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THE HIGH COURT
JUDICIAL REVIEW

[2005 No.152 JR]

BETWEEN

EIRCOM LIMITED

APPLICANT

AND

COMMISSION FOR COMMUNICATIONS REGULATIONS

RESPONDENT

Judgment of Mr.Justice William M.McKechnie dated 29th July, 2005.

1. The applicant in these judicial review proceedings is eircom Limited (eircom) which is a company providing telecommunications services both in the State and elsewhere.The respondent (ComReg) is the national regulatory authority for *inter alia* the telecommunications industry in Ireland.Its statutory powers and duties derive principally from the Communications Regulations Act 2002 with its functions being set out in s.10 thereof and its objectives in s.12 thereof.These impose upon it, amongst other requirements, an obligation "to ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks;" (s.10(1)(a)) and secondly, in the exercise of its functions, it is mandated to promote competition in the electronic communications networks, services and associated facilities (section 12).

2. In the instant set of proceedings there are also a number of other legislative enactments which are directly relevant to the issues raised.These, which have introduced a new European Regulatory Framework, include, Council Directive 2002/21/EC (The Framework Directive), the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 S.I.No.307 of 2003 ("The Framework Regulations"), Council Directive 2002/19/EC (The Access Directive), The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 S.I.No.305 of 2003 ("The Access Regulations"), Council Directive 2002/22/EC (The Universal Service Directive), and the European Communities (Electronic Communications Networks and Services) (Universal Service and Users Rights) Regulations 2003.S.I.No.308 of 2003.

   The purpose of the Framework Regulations and the Access Regulations was to implement into Irish law the Framework Directive and the Access Directive respectively.

3. The dispute in the present case concerns the market for "wholesale unbundled access (including shared access) to metallic loops and sub loops for the purpose of providing broadband and voice services." See the European Commission's Recommendation of 11th February, 2003, on relevant product and services markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

4. eircom is the owner of an established telecommunications network throughout the State.In general non technical terms, it consists of a mainstream or core network and a local network which is separated therefrom by a local exchange.This local access network is the connection between the local exchange and a customers premises.This consists of a physical connection, typically provided over copper pairs and is known and referred to as the “loop” or the “local loop”.

   “Local loop unbundling” is a service which permits other industry operators to gain exclusive access to and control over the loop so as to offer, independent from eircom, services to their own customers.This process involves the physical connection being disconnected from eircom’s network in the local exchange and transferred to alterative operators, who in the documents later referred to are described as “Access Seekers”.The connection at all times however and notwithstanding the exercise of control over it by the access seeker, remains the property of eircom.

5. The affidavits sworn in this matter by eircom and ComReg, set out in impressive detail a great deal of information which is highly informative of both the background to the substantive dispute and of the generality of the efforts which have been made and the problems which have been encountered in opening up this market.Whilst most appreciative of this information, I truly believe that it is neither desirable or necessary to burden this judgment with much of the materials supplied.This is because the only issue for my decision involves a net, technical point of law.Therefore the judgment has no wider implication than determining whether a decision of the Regulator is enforceable within the permitted appeal period, notwithstanding the subject’s right of appeal and his right to seek a suspension of the decision pending the outcome of that appeal.Accordingly I propose to confine myself to the following matters by way of general background.

6. Having had the “utmost regard” to the Commission’s Recommendation of 11th February, 2003, on the Relevant Product and Service Markets and to its Guidelines on Market Analysis and the assessment of Significant Market Power, ComReg, by virtue of Regulations 26 and 27 of the Framework Regulations, was obliged to and did define the “relevant markets” for the purposes of that Regulation and also was obliged to and did conduct an analysis, of these markets in order to determine whether or not the same were competitive.The results showed that there existed the distinct market, which is described at para.3 above, and that in accordance with the Framework Regulations, eircom had significant market power therein.As a result the regulator issued on 15th June, 2004 Decision No, D8/04 (the “SMP decision”).In this, ComReg designated eircom as having significant market power in the market for “wholesale unbundled access (including shared access) to metallic loops and sub loops for the purpose of providing broadband and voice services,” the local loop market.As a regulatory consequence of this designation, certain requirements were imposed on eircom.These included “an obligation to meet reasonable requests by authorised undertakings for access to the local loop and access to collocation, or associated facilities, as provided for by Regulation 13 of the Access Regulations” (see para.4.1) and an obligation to “negotiate in good faith with

authorised undertakings requesting access to LLU services and facilities" (see para.4.4).There was no appeal from this SMP decision.

7. Following this Decision, D8/04 ComReg received expressions of interest from other alterative operators with regard to gaining access to the local loop and other associated facilities.So as to coordinate the requirements of these Access Seekers, the Regulator in December, 2004 produced a document which became known as the "Market Requirements Document" (MRD).In that, which also dealt with many other highly technical matters, there was set out three basic capabilities which the Access Seekers sought by way of access to the local loop.Having furnished a copy of the document to eircom and having had a number of bi-lateral and multi party meetings, a point had been reached in January, 2005 at which the Access Seekers indicated that the MRD reflected their position and at which ComReg was satisfied that the requirements sought were reasonable.

8. However eircom did not share these views.It was of the opinion that the MRD was deficient in a number of important respects, the details of which are not immediately relevant.In any event a meeting was scheduled for 13th January, 2005, at which the industry was to discuss the work programme and the implementation of the MRD.eircom did not agree with this approach and whilst apparently willing to attend, it was prepared to discuss only matters of generality.This fell well short of what was required and accordingly that meeting was cancelled.

This background and in particular ComReg's dissatisfaction with eircom's position led directly to the Regulator's decision of 18th January, 2005, (D1/05), which is at the heart of what this court must decide.

9. This Decision, (D1/05) starts with an executive summary and then, sets out the background to the problem as Comreg saw it.At paragraph 2.1, the Regulator speaks of the importance of the local loop unbundling, at paragraph 2.2 it points out what the industry's requirements are in respect of that market; the meetings which took place on and the current status of the MRD, and the positions respectively of the Access Seekers, eircom and ComReg on these matters.The Decision then contains two Directions to eircom.

