



THE HIGH COURT
COMMERCIAL
2019 No. 167 MCA
(2019 No. 76 COM)

Thursday the 1st day of July 2021

BEFORE MR JUSTICE O'MOORE

**IN THE MATTER OF AN APPEAL UNDER REGULATION 4 OF THE
EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS
NETWORKS AND SERVICES) (FRAMEWORK) REGULATIONS 2011
BETWEEN/**

EIRCOM LIMITED

APPELLANT

AND

COMMISSION FOR COMMUNICATIONS REGULATION

RESPONDENT

AND BY ORDER OF THE COURT:

THREE IRELAND (HUTCHISON) LIMITED

AND

THREE IRELAND SERVICES (HUTCHISON) LIMITED

AND

VODAFONE IRELAND LIMITED

NOTICE PARTIES

The above entitled proceedings having being listed before the Court on the 6th day of November 2020 for Preliminary Reference Hearing pursuant to the parties making an application to the Court for a reference to the Court of Justice of the European Union for a preliminary ruling pursuant to the provisions of Article 267 of the Treaty on the Functioning of the European Union

On the application of Counsel **IT IS ORDERED** that the proceedings herein be reported by a shorthand writer

And on hearing Counsel for the Appellant Counsel for the Respondent Counsel for the First and Second Named Notice Parties and Counsel for the Third Named Notice Party

And the Court being pleased to reserve Judgment

And further clarification regarding the form of question being provided by the parties and in particular the Appellant by the 13th day of November 2020

And a written ruling having been delivered electronically on the 19th day of February 2021

And a written Judgment having been delivered electronically on the 5th day of May 2021

And the parties having provided agreed submissions to appear as Schedule to the within Order giving a background of the matters under consideration for the within referral to said Court of Justice

And the matter coming before the Court on this day

IT IS ORDERED that pursuant to Article 267 of the Treaty on the Functioning of the European Union that the question as set forth in the written Judgment of this Court delivered on the 5th day of May 2021 be and the same is hereby referred to the Court of Justice of the European Union for a determination the said question being as follows:

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?

JEAN BRENNAN
REGISTRAR
Perfected 30th of July 2021

A&L Goodbody
Solicitors for the Appellant

McCann FitzGerald
Solicitors for the Respondent

Matheson
Solicitors for the First and Second Named Notice Parties

McKeever Rowan
Solicitors for the Third Named Notice Party

SCHEDULE

THE HIGH COURT

2019/167MCA

BETWEEN

EIRCOM LIMITED

PLAINTIFF

AND

**COMMISSION FOR COMMUNICATIONS
REGULATION**

DEFENDANT

AND

VODAFONE IRELAND LIMITED

AND

THREE IRELAND (HUTCHINSON) LIMITED

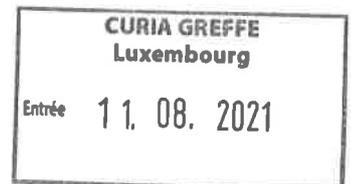
AND

THREE IRELAND SERVICES (HUTCHINSON) LIMITED

NOTICE PARTIES

ORDER FOR A REFERENCE TO THE COURT OF JUSTICE OF THE

EUROPEAN UNION



1. Abbreviations

- | | |
|-------------------------------|---|
| “C-389/08 <i>Base</i> ” | Judgment of 6 October 2010, <i>Base NV and Others v. Ministerraad</i> , Case C-389/08, ECLI:EU:C:2010:584 |
| “Universal Service Directive” | 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 |
| “Framework Directive” | 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 |

“USO”	Universal Service Obligation
“USP”	Universal Service Provider
“ROCE”	Return on Capital Employed
“WACC”	Weighted Average Cost of Capital

I. THE REFERRING COURT

2. This request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union is made by the High Court of Ireland (Mr Justice O’Moore). The contact details for communications from the Court of Justice are as follows.

Principal Registrar
The High Court
Four Courts
Inns Quay
Dublin 7
Ireland

II. THE PARTIES TO THE MAIN PROCEEDINGS AND THEIR REPRESENTATION

3. The Plaintiff (“Eircom”) is represented by Jonathan Newman, SC; and Jennifer O’Connell BL of the Bar of Ireland, instructed by A&L Goodbody Solicitors LLP of International Financial Services Centre, North Wall Quay, Dublin 1, D01H104, Ireland.
4. The Defendant (“ComReg”) is represented by Cian Ferriter SC; and David Dodd BL of the Bar of Ireland, instructed by McCann Fitzgerald Solicitors of Riverside One, Sir John Rogerson's Quay, Dublin 2, Ireland.
5. The First Named Notice Party is represented by Niall Buckley BL of the Bar of Ireland, instructed by McKeever Rowan Solicitors of 8 Exchange Place, International Financial Services Centre, Dublin 1, Ireland D01 E925.
6. The Second and Third Named Notice Parties are represented by Donogh Hardiman BL of the Bar of Ireland, instructed by Matheson Solicitors of 70 Sir John Rogerson's Quay,

