Neutral Citation: [2013] IEHC 382

THE HIGH COURT

COMMERCIAL

[2012 No. 465 MCA]

[2013 No. 8 COM]

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

BETWEEN

VODAFONE IRELAND LIMITED

APPELLANT

AND

COMMISSION FOR COMMUNICATIONS REGULATION

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 14th day of August 2013

1. This is the judgment of the Court upon an appeal brought under Regulation 4 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) ("the Framework Regulations") against two decisions addressed to the appellant by the respondent ("ComReg") dated the 21st November, 2012, and designated respectively decisions D11/12 and D12/12 (the "Contested Decisions"). As explained in greater detail below, the principal contested effect of those decisions has been to impose certain cost recovery and pricing obligations upon the appellant ("Vodafone") in respect of the wholesale charges it makes to other telecommunications service providers for one particular service described as "Mobile Voice Call Termination" ("MVCT"). Briefly stated and in practical terms, the effect of the decisions has been to require Vodafone and the other service providers to which the same decisions have been addressed, to adopt a particular cost recovery methodology and to charge a maximum price, expressed in cents per minute, of 2.60 cents from the 1st January, 2013, to the 30th June, 2013, and a price of 1.04 cents per minute from the 1st July, 2013, onwards for calls made to a subscriber on its network by a subscriber on another mobile network. The expression "terminated" is employed as meaning that the call is received on the network to which the person called subscribes for the mobile phone service. These costs are referred to as the "mobile termination rates" or MTRs. (The suite of directives is referred to in the Framework Directive as the "Specific Directives".)

Introduction

2. The respondent is the statutory authority established by s. 6 of the Communications Regulation Act 2002, with the powers, functions and obligations for the regulation of, the supply of and access to, electronic communication services, electronic communications networks and associated facilities, and the transmissions of such services on networks in the State. As such, it is charged with responsibility on behalf of this Member State for implementation of obligations arising for the State under European Union measures adopted in those fields and in particular those adopted in the implementation of the internal market for telecommunication services within the European Union, with a view to creating the conditions for effective competition in telecommunications services.

3. The legislative context at European Union level in which the respondent's two decisions have been made are principally Directive 2002/19/EC of the European Parliament and of the Council of the 7 March, 2002, on access to, and interconnection of, electronic communications networks and associated facilities, O.J. L108/7, 24.04.2002 ("the Access Directive") and Directive 2002/21/EC of the European Parliament and of the Council of the 7 March, 2002, on a common regulatory framework for electronic communications networks and services, O.J. L108/33, 24.04.2002 ("the Framework Directive"). Those two Directives form part of a suite of measures adopted in this area, the others being Directive 2002/20/EC of the European Parliament and of the Council of 7 March, 2002, on the authorisation of electronic communications networks and services, O.J. L108/21, 24.4.2002 ("the Authorisation 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, O.J. L108/51, 24.4.2002, ("the Universal Service Directive") and Directive 97/66/EC of the European Parliament and of the Council of 15 December, 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector, O.J. L24/1, 30.01.1998. The Framework Directive and the Access Directive were amended by Directive 2009/140/EC of the European Parliament and of the Council of the 25th November, 2009, amending Directive 2002/21/EC and Directive 2002/19/EC, O.J. L337/37, 18.2.2009, (sometimes referred to as the "Better Regulation Directive"), and, except where otherwise indicated, the provisions of the two directives cited in this judgment are those of the measures as thus amended. (These directives are referred to in the Framework Directive as the "Specific Directives".)

4. The provisions of the Framework Directive have been transposed into Irish law under s. 3 of the European Communities Act 1972 by the above Framework Regulations 2011. The provisions of the Access Directive have been correspondingly transposed by the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) ("the Access Regulations"). References in this judgment to "the Directives" are to the Access Directive and the Framework Directive and references to "the Regulations" are to the Framework Regulations and the Access Regulations unless otherwise indicated.

5. Although there has been no dispute between the parties as to the adequacy or validity of the transposition of the Directives into national law, it is important to point out that there are some instances where the precise wording of the Regulations is not a mere cut and paste of the wording of the Directives. However, it is accepted that nothing in these divergences prevents the Court construing the relevant provisions of the Regulations in a way that is consistent with the requirements and objectives of the corresponding provisions in the Directives. That being so, the Court is primarily concerned with applying the provisions of the domestic Regulations although, of course, it is appropriate to refer when necessary to the recitals in the two Directives for clarification of meaning and

explanation of the objectives sought to be achieved by the Union legislators.

6. In order to determine the issues raised by the appellant in this appeal it is necessary to examine in detail not just the content of the two Contested Decisions and the manner in which the respondent has approached and formulated the particular obligations which those decisions impose upon the appellant; it is also necessary to consider the nature of the legislative and administrative relationship between ComReg and the European Commission under the arrangements established by the Directives referred to above for the telecommunications sector. This is required because, at the heart of the issues in the present appeal, there is a question as to the nature and extent of ComReg's entitlement and/or obligation to take "utmost account" of an instrument of the European Commission which is designated a "recommendation" and addressed, under the Framework Regulations, to all of the national regulatory authorities of the Member States. The relevant recommendation is Commission Recommendation 2009/396/EC of 7 May, 2009, on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, O.J. L124/67, 20.05.2009, ("the 2009 Recommendation"). Under Article 19.1 of the Framework Directive the Commission is empowered to issue such recommendations for the purpose of ensuring the harmonised application of the suite of Directives referred to above including the Framework and Access Directives. The 2009 Recommendation purports to stipulate that for the purpose of implementing the price control obligations imposed on an MVCT service, a particular cost recovery methodology called "Long-Run Incremental Costs" ("LRIC") is to be used and applied by the addressee service providers.

7. Moreover and more importantly in the context of this appeal, the 2009 Recommendation is the basis upon which the respondent asserts an entitlement not to fix the MCVT rates by reference to the LRIC methodology as such but to do so by means of a "benchmarking" of results obtained by National Regulatory Authorities ("NRAs") applying LRIC methodologies in a number of other Member States.

8. In essence, Vodafone's case on this appeal is that (a) the use of the LRIC methodology is incompatible with the relevant provisions of the Access Regulations authorising the imposition of price control and cost recovery obligations; and (b) that ComReg has acted unlawfully by fixing the two above MTR figures not by reference to any actual costs of service providers in the Irish market, but by "benchmarking" that is by taking an average of the corresponding prices fixed according to the LRIC methodology as notified to the European Commission by NRAs in seven other Member States. ComReg's essential response to these grounds is that both the LRIC methodology and its implementation by benchmarking are fully compatible with the requirements of the Regulations and the Directives and that it was entitled to adopt both on the basis of the reasons and analysis given in the Contested Decisions and having regard especially to its obligation to take "utmost account" of the 2009 Recommendation. These arguments, concepts and technical terms, and the specific provisions of the legislation and of the two Contested Decisions will be examined in greater detail below.

The Scope of the Appeal

9. Before examining these issues in greater detail, however, it is useful to identify the particular legal basis upon which the appeal comes before the Court under the above legislation, because, as is usual in statutory appeals of this kind, the parties have engaged in the inevitable debate as to the scope and basis of the appeal and the approach to review which the Court is obliged to take. Counsel for the parties have referred the Court to the leading cases on this issue in this jurisdiction and also to some cases decided in other Member States on appeals arising under the corresponding national regulations implementing the Directives.

10. Amongst the former cases, the Court has been referred particularly to *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 and the judgment of this Court (currently under appeal) in *Rye Investments Limited v. Competition Authority* [2009] IEHC 140. Other authorities referred to have included *Ulster Bank v. Financial Services Ombudsman and Others* [2006] IEHC 323 and *Carrickdale Hotel Limited v. Controller of Patent Designs and Trademarks* [2004] 3 I.R. 410. In addition the Court was referred to the appeal from a decision of the Competition Commission determined by the Court of Appeal in the United Kingdom and its judgment in *Everything Everywhere Limited v. Competition Commission and Others* [2013] EWCA Civ. 154.

11. While it is clear from the Irish authorities quoted above that it is desirable, insofar as the specific statutory provisions allow, to maintain some degree of uniformity in the approach of the High Court to statutory appeals, remedy procedures with different terms and scope are invariably legislated for according to the particular subject matter, circumstances and requirements of the administrative processes concerned. This is especially so when the statutory remedy lies against an authority or tribunal charged with exercising supervisory functions or making quasi-judicial determinations in areas requiring the exercise of special expertise of an economic, financial, scientific or technological character following consultation with interested parties and detailed analysis of proposals and commissioned expert reports in such fields.

12. Accordingly, in considering the scope of a statutory appeal and the approach which the Court must take, the starting point and overriding principle is that the appeal will be governed by the particular terms in which the statutory right of appeal has been created by the legislator. That is especially so where the appeal process is not the exclusive creation of domestic legislation, but owes its origin to a requirement in a legislative measure at European Union level, as is the case here. The appeal remedy in Regulation 4 of the Framework Regulations gives effect to the obligation to provide an "effective appeal mechanism" in Article 4 of the Framework Directive. As there are some differences of structure and wording between those provisions it is useful to set out both:-

> "Article 4,
>
> Right of Appeal
>
> 1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.
>
> 2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty [now Article 267 TFEU]."

13. Regulation 4 of the Framework Regulations, on the other hand, is as follows:-

> "Right of appeal against decision of Regulator

4. (1) A user who, or undertaking that, is affected by a decision of the Regulator may appeal to the High Court against the decision.

(2) Any appeal, referred to in paragraph (1), must be lodged within 28 days after the user or undertaking has been notified of the decision.

Regulator to be respondent to appeal

5. (1) The High Court may hear the appeal referred to in Regulation 4(1) only if it is satisfied that a copy of the appeal has been served on the Regulator.

(2) On being served with a copy of the appeal, the Regulator becomes the respondent to the appeal.

Powers of High Court with respect to appeals

6. (1) The High Court shall hear and determine the appeal referred to in Regulation 4(1) and may make such orders as it considers appropriate.

(2) Without limiting paragraph (1), the orders that may be made by the High Court on the determination of the appeal include -

(a) an order affirming or setting aside the whole or any part of the decision of the Regulator, and

(b) an order remitting the case to the Regulator to be reconsidered, either with or without the hearing of further evidence, in accordance with the directions of the High Court."

14. Further provision is made in Regulations 7, 8 and 9 for the effect of the commencement of an appeal on the operation of a regulator's decision including the power of the High Court to stay operation or implementation of the decision pending determination of the appeal; for the furnishing of certain documents to the High Court and for the collection by the Regulator of information relating to appeals. It is not necessary here to set those particular provisions out in detail.

15. It is to be noted that Article 4 requires the Member States to provide users and undertakings with a "right of appeal" against decisions of an NRA without imposing any qualification on the nature or scope of the appeal other than the requirements that it be effective and that the "merits of the case" are taken into account. The fact that the appeal body is to have the appropriate expertise available to it clearly indicates that it will be expected to fully examine all technical, economic, financial or other factors to the extent that they may be put in issue by an appellant. The remedy is clearly wider than the form of judicial review encountered elsewhere in Union legislation including, of course, the remedy of Article 263 TFEU which empowers the Court of Justice of the European Union to "review the legality" of legislation and other acts of the institutions and agencies of the Union by reference to the four grounds identified in the second paragraph of that Article.

16. Nothing in the more detailed transposition of Article 4 in Regulations 4, 6, and 7 of the Framework Regulations above curtails the broad scope of the appeal remedy required to be provided. Indeed, the wide scope of the appeal, as compared with many of the other statutory appeals which have been considered in judgments of the High Court is evident from a number of points in the Framework Regulation:-

- The Court is to hear and determine the appeal and make "such orders as it considers appropriate";

- These may include setting aside a decision in whole or in part;

- It is entitled (but not obliged) to remit a decision to ComReg for reconsideration with or without directions as to how that reconsideration is to be conducted; and

- Pending determination of the appeal, the Court may stay the operation or implementation of a decision either in part or in its entirety.

17. Although no express mention is made of the Article 4 requirement that account be taken of the merits of the case, it is clearly inherent in the approach adopted in these Regulations that an examination of the substantive merits of the case may be undertaken by the Court when material factors of that kind are put in issue by the grounds of appeal. It follows that in appropriate appeals, the Court is entitled, both to hear new evidence and to retain its own expertise for the purpose of examining the merits. So far as the scope of the appeal is concerned therefore, one can paraphrase the words quoted by Costello J. in *Dunne, v. Minister for Fisheries* [1984] I.R. 230 at p. 237 from Wade's *Administrative Law* (5th ed., p. 34) to the effect that the appellant is entitled raise both the question "is it lawful or unlawful?" and the question "is it right or wrong?" in seeking to set aside an appealed decision.

