

**THE HIGH COURT**

**COMMERICAL**

**[2022] IEHC 165**

**[RECORD NO: 2022/12 MCA]**

**IN THE MATTER OF AN APPEAL PURSUANT TO THE EUROPEAN  
COMMUNITIES  
(ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (FRAMEWORK)  
REGULATIONS 2011 (S.I. NO. 333 OF 2011)**

**AND IN THE MATTER OF THE COMMUNICATIONS REGULATION ACTS  
2002-2011**

**BETWEEN**

**EIRCOM LIMITED**

**APPLICANT**

**AND**

**COMMISSION FOR COMMUNICATIONS REGULATION**

**RESPONDENT**

**AND**

**SKY IRELAND LIMITED**

**VODAFONE IRELAND LIMITED**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Denis McDonald delivered orally on 4<sup>th</sup> March, 2022.**

1. This is my ruling on the Appellant's application for a stay pursuant to Regulation 7 (2) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (which I will refer to as "the Framework Regulations") staying the operation and implementation of the decision of the Respondent, number D11/2021, pending the determination of the Appellant's appeal by the Court.

2. I will refer to the Appellant as "Eircom". I will refer to the Respondent as "ComReg" and I will refer to the Notice Parties as "Sky" and "Vodafone"}. Each of ComReg, Sky and Vodafone opposed the application. I will deal with the relevant facts insofar as it is necessary to do so in more

detail later. It is sufficient at this point to note that, in these proceedings, Eircom appeals against Decision D11/2021 made by ComReg on 17th December 2021 and published on 20th December, 2021. There is no dispute that this decision is a decision of the regulator within the meaning of the Framework Regulations.

3. In very broad terms, the decision sets new lower maximum prices that Eircom can charge for its broadband products in two regulated markets - namely, the Wholesale Local Access Market and the Wholesale Central Access Market. Again, in very broad terms, the decision focuses primarily on fibre to the cabinet services - or FTTC in short. This is to be contrasted with fibre to the home, or FTTH services, where a broadband connection to the retail customer is delivered solely by fibre without the use of any copper wiring. In contrast, FTTC is a mix of fibre, with the ultimate connection to the retail customer delivered through copper wiring. Both Sky and Vodafone are wholesale customers of Eircom in FTTC services in these regulated markets. On the evidence before the Court, they are the leading customers of these wholesale access services.

4. On 14th January, 2022, Eircom issued an appeal by way of an originating Notice of Motion seeking orders pursuant to Regulation 6(2)(a) of the Framework Regulations setting aside the decision and, in the alternative, seeking an order pursuant to Regulation 6(2)(b) of the Framework Regulations remitting the decision to ComReg to be reconsidered in accordance with such directions as the Court may give. The appeal is signaled in the papers before the Court at this stage to be vigorously contested both by ComReg and by the Notice Parties.

5. I need next to describe some aspects of the regulatory regime under which the present application is made. It is to be found in the Framework Regulations, which give effect in the State to Directive 2002/21 on a common framework for electronic communications networks and services, which I will call the "Framework Directive". It will be necessary in due course to consider the provisions of the Directive in more detail, but first I should draw attention to the relevant provisions of the Regulations.

6. In the first place, Regulation 4 makes clear that an undertaking affected by a decision of ComReg has a right of appeal to the High Court against that decision and Mr. Sreenan in the course of his submissions on behalf of Eircom has emphasised that the right of appeal is untrammelled in any way. Regulation 4(1) provides that *"A user who or undertaking that is affected by a decision of the regulator may appeal to the High Court against the decision"* and paragraph 2 provides that *"Any appeal...must be lodged within 28 days after the user or undertaking has been notified of the*

*decision*". No issue arises in relation to paragraph 2 in this case.

7. Secondly, Regulation 6 identifies the nature of the appeal to the High Court and the powers of the High Court with respect to appeals. Again, Mr. Sreenan has emphasised the breadth of the powers available to the High Court on such an appeal. It is not limited to appeals on points of law. However, the precise parameters of the scope of the appeal is not a matter to be decided today. At a later point in these proceedings, it will be necessary to consider the parameters by reference to the guidance given by Clarke J. (as he then was) in *Fitzgibbon v. Law Society* [2015] 1 I.R. 516. But paragraph 1 of Regulation 6 provides as follows: "*The High Court shall hear and determine the appeal referred to in Regulation 4(1) and may make such orders as it considers appropriate.*" And then in paragraph (2), it says:

*"(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."*

8. Of more immediate relevance for present purposes is Regulation 7 which deals with two things. First of all, it deals with the status of a decision of ComReg pending the appeal and Regulation 7(1) provides that:

*"Subject to this Regulation, lodging an appeal with the High Court from a decision of the Regulator does not of itself affect the operation of the decision or prevent action from being taken to implement the decision."*

9. The second matter which Regulation 7 deals with is the power of the Court to grant a stay on a decision of ComReg pending appeal and that is addressed in two paragraphs of Regulation 7. Firstly, Regulation 7(2) provides:

*"If an appeal is lodged with the High Court from a decision of the Regulator, the High Court or a Judge of the High Court may make such order staying or otherwise affecting the operation or implementation of the decision of the Regulator, or a part of that decision, as the High Court or Judge of the High Court considers appropriate for the purpose of securing*

*the effectiveness of the hearing and determination of the appeal."*

10. And then paragraph 4 provides:

*"An order in force under paragraph (2)...*

*(a) is subject to such conditions as are specified in the order..."*

11. That is all I think I need to quote from paragraph 4. The language used in paragraphs (2) and (4) does not, it has to be said, give much by way of guidance in relation to the test to be applied by the Court, save and insofar as paragraph (2) provides that the Court *may* make an order, which *prima facie* suggests a discretion on the part of the Court. And paragraph (2) further suggests that the purpose of the order is to secure the effectiveness of the hearing and determination of the appeal. In addition, paragraph (4) identifies that the Court can make an order subject to conditions. The fact that the paragraph is silent as to the types of conditions that the Court may impose is further suggestive of a broad discretion being given to the Court.

12. Remarkably, although I was referred to a number of Irish authorities, including *Okunade v. Minister for Justice & Ors* [2012] 3 I.R. 152, *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42 and *Dowling v. Minister for Finance* [2013] 4 I.R. 576, there is no Irish authority directly in point which identifies the test to be applied in an application for a stay under Regulation 7 (2). There was a significant level of disagreement between the parties as to the parameters of the test to be applied under Regulation 7 (2). Eircom sought, at least initially, to rely on Australian authority based on similar language in Australian legislation dealing with appeals from administrative tribunals. In particular, Eircom sought to rely on observations made by a Master of the Australian Capital Territory Court, Master Harper, in a ruling made by him in *Westfield Limited v. Commissioner for Land Planning and Efkar Pty Limited & Ors* [2003] ACTSC 80. In particular, Eircom relied on the summary of the principles of page 5 of Master Harper's ruling, which I do not propose to quote from in full, save to note that Eircom relied, in particular, on the fifth principle listed by Master Harper to the effect that:

*"assuming that there is a reasonably arguable case on the appeal, a stay would normally be granted to avoid an appeal being rendered nugatory or ineffective."*

13. It is fair to say that in opening this application, counsel for Eircom placed strong reliance on this aspect of the ruling. However, as counsel for Sky and Vodafone established, *Westfield* is not fully representative of the Australian approach and counsel referred to a 2018 decision of a judge,

Thawley J. in *Minister for Home Affairs v. Zadeh* [2018] FCA 1452, where Thawley J. identified six principles. Again, I do not think it is necessary to go through them in detail in this ruling, but I note, in particular, the sixth principle mentioned by him, which was absent from those identified by Master Harper in the *Westfield* case, namely:

*"Considerations such as the balance of convenience and the competing rights of the parties and the effect of granting or not granting the stay on non-parties are to be weighed in the balance."*

14. On that basis, I do not believe that *Westfield* can be taken to be a complete statement of the Australian position, but I do not propose to spend time on the Australian authorities. I do not believe that it is appropriate that the Court would look to Australia for guidance in respect of a provision of Irish law which was enacted against the backdrop of EU legislation, namely the Framework Directive. In this context, it is important to keep in mind the well-established principle derived from the decisions of the European Court in Case C-14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* EU:C:1984:153 and Case C-106/89 *Marleasing v. Comercial Internacional de Alimentación* EU:C:1990:395, that national courts are obliged, in interpreting national implementing provisions implementing a Directive, to do so in light of the wording and purpose of the Directive in order to achieve the results pursued by the Directive. Those principles have been applied on numerous occasions by courts in the State, including by the Supreme Court in *Nathan v. Bailey Gibson Ltd* [1998] 2 I.R. 162 and also more recently in judicial review proceedings involving the same parties as these proceedings by McKechnie J. in 2005 in *Eircom v. Commission for Communications Regulation* [2007] 1 I.R. 1, at paragraph 35. Having regard to those principles, it is therefore necessary to consider the relevant provisions of the Framework Directive as amended. It may be helpful first to consider the provisions of the Framework Directive as it existed prior to the enactment of the Framework Regulations – that is to say Directive 2002/21/EC as amended. And recital 12 to that Directive provides insofar as relevant, as follows:

*"Any party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved. This body may be a court."*

15. It's also necessary to have regard to Article 4, which deals with the right of appeal, and Article 4(1), in particular, which provides as follows:

*"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 the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law."*

**16.** It will be seen, therefore, that the provisions of Regulation 7 reflect the terms of Article 4 of the Framework Directive. The reference to national law in the final sentence of Article 4 may suggest that the test to be applied in determining whether to grant a stay is purely a matter of national law, which is the approach which has been taken, for example, by the Court under the Remedies Regulations in procurement cases in determining whether or not an automatic stay should be lifted. However, I do not think that one could safely take that approach in the context of the Framework Directive. I have formed that view in circumstances where the Framework Directive was amended in 2009 before the enactment of the Framework Regulations in 2011 by the Better Regulation Directive, Directive 2009/140/EC of 25th November, 2009. It seems to me that Article 4 of the Framework Directive must now be read in the context of the purpose identified in the Better Regulation Directive insofar as it identified the aim of standardising the substantive approach to be taken on applications for a stay by the relevant appeal bodies in each of the Member States.

**17.** There are two recitals in the Better Regulation Directive which are relevant in this context. The first is recital 14, which provides:

*"In order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy. Interim measures suspending the effect of the decision of a national regulator authority should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires."*

**18.** I pause there because I think it is clear that the intention is that the applicant for a stay must establish that, without a stay, serious and irreparable harm will ensue. And, also, crucially the recital refers to a balancing of interests. This means that the Court is not solely concerned with the

position of the applicant for a stay. I then turn to recital 15, which is in the following terms:

*"There has been a wide divergence in the manner in which appeal bodies have applied interim measures to suspend the decisions of the national regulatory authorities. In order to achieve greater consistency of approach common standards should be applied in line with Community case-law."*

**19.** I draw attention, in particular, to that recital because it seems to me to make clear that a common standard should be applied by the relevant appeal bodies of the Member States, in this case, the High Court in Ireland.

**20.** Now, subsequent to the enactment of the 2011 Regulations, the 2002 Framework Directive (as amended) was repealed and there is now in place since 2018 a Recast Directive. The Recast Directive does not alter the language of Article 4, albeit that the provision dealing with appeals is now to be found in Article 31. But it also expressly incorporates into the Framework Directive the two recitals or substantially the two recitals that I have previously referred to from the Better Regulation Directive, namely Recitals 14 and 15. And before looking at the recitals which are now contained in the Recast Framework Directive, I should identify that, according to Article 124 of the Recast Directive, Member States were required to take the necessary measures to transpose the Recast Directive by 21st December 2020. Based on the papers before the Court, Ireland does not appear to have done that yet. I do not know whether, insofar as the appeal process is concerned, Ireland considered that it is already in compliance with the requirements of the Recast Regulation. In any event, it is clear from the decision of the European Court in the *Marleasing* case, at paragraph 8, that, in applying national law, whether adopted before or after the transposition date of a directive, the national court is required to interpret the national law in light of the wording and purpose of the Directive in order to achieve the result intended by the Directive unless that would be *contra legem*.

**21.** In light of that principle, it seems to me that I am required to take the provisions of the Recast Directive into account and there are two recitals in the Directive which are directly relevant to the approach to be taken to an application for a stay on the decision of a national regulator, namely recitals 77 and 78. As I mentioned a moment ago, these recitals largely replicate what was said in the Better Regulation Directive. For that reason, it is unnecessary to quote recital 77. It is, I think, in identical terms to recital 14 of the Better Regulation Directive. But recital 78 is noteworthy because not only does it replicate in substance recital 15 to the Better Regulation Directive but it now includes express reference to the case law of the Court of Justice. The opening words of Recital 78 provides

as follows:

*"There has been a wide divergence in the manner in which appeal bodies have applied interim measures to suspend the decisions of the national regulatory or other competent authorities. In order to achieve greater consistency of approach common standards should be applied..."*

22. And this is the new language: "...in line with the case law of the Court of Justice." So that seems to put beyond doubt that in considering an application to suspend the decision of ComReg, I should have regard to the case law of the Court of Justice. Even if I am wrong in having regard to the Recast Framework Directive, I do not think that this ultimately makes any difference in substance. The effect of Recital 78 is the same, in substance, as Recital 14 to the Better Regulation Directive, which amended the Framework Directive, although it did not use the words "*in line with the case law of the Court of Justice.*" The language used was to the same effect, in my view. It follows from the approach taken in the Directives that, in considering this application for a stay, I should apply the approach taken by Court of Justice. It is, I believe, very clear that I should not have regard to a case law of a non-Member State such as Australia.