Direction 1:

This reads:-

> "By 5 pm on 14th February, 2005, eircom shall provide to ComReg and Access Seekers, a fit for purpose response that deals with the efficient and timely implementation of the Access Seekers requirements (3 capabilities) contained in the MRD (set out in Appendix 1 hereto) as agreed by industry on 6th January, 2005.This response shall include at a minimum, but is not limited to:-
>
> * The development and analysis of a "product matrix" which:-

- Maps the migration paths from all relevant existing wholesale/retail product combinations to and from the ULM/LS products in the context of the requirements set out in the MRD.The scope of this matrix is to be initially as identified by eircom at the meeting with ComReg on 11th January, and amended as advised by ComReg following the first presentation of progress by eircom to Access Seekers and ComReg.
- The analysis shall include but not necessarily be limited to - Impact on existing Product/Processes (which identifies all the operator and interoperator issues that will have to be addressed in order to implement fit for purpose products and processes in line with the MRD)
  - Impact on contracts with existing Retail and Wholesale customers
  - Issues regarding return paths to eircom and other Operators for relevant services.* A Draft Product Description (s) for Access Seekers capability requirements, with associated milestones for achieving the MRD requirements".

Direction 2.
This reads:-

> "eircom shall engage with ComReg and Access Seekers on 1st February or such time as eircom have completed 50% of the analysis work, if sooner than 1st February, regarding the work being, or to be, carried out to implement their requirements.This engagement shall be chaired by ComReg and shall take the form of a detailed update as to the content and progress of eircom's response to the MRD and its associated work streams.The object of the meeting will be for eircom to indicate where Access Seekers need to provide additional information and to receive feedback from Access Seekers and ComReg with a view to factoring this into the remaining work.This meeting will also allow Access Seekers to further their awareness of issues which are likely to be raised as a result of eircom's response".

The time limits for compliance are critical as both fall within a period of 28 days from the 18th January, the date upon which the Decision became effective.

These Directions were issued under Regulation 17 of the Access Regulations, having regard to sections 10 and 12 of the Act of 2002.

10. On 31st January, 2005, the day immediately proceeding the date for compliance with Direction 2, eircom wrote to ComReg and challenged both the factual and legal basis of the entire Decision.In addition, it indicated its intention to appeal and to seek a suspension of the above decision until that appeal had been determined; that was unless ComReg, as it was invited to so do, agreed to withdraw the Decision.The Regulator did not so agree.Instead, being of the opinion that the applicant's participation at the meeting scheduled for 1st February did not meet the requirements of Direction 2, it issued on 2nd February, what is described as the "First Enforcement Direction".Citing that eircom's non compliance with Direction 2 would "create serious economic and/or operational problems

for undertakings and potentially, users of electronic communications networks or services," ComReg further directed eircom to do the following:-

(1) "Engage with ComReg and Access Seekers at a meeting to be held at ComReg's offices at 2.30 pm on 4th February, 2005, regarding the work being, or to be, carried out to implement their requirements.This engagement shall be chaired by ComReg.

(2) Provide a detailed update as to the content and progress of eircom's response to the Market Requirement Document (the MRD) (as referred to in Direction 2) and its associated work streams.

(3) Indicate where Access Seekers need to provide additional information and to receive feedback from Access Seekers and ComReg with a view to factoring this into the remaining work".

This Direction issued under Regulation 18(10), Regulation 6 of the Access Regulations, and having regard to Sections 10 and 12 of the Act of 2002.

The representations, which eircom made against this Direction under Regulation 18(11) of the Access Regulations were unsuccessful.

11. A very similar situation arose with regard to Direction 1 of Decision D1/05, which had the 14th February, 2005 as its due date.Once again correspondence took place between eircom/its Solicitors and ComReg, with Arthur Cox requesting that the date specified in Direction 1 should not be insisted upon, given their clients right of appeal and its intention to so do.In particular, the solicitors pressed the point that eircom was entitled to apply to have the entirety of the Decision D1/05 suspended until the appeal was determined, a right which would be entirely nullified, if even prior to having an opportunity of so doing, it was obliged to comply.ComReg rejected this view.As a consequence of eircom's resulting stance, ComReg formed the opinion that it had not complied with Direction 1 of the Decision D1/05.Accordingly on 15th February, 2005, the Regulator issued a "Second Enforcement Direction".Again reciting that serious economic and/or operational problems would be caused for undertakings by eircom's failure, this Enforcement Direction, compelled the applicant to effectively perform the allegations contained Direction No.1 and to do so by 11.00 am on 18th February, 2005.The same statutory powers for the issue of this second enforcement direction were relied upon by ComReg with the representations made under Regulation 18(11) of the Access Regulations again being successfully.

12. eircom duly lodged its appeal by the specified date which coincidentally was 14th February, 2005.Its appeal documentation would appear *prima facie* to have been in conformity with Regulation 3 of the Framework Regulations, and in it, the applicant sets out in over 47 pages, the grounds of its appeal.At paragraphs 150 to 154 inclusive, it repeats its intention to apply to have the Decision D1/05 suspended until the appeal proper had been determined.

13. Faced with the real possibility of the Regulator applying in a summary manner to the High Court, as it would be entitled to do under Regulation 18(12) of the Access Regulations, for an order compelling due compliance with both Enforcement Directions, and possibly for the imposition of a financial penalty, eircom moved on the judicial review side of this court and obtained leave from O'Neill (J.) on 17th February, 2005, to continue with these proceedings.In essence what the applicant seeks is an order of Certiorari in respect of the Decision (D1/05) of the 18th January, 2005, which contains both Direction No.1 and 2 which are above referred to.It does so however only to the extent necessary to preserve its right of appeal including its right to seek a suspension order.Moreover it requires a similar order in respect of both the First enforcement direction and Second enforcement direction.Further and other ancillary relief is also prayed for.A statement of opposition has been filed and as previously indicated substantial affidavit evidence together with supporting material has been submitted.

14. In order to understand the submissions which follow in abbreviated form, it is I think desirable to set out at this juncture, the material sections of the relevant legislative regime whether that be community or domestically based.

In the first instance reference must be made to the Framework Directive 2002/21/EC of 7th March, 2002.

Recital 12 of the introductory part of this Directive provides that "Any party who is the subject of a decision by a national regulatory authority shall have the right to appeal to a body that is independent of the parties involved", and it goes on to state that "this appeal procedure is without prejudice to the division of competences within national judicial systems and to the rights of legal entities or national persons under national law".

Article 4(1) then sets out in greater detail the requirements on a member state in respect of this right of appeal.It reads as follows:

"4(1) Member States shall ensure that effective mechanisms exist at national level under which any use or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of an 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 available to it to enable it to carry out its functions.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 the appeal body decides otherwise."