18. While it is a relatively straightforward matter to so define the scope and nature of the appeal and the remedies available to be applied by the Court, there remains the question as to how badly "wrong" an appellant must demonstrate the decision to be in order to require the Court to intervene to set it aside. In other words, if the appellant challenges a decision as wrong on some substantive ground, what degree of gravity of error on the part of ComReg must be established if the appeal is to succeed? Clearly, no definition of that standard is to found in either of the legislative provisions cited above.

19. In that regard it is obviously appropriate for the Court to take into consideration existing case law in this jurisdiction in relation to analogous appeal procedures provided by statute. More importantly, perhaps, it is relevant to have regard to appeals that have been determined by courts in other Member States against equivalent decisions adopted there under the Access and Framework Directives according to appeal mechanisms provided in compliance with the requirement of Article 4 of the Framework Directive. It is clearly inherent in the objective of that requirement that there should be no material discrepancy in the effectiveness of the appeal mechanisms available to users and undertakings in the different Member States although, of course, the diversity of legal systems will mean that procedural differences will exist and the number of additional levels of appeal available may be greater in some Member States than others. The appeal before this Court, however, is the primary appeal mechanism which satisfies the obligation of this Member State under Article 4 of the Framework Directive.

20. Of the various authorities opened to the Court on this issue it is appropriate to consider in particular the judgment of the Supreme

Court in *Orange Limited v. Director of Telecom (No. 2)* [2000] 4 I.R. 159 both for its review of existing authorities on statutory appeals in this jurisdiction and because the case concerned an appeal from the then licensing authority in this sector, the functions of which have since been transferred to ComReg, as provided for under s. 111(2) of the Postal and Telecommunications Services Act 1983. That statutory appeal too was provided in fulfilment of the requirement to provide for an appeal laid down in Article 9(6) of Directive 97/13/EC of the European Parliament and of the Council of the 10th April, 1997, on a common framework for general authorisations and individual licences in the field of telecommunication services, O.J. L117/15, 07.05.1997. *Orange Limited* had taken its appeal against the respondent's refusal of a mobile telephone licence following a competition for the issue of such licences.

21. When transposed by means of the amendment of s. 111 of the Act of 1983, the right of appeal was expressed in s. 111(2B)(i) as a straightforward entitlement to appeal within 28 days in receipt of the refusal notification against the decision and:

> "The High Court may confirm the decision or direct the Minister, as the case may be appropriate, to refrain from granting, revoking or suspending the licence concerned and the Minister should comply with the direction under this subparagraph and shall not implement the decision unless and until it is appropriate to do so having regard to the outcome of the appeal."

22. Having referred to principles in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 as not necessarily applicable, Keane C.J. at p. 184 approached the case on the basis that:

> "[T]he High Court in hearing the appeal must bear in mind that the Oireachtas has entrusted to the first defendant a decision of a nature which requires the deployment of knowledge and expertise available to her, her staff and consultants retained by her, but not available to the court."

23. He then cited the familiar passage from the judgment of the Canadian Supreme Court in *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 at paras. 55 to 56:

> "An appeal from a decision of an expert Tribunal is not exactly like an appeal from a decision of a trial court. Presumably if parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage the judges do not. For that reason alone, review of the decision of a tribunal should often be of a standard more deferential than correctness . . . I conclude that the . . . standard should be whether the decision of the tribunal is unreasonable. This is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it."

24. Keane C.J. at p. 184 then referred to the citation of that passage in the judgment of Kearns J. in *M.J. Gleeson v. Competition Authority* [1999] 1 I.L.R.M. 401, where Kearns J. added at pp. 410 to 411:-

> "That means in practical terms that the applicants in order to succeed must establish a significant erroneous inference which was critical to the grant of the licence and which went to the root of that decision rather than an erroneous inference which relates to some detail, even if that detail is relevant."

25. Keane C.J. then concluded at pp. 184 to 185:-

> "In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, the applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the Court will necessarily have to have regard to the degree of expertise and specialised knowledge available to the first defendant."

26. For the reasons that will be given later in this judgment, the Court does not consider that the particular nuances of different standards to be applied for distinct statutory appeal procedures have any material bearing on the approach to the present case. As already indicated, the first principle is that the nature and scope of each appeal is governed by the particular terms used by the relevant legislature when requiring that the appeal remedy be provided. The particular standard to be applied will be dictated by the subject matter of the decision under appeal; by the particular type of expertise which has been deployed by the decision maker in question; the extent and quality of any consultation process that has preceded the adoption of the decision and, as indicated above, the degree of scrutiny expected of the High Court in its examination of the decision having regard to the powers of annulment, alteration or reformulation conferred upon it. In that regard, the Court considers that Article 4 and Regulation 4 taken together embody an expectation that the High Court will, if necessary, exercise a more extensive degree of scrutiny of substantive aspects, including the merits, of a ComReg decision of this character because of the requirement that the High Court have appropriate expertise available to it for the purpose. This contrasts, for example, with the assumption made by Keane C.J. in *Orange Limited*, above, that the relevant areas of expertise would be available to the decision maker, but not to the High Court.

27. There have been a number of cases in the English courts in which the corresponding appeal mechanism provided in compliance with Article 4 of the Framework Directive has been considered. In the United Kingdom, the EU Directives have been transposed for the most part by the Communications Act 2003. The appeal provided for the purpose of Article 4 of the Framework Directive is set out in s. 192 of the Act of 2003. The appeal falls to be decided in the first instance by the Competition Appeals Tribunal as an appeal "on the merits and by reference to the grounds of appeal set out in the notice of appeal." In its judgment in Hutchison 3G UK Limited v. Office of Communications [2008] CAT 11, the Tribunal stated at para. 164:-

> ". . . this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. . . . The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable responses but whether the decision was the right one."

28. In the judgment of the Court of Appeal given by Jacob L.J. in *T-Mobile (UK) Limited v. Office of Communications* [2008] EWCA Civ. 1373, [2009] 1 W.L.R. 1565, the observation is made at pp. 1572 to 1573, para. 31:-

> "After all it is inconceivable that Article 4, [of the Framework Directive] in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision."

29. In its own judgment in *T-Mobile (UK) Limited v. Office of Communications* [2008] CAT 12, the Tribunal had noted at para. 82:-

> "It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well no single 'right answer' to the dispute. To that extent, the Tribunal may, whilst conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause."

30. It is also useful to draw attention to a point that was made in relation to the wording of Article 4 by Toulson L.J. in *British Telecommunications v. Office of Communications* [2011] EWCA Civ. 245 at para. 60, as quoted by Lloyd L.J. in the judgment of the Court of Appeal in *Telefónica O2 UK Limited and Others v. British Telecommunications plc*. [2012] EWCA Civ. 1002, one of a number of related appeals from the Ofcom determination in question at para. 65:-

> "There is nothing in Article 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression 'merits of the case" is not synonymous with the merits of the decision of the national regulatory authority."

31. Finally, it is appropriate to call attention to a number of other features of this form of statutory appeal as adverted to in the judgment of Moses L.J. in the English Court of Appeal in the case of *Everything Everywhere Limited v. Competition Commission and Others* [2013] EWCA Civ. 154 at para. 35 under the heading "The Need for Caution":-

> "35. Certain features should infuse consideration of the instant appeal. The subject matter of the appeal is a complex question of economic judgment. It involves questions of policy in a highly technical field. The regulator, Ofcom, and the Competition Commission are required to make educated predictions for the future as to the effect of any price control measure to be imposed. Although decisions relating to the control of charges are of great importance to communication providers and to the general public, the exercise of seeking an appropriate solution is necessarily imprecise; when looking to the future, there is unlikely to be any one right answer.
>
> 36. [The appellant] like the other mobile communications providers, has had every opportunity to present its case for LRIC plus and to oppose pure LRIC. . . . They were engaged in the two rounds of consultation conducted by Ofcom in May 2009 and April 2010 and in two further consultations on specific issues in November 2010.
>
> . . .
>
> 38. If that context and all those factors are given their due weight, the caution which Baroness Hale and others have urged should be taken in any appeal from or judicial review of the decisions of expert Tribunals, or in granting permission to appeal, needs to be underlined and underlined in red. Where a tribunal has particular expertise in a highly specialised area of law it is 'quite probable' that that tribunal will have got it right. A reviewing court, amongst which can be counted the expert Competition Appeal Tribunal, should not be astute to find an error of law…"

32. Drawing all of these observations and considerations together, it seems to the Court that its approach to determination of an appeal under Regulation 4 should be as follows. If it is established that the decision under appeal is vitiated by a material error of law including a significant failure to comply with a mandatory requirement of the Regulations or by a misinterpretation or misapplication of the Regulations, the Court can and should intervene to make an order appropriate to the effect of that deficiency. It can and should also intervene where it is established that the decision is vitiated by a serious and significant error or series of errors of the kind described by Keane C.J. in *Orange Limited*. Having regard to the apparent purpose of the appeal in requiring the merits to be taken into account, the Court is also obliged to consider whether the decision is "wrong" in the sense contended for by an appellant. To be wrong in that sense, however, the Court must be satisfied that there has been a serious, significant and material mistake such that the operation or implementation of the decision as it stands would be manifestly unreasonable, disproportionate or incompatible with the outcome sought to be achieved by the exercise of the regulatory remedies which ComReg is entitled to impose. In this last connection, however, a distinction must be made in respect of technical and policy decisions by the Regulator in choosing a solution to the problem sought to be addressed. So long as the analysis conducted and the expertise relied upon is free of serious defect and the reasons for choosing the particular solution are adequately and cogently explained, a decision ought not be set aside upon the sole ground that the appellant and its experts contend that a better solution was available or that a different choice should have been made.

33. As already indicated this appeal is directed at two decisions of ComReg, designated as D11/12 and D12/12. The former is the market analysis decision in which the appellant (amongst several service providers,) has been identified as having "significant market power" ("SMP") as a result of the market analysis procedure carried out by ComReg in accordance with Regulation 27 of the Framework Regulations. This will be referred to as the "SMP Decision". The second decision is the "Price Control Decision" whereby ComReg has fixed the cost recovery and pricing obligations described in para. 1 above in exercise of its power in that regard under Regulation 13 of the Access Regulations.

34. Before proceeding further, it may be useful to explain some of the acronyms and other technical jargon that are encountered in the decisions and in the exchanges on these issues throughout the regulatory process and in this case.

> BEREC: stands for "Body of European Regulators of Electronic Communications" which is a collaborative entity and advisory body on technical aspects of the regulatory exercises involved. It was established by Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of the 25th November, 2009, O.J. L337/1. It plays an important advisory role and is a form of intermediary between the national regulatory authorities and the European Commission in implementation of the regulatory regime.
>
> Glide Path: A term used to describe the process by which a target rate to take effect at a given date is achieved in one or more graduated interim steps.

Cost Orientation: this is a principle which requires that the charges made by internet service providers ("ISPs") should be derived from the costs incurred and which may include a reasonable rate of return on investments made by the ISP. A variety of methodologies can be employed for the purpose of allocating the actual costs which it is permissible to include as recoverable by means of charges.

LRIC: or "Pure-LRIC"; this stands for "Long Run Incremental Costs" and is a methodology according to which service providers are confined to recovering, through their charges, the costs specifically incurred in providing the service of terminating calls. It excludes common costs associated with running other services or the provider's business as a whole. Put simply, the costs recoverable under Pure-LRIC are confined to those which are incurred only by reason of the provision of the termination service as such, with the result that all other costs common to the service provider's business operation must be recovered through its other sources of income including, of course, its charges to its retail customers and subscribers; hence the link between price control on the inter- operator wholesale termination charges and price competition at retail level.

LRIC+: (LRIC Plus): this is a methodology based upon Pure-LRIC but which allows for inclusion of a proportionate account of some common costs.