23. The classic authority on the approach taken by the Court of Justice is its decision in 1991 in Case C-143/88 and C-92/89 *Zuckerfabrik Jülich & Ors* EU:C:1991:65. That was a reference by the Finanzgericht in Hamburg in which the German Court sought guidance in relation to the approach to be taken when an application is made to suspend the operation of an administrative measure based on national implementing legislation until a substantive decision could be taken. It is necessary to quote from a fairly extensive extract from the judgment of the Court, running from paragraph 23 to paragraph 33. At paragraph 23, the Court said:

*"It must first of all be noted that interim measures suspending enforcement of a contested measure may be adopted only if the factual and legal circumstances relied on by the applicants are such as to persuade the national court that serious doubts exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the granting of suspensory measures."*

24. And, if I might just pause there for a moment, I will consider that issue as to whether the standard to be applied – i.e. the serious doubts standard – is a significantly higher standard than the traditional standard applied in Ireland of a fair question to be tried or arguable grounds. But returning



to the judgment, at paragraph 24 the Court continued in the following terms:

*"24 It should next be pointed out that suspension of enforcement must retain the character of an interim measure. The national court to which the application for interim relief is made may therefore grant a suspension only until such time as the Court has delivered its ruling on the question of validity. Consequently, it is for the national court, should the question not yet have been referred to the Court of Justice, to refer that question itself, setting out the reasons for which it believes that the regulation must be held to be invalid.*

*25 As regards the other conditions concerning the suspension of enforcement of administrative measures, it must be observed that the rules of procedure of the Courts are determined by national law and that those conditions differ according to the national law governing them, which may jeopardize the uniform application of Community law.*

*26 Such uniform application is a fundamental requirement of the Community legal order. It therefore follows that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned."*

25. And I pause there also because I believe it is clear from these paragraphs that although the procedure to be followed is a matter for national law, the conditions for the grant of relief must be uniform in all Member States. In the next paragraph, namely paragraph 27, the Court went on to say that the national court should take the same approach as the Court of Justice does in relation to the equivalent application made to it. And then, in the next number of paragraphs, the Court set out the approach to be taken, and I begin at paragraph 28 where the Court said:

*"28 In this regard, the Court has consistently held that measures suspending the operation of a contested act may be granted only in the event of urgency, in other words, if it is necessary for them to be adopted and to take effect before the decision on the substance of a case, in order to avoid serious and irreparable damage to the party seeking them.*

*29 With regard to the question of urgency, it should be pointed out that damage invoked by the applicant must be liable to materialize before the Court of Justice has been able to rule on the validity of the contested Community measure. With regard to the nature of the damage,*

*purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid.*

*30 It should also be added that a national court called upon to apply, within the limits of its jurisdiction, the provisions of Community law is under an obligation to ensure that full effect is given to Community law and, consequently, where there is doubt as to the validity of Community regulations, to take account of the interest of the Community, namely that such regulations should not be set aside without proper guarantees."*

26. I should make clear that the reference to the Community in that paragraph would now be a reference to the Union, the European Union. Then, going on to paragraphs 31 to 32:

*"31 In order to comply with that obligation, a national court seised of an application for suspension must first examine whether the Community measure in question would be deprived of all effectiveness if not immediately implemented.*

*32 If suspension of enforcement is liable to involve a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security."*

27. Then, in the next paragraph, paragraph 33, the Court answered the specific question posed by the German Court in the following terms insofar as relevant:

*"33 It follows from the foregoing that the reply to the second part of the first question put to the Court by the Finanzgericht Hamburg must be that suspension of enforcement of a national measure adopted in implementation of a Community regulation may be granted by a national court only:*

*(i) if that court entertains serious doubts as to the validity of the Community measure...*

*(ii) if there is urgency and a threat of serious and irreparable damage to the applicant;*

*(iii) and if the national court takes due account of the Community's interests."*

**28.** It may be noted that, in *Zuckerfabrik*, the Court of Justice did not refer to a balancing of interests save insofar as it referred to the need to take EU interests into account. However, it is clear both from the express terms of the recitals to the Better Regulation Directive and the Recast Framework Directive, and from subsequent case law of the Court, that a balancing of interests is an inherent part of the test. In the course of the hearing, I was referred in the latter context to the decision of the President of the General Court in Case T-44/98 R II *Emesa Sugar (Free Zone) NV v. Commission of the European Communities* EU:T:1999:90 in 1999. I do not believe that is necessary to quote from that case, but it illustrates the balancing of interests approach.