III. THE SUBJECT-MATTER OF THE MAIN PROCEEDINGS AND THE RELEVANT FACTS

7. Guidance is required from the Court of Justice of the European Union as to the correct application of C-389/08 *Base* which considers the interpretation of the Universal Service Directive and specifically the assessment of an unfair burden, in circumstances where there is only one USP in the Irish market but multiple telecommunication service providers.
8. The dispute in the main proceedings concerns a statutory appeal to the Irish High Court brought by Eircom pursuant to Regulation 4 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011 (“the Framework Regulations”).
9. Eircom is seeking relief in respect of five Decisions made by ComReg, which found that the net cost to Eircom of delivering the 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 Eircom and that, consequently, Eircom’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.

IV. OVERVIEW CHRONOLOGY

10. On 30 June 2010, following a public consultation, ComReg re-designated Eircom as the 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 Eircom for certain aspects of the universal service and the conditions and obligations have been altered in light of market conditions. Eircom remains the sole USP for the provision of access at a fixed location and a voice service and public payphones in Ireland to date.
11. 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. The terms of the relevant decisions setting out this approach are set out in **Annex A**.

12. Between September 2014 and March 2016, Eircom 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.
13. 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 Eircom in delivering the USO in each of the years 2010-2011 to 2014-2015 was in each case not an unfair burden.
14. On 15 May 2019, Eircom brought a statutory appeal against the Decisions on the grounds that ComReg erred in its finding that there was no unfair burden on Eircom.

V. THE DECISIONS UNDER CHALLENGE

15. ComReg made a separate Decision in respect of each year for which Eircom sought funding. These decisions were published together and in each case it was decided that the net cost was not an unfair burden on Eircom.
16. ComReg calculated that the net cost to Eircom of the USO over the five years was just under €43 million in total. The positive net cost identified by ComReg for each year is set out in **Annex B**.
17. The Earnings Before Interest & Tax of Eircom in respect of its fixed line business over the five year period in question was €1.397 billion, the figure in respect of each relevant year being set out in **Annex C**.
18. 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. The Report of Oxera for the year 2014-2015 is attached at **Annex D** by way of sample, together with the corresponding Decision of ComReg at **Annex E**.
19. 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, as set out in **Annex A**).

20. 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, as set out in **Annex A**).
21. The benchmark used by Oxera (and adopted by ComReg) to determine whether or not Eircom was earning a fair rate of return was to compare a return on capital employed ("ROCE¹") measure of Eircom'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 Eircom's fixed line (retail and wholesale) business ROCE including the net cost was 11.4%, whilst Eircom'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). A table of these figures for each year under assessment is at **Annex F**. Oxera also considered (although Eircom takes the view that no significance was given to these indicators by Oxera) additional indicators of Eircom's financial position and economic situation, including Eircom's own market share of the fixed line market by Revenue, changes in Eircom's average revenue per user over time, and changes in the number of customers of Eircom over time as "broader context" for the profitability analysis that it had conducted. Oxera concluded in each year under assessment that Eircom's profitability and ability to earn a fair rate of ROCE 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 Eircom's ability to bear it.
22. Oxera stated that it had not therefore, on the basis of the analysis carried out, assessed whether the net cost materially impacted Eircom's ability to compete on equal terms with competitors going forward under Decision 41 (as set out in **Annex A**).
23. ComReg concluded that, in respect of each year of application, the finding as to there being no significant effect on Eircom's profitability and ability to earn a fair rate of ROCE demonstrated that the net cost had not caused a significant competitive disadvantage for Eircom. ComReg therefore found that there was no need carry out the competitive distortion assessment set out in Decision 41 of Decision 04/11.

¹ The ROCE is an accounting-based financial returns metric which captures the relationship between operating profits and capital employed in a business.

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

VI. THE FIXED LINE TELECOMMUNICATIONS MARKET IN IRELAND

25. 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 Eircom (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 Eircom's 44% in a 2013 household survey.
26. As Eircom 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, Eircom 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.
27. 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 "GAP").
28. 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.
29. 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.