BU-LRIC: this is the acronym for "Bottom-Up LRIC" which is to be contrasted with "Top-Down LRIC". The LRIC model is described as a generic bottom up model for a telecom's network based upon the long run incremental cost methodology. It is favoured by the European Commission as the costing methodology to be used by the Member State regulators, but it has also been adopted and applied in various other jurisdictions across the world. The establishment of a LRIC model involves development by experts usually taking extended periods of time and employing considerable technical resources. The methodology is therefore mainly commissioned for use by national regulators and major service providers. The Price Control Decision is based upon the adoption of a Pure BU-LRIC methodology.

LRAIC: stands for Long Run Average Incremental Cost. This is a further variation on LRIC methodology that allows for inclusion of costs attributable to wider range of mobile traffic services.

LRAIC+: (LRAIC Plus): this is yet another variation on the basic LRIC methodology and, as explained in para. 6.6 of the Price Control Decision, all of these approaches have "the common feature that the wholesale Termination Rate includes some part of the costs that are joint/common with other service(s)" so that they ultimately result in values above a Pure-LRIC outcome.

The SMP Decision: Market Analysis.

35. The regulatory regime established under the Access and Framework Directives prescribes a series of procedures to be followed by the NRAs in each of the Member States in deciding whether regulatory intervention is necessary in order to remedy a lack of competition in specific telecommunications sector service markets. As implemented in the Irish Regulations the regime requires ComReg to follow a series of investigatory and evaluation steps in determining whether a particular market in the sector requires regulatory intervention. ComReg is thus required first to identify and define "relevant markets appropriate to national circumstances, in particular the relevant geographic markets within the State, in accordance with the principles of competition law" (Regulation 26(1) of the Framework Regulations).

36. It is thus clear that the starting point of the entire subsequent procedure leading to the imposition of the contested obligations is anchored upon the identification and delineation of specific service markets peculiar to the national and geographic circumstances of this Member State.

37. In this instance ComReg has so defined a relevant market for the provision of a wholesale service for the purpose of terminating incoming voice calls on the mobile networks – "the MVCT market". Having so defined a relevant market the Regulator is secondly required to carry out an analysis of the market with a view to determining whether it is "effectively competitive" (Regulation 27(2)). Where the Regulator concludes that the market in question is effectively competitive, it is precluded from imposing or maintaining any of the obligations referred to below (Regulation 27(3)).

38. The third stage occurs where the Regulator determines that a relevant market is not effectively competitive. In that event it is required to designate the undertakings which individually or jointly have SMP on that market and to impose upon the undertakings appropriate regulatory obligations, which may include the cost orientation and price control obligations which are the subject matter of the present appeal (Regulation 27(4)). While Vodafone has objected throughout the consultation process that MVCT is not "a market" in the sense of the Regulations, it has not challenged the market definition in this appeal.

39. The SMP Decision follows much the same format and approach as that of the Price Control Decision, which is described in greater detail below in this judgment. The main body of the document sets out in detail the analysis made by ComReg; the consultation process engaged in and the assessments and conclusions reached in its examination of the MVCT activities of the service providers leading to its definition of the relevant market in those terms; its assessment of competition in the market so identified and the basis upon which it concludes that certain service providers including Vodafone hold positions of SMP. As in the case of the Price Control Decision, the "Final Decision Instrument" containing the actual exercise of the statutory power in this regard and the operative part of the Decision are set out in Appendix I, headed "Final Decision Instrument". As already indicated, the SMP Decision is appealed against, but the principal focus of that aspect of the appeal is the allegedly flawed market analysis which the SMP Decision is claimed to contain. It is alleged that the SMP Decision is defective because ComReg failed to carry out a sufficient analysis of the relevant market in order to conclude that there was a risk of excessive prices. As a conclusion to that effect is logically a precondition to the imposition of the cost orientation and price control obligations, it is submitted that this ground of invalidity of the SMP Decision, if upheld, would render the Price Control Decision invalid.

40. In these circumstances it is not necessary, in the view of the Court, to set out the contents of the SMP Decision in the same detail as is presented below in respect of the Price Control Decision. It is sufficient to summarise the principal operative conclusions of the SMP Decision as follows:

At para. 4.2.6 of the Final Decision Instrument ComReg identifies and defines six separate relevant markets including:

> "the provision by Vodafone of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to mobile numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which Vodafone is able to set the MTR.

…

5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and taking the utmost account of the SMP guidelines, having determined that the Relevant Markets are not effectively competitive, each of the Mobile Service Providers [including Vodafone] is individually designated as having SMP in relation to the relevant market on which that Mobile Service Provider operates…."

Part 2 of the chapter sets out the obligations imposed upon the service providers pursuant to Regulations 8, 9, 12 and 13 of the Access Regulations namely: obligations to provide access pursuant to Regulation 12(1) with the conditions identified in para. 9 of the Appendix attached.

Pursuant to Regulation 10 of the Access Regulations an obligation of non discrimination including an obligation to apply equivalent conditions including in respect of MTRs or other charges in equivalent circumstances to other undertakings requesting or being provided with access.

Pursuant to Regulation 9 of the Access Regulations an obligation of transparency; and

Pursuant to Regulation 13(1) of the Access Regulations "a cost orientation obligation as regards MTRs and prices charged" by the service provider to any other undertaking for access or for the use of the products, services, or facilities in question.

41. Regulation 27 of the Framework Regulations gives effect to Article 16 of the Framework Directive and requires ComReg to carry out an analysis of relevant markets with a view to assessing whether they are effectively competitive. Regulation 27(4) provides:

"Where the regulator determines that a relevant market is not effectively competitive, it shall designate undertakings which individually or jointly have a significant market power on that market and it shall impose on such undertakings appropriate specific regulatory obligations referred to in paragraph (2) or maintain or amend such obligations where they already exist".

Paragraph (2) of Regulation 27 provides:-

Where the Regulator is required under paragraph (3) or (4), Regulation 13 of the Universal Service Regulations or Regulation 8 of the Access Regulations to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph (1) whether a relevant market is effectively competitive."

42. In Section 4.2 of Appendix I of the SMP Decision ComReg identified six relevant markets including that in respect of which Vodafone provided "a wholesale service to other undertakings for the purpose of terminating incoming voice calls to mobile numbers (which is the subject of a primary allocation/reservation and/or a secondary allocation/reservation) in respect of which Vodafone is able to set the MTR"..

The Price Control Decision

43. The second decision D12/12, the Price Control Decision, is made in exercise of ComReg's authority to impose obligations on operators determined to have SMP in an identified market under Regulation 8 of the Access Regulations which implements Article 8 of the Access Directive. Regulation 8(1) provides:-

"Where an operator is designated as having a significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 9 to 13 as the Regulator considers appropriate."

44. Regulations 9 to 13 of the Access Regulations provide for the imposition of obligations in relation respectively to transparency, non-discrimination, accounting separation, and, in Regulation 13, price control and cost accounting obligations. The appellant contests the application of the last of those impositions of obligation in the Price Control Decision. As it is central to the main issue in this case, it is necessary to set out Regulation 13 in full:-

"13(1) The Regulator may in accordance with Regulation 8 impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end-users.

(2) To encourage investments by the operator, including in next generation networks, the Regulator shall, when considering the imposition of obligations under paragraph (1), take into account the investment made by the operator which the Regulator considers relevant and allow the operator a reasonable rate of return on adequate capital employed, taking into account any risks involved specific to a particular new investment network project.

(3) The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it imposes under this Regulation serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard, the Regulator may also take account of prices available in comparable competitive markets.

(4) Where an operator has an obligation under this Regulation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs, including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, the Regulator may use cost accounting methods independent of those used by the operator. The Regulator may issue directions requiring an operator to provide full justification for its prices and may, where appropriate, require prices to be adjusted.

(5) The Regulator shall ensure that, where implementation of a cost accounting system is imposed under this Regulation in order to support price controls, a description of the cost accounting system is made publicly available showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall, at the choice of the Regulator, be verified by the Regulator or by a suitably qualified independent body."

[The remaining paras. (5) to (8) are not immediately relevant to this issue.]

45. The Price Control Decision is a narrative instrument of considerable length and complexity comprising some 279 pages, including 4 annexes of which Annex 2 contains what might be described as the operative part of the decision in respect of MVCT. The 200 pages of the main body of the instrument contain, apart from an introductory chapter and an "Executive Summary" a detailed expose of the background to the regulatory assessments concerned; an account of the consultation process which had been initiated by a consultation document published by ComReg on the 28th June, 2012, and of the responses received; and an outline of possible approaches available to price control remedies for termination rates. The decision also covers price controls for both fixed voice termination rates and mobile termination rates, but this appeal concerns only the latter.

46. In its consultation document ComReg had identified five possible regulatory approaches to price controls as follows:-

> - No price control according to which mobile service providers would effectively decide what rates to charge one another and while that option did not require any resources for implementation it did not provide transparency or regulatory certainty and was considered not justified have regard to the competition problems identified;
>
> - The "fair and reasonable approach" which involved the operators finding a resolution within specific defined parameters which would be fair and reasonable to all involved.
>
> - Bill and Keep: under which a service provider originating the call would bill the calling party and does not pay anything to the service provider terminating the call.
>
> - Receiving party pays: which is the retail pricing approach whereby the terminator service provider bills the receiving party while the originating service provider bills the calling party.
>
> - Cost orientation: which was described as having been the most appropriate intervention identified in the 2009 termination rate recommendation and was considered to have superior performance compared with the low price control and fair and reasonable options. The consultation document had identified two possible mechanisms for the approach namely cost modelling and bench marking.

47. In Section 4.2.3 of the Price Control Decision ComReg set out its assessment of the responses it had received in the consultation document and its final decision. Paragraph 4.23 is as follows:-

> "Having considered the above views expressed by interested parties and for the sake of clarity, ComReg has decided to address each of the issues raised under the following respective headings:
>
> - Proposal to continue with the current voluntary glide path approach based on a BEREC benchmark;
>
> - Assessment of LRIC+ as a credible alternative cost orientated remedy;
>
> - Impact of Pure-LRIC approach on fixed and common cost recovery and efficient investment and innovation in sentence;
>
> - Viability of the proposed Pure-LRIC benchmarking approach to MTRs and regulatory certainty;
>
> - Approach to waiting criteria and claim of undue emphasis on the 2009 Termination Rate Recommendation;
>
> - Inter relationship between proposed price control remedies and the market review process."

48. In the consultation document it had been pointed out that MTRs of mobile service providers with SMP had hitherto been set, not on the basis of application of a specific methodology based upon actual efficient costs of the providers concerned, but on the "the basis of a benchmarked voluntary glide path approach, with the average being derived from a combination of BEREC six monthly snapshot reports . . ." (para. 7.5 of the Price Control Decision). This approach had led to reductions in rates every six months for the operators concerned (including Vodafone) in 2004 and 2008. The decision further explains that the proposed move to a Pure LRIC methodology would mean that all service providers will suffer a steeper decline than had been experienced under the voluntary glide path to date, because the BEREC average included Member States that had not yet implemented the 2009 Recommendation, while the proposal in the consultation document would include Member States, which have final and binding decisions consistent with the approach recommended in the 2009 Recommendation. Paragraph 7.6 conceded:

> "Accordingly, the BEREC average MTR (which has been the basis for benchmarking of MTRs to date) is likely to be higher than the benchmark which includes only those Member States that have adopted a pure LRIC cost methodology that is consistent with the 2009 Termination Rate Recommendation".

49. It is important to note, accordingly, that what is at the heart of the price control decision and of the present challenge to its legality, is the admission on the part of ComReg that it is actually unable to base its cost orientation decision upon its own specific implementation of the LRIC methodology, which it otherwise decides to adopt for the future in principle. Instead, its decision is based upon what it considers to be the licence granted to it by the 2009 Recommendation to adopt, in anticipation of its ultimate construction of its own LRIC model, a "methodology" consisting of taking an average of the rates notified to the Commission by Member States that had adopted final and binding decisions based upon the approach recommended by the recommendation.

50. At para. 7.23 of the Price Control Decision ComReg effectively recognised the inherent unreliability of basing a decision upon a very limited number of notified rates, it pointed out that to date: "seven Member States have notified the European Commission of MTRs using pure BU-LRIC models and those models have been accepted by the European Commission as being consistent with the 2009 Termination Rate Recommendation". ComReg relied upon the fact that it had commissioned a report from Analysys Mason on adoption of a benchmarking approach, which had concluded that "Ireland has broadly similar characteristics to other Member States" so far as concerned characteristics relevant to the avoidable costs standard are concerned, which can potentially impact on the Pure BU-LRIC costs approach where they are features which are specific to individual Member States. ComReg concludes at para. 7.24:

> "The results from a detailed pure BU-LRIC modelling exercise for Ireland would likely not fall materially out of the range presented in the Analysys Mason Benchmarking Report regarding the mobile termination cost calculated for other Member States using a pure BU-LRIC methodology."

