective justification be found by the NRA in market circumstances, such as a competitive advantage that the USP enjoys over its rivals?
18. The answer to (i), it is conceded by counsel for the Respondent, is "yes". It is difficult to see why, in these circumstances, the assistance of the Court of Justice is needed.
19. Query (ii) is similar to the earlier questions, which I have already decided not to refer.
20. Query (iii) is so closely connected to the question which I am referring that I see no real advantage in asking for the view of the Court of Justice on this specific aspect.
21. I therefore request a Preliminary Ruling from the Court of Justice, pursuant to the provisions of Article 267 of the TFEU, on the question set out at paragraph ten of this Judgment and first notified to the Parties and Notice Parties in my decision of the 19th of February 2021. I will give all parties liberty to apply.