15. The Framework Regulations (S.I.No.307/2003), which came into operation on 25th July, 2003, have the following relevant provisions:-

(A) " Application for appeal against decision of Regulator

3(1) This Regulation applies to any user or any undertaking that is effected by a decision, designation, determination, specification, requirement direction or any other act of an equivalent nature of the Regulator under these Regulations, the Specific Regulations or Regulation (EC) No.2887/2000 of the European Parliament and of the Council of 18th December, 2000, on unbundled access to the local loop, other than a notification under Regulation 35, a notification or direction under Regulation 18 of the Access Regulations, Regulation 16 of the Authorisation Regulations or Regulation 32 of the Universal Service Regulations or a notice under section 44 of the Act of 2002 (and this part referred to as a "decision").

(2) No appeal lies against the decision under this Regulation.(3) A person to whom this Regulation applies may, if aggrieved by a decision, within 28 days of the decision, notify the Minister and the Regulator in writing of his or her intention to appeal the decision and of the grounds of appeal.

(4) An appeal notification shall

(a) be made in writing,

(b) state the name and address of the appellant and of the person, if any, acting on his or her behalf,

(c) state the subject matter of the appeal, including the Regulator's decision or the parts of the Regulator's decision to which the appeal refers

(d) state in full the grounds of appeal and the reasons, considerations and arguments on which they are based, and

(e) be made within the period specified under paragraph (3) for making the appeal.

(5) Grounds of appeal may plead that the decision is vitiated by errors of fact, including inferences of fact and or errors of law, including issues of jurisdiction and procedure.

(6) An appeal notification which does not comply with the requirements of paragraph (4) is invalid".

(B) Regulation 4 obliges the Minister for Communications, Marine and Natural Resources, to establish, on receipt of a valid appeal notification, one or more appeal bodies to be known as an "Appeal Panel".Subparagraph (2) entitles the Minister to decline to establish such an Appeal Panel or to refer an appeal to an existing Appeal Panel where there are court proceedings in being, which in the Ministers view are relevant to the subject matter of the appeal.

(C) Appeals, if at all practicable, shall be determined within a period four months from the date of the establishment of the Appeal Panel or from when the appeal was referred to an existing Appeal Panel (Regulation 12(1)).

(D) Regulation 16, which is one of the provisions directly in point in this case has as its heading "Decision of Regulator stands pending appeal" and it reads as follows:-

(1) Subject to paragraph 2(2), pending the outcome of an appeal under Regulation 3, a decision of the Regulator stands.

(2) An Appeal Panel may, on the application to it by the appellant in an appeal under Regulation 3, and taking into account any submission made by any other interested party in relation to such application suspend the decision of the Regulator pending the determination of the appeal, where it considers it appropriate to do so.

(3) An Appeal Panel may impose such conditions as it sees fit on a suspension of a decision under paragraph 2(2)".

16. The Access Directive (Directive 2002/19/EC) of 7th March, 2002, must be noted as forming part of the community framework against which the Access Regulations (S.I.305/03) were brought into force on 25th July, 2003.In its own right however, this Directive does not require any further specific reference to it in this case.

17. The Access Regulations on the other hand have direct relevance and in particular Regulations 17 and 18.These read as follows:-

"Directions

17. The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an undertaking to do or refrain from doing anything which the Regulator specifies in the direction.

Enforcement – Compliance with obligations

18.(1) Where the Regulator finds that a person has not complied with an obligation under these Regulations or a direction under Regulation 17, the Regulator shall notify the person of those findings and give the person an opportunity to make representations in relation to the notification or remedy any non-compliance, not later than –

(a) one month after issue of the notification,

(b) such shorter period as is agreed by the Regulator with the person concerned or stipulated by the Regulator in case of repeated non-compliance, or

(c) such longer period as may be specified by the Regulator

(2) The Regulator may publish, in such manner as it thinks fit, any notification given by it under this Regulation subject to the protection of the confidentiality of any information which the Regulator considers confidential.

(3) The Regulator may amend or revoke any notification under this Regulation.

(4) Where, at the end of the period referred to in paragraph (1), the Regulator is of the opinion that the person concerned has not complied with an obligation or direction, the Regulator may, subject to paragraph (13), apply to the High Court for such order as may be appropriate by way of compliance with the obligation or direction.The Court may, as it thinks fit, on the hearing of the application make an order compelling compliance with the obligation or direction or refuse the

application.An order compelling compliance shall stipulate a reasonable period for the person to comply with the obligation or direction.

(5) An application for an order under paragraph (4) shall be by motion and the Court when dealing with the matter may make such interim or interlocutory order as it considers appropriate.

(6) The Court shall not deny interim or interlocutory relief solely on the basis that the Regulator may not suffer any damage if such relief were not granted pending conclusion of the action.

(7)(a) An application for an order under paragraph (4) or (12) may include an application for an order to pay to the Regulator such amount, by way of financial penalty, as the Regulator may propose as appropriate in the light of the non-compliance

(b) In deciding on such an application, the Court shall decide what amount (if any) of the financial penalty which should be payable and shall not be bound by the amount proposed by the Regulator.

(c) Any financial penalty ordered by the Court to be paid by a person under this paragraph shall be paid to and retained by the Regulator as income.

(d) In deciding what amount (if any) should be payable, the Court shall consider the circumstances of the non-compliance including –

(i) its duration

(ii) the effect on consumers, users and other operators,

(iii) the submissions of the Regulator on the appropriate amount, and

(iv) any excuse or explanation for the non-compliance.

(8) Where the Regulator has evidence of non-compliance with an obligation under these Regulations or a direction under Regulation 17 that represents an immediate and serious threat to public safety, public security or public health, the Regulator may issue a direction to the person concerned requiring that the use of such apparatus or part of it, as may be specified in the direction cease with immediate effect or, on or before such date and time, as may be so specified.

(9) A person to whom a direction has been issued under paragraph (8) shall cease to use the apparatus or part of it to which the direction relates, unless and until such direction has been withdrawn by the Regulator, and shall take such measure as may be specified by the Regulator in the direction to remedy the non-compliance.

(10) Where the Regulator has evidence of non-compliance by a person with an obligation under these Regulations or a direction under Regulation 17 that will in the opinion of the Regulator create serious economic or operational problems for undertakings or for users of electronic communications networks or services, the Regulator may issue a direction the person requiring immediate compliance.