51. It is also relevant to quote a passage that appears at para. 7.25 of the Price Control Decision as illustrative of the approach ComReg has adopted to the basis upon which it has taken its decision. It says: "ComReg believes that Vodafone does not provide sufficient evidence to support its claim that MTRs based on the benchmarking methodology will be below true pure BU-LRIC costs in Ireland". That paragraph then addresses in more detail the submissions which had been made by Vodafone. What seems to the Court to be significant about the quoted sentence as something which appears to inform much of the way in which the Contested Decisions are cast, is ComReg's understanding that, having published the consultation document setting out its proposal, the burden of proof or argument lay with the service providers which had made submissions to disprove ComReg's assertions. In the view of the Court, it is important to bear in mind that the Price Control Decision is not akin to an infringement decision on the part of a competition authority which condemns a measure or agreement as breaching one of the competition rules. ComReg's function is to intervene when necessary to regulate operations and activities in a market which will otherwise be governed by the forces of the free market and those competition rules. It is not, therefore, for the service providers to prove why the regulators proposed intervention is unjustified or wrong; it is for the regulator to justify the necessity of its intervention within the terms of the statutory conditions which govern the exercise of its competence.

52. It is also notable that in addressing Vodafone's submissions in the consultation process, ComReg recognised the vulnerability of the benchmarking approach in para. 7.27 of the Price Control Decision. It said:

> "In response to Vodafone's points outlined in para. 4.18, while ComReg agrees that the benchmarking methodology could potentially be more robust if more countries were available for benchmarking, it can be observed that MTRs based on pure BU-LRIC models were within a relatively limited range of between 0.8 and 1.27 eurocent per minute despite the variety of country and model characteristics in the benchmarked countries."

In rejecting Vodafone's submissions ComReg states at para. 7.27 that it had:

> "… not identified country-specific characteristics that would clearly place Ireland above or below the simple average of the benchmarked countries. It is therefore ComReg's opinion that the robustness of the proposed MTRs would likely not be increased significantly by the inclusion of more countries in the benchmark calculation".

53. In the view of the Court, it is of some significance that ComReg appears to have conceived its role in the circumstances as being sufficiently discharged if it settled upon a result reasonably consistent with the average of available results achieved in some other Member States and that it was not unduly concerned about the possibility that an actual cost based LRIC model constructed specifically for the Irish market might produce a different result.

54. In para. 7.8 of the Price Control Decision, ComReg explained that it did not currently possess a Pure BU-LRIC model which would enable it to determine rates upon that basis. It says:

> "Although the 2009 Termination Rate Recommendation recommends that NRAs should implement a pure BU-LRIC methodology by the 31st December, 2012, it was not considered feasible in Ireland to have such a model prior to 2013 given that it takes a significant amount of time to build a model and, like many NRAs across Europe, resources are limited in ComReg to allow the appropriate amount of time to develop a pure BU-LRIC model by 2013".

55. In the absence of such a model ComReg proposed to proceed with a "benchmark approach" on the basis that this was specifically mentioned in the 2009 recommendation as an "alternative methodology that can be used in the short term" (para. 7.9).

56. In answer to Vodafone's objection to the use of the benchmark approach, ComReg pointed out in para. 7.23 of the decision that "[t]o date seven Member States have notified the European Commission of MTRs using these pure BU-LRIC models and those models have been accepted by the European Commission as being consistent with the 2009 Termination Rate Recommendation". Vodafone's objection was that MTRs based upon the benchmarking approach would yield rates below the true Pure BU-LRIC costs in Ireland. Vodafone, at para. 7.25, point to two particular characteristics of the Irish market in this regard: (i) Irish operators are relatively small compared to those in the benchmark countries and therefore are unlikely to be able to gain from the same economies of scale; and (ii) the population dispersion in Ireland is likely to be higher than in other Member States leading to higher traffic costs.

57. ComReg rejects these submissions in para. 7.25 saying:

> ". . . neither of these examples conclusively shows that a pure BU-LRIC cost model would yield a higher result for Ireland, taking in to account also other important cost drivers analysed in the Analysys Mason Benchmarking Report.
>
> . . . the reference to a smaller MSP [mobile service provider] size would likely not be a materially upward influencing factor . . . since the pure BU-LRIC model in other countries has typically been built on the basis of reflecting the cost of a hypothetical efficient operator. Hence the market share reflected in pure BU-LRIC models to date has typically reflected the average market share of the operators rather than individual operator's allocation. The Analysys Mason Benchmarking Report notes further that the presence of four mobile network operators in the Irish implies a relatively smaller market share than in countries with fewer operators which could potentially lead to a lower pure BU-LRIC outcome."

ComReg adds at para. 7.26:

> "A significant review of the various inputs and outputs, as set out in the Analysys Mason Benchmarking Report of pure BU-LRIC models built in other Member States and relevant country-specific factors shows that all of the main cost characteristics of the Irish network are likely to be broadly between the upper and lower values of the countries with modelled MTRs."

It concludes at para. 7.25:

> "The relevant rate for each Member State is the Pure BU-LRIC adopted in the NRAs final decision (sic) is appropriate and is sufficiently representative of the prevailing incremental mobile termination cost conditions in Ireland."

In para. 7.28 ComReg acknowledges that:

> "While there is a risk that the inclusion of more countries with the modelled pure BU-LRIC MTR in the upper range could lead to a higher simple average, ComReg does not believe this risk can be quantified and, based on ComReg's review of the Analysys Mason Benchmark Report, it believes that the risk of a modelled rate being materially higher than the

benchmark rate proposed is relatively low."

It is pointed out in the same paragraph that the benchmark will be reviewed every six months and may:

> "[W]here appropriate be updated on foot of such a review to ensure that Irish MTRs continue to be consistent with the simple average of modelled pure BU-LRIC MTRs adopted by NRAs in countries where (a) the relevant NRAs have notified the European Commission of MTRs using pure BU-LRIC models, (b) those models have been accepted by the European Commission as being consistent with the 2009 Termination Rate Recommendation and (c) the relevant NRA has adopted a final decision setting a BU-LRIC MTR (irrespective of whether that decision is currently under appeal)."

58. Section 7.2.4 of the document is headed "ComReg Decision" and is as follows:

> "MTRs shall be based on a pure LRIC cost methodology based on a benchmark approach until such time as a 'fit for purpose' pure BU-LRIC model is available for Ireland.
>
> The benchmark calculation shall be a simple average of the Pure BU-LRIC MTRs calculated using the pure BU-LRIC models that have been built in other EU Member States which have been notified, accepted by the European Commission as being consistent with the 2009 Termination Rate Recommendation and the relevant rate for each Member State is the pure BU-LRIC rate adopted in the NRAs final decision.
>
> ComReg shall review the range of benchmarked countries every six months and may amend it, where appropriate, on foot of such a review in order to ensure that the benchmark has been appropriately updated to reflect any further notifications to the European Commission in relation to Member States with MTRs set using a pure BU-LRIC model. It is anticipated that the first such review will be in September 2013."

59. In Section 7.3 of the Price Control Decision, ComReg sets out in more detail its reasons for adopting benchmarking as the basis for fixing the MTRs at 2.60 cent per minute from the 1st January, 2013, and 1.04 cent per minute from the 1st July, 2013. The reasoning for the first refers, at para. 7.43, to the constraints it was under in implementing the recommendations of the 2009 Recommendation by the 31st December, 2012, as previously referred to in the ComReg Consultation Document. It then summarises the responses that were received to this part of the Consultation Document. In para. 7.70 and the table at fig. 7.2, the actual benchmarking calculation is set out and explained:-

> "With respect of the actual benchmark MTR to be applied, ComReg set out in its Consultation Document in Figure 7.3 that the benchmark pure-LRIC rate would be in the range of between 0.8 cent per minute and 1.27 cent per minute. ComReg has now decided that the benchmark pure-LRIC MTR shall be 1.04 cent based on a benchmark of the seven Member States which satisfy the following conditions that ComReg has now decided to apply:
>
> > (i) the relevant NRA has notified pure BU-LRIC MTRs (i.e.: calculated on the basis of a pure BU-LRIC model developed by the NRA) to European Commission;
> >
> > (ii) that modelling approach has been accepted by the European Commission as being consistent with the 2009 Termination Rate Recommendation; and
> >
> > (iii) the relevant NRA has adopted a final decision setting out a pure BU-LRIC MTR (irrespective of whether that decision is currently under appeal).
>
> It should be noted that the benchmarked pure BU-LRIC MTR of 1.04 cent resulting from this calculation is the maximum permitted MTR which may be charged by any SMP MSP. Figure 7.2: Benchmark of countries where final measures, based on BU pure LRIC, have been notified to the European Commission.

Member State	Target Rate (cent per minute)
Denmark	1.07
France	0.8
Portugal	1.27
Spain	1.09
UK	0.99
Belgium	1.08
Italy	0.98
Simple Average	1.04

60. In the section 7.81, headed "Benchmarking Approach", ComReg sets out the comments it received on its proposal from the European Commission including its comment on the draft proposal of a rate of 1.02 cent per minute:-

> ". . . the proposed MTR (1.02c per minute) appears to be consistent with the EU simple average of the Member States that had implemented a pure BU-LRIC model by way of a final decision, and that therefore the outcome of ComReg benchmarking is in line with the Commission's recommended approach."

61. ComReg also acknowledges at para. 7.87 the Commission's observation that its proposed implementation date of the 1st July, 2013, for the imposition of Pure-LRIC MTRs was "not in line with the Commission's Termination Rates Recommendation according to which, NRAs should ensure the termination rates are implemented on a cost-efficient (BU-LRIC) level by the 31st December 2012". In response ComReg expresses the view, at para. 7.89, that the "MSPs should be allowed sufficient time to adjust their business plans for the pure LRIC MTR. On that basis ComReg has decided that the PureLRIC MTR will come into effect on the 1st July 2013 with a step change reduction from the 1st January 2013".

62. At Section 7.3.4 ComReg summarises its decision in this regard as follows:-

> "The maximum permitted weighted average MTR should be no more than 2.60 cents from the 1st January 2013 weighted for time of day traffic profile. The maximum permitted flat-rate MTR shall be 1.04 cents from the 1st July 2013 regardless of time of day traffic profile.
>
> ComReg shall pre-notify Service Providers three months in advance of the effective date of any change to the MTR which results from the six monthly review of the benchmark. The first such review will be in September 2013.
>
> MSPs shall pre-notify ComReg and confirm any changes to their MTRs 60 days in advance of the effective date of any such changes. . . ."

63. Annex 2 entitled "Decision Instrument" appears to be intended to be taken as the formal exercise of the statutory power and the operative part of the decision. After a series of paragraphs setting out the basis upon which the statutory power to decide is taken and a recital of the background consultation arrangements the annex sets out a series of definitions employed in the decision including those already set out in para. 34 above. The material paragraphs of the annex for the purpose of the present appeal are as follows:-

> "3.1 This Decision Instrument applies to H3GI, Lycamobile, Meteor, Telefónica, Tesco Mobile and Vodafone.
>
> . . .
>
> 3.3 This Decision Instrument relates to a further specification of the cost orientation obligation imposed by ComReg under Section 12.1 of the Decision Instrument annexed to ComReg decision D11/12 in relation to the Relevant Markets.
>
> …
>
> 4.1 Pursuant to Regulation 13(1) of the Access Regulations and in accordance with Section 12.1 of the Decision Instrument annexed to ComReg decision D11/12, each SMP Mobile Service Provider is subject to a cost orientation obligation as regards MTRs and prices charged by the SMP Mobile Service Provider to any other undertaking for Access to or use of those products, services or facilities referred to Section 8 of the Decision Instrument annexed to ComReg decision D11/12.
>
> 4.2 For the purpose of further specifying requirements to be complied with relating to the cost orientation obligation set out in Section 12.1 of the Decision Instrument annexed to ComReg decision D11/12, and pursuant to Regulation 18 of the Access Regulations, each SMP Mobile Service Provider is hereby directed to ensure that its Mobile Termination Rate(s) are set out in accordance with a Pure-LRIC costing methodology.
>
> 4.3 Without prejudice to the generality of Section 4.2, pursuant to Regulation 18 of the Access Regulations and in accordance with Regulation 13(3) of the Access Regulations, each SMP Mobile Service Provider shall ensure that its Mobile Termination Rate is no more than the Benchmark of BU pure LRIC Mobile Termination Rates set out in the table below, which may be amended by ComReg from time to time. For the avoidance of doubt, each SMP Mobile Service Provider shall be deemed to have complied with Section 4.2 above, by complying with Section 4.3 of this Decision Instrument (as may be amended by ComReg from time to time).