VII. THE RELEVANT LEGAL PROVISIONS

30. At the material times the EU regulatory framework for electronic communications consisted of the Framework Directive and four specific Directives, of which the Universal Service Directive is relevant to this appeal.
31. The Framework Directive provides that each Member State shall designate either one or more competent bodies to act as a National Regulatory Authority 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.*”
32. ComReg, as the regulator of the electronic communications sector in Ireland, is the National Regulatory Authority for the purpose of the Framework Directive and the specific Directives.
33. Articles 7 and 8 of the Framework Directive set out the principles to be applied by the National Regulatory Authority including non-discrimination, safeguarding competition, proportionality and transparency.²
34. 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 National Regulatory Authority considers that a USP may be under an unfair burden;
 - Article 13, which provides that where an National Regulatory Authority 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 USOs 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 costs³.

² Article 2(g), 3(1) and Recitals 1 and 36 of the Framework Directive are also relevant.

³ The following recitals are also relevant to the issues in these proceedings: Recitals 2, 3, 4, 18, 21 and 23.

35. At the national level, Regulation 11 of the Universal Service Regulations (S.I. 337/2011)⁴ provides that the USP may apply to ComReg for a determination that the net costs of the USO represent an unfair burden.
36. Regulation 12 provides that where ComReg finds there to be an unfair burden on the USP it shall apportion the net cost of the USO among providers of electronic communications networks and services.

VIII. C-389/08 *BASE*

37. There is a disagreement between the parties as to the meaning of the conclusions of the Court of Justice in 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 C-389/08 *Base*.
38. 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.
39. 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.
40. At §§42–43 the Court of Justice held as follows as to the meaning of “unfair burden”:⁵

“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

⁴ European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011.

⁵ The same principles are set out in Case C-222/08 *Commission v Belgium*, related infringement proceedings brought by the Commission.

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.”

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

IX. THE POSITIONS OF THE PARTIES ON THE LEGAL ISSUES

42. 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 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.

Eircom's position

43. Eircom'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 Eircom's own characteristics, but those of its competitors. The independent expert economist engaged by Eircom expresses the view that

without that assessment 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 C-389/08 *Base* 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 National Regulatory Authority 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 C-389/08 *Base*, 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 C-389/08 *Base* must also be understood in the context of the binding obligations on National Regulatory Authorities 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 National Regulatory Authority;
- (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 National Regulatory Authority 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 Eircom, 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 National Regulatory Authority 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 ROCE of each of the market participants for the relevant period, as calculated by Eircom's expert economist, appear at **Annex H**. The independent expert economist engaged by Eircom expresses the view that the figures show that Eircom'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 Eircom 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 Eircom. 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 Eircom'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 Eircom'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 C-389/08 *Base* are relevant to markets with a sole USP, it therefore follows that the National Regulatory Authority 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) Eircom'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 Eircom that its rivals do not bear without Eircom possessing any countervailing advantage (such as quasi-monopoly 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

44. 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 C-389/08 *Base* 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 National Regulatory Authorities 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 C-389/08 *Base*, positively requires National Regulatory Authorities to do so. These are not fixed in the Directive or by the Court but are to be decided on by each National Regulatory Authority. 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 C-389/08 *Base* 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 C-389/08 *Base*, profitability is a critical variable in determining Eircom's ability to bear the net cost;
- (v) ComReg contends that Eircom's profitability and ability to earn a fair rate of ROCE 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 Eircom's characteristics and Eircom's ability to bear the net cost and concluded that the net cost was not excessive in light of Eircom'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 C-389/08 *Base*;
- (viii) Eircom emphasises the unfairness to it of having to bear a burden of €45m over five years, ignoring in the same period that Eircom'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, Eircom does not present evidence that its profitability and ability to earn a fair rate of ROCE was significantly affected by the net cost of the USO. Nor is it claimed by Eircom 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 Eircom's profitability. To take the year 2010-2011 as an example, while operating in a competitive environment, Eircom's EBIT was €388 million while bearing the positive net cost for that year of €7.5 million;
- (x) Nowhere does C-389/08 *Base* 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 C-389/08 *Base* is it suggested that such a type of market analysis has to be carried out, or that any kind of comparison between Eircom and its competitors must be conducted, before determining whether Eircom can bear the net cost burden;
- (xi) ComReg contends that the competitors' market shares and their progression trends (as advanced by Eircom) are not indicative, still less determinative, of Eircom's ability to bear the net cost. In relation to the ROCE of other market participants set out by Eircom 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 C-389/08 *Base*; 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 Eircom'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 GAP;
- (xvi) In deciding C-389/08 *Base* there can be no doubt that the Court of Justice had in the forefront of its mind 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.

X. GROUNDS FOR A REFERENCE

- 45. There is a disagreement between the parties as to the meaning of the conclusions of the Court of Justice in 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.
- 46. The decision in C-389/08 *Base* does not address a situation where there are multiple telecommunication services providers in the relevant market but only one USP. Such a situation arises in Ireland. In deciding the issues in the main proceedings, 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.

XI. QUESTION REFERRED FOR A PRELIMINARY RULING:-

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?