**29.** There is one further relevant authority to which I should refer, and that is the decision of the General Court (as it now is) in Joined Cases T-207/01 R and T-195/01 R *Government of Gibraltar v. Commission* EU:T:2001:291. In that case, the Government of Gibraltar sought interim measures to restrain a decision in relation to state aid, and it contended that this would have serious repercussions for Gibraltar's reputation as a finance centre and would significantly damage the financial services market in Gibraltar. But at paragraph 101, the Court said:

*"In so far as the applicant bases its arguments on the anticipated reaction of the financial circles concerned, the damage invoked remains, for the time being, entirely hypothetical in so far as it is based on the occurrence of future and uncertain events. Such damage cannot justify granting the interim measures requested."*

**30.** It is, therefore, clear that there is an obligation on the party seeking a stay to establish the likelihood that it will suffer damage and, as *Zuckerfabrik* shows, that damage must be irreparable or irreversible to use the language of the Court in that case. Before leaving the European case law, I should record that I was also referred by counsel for ComReg to a decision of the President of the Court of Justice in Case C-111/88 R *Greece v. Commission* EU:C:1990:159 where Greece sought to suspend the operation of a Commission decision to withdraw export subsidies in respect of the export of Cretan citrons. The President took the view that, because the value of the citron exports was less than one quarter of a percent of the value of the total volume of Greek exports, that was too trifling to amount to serious and irreparable harm. I am not persuaded, however, that this authority can necessarily be applied in the same way or precisely in the same way to a party in the position of Eircom, which is claiming a direct loss to it, albeit that this loss is relatively minor in relative terms of its overall financial position. In the *Greece* case, the loss of the export credits was suffered by the farmers in Crete, not by Greece itself. The only damage claimed by Greece was in respect of the

impact the decision might have on the stability of its balance of payments and it was in those particular circumstances that the impact was minuscule. Here, while the amounts at stake are, relatively speaking, minor, they are in absolute terms substantial and, if Eircom was to lose the present application, it would, subject to an undertaking offered by Sky and Vodafone (to which I will return at a later point in this ruling) suffer permanent and irreversible loss of revenue.

**31.** So bearing the European case law which I have discussed in mind, it is next necessary to extract the relevant principles by reference to which the application for a stay falls to be considered. Based on the language of the Court in *Zuckerfabrik*, the first requirement is framed in terms that the applicant for a stay must raise serious doubts as to the validity of the decision under challenge. On its face, that might appear to be a higher standard than the arguable ground standard adopted in Ireland in *Okunade*, but for the purposes of this application, I will proceed on the basis that this element of the test has been satisfied. I do so in circumstances where both ComReg and the Notice Parties have been prepared, solely for the purposes of this application, to concede that there are arguable grounds of appeal, and in circumstances where it was accepted on all sides in the course of the hearing that the establishment of arguable grounds was sufficient. Moreover, the Court in *Zuckerfabrik* did not spell out what it meant by serious doubts, and it may well be that there is no difference in substance between the two standards. In my view, it is telling that, in the last sentence of paragraph 23, the Court expressed itself in terms that suggest that what the Court must be satisfied of is that there is a possibility of a finding of invalidity. That standard seems to me to be substantially the same as the arguable grounds standard applied in *Okunade*.

**32.** This is also supported by a consideration of the judgment of the Court in Case C-441/17 R *Commission v. Poland* EU:C:2017:877. In that regard, the Court said at paragraph 54:

*"...the Court recalls that the procedure for interim relief is not designed to establish the truth of complex facts that are very much in dispute. The Court hearing an application for interim measures does not have the means necessary in order to carry out such examinations and in numerous instances it would be difficult for it to manage to do so in good time."*

**33.** That does seem to me to support the view that the test is less onerous than the language of "*serious doubt*" might apply, and is not different in substance to the arguable grounds test applied in a domestic context. Now, before leaving this first requirement aside, I should, at this point, express my gratitude to ComReg and the Notice Parties for their good sense in conceding that arguable grounds exist for the purposes of this application. Had they not done so, that would have significantly

extended both the hearing time and the judgment writing time, and I have no doubt that I would not have been in a position to give a ruling by today.