From the 1st July onwards:	Benchmark of Pure BU-LRIC mobile termination rates (Euro cent per minute)
	1.04

> 4.4 With effect from the 1 July 2013, each SMP Mobile Service Provider shall apply Section 4.3 to all voices/credit notes issued by it to any Undertaking in respect of MVCT.
>
> …
>
> 5.1 With effect from the 1 January 2013 and pending the entry into force of Section 4 this Decision Instrument, pursuant to Regulation 18 of the Access Regulations and in accordance with Regulation 13(3) of the Access Regulations, each SMP Mobile Service Provider shall ensure that its Weighted Average Mobile Termination Rate is no more than the figure set out in the table below:

From 1st January, 2013 to the 30th June, 2013	Weighted average mobile termination rate (Euro cent per minute)
	2.60

> 8.1 The Effective Date of this Decision Instrument shall be, unless otherwise expressly stated in this Decision Instrument, the date of its notification to the SMP Mobile Service Providers and it shall remain in force until further notice by ComReg."

The Grounds of Appeal

64. As indicated above this appeal is directed at both of the Contested Decisions and relies upon a number of grounds both technical and legal. In the case of the SMP Decision, the principal ground advanced asserts that the market analysis carried out by ComReg was inadequate and flawed. The appellant does not challenge the SMP Decision as such, but submits that its market analysis was not properly conducted according to the requirements of the Access Regulations and Regulation 27 of the Framework Regulations. Accordingly, it does not justify the cost orientation obligations imposed under Regulation 13 of the Access Regulations. While the analysis adopted may justify some of the less intrusive obligations such as transparency, non-disclosure or accounting separation provided for in Regulations 8 to 13 of the Access Regulation, it does not necessarily require or justify the chosen price control imposition.

65. The appeal grounds directed at the Price Control Decision are broad. First, the degree of intrusion involved in the price control obligation is not justified by and fails to comply with Regulation 8(6) of the Access Regulations which requires that any obligations imposed must:-

> (a) "be based on the nature of the problem identified,
>
> (b) be proportionate and justified in the light of the objectives laid down in s. 12 of the Act of 2002 [the Communications Regulation Act 2002], and Regulation 16 of the Framework Regulations, and
>
> (c) may only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations."

66. Secondly, it is submitted that the respondent has misused it powers under the Access Regulations. It is asserted that it has used its power to impose a price control obligation under the pretext of avoiding a risk of excessive pricing in the MVCT market in order to achieve an improper and ulterior result in the retail market where price controls are not permissible.

67. Thirdly, it is further argued that because the particular methodology chosen (or rather to be chosen), as the means of price control namely, Pure BU-LRIC, is the most severe and intrusive form of price control and goes so far beyond any remedy needed to rectify the identified defects of competition, it is disproportionate and unlawful.

68. Fourthly, it is contended that the Price Control Decision is fundamentally flawed and incompatible with Regulation 13 of the Access Regulations in that by adopting the LRIC methodology based upon hypothetical costs of a notional efficient operator, the decision disregards the explicit obligation of Regulation 13(2) "to take into account the investment made by the operator" on whom the price control obligation is imposed.

69. Finally, the appellant contends that ComReg's recourse to the interim solution of "benchmarking" as the basis upon which the actual price controls are fixed as from the 1st January, 2013 and the 1st July, 2013, is unlawful, because, in effect, it has no basis in either of the Regulations or in the Directives. In other words, "benchmarking" as a basis for fixing mobile termination rates is ultra vires.

70. As this ground raises a discrete issue of law, which turns upon the interpretation of the Regulations and of the Directives and is dependent in particular upon the validity of ComReg's claim to be entitled (and even bound) by the 2009 Recommendation, it is appropriate to examine this challenge first.

The Benchmark Ground of Appeal

71. As mentioned in para. 49 above, although ComReg has clearly decided in principle to impose a cost orientation obligation by reference to the Pure BU-LRIC methodology when its own "fit for purpose" model becomes available to it, the termination rates imposed are not derived from the application of that methodology in any direct sense, but are based upon a simple average of rates fixed by NRAs in seven other Member States as notified to and accepted by the European Commission as explained at para. 7.70 of the Price Control Decision.

72. The appellant submits that this recourse to benchmarking is unlawful for several reasons:-

> (i) The figure is derived indirectly from LRIC methodology used elsewhere and as that methodology is, according to the appellant, in any event a wrong methodology, the contested rates are unjustified by the regulations and the directives;
>
> (ii) The simple average of rates from other Member States results in a random figure not based on objective criteria which relate to the conditions in the Irish market;
>
> (iii) The benchmark solution does not relate to actual costs or even to the hypothetical costs of the notional efficient operator in the Irish market; and
>
> (iv) Actual costs in the Irish market are significantly different from those in other Member States and particularly those Member States from which the benchmark average has been drawn. It is not therefore a true or valid cost orientation measure.

73. In essence the appellant argues that there is a fundamental inconsistency in the stance adopted by ComReg at paras. 4.2 and 4. 3 of the Decision Instrument, annexed to the Price Control Decision. It points out that in para. 4.2 ComReg purports to give a direction in accordance with Regulation 18 of the Access Regulation, which binds each SMP mobile service provider "to ensure that its Mobile Termination Rates are set in accordance with a Pure BU LRIC costing methodology". The succeeding paragraph then purports to direct that "without prejudice to the generality of Section 4.2", the MTR is to be no more than the benchmark rates set out in the following tables and stating: "[f]or the avoidance of doubt, each SMP mobile service provider should be deemed to have complied" with the direction in Section 4.2 if the benchmark rates are not exceeded. Accordingly, while para. 4.2 leaves it open, in theory, for each service provider to take the necessary steps to calculate its rates according to a Pure LRIC costing methodology, para. 4.3 prohibits the specific rates set from the 1st January and the 1st July, 2013, being exceeded whether or not a Pure LRIC cost methodology based upon Vodafone's actual costs in the Irish market produced a figure higher than those rates. Because ComReg is imposing a specific maximum price even in circumstances where a service provider could show that its actual Pure LRIC cost is higher, demonstrates that the measure is not a cost orientation obligation and is inconsistent with the provision in Regulation 13(4), according to which the burden of proof that charges are derived from costs, including a reasonable rate of return on investment, shall lie with the operator concerned where the operator has an obligation regarding the cost orientation of its prices.

74. ComReg's response to the challenge directed at its benchmarking approach is essentially that benchmarking is a legitimate option for NRAs which, by virtue of having limited resources, are unable to establish their own "fit for purpose" Pure LRIC model within the transition period ending on the 31st December, 2012. It argues that this has been recognised and effectively authorised by the European Commission in the 2009 Recommendation. It also relies heavily upon the fact that it retained Analysys Mason as experts, who had been involved in building LRIC models for other NRAs to examine the result that had been obtained by the use of that methodology in other Member States with a view to determining whether benchmarking by reference to the results obtained from Pure BU-LRIC models developed in other Member States would provide a sufficiently robust basis for the use of the benchmarking approach in this market. (The Analysys Mason Benchmarking Report was published by ComReg with the Contested Decisions – see para. 4.52 of the Price Control Decision and footnote no. 51. It was not made available to the operators during the consultation process.). ComReg concluded at para. 7.24 of the Price Control Decision that the conclusion in the report provided a robust basis for its approach, namely that:

> "… country- specific features that can potentially impact on the pure BU-LRIC costs, Ireland has broadly similar characteristics to other Member States for those characteristics that are relevant to the avoidable costs standard. The results from a detailed pure BU-LRIC modelling exercise for Ireland would likely not fall materially out of the range presented in the . . . Benchmarking Report regarding the mobile termination cost calculated for other Member States using a pure BU-LRIC methodology."

75. ComReg also maintains that Vodafone's stance on this ground is inconsistent because it had not objected to the use of benchmarking in principle and had specifically accepted the use of the BEREC benchmark for MTRs so long as it did not include Pure LRIC countries (or at least too many of them).

76. The appellant, however, vigorously challenges both the validity of the Analysys Mason assessment exercise and ComReg's resulting conclusion that cost results from other NRAs are broadly comparable with costs in the Irish market. Vodafone emphasises particularly that ComReg has accepted this conclusion without there having been any empirical analysis of actual costs in the Irish market. It places particular stress upon the fact that while benchmarking might be acceptable as a price control method if it allowed a reasonable mark up on average variable costs to cover common costs, it runs a significant risk of imposing below costs service provision obligations on operators when the benchmark is based upon the most severe form of price control which Pure LRIC represents.

77. The appellant also places before the Court expert evidence of Prof. Hausmann, which is to the effect that there is substantial variation in the results drawn from the other benchmark Member States. To eliminate the risk of bias and unreliable estimates, a statistical adjustment should be made to control for factors which differ from one Member State or market to another, including the economic, geographic and population characteristics involved. It was pointed out that three of the lowest in the table of seven benchmark countries are those from three of the largest Member States namely France, Italy and the United Kingdom. This simple average approach is therefore fundamentally inappropriate and lacks integrity as a model for the imposition of a price control obligation.

78. ComReg accepts that reliance upon the benchmarking approach necessarily means that "actual costs" in these markets have not been taken into account. The reality, however, is that every benchmark is a proxy for actual costs and it is precisely because ComReg does not have actual cost data that it has recourse to the benchmark approach.

79. In answer to the argument that the simple average creates a risk that the rates are set below that which the application of Pure-LRIC might indicate ComReg considers that any such risk is low. It relies upon the conclusion reached by its experts that Ireland has broadly similar characteristics to the other Member States concerned and that a detailed BU-LRIC modelling exercise is unlikely to produce a result outside the range indicated by the average from the other seven Member States. It also points out that, since the Price Control Decision was adopted, further NRAs have completed their models and a new average based upon their inclusion produces a result which "is extremely close to the rate" which ComReg has fixed.

80. In paras. 71 to 79 above, the Court has given a relatively brief summary of some of the main points that had been made on either side in relation to the benchmarking ground. The arguments have been set out in some considerable detail both in the affidavits exchanged, including the extensive affidavits of experts on either side and in the written legal submissions as expanded upon in oral argument before the Court. It has been set out in this manner in order to indicate the degree of distance between the parties on the technical aspects of this ground, although ultimately, as already mentioned, it is a ground which is directed at the essential competence in law of ComReg to impose a price control upon the appellant in respect of this particular service market when that price control is based upon the simple average drawn from results in a limited number of other Member States, rather than being based upon ComReg's own results from an application of a Pure BU-LRIC methodology established by reference to actual costs and conditions in the market over which the price control is imposed.

The Issue under the Regulations

81. The rates have obviously been fixed by ComReg in express exercise of the powers conferred upon it by the Access and Framework Regulations. It is not suggested that those Regulations incorrectly or inadequately transpose the provisions of the two parent Directives. Given that as a matter of national law, no authority or agency performing statutory functions can validly impose obligations of this character, with far reaching financial consequence, other than by the valid exercise of powers lawfully delegated to it either directly or indirectly by the Oireachtas, two issues arise. First, do the terms of the Access and Framework Regulations, when correctly construed according to the terms used and in the light of the purposes they seek to achieve, empower ComReg to impose a price control based upon this benchmarking approach? Second, if the use of a benchmarking approach for the imposition of the price control obligation does not appear to be within the express competence of ComReg on that basis, is any such deficiency in its competence made good by its entitlement and/or its obligation to take "utmost account" of recommendations of the European Commission and particularly its suggested authorisation of a benchmarking approach as such in the 2009 Recommendation?

82. It is therefore necessary to examine first precisely what ComReg is required and entitled to do under the Access and Framework Regulations in order to impose a price control obligation. The relevant regulations have been set out in paragraphs 41, 43 and 44 above.