(11) A person may make representations to the Regulator concerning a requirement made of the person under paragraph (8) or (10) and the Regulator having considered the representations may confirm, amend or withdraw the requirement.

(12) Where a person fails to comply with a requirement under paragraph (8) or (10), the Regulator may, subject to paragraph (13), apply in a summary manner to the High Court for an order compelling compliance.

(13) Where the Regulator has brought proceedings for an offence under these Regulations or given a notice under section 44 of the Act of 2002 in respect of a failure by a person to comply with an obligation under these Regulations, the Regulator shall not make an application for an order under this Regulation to the High Court to compel compliance by the person with the obligation."

18. As with the affidavit evidence placed before the court the parties have made extensive submissions on fact as well as on legal principles available from Ireland, the United Kingdom and the European Community.These have been supported by a Joint Booklet of Authorities in which all of the relevant legislative provisions as well as numerous reported cases have been included.As these submissions and this booklet are readily available for ones reference, I hope that I will be forgiven for not outlining verbatim the entire of what is contained in these documents.Instead I propose to confine myself to what I believe are the most direct and relevant principles in order to determine the issue at hand.

19. Mr.Maurice Collins S.C.made the following submissions on behalf of eircom:-

(1) His client had an unqualified right of appeal against Decision, D1/05 and having duly complied with the time and document requirements of Regulation 3 of the Framework Regulations, it was also entitled, as a matter of right, to make use of Regulation 16 and to apply to an Appeal Panel to suspend the Decision until the determination of its substantive appeal.

(2) ComReg cannot use Regulation 17 of the Access Regulations either alone or in conjunction with Regulations 18(10) thereof, in such a manner as to render either or both of these rights nugatory.

(3) That would be the inevitable and uncontradicted consequence of complying with the time requirements of Directions 1 and 2 of Decision D1/05, in that once the applicant had so engaged as was required, the same would have a significant impact on it and that impact could not be unperformed or reversed.

(4) The legislative history of the Framework Directive clearly demonstrates that serious consideration was given to the enforceability of a Regulator's Decision where the undertaking in question had exercised its right of appeal.The compromise of the different party positions resulted in such decisions standing "unless the appeal body decides otherwise" see Article 4(1) of the Directive.

(5) This Article 4 also obliges Member States to ensure that there is an "effective appeal mechanism" for aggrieved users and undertakings.

(6) The requirements of this Article, are met by Regulations 3, 4 and 16 of the Framework Regulations in conjunction with the other provisions contained in Part 2 of that Instrument.This statement however is subject to a crucial proviso, namely that ComReg cannot use the provisions of Regulations s.17 and 18 of the Access Regulations in order to render inoperable the domestic regime demanded by Article 4 (and recital 12) of the Framework Directive.

(7) In interpreting how Regulations s.17 and 18 of the Access Regulations can be lawfully used in circumstances like the present, one must have regard to the Framework Directive and its history.See V*on Colson v.Germany* (Case 14183) (1984) ECR 1891 and *Mecklenberg* (Case C-321/96) (1998) ECR 1-3809.

(8) This court has the power if necessary to grant eircom appropriate interim measures to ensure that a rule of national law does not impair the full effectiveness of community law.See *R.v.Secretary of State for Transport, ex parte, Factortame ECR* (Case (-213/89) (1990) ECR 1-2433 and *Siples SrL v.Ministerio della Finanz*e (Case C-226/99) (2001) ECR 1-277.

(9) A case not dissimilar to the present one is *IMS Health Inc.v.Commission* (Case T – 184/01) (2001) ECR II-2349 in which the President of the Court of First Instance granted a temporary suspension of the Commission's decision to impose interim measures, and did so even on an ex parte application.

(10) Under general domestic law the courts have the power to and will grant a stay on orders of say the High Court pending an appeal to the Supreme Court.*Megaleasing U.K.Limited v.Barrett* [1992] 1 I.R.219 is a good example with the rationale in that case being that in the absence of a stay, an appeal to the Supreme Court would be a moot.

(11) In exercising its powers under Regulations 17 and 18 of the Access Regulations, ComReg must, adhere to the principle of proportionality but in this case has failed to do so.See Lenaerts and Van Nuffel, Constitutional Law of the European Union 2nd Ed., (London, 2005), at 5036 ff (p.109)).

(12) There was no evidence upon which ComReg could lawfully come to the conclusion that eircom's failure created serious economic and or operational problems for Access Seekers, and finally

(13) There was no substance in the suggestion by the Regulator that this Court should refuse relief on discretionary grounds.

20. Mr.Gerard Hogan S.C.outlined the position of the Regulator as follows:-

(1) The real issue in this case is whether ComReg, acted unreasonably in invoking the emergency powers of Regulations 18(10), in respect of which there is no appeal, to compel compliance with an obligation, before the appeal period in respect of that obligation, has expired.

(2) The Regulator, who is charged with the responsibility of promoting competition in the telecommunications market, designated eircom in June, 2004, as having significant market power in the "local loop unbundling" market, and at that time imposed on the applicant various obligations, including an obligation to provide access and to negotiate in good faith with other intended operators in that market.

(3) ComReg's position is that eircom has refused to constructively engage in the process with the result that competition is hindered, in particular in respect of the broadband run out.This less than cooperative attitude on the part of the applicant, is also causing serious economic difficulties for the Access Seekers.

(4) Decision D1/05 has as its statutory basis Regulation 17 of the Access Regulations.Having formed the opinion that eircom had failed to comply with either Direction 1 or 2, of that Decision, ComReg was entitled to avail of Regulation 18(10) and issue both the First and Second enforcement directions as it had sufficient evidence that such failure was creating serious economic and/or operational difficulties for other operators.

(5) The Regulator has a very wide discretion as to the means which it employs to promote competition.See sections 10 and 12 of the Act of 2002 and Regulation 6(1) of the Access Regulations.

(6) Given the circumstances which it faced, the actions of the Regulator were not unreasonable and the court should be mindful of the limitations imposed upon it when applying the test.*Wednesbury/Stardust/O'Keeffe* See *Associated Provincial Pictures Houses Ltd.v.Wednesbury Compensation* [1948] 1 K.B.223, *The State (Keegan) v.The Stardust/O'Keeffe Victims Compensation Tribuna*l [1986] I.R.642, *Kiberd v.Mr.Justice Hamilt*on [1992] 2 I.R.257, *O'Keeffe v.An Bord Pleanála* [1993] 1 I.R.39 and *Aer Rianta Cpt v.The Commissioner for Aviation Regulation* (Unreported, High Court, O'Sullivan J.16th January, 2003).