34. Moving on then to the second requirement, the second requirement is that the Applicant must show that a stay is required as a matter of urgency in the sense that it is necessary that a stay be put in place before a decision on the merits in order to avoid serious and irreversible damage to the party seeking the stay. That seems to me to be a step which the Applicant must establish before any balancing of interests is considered. To that extent, it is different, for example, to the approach now taken in the domestic context under the principles set out in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2020] 2 I.R. 1. In addition, having regard to the decision in the *Gibraltar* case and also on the basis of *Commission v. Poland*, it appears to be clear that an Applicant seeking a stay cannot surmount this hurdle purely on the basis of hypothetical damage based on the occurrence of future uncertain events. And I should refer in this context to paragraph 55 of the judgment in *Commission v. Poland*, where the Court said: "*The serious and irreparable damage whose likely occurrence must be proven...*" I do not think it is necessary to finish that sentence, but I draw attention to those words, "*serious and irreparable damage whose likely occurrence must be proven.*"

35. To that extent, the requirement under EU law is not unlike the requirement under national law that emerges from the decision in *Curust Financial Services Ltd v Loewe-Lack-Werk* [1994] 1 I.R. 450 that an applicant for an injunction should establish, as a matter of probability, that, without the grant of an injunction, it will be exposed to irreparable harm in the period between then and the final determination of the proceedings.

36. The third aspect of the principles to be applied that emerges from *Zuckerfabrik* and the other European Court decisions is that it is necessary to consider where the balance of interests lies. The recitals to the Better Regulation Directive and now the Recast Framework Directive identify that a stay will only be granted where the balance of interest so requires. The recitals do not expressly identify what interests are to be taken into account, but it seems to me to be self-evident that the interests of the applicant for relief must be weighed against the interests of all those who would be adversely affected by a stay. In the present case, that would obviously extend to Sky and Vodafone and other wholesale customers of Eircom in the relevant markets, and also the ultimate retail customers in those relevant markets. But it also seems to me that, by analogy with the interests of the EU identified in *Zuckerfabrik*, it is necessary to also include in the balancing exercise the interests of the community at large and, in particular, the public interest in the orderly implementation of the

regulatory regime. This also seems to me to follow from the way in which the recitals and the European case law contemplate that the jurisdiction to grant a stay will only be engaged where an applicant can demonstrate that, without it, the applicant will be exposed to serious and irreparable harm. The imposition of such an onerous threshold implies that there is an interest in allowing the immediate implementation of the regulatory decision, and this is also reflected in the default position in the Directive and in the Regulations, that pending the outcome of the appeal, the decision of the regulator shall stand unless a stay is granted. On that basis, the approach to be taken is not dissimilar to that taken in a domestic context under the *Okunade* principles. I should add, however, that, in my view, that is not the only public interest in play.

**37.** I was referred in this context to Case C-321/15 *ArcelorMittal Rodange and Schifflange* EU:C:2017:179 but it is clear from paragraphs 20 and 24 of that judgment that one of the purposes of Article 4 of the Framework Directive is to ensure that an effective appeal mechanism exists and that this is an expression of the principle enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, that of effective judicial protection. So, when it comes to the weighing and balancing of interests, the effectiveness of the appeal mechanism is an important element to be kept in mind. If the refusal of the grant of a stay were to render the appeal ineffective, that is a factor that might very well weigh heavily in the balance.

**38.** But, to return to the principles that emerge from the European case law, it is, fourthly, clear from the *Zuckerfabrik* decision that, as a condition of the grant of a stay, the Court can require the applicant to provide a guarantee or undertaking. Again, that is very similar to the position under our domestic law. Accordingly, the existence or not of such an undertaking would be a very relevant factor in any balancing of interests.

**39.** So, having set out what I believe are the relevant elements of the test to be applied, it is now necessary to consider the application of the test to the particular circumstances of the present case. Before I consider that in detail, I should advert to the suggestion made by counsel for Eircom that, having regard to the approach taken by the Supreme Court in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] 1 I.R. 63, neither ComReg nor the Notice Parties are entitled to call into question the cogency of Eircom's evidence in the absence of cross-examination. I do not believe that this submission is sound. *RAS Medical* was concerned with the substantive hearing of judicial review proceedings, not with an interlocutory application. The decision of the Supreme Court in *IBB Internet Services v. Motorola* [2013] IESC 53 shows that, ordinarily, cross-examination at an

interlocutory stage is not appropriate. That case was concerned with an application for security for costs which was heard on affidavit, where there were conflicts of fact on the affidavits before the Court, and the position to be adopted was explained by Clarke J. (as he then was) as follows at paragraph 7.4:

*"However, there are sound reasons of principle and policy as to why, save in exceptional circumstances, courts should not contemplate cross-examination in interlocutory matters. It is important, in that context, to note that the wording of s. 390 which has already been analysed in some detail, is designed to meet a situation which is, in any event, at least partly hypothetical and subject to estimate. While not ruling out the possibility that, in an exceptional case, some level of limited cross-examination might be necessary, nonetheless it seems to me to be important to emphasise that, ordinarily, a court hearing an application under s. 390 should simply do the best it can on the basis of all of the affidavit evidence which the parties choose to put before it. The Court is not making a final decision determining rights and obligations. Rather the court is making an, admittedly important, interlocutory order which, while it of course may have an effect on the run of the proceedings (including, in some cases, perhaps, stifling the proceedings) nonetheless is just that, an interlocutory order. A court should, in those circumstances, in my view, be very slow to entertain an application for cross-examination. Rather the court should take into account all of the evidence and reach a conclusion..."*

40. And he goes on then to mention the particular conclusion that has to be reached in the context of an application under section 390 of the Companies Act. But the same principle undoubtedly applies in an application of the kind before me.

41. I must, therefore, do the best I can on the basis of the affidavits presented. And I must, for example, reach a conclusion as to whether Eircom has established on the evidence that it will be exposed to serious and irreparable harm if a stay is not granted. Since that is an issue that I am required to consider and since the onus of proof lies on Eircom in this regard, I believe that ComReg and the Notice Parties must be entitled to comment adversely on the quality of the evidence put forward by Eircom. In my view, they do not have to seek to cross-examine in order to do so. That said, the fact that cross-examination is not available at this interlocutory stage means that they cannot readily undermine evidence which is plausible on its face.

42. In circumstances where I do not need to consider the serious doubts or arguable grounds issue, the first question which arises is whether Eircom has shown that it will be exposed to serious

and irreparable harm if the stay is not granted. Eircom has sought to rely on a number of factors in this context. The first and most obvious one is that Eircom will be faced with significantly reduced revenue in the period between now and the determination of the appeal, which, subject to an undertaking which was offered by Sky and Vodafone on Day 2 of the hearing, will be irrecoverable. I will deal with that undertaking presently. At this point, I just want to focus on Eircom's immediate exposure.

43. It is clear from the evidence before the Court that the losses to Eircom on an annualised basis would be in excess of a range running from €4.5 million to €7 million per year. Curiously, those figures do not emerge from Eircom's own evidence, but from the evidence put before the Court by Vodafone and Sky. However, the evidence is before the Court and there is no reason to doubt it. Eircom will not be able to recover damages from ComReg or the Notice Parties in the event that a stay is refused and it subsequently wins its appeal. On that basis, the refusal of the stay would result in irrecoverable loss to Eircom, which in absolute terms is significant in scale.

44. As I mentioned earlier, counsel for ComReg sought to suggest that the scale of losses to which Eircom is exposed is trivial when compared to Eircom's overall financial position and overall revenues, and he also suggested that this is the reason Eircom did not address those losses in its evidence. He asked why was the Court not told that the losses were less than €10 million annually. He said that the reason is obvious, because if one takes the loss of revenue of under €10 million per annum and one sets it against annual revenues of €1.2 billion per annum, it is manifest that these financial losses would not be remotely close to being serious from Eircom's perspective, and he argued that they just cannot satisfy the test in terms of the harm being serious and irreparable. He referred in this context to what Mr. Leavy on behalf of ComReg said in paragraph 70 of his affidavit:

*"According to financial information published on its website, Eir Group's overall revenue for the year ended 30 June 2021 was €1.2 billion. Its fixed line EBITDA was €515 million and Eircom made dividend payments to shareholders of €450 million in December 2020 (after a sale of its mobile mast infrastructure) and of €80 million in September 2019."*

45. And he referred in that context to unaudited results for the twelve months to 30th June 2021 for Eircom Holdings Ireland Limited dated 3rd September 2021 from which those figures from derived. As I noted earlier, counsel for ComReg also relied on the *Greece* case in this context. However, as I have previously indicated, I am not persuaded that the *Greece* case can be applied to a situation of a party who is directly exposed to financial loss as a consequence of a regulatory decision



such as Eircom here. By any measure, a loss of somewhat more than a range of between €4.5 million to €7 million is significant. Moreover, as Eircom's counsel demonstrated, when one looks at the financial statements of Eircom, the relevant column dealing with its wholesale broadband access shows that its return for the year to 30th June 2020 was €53.418 million, and a loss of revenue of more than €4.5 million or €7 million in respect of that line of business could not be said to be anything other than significant. That said, a loss of revenue that will be suffered is not existential in scale. Having regard to Eircom's revenues, it could not be said to be existential at all relative to Eircom's overall financial position, and that is a matter that may well be relevant in the context of the balance of interests to which I will return presently.