83. In order to impose price control obligations on an SMP undertaking, the Access Regulations effectively require that:

> (a) Any obligations must be appropriate and must comply with the three conditions prescribed in Regulation 8(6) – see para. 65 above.
>
> (b) Any price control and cost recovery obligations must take into account the ***investment made by the operator*** which the Regulator considers relevant and ***must allow the operator*** a reasonable rate of return on adequate capital employed (Regulations 13(1) and (2)).
>
> (c) Where a cost orientation obligation has been applied, the burden of proof that charges are derived from costs (including a reasonable rate of return on investments) lies with the operator, but the Regulator is entitled to use a costs accounting method other than that actually used by the operator in question in calculating the cost of efficient provision of the services in question (Regulation 13(4)).
>
> (d) Any cost recovery mechanism or pricing methodology imposed must serve to promote efficiency, sustainable competition and must maximise consumer benefits. The Regulator may in that regard take account of prices in comparable competitive markets. (It is to be noted that this refers to prices in ***comparable competitive markets*** and not markets judged to be not effectively competitive) (Regulation 13(3)).

[Emphases added.]

84. In the Framework Regulations, Regulation 16 prescribes a number of tasks and objectives for ComReg. These include, in addition to ensuring consistency of regulatory approach, non-discrimination and the safeguarding of benefits of competition for consumers, the promotion of efficient investment and innovation in new infrastructures together with the stipulation that ex-ante obligations are only imposed when and so long as there is no effective and sustainable competition (Regulation 16(2)). Importantly, ComReg is also required actively to support the goals of BEREC in promoting greater regulatory coordination and coherence and it is required to "take the utmost account of opinions and common positions adopted by BEREC when adopting decisions for the national market" (Regulation 16(3)).

85. Regulation 27 of the Framework Regulations prescribes the basis upon which the market analysis procedure is to be carried out. It is to be noted that this analysis of "the relevant markets" is to be carried out, where appropriate, with an agreement with the Competition Authority under the provisions of the Competition Act 2002 (as amended) and taking account of markets identified in the European Commission recommendation as referred to in Article 15(1) of the Framework Directive and "taking the utmost account of the guidelines referred to Article 15(2)" of that Directive.

86. Regulation 27(2), quoted above at para. 41, provides that where the Regulator is required to determine whether to impose obligations under Regulation 8 of the Access Regulations, the determination is to be made on the basis of its market analysis under para. (1) as to whether the relevant market in question is effectively competitive.

87. There is accordingly, in the judgment of the Court, a clear and deliberate connection made in the Regulations between on the one hand, the entitlement and duty of ComReg to impose cost orientation and/or cost price control obligations on an operator designated as having SMP and, on the other, the specific terms of the market analysis which constitutes the starting point of the procedure. It is fundamental to the procedure that the Regulator must identify specific operators as having SMP on an identified "relevant market" and that the "relevant market" is defined both in terms of the particular service offered on the market and the extent of its geographic location. In this case the "relevant market" of this appellant has been defined as its MVCT service across the State. The particular provisions contained in Regulation 13 of the Access Regulations are clearly predicated on the understanding that the finding of lack of effective competition derives from an analysis of the particular market in question and that "the operator concerned" may sustain prices at an excessively high level. Furthermore, the fundamental link between the requirement to impose the cost recovery and price control obligations and the specific circumstances of "the operator concerned" is unambiguously evident in the requirement that account be taken of that operator's investment by allowing the operator in question a reasonable rate of return on capital employed (Regulation 13(2)). In the judgment of the Court, the inescapable conclusion which results from the construction of the plain terms of the Regulations is that the competence of ComReg to impose a price control is expressly conditional upon an analysis directed at the specific conditions, including actual costs, relating to the individual operator upon which the price control is imposed.

88. It goes without saying that neither of the Regulations makes any mention of "benchmarking" as a permissible basis for the imposition of cost orientation obligations or price control although it is true to say that the Regulations do not make any specific reference to any of the cost recovery methodologies described in para. 34 above. Nevertheless, when Regulation 13(4) permits the Regulator to "use cost accounting methods independent of those used by the operator" that is clearly an authorisation to employ a particular form of accounting methodology or analysis including one or other of those listed methodologies. Regulation 13 cannot, however, in the judgment of the Court, be construed as permitting such an independent cost accounting method on the basis that it is applied to costs other than those of the operator in question. It follows in the judgment of the Court that a fortiori, the facility allowed to the Regulator in this regard cannot extend to calculating the cost of efficient provision of the operator services by taking an average of results obtained by a number of other NRAs in other geographic markets. However widely one construes the latitude afforded to the regulator to rely on its own independent accounting method, it must be applied to costs incurred or liable to be incurred by an efficient operator in the market in which it is providing the service and in which the regulatory obligation is to be imposed. The reality of the benchmark solution is that all of the costs that have given rise to the results notified to the Commission by other NRAs and used to calculate the benchmark by ComReg are costs calculated in respect of other operators in other markets.

89. If therefore the Regulations are construed as domestic statutory instruments it is, in the judgment of the Court, clear that the recourse to benchmarking adopted by ComReg in this instance cannot be justified as an exercise which was contemplated as coming within the competence of the authority. It is in particular clearly outside the scope of what is provided for in Regulation 13 of the Access Regulations.

The Effect of the Directives

90. It is necessary, accordingly, then to consider whether this conclusion is altered by the need to interpret the Regulations in the context of the requirements and obligations of the legislative regime at European Union level and particularly having regard to the 2009 Recommendation.

91. The power which is exercised by an NRA whether it imposes a cost recovery obligation or a price control measure, derives specifically from Articles 8 and 13 of the Access Directive and is governed by the particular procedure, policy objectives and regulatory principles set out in the Framework Directive, especially those set out at its Articles 7, 7a, 8 and 19.

92. Not surprisingly, given that the Irish Regulations are accepted as having correctly transposed the relevant provisions, an examination of the articles of the Access Directive leads to the conclusion that the Community legislators (the European Parliament and the Council) cannot be taken as having envisaged that the most intrusive form of regulatory intervention – price control and cost orientation obligations – would be adopted on the basis of a proxy average, drawn from market results in Member States other than that of the market of the Member State in which the control is to apply, rather than by reference to the findings made in an analysis specific to the market in which the operator concerned is providing the service which is the source of the identified risk of excessively high prices or of price squeeze.

93. Thus, Regulation 13(1) of the Access Regulations authorises an NRA to impose these obligations where the market analysis has indicated a lack of effective competition. The relevant market for the purposes of Regulation 13(1) is the market on which "the operator concerned" is providing the service, incurring costs and charging the prices that are the subject matter of the analysis and of the intended control. Furthermore, the exercise of the price control power by the NRA is explicitly subject to the condition that the measure adopted must take account of that operator's investment (i.e.: the investment that operator has made in that particular market), and that it is allowed a reasonable rate of return on adequate capital employed.

94. The presumption that the price control is directed at the costs, capital and charges specific to the particular operator concerned is further underlined by the provision as to the burden of proof and the obligation on the part of the operator to justify its charges and adjust them if so required (Regulation 13(4)). Clearly, any such adjustment is to be based upon a determination, on the part of

the NRA, that the existing charges are excessive, by reference to the NRA's own calculation of what is justified as the cost of efficient provision of those services in that market as analysed by it when, if necessary, scrutinised in the application of its own independent cost accounting method.

95. It is also relevant to refer to the terms in which the price control competence of an NRA is cast in the Access Directive. Thus, in explaining why it is justifiable to continue to retain the range of obligations available to be imposed under the preceding directive, recital (14) of the Access Directive reasons: "This range of possible obligations should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-regulation". This preference for light regulation wherever possible is further underlined by recital (20).

> "Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable . . . or much heavier such as an obligation that prices are cost orientated to provide full justification to those prices where competition is not sufficiently strong to prevent excessive pricing. . . . when a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits."

96. That the calculation of costs incurred in establishing the efficient provision of the particular service which is scrutinised for lack of effective competitiveness, is predicated upon taking account of the fact there is a contribution to costs in the geographic area of the NRA's jurisdiction, is reaffirmed by the provision in Article 8(3) of the Access Directive, which prohibits the NRA imposing any of the Articles 9 to 13 obligations on an operator which has not been designated as having SMP. The SMP designation can only be made by reference to the position of the operator on such a market.

97. It is also relevant to the point addressed later in this judgment to draw attention to the exceptional possibility anticipated in para. (3) of Article 8, that an NRA might consider imposing obligations other than those allowed for in Articles 9 to 13. That can only be done following a request to the European Commission as the Commission is given an explicit decision making power to authorise or prevent such an imposition. As explained below, this contrasts with the defined role of the Commission in issuing recommendations.

98. It follows in the judgment of the Court that, as in the case of the national Regulations, the relevant provisions governing the NRA competence to impose price control and cost recovery obligations cannot be construed or interpreted as either expressly or impliedly allowing an NRA to base its calculation of a maximum price to be fixed by way of price control on a cost analysis other than that which relates to the operator upon which the control is to be imposed. Clearly, its facility to use a cost accounting method independent of that actually used by the operator concerned entitles the NRA to have recourse to its own independent methodology including one of those listed in para. 34 above, such as the Pure BU-LRIC. Its methodology must, however, actually be applied. It cannot simply be abandoned and substituted by a proxy figure drawn from results achieved by other NRAs in distinct geographic markets. It may well be a policy objective to seek to achieve a reasonable level of costs harmonisation across the internal market and it may be arguable that a sufficiently broadly based average drawn from LRIC based termination rates calculated by other NRAs ought, from a statistical point of view, not be materially out of line with the result of a similar exercise carried out here, but that is not something that is countenanced or permitted by the Directives according to their ordinary meaning. As already remarked in relation to the Regulations, the concept of "benchmarking" receives no mention in the Directives nor does there appear to be given any latitude to be regarded as permissible by implication on the basis that it could be regarded as achieving a result consistent with their objectives.

The 2009 Recommendation.

99. Finally, therefore, it is necessary to consider the significance and effect of the 2009 Recommendation as that is strongly relied upon by ComReg and is in fact the only place where "benchmarking" receives a mention by the European Commission, albeit a somewhat fleeting mention.

100. As will be clear from the provisions of the two Directives considered so far in this judgment, those provisions laid down the policy objectives for a regulatory framework which aims to install an internal market in telecommunication services generally, together with the principles to be applied, the measures that may be taken in the Member States by their NRA and the procedures to be followed by that NRA when intervening to regulate any of the relevant markets. The provisions thus provide the basis for a market analysis and SMP designation that may lead to the adoption of any of the obligations in Articles 9 to 13 of the Access Directive, but do not of themselves require individual NRAs to embark upon the analysis of any particular market or to adopt obligations within any particular time frame. The Contested Decisions are prompted and required (or advised) by the 2009 Recommendation.

101. It is also evident that in enacting the Directives in 2002 and subsequently amending them, the Community legislators have deliberately struck a particular balance in the allocation of powers and duties for executive implementation and administrative supervision as between the European Commission on the one hand and the NRAs on the other. It is therefore important to have regard to the particular roles accorded respectively to the Commission and the NRAs under the legislation and to the precise scope and limits of the supervisory function allocated to the Commission. It is clear that throughout the legislative process for the adoption of the 2002 Directives and the amendments in the Better Regulation Directive of 2009, that the issue as to where the line might be drawn between the autonomy of the NRAs and their responsibility for regulation of their national markets on the one hand and the extent of the Commission's power to supervise, direct and forbid on the other, was a matter of considerable debate and concern amongst the legislators. The compromise ultimately struck centres upon the detailed procedures embodied in Articles 7, 7a of the Framework Directive and the respective roles assigned to the NRAs, to the European Commission and to BEREC. It is reflected particularly in the employment of the notion of taking "utmost concern" which is addressed both to the NRAs vis-à-vis the European Commission and to the Commission vis-à-vis BEREC.

102. The procedures employed in Article 7a of the Framework Directive for the consistent application of the measures to be adopted to remedy a lack of effective competition are detailed, complex and nuanced but the essential features can be summarised as follows, bearing in mind that the Directives are designed to delimit the boundaries between the entitlement of the NRAs to assess and regulate their domestic markets of their own initiative on the one hand and the responsibility of the Commission to decide, prohibit or merely advise on the other.

103. The 2009 Recommendation is issued by the Commission on the basis of Article 19(1) of the Framework Directive and therefore on the basis of taking utmost account of a BEREC opinion, with a view to furthering the achievement of the Article 8 objectives and because the Commission had discerned that divergences had appeared in the implementation by the NRAs of their regulatory tasks.