(7) An essential point in this case, in fact almost a key point, is that, by very clear and express statutory provision, there is in fact no right of appeal against a Direction issued under Regulation 18(10) of the Access Regulations; see Regulation 3 of the Framework Regulations.This provision has not been constitutionally challenged and therefore eircom must comply with both Enforcement Directions.There is no justification for building into the existing regime a "period of grace" in which an undertaking can leisurely consider its appeal position.

(8) As regards proportionality it is said that the criteria is largely if not entirely the same as that applicable to the test of unreasonableness.If however the threshold should be higher or different than that too had been satisfied by ComReg.

(9) This interpretation of what is said to be the correct legal position does not mean that the applicant cannot have matters reviewed by an independent body.As ComReg has indicated, it proposes to apply to the High Court under Regulation 18 of the Access Regulations for an order directing compliance.That court can either accede to or refuse such application.In this way it is said that all matters of concern to eircom can be ventilated through this forum, and accordingly, a point of considerable importance, is that the resulting process, including this mechanism, provides an effective appeal procedure for any aggrieved party.Consequently Article 4(1) of the Framework Directive is satisfied *inter alia* in this way.

(10) To prevent the Regulator from invoking the powers contained in Regulation 18(10) would be to deprive him of a valuable tool in the discharge of his duty to promote competition.

(11) Even if this Court should be mindful to grant relief, it should refuse to so do on the basis of exercising its discretion.Firstly there was no appeal against the SMP Decision, secondly there is an adequate alternative remedy under Regulation 18 (12) of the Access Regulations, thirdly there is serious damage being caused to the Access Seekers and finally it is claimed that the applicant is guilty of "a egregious" delay by not taking steps to bring the matter before the Appeal Panel until the respondent had issued its second enforcement direction.

In conclusion, Mr.Hogan S.C.submitted that the applicant has failed to discharge the onus of proof which was upon it in all respects.

21. The issue upon which this Court is called upon to resolve does not in my view require any examination or evaluation of the "merits" of either party's position on the substantive dispute between them.Nor does it involve the court in substituting its own views for those of ComReg or acting in any way as an appeal body.In addition I am not being asked to set aside D1/05 or to suspend generally it or the first or second enforcement directions.Moreover it is no part of my function to make any comment on, much less to offer a view to the appeal body in how it might deal with the appeal proper or with an application under Regulation 16 of the Framework Regulations.It is also important to point out that the applicant does not seek to appeal either to the appeal panel or to this Court, the enforcement directions as without a constitutional challenge it cannot of course do so, nor does Eircom suggest that the E.U.Directives have not been adequately transposed into Irish Law.What is at stake is whether the National Regulator can use Regulation 17, aided by the use of Regulation 18(10) of the Access Regulation, to effectively render immune from appeal an undertaking's right to challenge directions given under Regulation 17, in circumstances where that right is expressly provided for in the Framework Regulations.See Regulation 3 and the definition of "Specific Regulations" in Regulation 2 of these Regulations.

Whilst sections 10 and 12 of the 2002 Act have been referred to as forming part of the statutory basis under which Decision D1/05 and the First and Second Enforcement Notices were issued, as well as Regulation 6 of the Access Regulations in relation to the latter, nevertheless the direct and immediate power under which the Decision D1/05 issued was Regulation 17 and the Enforcement Notices, Regulation 18(10), both of the Access Regulations.Therefore in my view it is unnecessary to further consider these other statutory provisions.

22. In so describing the issue, I do not believe that I have over stated the consequences which will follow if the Regulator is correct in its view.This is because the evidence from eircom is that once Decision D1/05 has been complied with, the same cannot be undone, unperformed or unravelled.Simply put its position is irreversible and irretrievable.This evidence has not been contradicted or neutralised.True, in theory the appeal could still proceed but any successfully result would be devoid of worth, would be hollow and would be meaningless.It would be empty of business or commercial value and whilst it might afford a theoretical vindication of one's position, that would not carry with it any benefit or reward.Therefore the position in this case is, I think, as stark as I have outlined.Accordingly the right, which is the opportunity of appealing and more particularly of applying for a suspension of the Decision D1/05, has at least the possibility of achieving for eircom some real tangible benefits.One can therefore see the importance of the issue from its point of view.

23. The legislative provisions, which are referred to by title at paragraph 2 above, have introduced a new regulatory regime in the telecommunications industry in this country, and presumably in many other Member States as well.One such provision, as we know, is the Framework Directive (Directive 2002/21/EC) of which recital 12, and more importantly Article 4, are relevant to this case.As is permitted by community law, one can have regard to the legislative history of a Directive when interpreting or applying its provisions.See Mecklenberg (Case C-321/96) (1998) ECR 1-3809 paragraph 28.From our point of view it is interesting to follow the various proposals which were considered before the wording of what became Article 4(1) was finalised and in particular that part thereof which states that a decision of a Regulator stands "unless the appeal body decides otherwise".

24. The Commission in its initial draft of Article 4(1) had no provision for suspension in any circumstances.That did not accord with Parliament's view which suggested that an appeal body could suspend but only for urgent and imperative reasons linked to a potential conflict with the regulatory framework.See Resolution of 1st March, 2001, (2001) OJC 277/91.In its amended proposal of 7th February, 2001, the Commission included this provision.However by the 30th November of that year the same was dropped from the Common Position of both the Commission and the Council but ultimately, again at the behest of the Parliament, the present position was decided upon in the final adopted text.

I refer to this only to indicate that the power to suspend was not, in anyway included as a matter of routine but rather resulted from a deliberate decision by the legislature, which

presumably reflected its views as to the best manner in which the tension between immediate enforcement and an effective right of appeal should be dealt with.Consequently, its incorporation came about only as a result of careful and conscious consideration and therefore, despite a regulator's view, must have been intended, where available, as having some real value to an aggrieved party.

25. Charged with the responsibility of giving effect to this Directive in domestic law, the Minister for Communications Marine and Natural Resources made the Framework Regulations (S.I.No.307 of 2003), on 21st July, 2003.Part II of this Statutory Instrument deals with appeals, the relevant provisions of which are set out at para 15 above.At the same time the Minister made the Access Regulations (S.I.No.305 of 2003) in order to give effect to the Access Directive (Directive 2002/19/EC), with once again the relevant provisions of the former being outlined at paragraph 17 of this judgment.As a result of both of these Regulations, the position insofar as the appeal process is concerned is *inter alia* as follows:-

(a) any effected party, being an undertaking or user, who is the subject of a Direction issued under Regulation 17 of the Access Regulations, is entitled to appeal that Direction pursuant to Regulation 3 of the Framework Regulations.There is no such right in respect of a Direction issued under Regulation 18 of the Access Regulations.

(b) Such a person has no right of appeal otherwise than under the Framework Regulations,

(c) An appeal must be notified to the Minister within 28 days of the decision in question and within the notification document an appellant must comprehensively set out effectively its full case.If it does not do so the appeal is invalid.

(d) The scope of what may be appealed is extremely wide and includes errors of fact, inferences from such fact, errors of law and questions of jurisdiction and procedure.In practical terms, it is difficult to think of any issue which is not so covered.

(e) The appeal is then referred by the Minister to an Appeal Panel (which is known as the "Electronic Communications Appeal Panel"), which may already be in existence or which may have to be established by the Minister.If the intention is to establish a new panel then some time will inevitably lapse between notification of the Appeal and its establishment.

(f) If there are proceedings in existence which the Minister thinks are "relevant to the subject matter of the appeal" he may decline to establish an Appeal Panel or to refer the appeal to an existing Appeal Panel, until the proceedings have been concluded.

(g) The Appeal Panel, where established and before whom there stands a valid appeal, must determine that appeal within four months if it is practicable to so do, (Regulation 12 (1) of the Framework Regulations) and finally,

(h) The Appeal Panel has power to suspend a Direction which is capable of appeal, pending its determination on the appeal proper.Otherwise any Direction of a regulator stands, notwithstanding the appeal and presumably is therefore capable of immediate enforcement.

In outlining the position as above, I have approached the case in the manner in which it was presented and therefore, in the absence of both the Minister's presence and any challenge based on it, I have disregarded the Authorisation Directive (2002/20/EC) and in particular any impact it may have on Part II of the Framework Regulations.

26. As can be seen from the aforegoing summary, an intending appellant can take up to 28 days to decide upon and to lodge his notice of appeal.This period is unqualified and is not capable of compulsory abridgement.Given the necessity of having to comprehensively outline every aspect of one's entire appeal, which in eircom's circumstances comprise 47 pages of script, one can understand why such a period has been allowed.When a valid appeal has been lodged, which must include an application to suspend, if that is one's intention, the matter is then in the hands of the Minister.Having been referred by him to an Appeal Panel, whether previously in existence or newly established, that body must then determine or outline its procedures and make arrangements to hear the suspension application (if any) under Regulation 16 and thereafter the substantive appeal.All of this, must of necessity, take time over which, apart from the permitted appeal period, an appellant has no control.Quite evidently, until these steps have been completed, an appellant cannot even make its application for a suspension order.

In establishing this regime, the Minister must have taken the view that this was the most appropriate way in which the Framework Directive and the Access Directive should be implemented into domestic law.Such regime, for the purposes of this case but subject to the issues raised herein, would appear to have created an effective appeal structure as is required by Article 4 of the Framework Directive.

27. The question which in my view then arises, is whether, if ComReg was acting lawfully in imposing the timeframe outlined in Decision, D1/05 and in issuing the follow up enforcement directions, can it be said that the above appeal process, as so operated, still affords to an aggrieved party an effective appeal mechanism, (as demanded by Article 4(1) of the Framework Directive), against a Direction issued under Regulation 17 of the Access Regulations which in itself is undoubtedly capable of being appealed? If it cannot be so said, does the court have the power to and should it override the national provision and apply Article 4(1) of this Directive in such a way as to preserve for the appellant, a meaningful opportunity of mounting its appeal and of applying for a suspension order?

This last mentioned issue however, would not arise if the correct interpretation of Regulations 17 and 18 of the Access Regulations does not permit the Regulator to operate

either in such a way so as to effectively eliminate the applicants rights under Regulation 3 and likewise under Regulation 16.

28. In its submission, which I have outlined previously, the respondent places great emphasis on that part of Regulation 3 of the Framework Regulations which prohibits any appeal against a Direction issued under Regulation 18 of the Access Regulations.In many respects it suggests that this determines the matter and that the Enforcement Directions must be complied with.It is implicit in this view that the effective loss of a right of appeal and of more importance the actual loss of any opportunity of applying for a suspension of Decision D1/05, do not impair the effectiveness of the Irish appeal process.In support of this approach it is suggested that the applicants insistence of having available an appellate body to review its opposition to Decision, D1/05, can be satisfied by the role which this court plays on an application to it under Regulation 18 of the Access Regulations.

29. I cannot agree with this proposition.In the first instance when dealing with such an application, this Court is not acting as an appellate body.Secondly, its function is to order enforcement and/or impose a financial penalty or to decline to make either order.Thirdly, the scope of its involvement in this regard must of necessity be limited, and in particular it must be noted that it is the “Enforcement Direction” with which the court is primarily and directly concerned and not with any Direction given under Regulation 17, and fourthly, this restrictive approach is all the more evident when dealing with a Direction under Regulation 18(10) as the Court, can be moved in a summary manner.Moreover, I could see no circumstances in which its involvement could even remotely resemble the breath of the enquiry which an appeal panel can undertake and which, unlike the High Court, has the specialised knowledge skill and expertise to do so.Therefore this suggested avenue in my view is simply not relevant to the availability of an effective appeal process.

30. For such a process to be effective it can hardly be doubted but that in relation to a Direction which is appealable, an appellant must at least have the opportunity of appearing before the appeal body and of making his application to it.In the circumstances of this case that must include an opportunity of applying under Regulation 16, particularly so given the irreversible consequence of complying with Decision,D1/05.That opportunity cannot be availed of, if ComReg is correct and therefore it would be permanently be lost.In this regard I do not accept the suggestion that what is demanded is information only and thus, because of this, the loss of an appeal right, if it be that, is not significant.The outcome of any such application or appeal is entirely irrelevant for this purpose though one cannot pre-suppose that eircom will necessarily be unsuccessful.The availability of a meaningless appeal ex post facto cannot satisfy the requirement of effectiveness or the need to preserve a person’s position pending appeal.The decision of the Court of First Instance in *IMS Health Inc.v.Commission of European Communities*, (Case T – 184/01), [2001] E.C.R.11/2349 is an example of this at community level and *Megaleasing U.K.Ltd.v.Barrett* [1992] 1 I.R.219 is an example in the domestic setting.