According to recital (1) of the Recommendation, a review of 850 draft measures notified to it under Article 7, disclosed apparent inconsistencies in the regulation of voice call termination rates. Article 19(2) of the Framework Directive requires that Member States must ensure that their NRAs take "utmost account" of such a recommendation.

104. As already mentioned above, Article 19(3) distinguishes the matters in respect of which the Commission may make a decision as opposed to issuing a recommendation. There is therefore a deliberate division of the administrative supervisory authority allocated to the Commission by reason of the distinction made between the subject matters susceptible of control by decision as opposed to the matters amenable only to treatment by way of recommendation.

105. Where an NRA proposes to impose a price control under Article 13 of the Access Directive, Article 7a of the Framework Directive requires that it be notified in draft to the Commission, which then has a month in which to object. Where an objection is made by the Commission this gives rise to a three month period of suspension of the draft measure. During that period the NRA, the Commission and BEREC are to cooperate in finding of the most appropriate measure. BEREC is required to issue an opinion on the Commission's objection and, if it shares the Commission's "serious doubts", then the three agencies must cooperate closely to identify the most appropriate measure. In a case where BEREC does not share the Commission's serious doubts or the NRA maintains its draft measure, the Commission is entitled, while taking utmost account of the BEREC opinion (if any) to "issue a recommendation requiring the national authority" to amend or withdraw the draft measure while providing reasons for so requiring. Where the NRA declines to amend or withdraw in line with the recommendation's purported requirement, it is not disentitled to adopt a draft measure without amendment, but is required to provide "a reasoned justification".

106. While the legislators have obviously gone a long way in authorising the Commission to exert considerable advisory and administrative pressure on NRAs in the procedure for the imposition of price controls, they have deliberately stopped short of authorising the Commission to enforce, by decision, its serious doubts or its view that the NRA's draft measure could create a barrier to the single market. This is so notwithstanding the somewhat incongruous use of the expression "issue a recommendation requiring the national regulatory authority concerned to amend or withdraw the draft measure" in Article 7a(5) of the Framework Directive (emphasis added). Notwithstanding the strength of the Commission's serious doubts, the force of BEREC's opinion and the delays in implementation imposed on the NRA, the latter remains entitled under Article 7a(7) to decline to amend or withdraw its measure and proceed to adopt it. This contrasts, for example, with the position of an NRA under Article 8(3) (second subparagraph) when it seeks to impose an obligation on an SMP operator outside the options in Articles 9 to 13. There, the Commission has been given competence to prevent it so doing by adoption of a binding decision.

107. This distinction is not a mere procedural formality but derives from a fundamental constitutional feature of the European Union itself. Article 288 TFEU defines the force and effect of the measures available to the institutions. Thus, "a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them". A recommendation on the other hand, like an opinion, "shall have no binding force".

108. Thus, by defining the functions of the Commission in relation to the powers of the NRAs to impose price control measures as exercisable by means of a recommendation only, the legislators have explicitly restricted the authority of the Commission vis-à-vis the NRAs to one of advisory character, albeit one backed by formidable procedural and administrative imperatives.

109. This is not, of course, a case in which an NRA seeks to depart from the terms of the 2009 Recommendation by imposing an obligation or adopting a methodology other than those recommended by the Commission. ComReg seeks to rely upon the terms of the recommendation in support of its decision to adopt the benchmarking approach upon the basis that it is entitled and obliged to "take an utmost account" of the recommendation.

110. That is the specific issue now before the Court on this aspect of Vodafone's appeal ground, and so it is not necessary to set out in detail the entire content of the 2009 Recommendation. Its essential operative provisions can be summarised as follows:-

> 1. When imposing price control obligations on designated SMP operators in markets for wholesale voice call termination NRAs should set termination rates based on the costs incurred by an efficient operator. That is to be done in the way set out in the body of the Recommendation.
>
> 2. Effective costs evaluation is to be based on current costs and the use of a bottom up modelling approach using LRIC as the relevant cost methodology.
>
> 3. Incremental costs are those that can be avoided if a specific increment is no longer provided (avoidable costs).
>
> 4. NRAs are recommended to implement termination rates at a cost efficient, symmetrical level by the 31st December, 2012.
>
> 5. In exceptional circumstances due to lack of resources where an NRA is unable to finalise the recommended cost model "it could consider setting interim prices based on an alternative approach until the 1 July 2014". In para. 12 of the 2009 Recommendation, however, that facility is subjected to the condition that the NRA "is able to demonstrate that a methodology other than a bottom-up LRIC model based on current costs results in outcomes consistent with this Recommendation and generates efficient outcomes consistent with those in a competitive market"

111. It will be noted that nowhere in the operative part of the 2009 Recommendation (paras. 1 -12) is there explicit mention of "benchmarking". What is authorised in the exception is the application of "an alternative methodology" to the LRIC model which the Commission recommends.

112. The explanatory motivation for para. 12 is given in recital (22) of the recommendation and this is the only place in which the word "benchmarking" appears. The recital is as follows:-

> "For NRAs with limited resources, an additional transitional period may exceptionally be needed in order to prepare the recommended cost model. In such circumstances, if an NRA is unable to demonstrate that a methodology (e.g. benchmarking) other than a bottom-up LRIC model based on current costs results in outcomes consistent with this Recommendation and generates efficient outcomes consistent with those in a competitive market, it could consider setting interim prices based on an alternative approach until the 1 July 2014 . . . Any such outcome resulting from alternative methodologies should not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology."

113. A number of observations are called for. First, it is to be noted that the Recommendation gives no explanation as to what is meant by "benchmarking" in this context. It appears to have been assumed both by ComReg and the European Commission that, because the final sentence of the recital refers to the average rates set by NRAs based on the recommended cost methodology, benchmarking is simply the adoption of that average. There does not appear to be any reason, however, why "benchmarking" by one NRA might not involve assessing relevant efficient costs by reference to comparable national markets for other telecommunications services.

114. Secondly, it must be highly questionable whether the use of an arithmetical short cut of adopting the average of the rates that happened to be available from other NRAs who have fixed rates by reference to the recommended LRIC methodology at the time when the decision comes to be made by the NRA is a "methodology". As indicated in para. 46 above, a variety of alternative methodologies were subjects of discussion during the consultation process and are considered by ComReg in its decision. In the judgment of the Court, the apparent meaning of the terms used by the Commission in recital (22) and para. 12 of the 2009 Recommendation is that an NRA which happens to have one of the other recognised methodologies available to it, but lacks the time and resources to establish the Bottom-Up LRIC model prior to the 31st December, 2012, is permitted to base its rates on its existing methodology provided its rates are reduced to the average of NRA termination rates elsewhere if that alternative methodology produces a higher figure.

115. However if, as ComReg has argued, the benchmarked rates it has set do comply with what the Recommendation has authorised and that the Commission has accepted them on that basis, the adoption of the benchmark approach is, in the judgment of the Court, nevertheless ultra vires the Regulations and the Directives for the following reason.

116. The Court has found above that the adoption of such a benchmarking approach based upon a simple average of the rates set by a limited number of other NRAs is not compatible with or authorised by the relevant legislative provisions. In the judgment of the Court, a recommendation issued by the Commission on the basis of Article 288 TFEU cannot amend, alter or extend a legislative measure such as a directive adopted by the European Parliament and the Council. By definition, a recommendation has no binding force. It cannot therefore bind an addressee to adopt a measure or accept an obligation not provided for in the relevant legislative measure.

117. It is true of course, that the case law of the Court of Justice of the European Union in relation to the legal character and effect of recommendations indicates that while they have no binding force, they are not wholly without legal effect. In its judgment of the 13th December, 1989 in Grimaldi v. Fonds des maladies professionnelles (Case C-322/88) [1989] E.C.R. 4407 at para. 16, the Court of Justice held:-

> "16. In these circumstances there is no reason to doubt that the measures in question are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed, are not entitled to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court.
>
> 17. In this regard, the fact that more than 25 years have elapsed since the first of the recommendations in question was adopted, without its having been implemented by all the Member States, cannot alter its legal effect.
>
> 18. However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions."

118. While the Court of Justice has not in that case or elsewhere defined with any precision the nature and scope of the potential residual legal effect of a recommendation, it is clear that it must be treated by national courts as an authoritative source of interpretation or clarification when issued in order to assist Member States as addressees of a legislative measure in the implementation of that measure. An example of that in this jurisdiction is to be found in the judgment of Edwards J. in *Environmental Protection Agency v. Neiphin* Trading [2011] 2 I.R. 575.

119. In the judgment of the Court, however, the passing reference in parenthesis to "e.g. benchmarking" in recital (22) of the 2009 Recommendation cannot be taken as a mere interpretation or clarification of the measures adopted or the procedures to be followed under the Directives if it is the case that the European Commission concedes or intends that para. 12 of the Recommendation was to operate so as to exempt Member States from compliance with the methodologies and procedures for the imposition of price controls in the Access Directive.

120. This approach to the 2009 Recommendation is, in the view of the Court, confirmed by the order of the General Court of the European Union (then the Court of First Instance) of the 12th December, 2007, in *Vodafone Espana, SA v. Commission of the European Communities* (Case T-109/06) [2007] E.C.R. II-05151. In that order, the Court dismissed as inadmissible an action brought by the applicants (presumably the appellants' holding company and a sister company within that Group), for annulment of a decision of the European Commission alleged to have been taken under Article 7(3) of the Framework Directive. The Spanish NRA had notified the Commission of a draft measure under that paragraph and had received comments upon it from the Commission by letter of the 30th January, 2006. The comments in the letter related to the NRA's finding of collective dominance in the market in question. In its order the Court examines the nature of the communication in question with a view to considering whether it contained an act amenable to judicial review under Article 230 EC (now Article 263 TFEU). The Court held that, having regard to the nature of the comments and the role of the Commission under Article 7, the communication was not one which produced binding legal effects. It pointed out that the wording of Article 7(5) according to which the NRA is to "take the utmost account of comments of other NRA's and the Commission" underlined the non-binding nature of the Commission's letter. At para. 93 it is stated that Article 7(5):

> "does not therefore provide that the Commission's comments are to prevail over those of other NRAs . . . Accordingly, in the case where the comments of an NRA and of the Commission are contradictory, the notifying NRA would not infringe Article 7(5) . . . by following, after careful review of the various comments, the approach proposed by the other NRA and not the proposed by the Commission."

121. It may well be that having set itself the target of implementing the regulatory obligations by the 31st December, 2012, it was realised that some Member States lacked the time and resources to comply with the recommendation to use a Bottom-Up LRIC methodology and that some form of solution had therefore to be found to accommodate that problem. If that is so and if the solution was considered to lie in allowing such Member States to adopt the short cut of the simple average of rates set by NRAs elsewhere, that is something which could only be done, in the judgment of the Court, by the Commission either extending generally the target deadline or by proposing an appropriate amendment of the Directives to the Union legislators.

122. This is not in the view of the Court merely a point of interpretation or one of only procedural significance. Article 2 TEU declares the European Union to be founded on a set of values common to the Member States including the rule of law. It is an elementary consequence of adherence to the rule of law that no institution, authority or agency of the Union can impose burdens, obligations or liabilities on any citizen or undertaking other than by means of the valid exercise of an appropriate competence conferred on it by the treaties or derived by it from lawful delegation by a Union legislator with relevant competence. Where, as here, the Union legislators have deliberately confined the supervisory role of the Commission in relation to obligations under Article 13 to intervention by means of a non-binding measure, it follows in the judgement of the Court, that a recommendation cannot be used to empower an NRA to depart from the conditions required by the legislative act for the imposition of an Article 13 obligation.

123. In the judgment of the Court, the subsequent amendments of Article 7 and the addition of Article 7a by the Better Regulation Directive in 2009 have not altered the character of the steps which can be taken by the Commission vis-à-vis an NRA by means of recommendation. It follows in the judgment of the Court that the Commission cannot legally bind an NRA to follow the terms of a recommendation made in relation to proposed obligations under Article 13 of the Access Directive (provided, of course, the NRA is able to give a reasoned justification for its proposed approach as required by para. 7 of Article 7a of the Framework Directive). Nor can the Commission authorise an NRA by means of a recommendation to formulate and adopt a price control on a basis which fails to conform to the conditions and requirements of Article 13. That, in the judgment of the Court, is the position that obtains here.