31. In the *IMS Health* decision, the Commission had imposed interim measures on the applicant company which by way of action before the Court of First Instance sought an annulment of that decision.It did so on the basis that the finding of the Commission was manifestly incompatible with community law in that, as owner of a copyright in a particular structure it was denied protection under National law.It then claimed that such a finding would cause:

> "Immediate, serious, enduring and potentially irreparable damage, in particular by materially and permanently devaluing its brick- structure- based and copy right-protected data information services to a generic commodity service indistinct from the services offered by its competitors."

32. See paragraph 16 of the judgment.At paragraph 28 the President of the Court of First Instance said:

> "Accordingly, without waiting for the observations of the Commission,…and without prejudice to the final decision to be made in the course of the present proceedings, it is necessary to order, as a protective measure in the interest of the proper administration of justice until that decision is given, the suspension of the operation of the contested decision."

33. Hence the exercise by the Court of its power, on this occasion in the interests of the administration of justice, to preserve the status quo pending appeal where immediate compliance with the Commission's decision would cause the applicant very severe damage.

34. In the *Megaleasing* case, the High Court had directed defendants to make discovery of certain matters and refused a stay on the order pending an application to the Supreme Court.On appeal against that refusal McCarthy J., giving the decision of the Court, at page 222 of the judgment said

> "If the order stands without any stay of execution, then the compliance by the defendants with its provisions will end that case as a reality.Any further proceedings in it by way of appeal or otherwise will be a moot as the determination of the notice of motion in favour of the plaintiffs determines the action.On the other hand it is said that there is an urgency in the compliance with the order because of the need to pursue the defendants and, perhaps others, so as to recover the money.Such an argument pre-supposes success on all fronts for the plaintiffs.Granting a stay of execution on the order of the High Court does no more than allow for the possibility of the appeal being successful on the procedural issue.I am quite satisfied that the interests of justice demand that such a stay should be granted and I would order accordingly."

See also *Wilson v.Church (No.2)* [1879] 12 C.H.D.454 and *Erinford Properties Ltd.v.Cheshire Co.Co*.[1974] C.H.261.

32. Accordingly, I have no doubt but that in the circumstances of this case, the Regulation 17 direction in conjunction with the respondents use of Regulation 18(10) of the Access Regulations has meant that there is no effective appeal machinery available to eircom in respect of decision D1/05.If, therefore the time limits specified in this Decision are valid, the same is inconsistent with and contrary to Article 4 of the Framework Directive.

33. To reach such a conclusion however, pre-supposes that ComReg's submission in this regard is correct.The decision in question, as previously stated, was issued under Regulation 17 of the Access Regulations, which is entirely silent as to time limits and accordingly, it does not expressly make its compliance subject to the appeal procedure.Indeed, no such Regulation has such provision.On the other hand, Regulation 18 which has been described as an emergency provision or as an accelerated procedure, has some provisions which in terms of time are more imposing than others.Under sub-paragraph (1) thereof, the Regulator has a wide discretion as to the period afforded to a person to make representations on a finding of non-compliance against him, but usually such period is not less than one month.Under sub-paragraph (4), the High Court, on an application to compel compliance "shall stipulate a reasonable period" for the defaulting party to so do.Under Regulation 18(10) however, the Regulator, when of the opinion that non-compliance has caused serious economic and/or operational problems to other operators, can demand immediate compliance.That such a provision should exist may be readily understandable and may indeed constitute a powerful tool in the hands of the Regulator with immediate consequences.However, given the absence of any appeal therefrom (as the domestic law stands), it is important to recognise that this provision should be used only in limited circumstances and then only strictly within the express wording of the sub-paragraph itself.

34. In any event a problem remains as to how (if at all) this Regulation 17 of the Access Regulations can be harmoniously integrated in the overall Regulatory Framework and in particular as to how it can operate in conformity with the demands of Article 4 (1) of the Framework Directive and with Part II of the 2003 Framework Regulations.

35. In attempting to resolve this matter, the court is obliged to interpret both the Framework Regulations and the Access Regulations, which as previously noted were passed in order to incorporate the aforesaid Directives into national law, in a manner, so far as is possible, in conformity with the Directives and in particular in this case with the Framework Directive.This is a well established principle and is set out with clarity in the case of *Sabine von Colson and Kamann v.Land Nordrhein – Westfale*n [1984] E.C.R.1891.Paragraph 26 of the judgment of the European Court of Justice reads:

> "However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts.It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order

to implement Directive number 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189." (Now Article 249).

Therefore national courts are required to have regard to the purpose of the directive so as to ensure that its objectives are fully effective within the national system, if that is interpretively achievable.

36. There is no doubt but that the SMP decision of June, 2004 was not appealed, though capable of appeal, and therefore Eircom are bound to comply with any extant obligations thereunder.As matters stood in January, 2005 however the Regulator felt that it was necessary, in further implementation of the general obligations of the SMP decision, to issue directions under Regulation 17.That Regulation can be used "for the purposes of further specifying requirements" to be complied with relating to obligations which already exist.It is therefore clear that Decision D1/05 imposed requirements, which in some way were in addition to and/or different from those which had previously existed under the SMP decision.These were therefore new requirements and accordingly were capable of affecting the position of Eircom.That this is so, is quite clear from the wording of the decision itself and in particular from paragraph 3.1 thereof.Whilst therefore the underlining obligations may still rest in the SMP decision, it is not that decision which is directly in issue in this case.Rather it is the further implementation steps which are contained in Decision D1/05 and it is that which is sought to be appealed and not Decision D8/04.

37. This underlining purpose of Regulation 17, namely the imposition of further requirements, must be contrasted with the purpose of Regulation 18 which is not concerned with the creation of added obligations.The heading of the Regulation confirms this when it speaks of "Enforcement – Compliance with obligations".From the body of the Regulation itself this conclusion is also evident.Its provisions are to enforce obligations already imposed where there has been a default.A safeguard has been built in by enabling the Regulator to refer to the High Court.It is therefore perhaps understandable why, apart from the High Court, a neglectful party has no right to appeal to the Appeal Panel under Regulation 3 of the Framework Regulations.This must be based on the assumption that such party had previously a right of appeal in respect of the underlying obligation.With such an opportunity available, I cannot see, in the statutory regime with which I am dealing, any infirmity with the structures of the appeal process and, accordingly I firmly believe that the same accord with the Framework Directive.

38. Consequently it is my view that this is the correct manner of interpreting the Framework Regulations and the Access Regulations.This means that where a "direction" is capable of appeal under Regulation 3 of the Framework Regulations, the National Regulator cannot, in any given case unilaterally curtail or eliminate the subject's right of appeal, including his right to apply for a suspension order.If it was otherwise the respondent, by the use of such a direction, supported if necessary by enforcement proceedings under Regulation 18,

could arrogate to itself the power to determine who should or as the case may be who should not be entitled to appeal.This would simply obliterate the effectiveness of the Regulations and would, in addition to the above matters, take from the independence of the Appeal Panel, which, as a factor in itself, would create serious compliance difficulty with Article 4 (1) of the Framework Directive.In essence if there is no access to the right there is effectively no right.

39. I therefore believe that read and operated in this way, the domestic process, as outlined in this case, respects and is in accordance with our obligations under both the Framework and the Access Directives.In addition, and this factor must not be overlooked, fair procedures and constitutional justice would demand reasonable access to a right and an opportunity of reasonably exercising that right.

40. With the greatest of respect to the submission made on behalf of ComReg, I do not see how the *Wednesbury – Stardust – O'Keeffe* principles, could determine this case, nor do I see how the approach of Blayney J.in *Kiberd and Anor.v.The Honourable Mr.Justice Liam Hamilton* [1992] 2 I.R.257 applies.In that case the learned judge was interpreting a statutory provision which enabled a tribunal of inquiry to "make such orders as it considers necessary for the purposes of its functions".The phrase "as it considers necessary" was classified by the court as being equivalent to the phrase – when the tribunal "is of opinion".In that context, in order to determine whether a given order was within the section, Blayney J.posed a number of questions which in his view would solve the matter.One was whether the tribunal acted reasonably.In my opinion, the issue in the present case is not whether ComReg, in the exercise of some discretion, acted reasonably or unreasonably.Rather the point is one upholding a statutory right.Lets assume that the Regulator had the greatest justification for loosing patience with Eircom for what it possibly sees as a series of frustrating defensive actions which have had quite a negative impact on getting real movement in this market, and thus by reason of this felt, that its action in issuing Decision D1/05 could be fully justified as reasonable, could that description or view legally legitimise the decision, if as I have found, the same had the effect of rendering inoperable the exercise by eircom of a vested statutory right? In my opinion it could not and therefore I believe that this type of test or approach is not the most appropriate or correct way of determining the central issue in this case.

41. I am therefore of the opinion that, having interpreted the relevant provisions in the manner which I have, the operation by ComReg of Regulation 17, whether in conjunction with Regulation 18 (10) of the Framework Regulations or otherwise, is inconsistent with the above construction and consequently is in my view unlawful.This must therefore inevitably mean that Decision D1/05 cannot impose obligations on eircom which deprive that company of its right to appeal and of its right to seek a suspension order under Regulation 16 of the Framework Directions.

42. In light of the above interpretation there is no necessity for this Court to consider what powers it may have in the event of a finding that the domestic provisions did not create "an effective appeal mechanism" as required by Article 4 of the Framework Directive.If

however that issue should have arisen it appears to me that national courts have extensive powers to ensure that community law is applied and fully respected within Member States.In the *Queen v.Secretary of State for Transport, ex parte: Factortame Ltd.and Ors.,* [1990] E.C.R.1-2433, the Court at paragraphs 20 and 21 of its judgment said the following:

> "20. The court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, community rules from having full force and effect are incompatible with those requirements, which are the very essence of community law…
>
> 21. It must be added that the full effectiveness of community law would be just as much impaired if a rule of national law could prevent a Court seized of a dispute governed by community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under community law.It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."

This is but one of several and repeated statements from the European Court of Justice emphasising the obligations and duties which are on a domestic court when there is a potential conflict or inconsistency between community law and a national provision.See also *Zuckerfabrik Suderdithmarschen v.Hauptzollamt Itzehoe* [1991] E.C.R.1-415 and *Siples SrL v.Ministrio della Finanze* [2001] E.C.R.1- 277.

43. In addition to the above issues there were several others matters canvassed during the course of this case but a resolution of such matters is not in my view necessary.These however have included:-

(a) the issue of proportionality;

(b) the suggestion that since any direction given under or obligation imposed by Regulation 6 of the Access Regulations is appealable, the reference to that regulation as forming part of the statutory basis for the issue of both the First and Second enforcement notices, invalidate such notices in their entirety;

(c) the complaint that ComReg did not lawfully consider the representations which eircom made under Regulation 18 (11) of the Access Regulations in respect of both of these said notices and

(d) the lawfulness of ComReg's opinion, expressed in each of the Enforcement Directions, that eircom's alleged failure was creating serious economic and operational problems for other operators.

44. In having decided this case in the manner in which I have, it would I think be entirely inappropriate to refuse relief on discretionary grounds.See the submission of ComReg in this regard which is set out at paragraph 20 (11) of this judgment.Particularly so given eircom's declared position that if its application to suspend is unsuccessful before the Appeal Panel, it will then comply with decision D1/05.

45. Finally could I refer to a letter dated 1st March, 2005, in which the Minister conveyed his view that he would not establish an Appeal Panel to hear eircom's appeal pending the determination of these proceedings.Whilst I am circumscribed in what I might say in the absence of the Minister, it is however difficult to readily see how these proceedings or this judgment could support such a view, as eircom's position has never been to seek to prevent the establishment of such a panel.On the contrary, it makes the point that the whole purpose of these proceedings is to underpin the integrity of the appeal process.Perhaps therefore greater consideration could have been given to the establishment of such a panel.

46. In conclusion the court will issue a declaration that decision D1/05 and the follow on enforcement procedures cannot be operated in such a manner as would impair or curtail the right of eircom to appeal to the Appeal Panel in accordance with Part II of the 2003 Framework Regulations.