124. While that finding by the Court is sufficient to allow this ground of appeal upon the basis that ComReg's adoption of that benchmarking approach is ultra vires, it is appropriate to add that the Court also considers the appellant's arguments well founded insofar as they are directed at the random nature and inherent lack of robustness and reliability in the particular way the benchmarking exercise was conducted by the respondent.

125. It should be pointed out that, in the years prior to the adoption of the Contested Decisions, termination rates in the Irish market had been gradually reduced to their levels at 31 December, 2012, on the basis of a "voluntary glide-path" derived from a benchmark of the average figures from other NRAs as published in six-monthly reports from BEREC, supplemented by any updated information from individual NRAs (Section 7.2.1 of the Price Control Decision at para 7.5.). ComReg acknowledged that due to the switch to the proposed new approach to benchmarking the operators would experience a steeper decline in rates, as the relevant BEREC figure would include other NRAs which had not yet implemented the 2009 Recommendation, with the result that the continued use of that average would yield an average rate higher than that derived from an average based exclusively on confirmed LRIC methodology results.

126. When ComReg published its consultation document in June 2012, it had already decided that it would be unable to implement a Pure BU-LRIC methodology by the 1st January, 2013, as recommended by the 2009 Recommendation. Previous experience had shown that it would take up to eighteen months to develop the model and ComReg considered that it had no option but to rely upon a direct benchmark based on a simple average of the rates applied in other Member States where NRAs had set Pure-LRIC rates based upon a bottom-up model. In figure 7.2 on p. 104 of the Consultation Document the results obtained in seven Member States at that stage as applicable from the 1st July, 2013, were set out. The list included the figure for the rate in the Netherlands of 1.20 cent per minute, but that decision had been annulled. The Danish figure appearing in the list at para. 59 of this judgment was not then available and the decisions for the other Member States were either under appeal or liable to appeal. The UK figure was then 0.86 cent per minute, but as indicated in para. 59 above was subsequently finalised at 0.99 cent per minute.

127. The appellant was amongst the undertakings which made submissions by way of objection to the proposed benchmarking approach. As already indicated, in Section 7.2.3 of the Price Control Decision, ComReg sets out its response to the submissions that were made. It acknowledges "the possible issues with using a benchmark approach and the robustness of such an approach" and in order to "address these concerns" commissioned Analysys Mason to conduct a study of the models developed in the other Member States. That benchmarking report sought to examine whether the underlying "cost drivers" of the rates differed between countries and endeavoured to compare the situation in Ireland with other Member States in relation to the characteristics that materially affect pure incremental cost of the termination service for mobile calls. At para. 7.31 of the Price Control Decision ComReg summarises the conclusions made by its consultants in the analysis. The summary is as follows:-

> "- Two of the factors analysed (the extent of network coverage and voice usage) may lead to termination cost being higher in Ireland than the average of the benchmarked countries.
>
> - One of the factors analysed (market share) may lead to termination costs being lower in Ireland than the average of the benchmarked countries.
>
> - For five factors analysed (spectrum allocations, 2G/3G traffic mix, population density, radio deployment costs and WACC) it is not obvious at this stage whether they may lead to termination costs being higher or lower in Ireland than the average of the benchmarked countries.
>
> - Seven factors analysed (spectrum fees, topography, subscriber penetration, mobile broadband usage, switching network topology and costs, back haul technology and model duration) would probably not lead to termination costs being different from the average of the benchmark countries."

128. It is striking that the conclusions of the consultants are couched in terms which are either tentative or speculative. Two of the factors might lead to higher costs in Ireland and one to a lower termination cost. But in respect of the twelve other factors examined, there is clearly a high degree of either express or implied uncertainty as to what the position is.

129. ComReg accepts that benchmarking based on the result in a single Member State would be unacceptable but does not state what a minimum number of results might be other than accepting the particular seven available to it. Nor does it indicate what mix of relevant market or country characteristics is needed in results from other NRAs to exclude the risk that the average might be distorted by a preponderance of characteristics unreflective of Irish market conditions. For example, if the benchmarking exercise had been based on the results from the UK, France, Spain and Italy, the average would have been 0.96c per minute and if relied upon by the NRAs of Portugal or Belgium would have produced a rate significantly below the true LRIC based figure in those Member States. The Court notes that the benchmarked rate set by the Estonian regulator was calculated on model-based results in 12 Member States and that set by Slovakia on 15 Member States. The Greek regulator set a benchmarked rate based on seven results elsewhere. (Analysys Mason Report footnote No.24.)

130. If, contrary to what the Court has found above, it is considered within the competence of ComReg to have recourse to a direct benchmarking approach of this kind, the actual formulation of the benchmark by ComReg is not, in the judgment of the Court, sufficiently robust and free of uncertainty to constitute the basis for such a radical departure from the methodologies assumed to be

applicable in Article 13 of the Access Directive and Regulation 13 of the Access Regulations.

131. The actual average figure produced is, of course, the product of the happenstance that it is the seven particular Member States which had available model based rates at the time of adoption of the Price Control Decision. This number of Member States is less than one third of the membership of the Union and happens to contain four of the largest Member States, France, Spain, the United Kingdom and Italy. It is notable that three of the four lowest figures are the rates for the largest Member States (and markets) in the list namely, France, the United Kingdom and Italy. This presumably reflects, inter alia, the economies of scale of large populations and centres of population density and the other local characteristics which determine the size and spread of the infrastructure required to provide the network services and thereby dictate the investment required by the operator.

The Court also accepts as valid the criticisms made by the appellant's experts that an average based on such a small number of comparators is inherently unreliable for this purpose having regard particularly to the fact that no attempt has been made to adjust the comparators to control for characteristics which clearly differ from one Member State to another. ComReg's effective answer to this criticism is that it was simply unable to make the benchmark more robust because it lacked the necessary data at the time. Indeed this very point was made by the European Commission. In a letter dated 26th June, 2009, written by the Director General of the Commission responsible for the sector to the NRA in Malta, by way of comment under Article 7(3) of the Framework Directive on that authority's notification of proposed obligations including price control, it advised:

> "…if an NRA decides to impose price regulation on the basis of a comparison with other countries, it should carefully select objective criteria and clearly justify the reasons for which it believes that the relevant market(s) in these countries, against the background of those criteria, make the most suitable basis for comparison, taking into account differences between the conditions prevailing on the relevant market(s) in the different Member States and its home market."

132. The Court also accepts the criticism made of the approach by the appellant's expert, Frontier Economics, in its report of February 2013, where it criticises ComReg's characterisation of the range of rates in the benchmarked countries of between 0.8 and 1.27 cents per minute as "within a relatively limited range". The Court was informed that while differences of rates measured in such decimal points may appear to be very small, when applied to the volume of calls terminated by an operator in the market, the amount can be of considerable commercial significance to the operator. Thus, at p. 63 of the Frontier Economics report Vodafone is stated to have terminated over 1.6 billion minutes of calls on its network in 2012, which translates into a costs spread of €7.8 million based upon the lowest and highest rate in the benchmarked rates list. In the judgment of the Court, ComReg erred in relying upon an inadequate basis for the benchmark report and also misdirected itself at para. 7.25 of the Price Control Decision in considering that the onus lay with the appellant to provide sufficient evidence that the benchmark rate of 1.04 cent per minute would be below the true Pure BU-LRIC costs in Ireland.

133. For all of these reasons, accordingly, the Court will allow the appeal and will make an order pursuant to Regulation 6(2)(a) of the Framework Regulations setting aside the decision instrument annexed to the Price Control Decision to the extent that it fixes the rates of the price control on the basis of the benchmark.

134. The Court considers that in these circumstances it is also appropriate to include in the order to set aside para. 4.2 of the Decision Instrument because, as the appellant correctly submits, there is a significant inconsistency in the way in which ComReg appears to have approached the imposition of a cost orientation obligation in conjunction with the price control. The decision instrument annexed to the SMP Decision gives the impression that in para. 12.1 under the heading "Obligation Relating to Price Control" each SMP mobile service provider is subject to a cost orientation obligation as regards MTRs and prices charged. However, the actual decision to impose that obligation appears to be split between the SMP Decision and the Price Control Decision. Paragraph 12.2 of the former says: "without prejudice to the generality of the obligation in s. 12.1, the cost orientation obligation . . . shall be subject to the requirements further specified by ComReg" in the Price Control Decision. Accordingly, the actual effectiveness of the cost orientation obligation is dependent upon the operative part of the Decision Instrument in the Price Control Decision as appears in para. 4.2 of that decision:

> "For the purpose of further specifying requirements to be complied with relating to the cost orientation obligation set out in Section 12.1 of the decision instrument annexed to ComReg decision D11/12, and pursuant to Regulation 18 of the Access Regulations, each SMP Mobile Service Provider is hereby directed to ensure that its Mobile Termination Rate(s) are set in accordance with a Pure LRIC costing methodology."

135. In the view of the Court it is inherently contradictory to subject an operator to a cost orientation obligation while at the same time imposing a cap at a particular rate, which may not be exceeded. If an operator does set its MTRs according to the Pure LRIC costing methodology it is prohibited from giving effect to the result if it produces a figure even marginally higher than 1.04 cent per minute. On the other hand, if it produces a result which is below the rate set by the decision, it would appear irrelevant whether it is arrived at by means of that methodology or not. It also renders redundant paragraph (4) of Regulation 13 in that it deprives the operator which is subject to the cost orientation obligation of the possibility of proving that its post imposition charges do in fact derive from costs including a reasonable rate of return on its investment. In the judgment of the Court, this approach is a misuse of the power to impose a cost orientation obligation as such.

The Other Grounds of Appeal

136. As mentioned in paras. 64 to 70 above, the appellant has also appealed separately against the SMP decision upon the ground that its analysis is flawed and is inadequate to constitute a basis for the adoption of obligations under Regulation 13. It has also advanced a number of additional grounds of appeal against the Price Control Decision. In particular, it challenges the declared intention of ComReg to eventually adopt the Pure BU-LRIC methodology upon the ground that it is inconsistent with the requirement of Article 13(1) of the Access Directive by excluding the taking into account of investment made by the operator and any allowance for a reasonable rate of return on adequate capital employed. In effect, Vodafone argues that it is the LRIC Plus methodology which satisfies the requirements of that provision and it points to proceedings which have taken place in two other Member States (Germany and the Netherlands) where the Commission's recommendation of the Pure-LRIC methodology was not followed.

137. Subject to hearing the parties further in the light of this judgment, the Court does not consider it appropriate or necessary to rule upon these other aspects of the appeal.

138. So far as concerns the SMP decision, the appellant raises no objection to ComReg's finding of SMP in the MVCT market. Its case is that the market analysis conducted by ComReg for the purposes of Regulation 27 of the Framework Regulations was not sufficiently rigorous and comprehensive to support the imposition of a cost orientation obligation. Having regard to the purported imposition of that obligation, the direction appears to be split between the two Contested Decisions and any imposition of the obligation is effectively dependent upon the validity of the Price Control Decision rather than the SMP decision. The adequacy of the analysis does

not appear to have played any practical part in the adoption of the SMP decision beyond the definition of the relevant service market and furnishing the basis for the designation of the operators as occupying positions of significant market power. Accordingly, any consequence to be drawn from establishing such an inadequacy in the analysis would appear to the Court to impact on the validity of the Price Control Decision only.

139. So far as concerns the remaining grounds directed at the Price Control Decision, the Court considers that it would be unsatisfactory and therefore inappropriate to make any ruling on the question of the correct methodology at this stage. Although ComReg has clearly committed itself to ultimately adopting a Pure BU-LRIC methodology when its model is built and the methodology becomes available to it, the Court considers that it would be premature to adjudicate the issue raised by the appellant in the abstract and without having the benefit of the actual results of the application of that methodology in the context of the Irish market and the costs of the designated SMP operators. For the avoidance of doubt therefore, the Court makes no ruling upon the issue as to whether the BU-LRIC methodology is compatible with the conditions of Regulation 13 in order not to preclude that ground being relied upon if necessary in any future challenge by the appellant to a decision of the respondent imposing a model-based obligation.

140. For all of these reasons, the Court will allow the appeal in part and, subject to hearing the parties further, confine its order to setting aside the Decision Instrument annexed to the price Price Control Decision to the extent that it requires the appellant to fix its MVCT rates in accordance with the directions given not to exceed the figures prescribed in paragraphs 4.3 and 5.1 of that Annex.