46. It is also said both by ComReg and the Notice Parties that there is, in any event, no substance to the case made by Eircom that it will suffer damage in circumstances where Decision D11/2021 was made on the basis of two previous decisions by ComReg which have never been appealed by Eircom, namely, Decision D10/2018 and D11/2018, under which Eircom was found to have significant market power, or SMP in short. These decisions imposed an obligation on Eircom that prices for the relevant wholesale access would be cost-orientated, and also for this purpose determined the allowable rate of return on investment that Eircom should be entitled to obtain. This factor is known as the weighted average cost of capital, or WACC in short. It is contended by ComReg that, at least for those FTTC products that are to be subject to reductions in price, the reductions in price imposed by Decision D11/2021 are entirely as a result of the incorporation of the unchallenged reduction of the WACC in 2018 from 8.18% to 5.56%. Mr. Leavy has illustrated this in a table in his affidavit. It was also strongly urged by the Notice Parties that Eircom's rate of return on capital is of the order of 11%, which is substantially in excess of the rate of return previously set by ComReg of 5.61%. However, the difficulty is that, at this interlocutory stage of the proceedings, I cannot determine whether or not these contentions on the part of ComReg and the Notice Parties are correct in the sense that I do not know what the outcome might be if Eircom succeeds in its appeal and, in particular, what impact that will have on the wholesale prices it is entitled to charge. For example, on the basis of the case it makes, Eircom may succeed in establishing that it should not be subject to price control at all.

47. As Mr. Leavy said in paragraph 7 of his affidavit, the decision under challenge involved a complex cost modelling exercise and it is impossible for me to prejudge what impacts the various grounds of appeal might have on the outcome of that process, were Eircom to be successful or even partly successful in its appeal. I am very conscious in this context that Eircom contends that ComReg

should have undertaken an updated market analysis and that, had such an analysis taken place, a finding might well have been made that Eircom no longer has significant market power. For these reasons, I believe that I have to conclude that, on the evidence before the Court, Eircom has established at least one category of serious and irreparable loss if a stay is not granted.

48. Given that it will be necessary to weigh all irreparable harm to Eircom when it comes to considering the balance of interests, I should also at this point determine whether Eircom has established that it is probable that it will be exposed to any other form of serious and irreparable harm if a stay is not granted.

49. First of all, for this purpose, Eircom makes the case that the refusal of a stay will lead to harm to the rollout of FTTH infrastructure. This is addressed in paragraphs 29 to 40 of Mr. Hartog's grounding affidavit, where he identifies a number of concerns about the potential impact of lower prices charged for FTTC on the rollout of FTTH infrastructure both by Eircom and its competitors in the event that Eircom is forced to reduce its prices in the regulated markets pending the determination of the appeal. There is a similar narrative in Mr. Maunder's report at paragraph 24 and following paragraphs. But neither Mr. Hartog nor Mr. Maunder mention something which seems to me to be highly material. This is addressed by Mr. Leavy in paragraph 89 of his affidavit where he says:

*"In January 2021, following the publication of the ANM Decision, Eircom announced that it had agreed a deal with InfraVia to establish a joint venture partnership for its wholesale fibre broadband network which, according to Eircom's announcement, will provide investment that will allow fibre roll-out to accelerate by 25% to 250,000 homes a year from next year. This demonstrates that the ANM decision has not materially disincentivised investment in FTTH."*

50. And he exhibits a copy of that announcement. Now, while he referred to January 2021, it is clear from the announcement that this actually happened in January 2022. And, in that announcement, it was announced that: *"The partnership will allow fibre roll-out to accelerate by 25% to 250,000 homes a year from next year."* And it also states that on Friday, 28th January:

*"Eir, Ireland's leading telecommunications provider, has agreed a deal with InfraVia to establish a joint venture partnership for its wholesale fibre broadband network that will help to accelerate the roll-out of high-speed internet across Ireland."*

*Investment provided by this joint venture will allow eir to increase the pace of expansion of its fibre broadband network, and it is estimated that 200,000 homes will be passed in 2022,*

*increasing to 250,000 homes in 2023."*

**51.** So, here is Eircom, about a month after publication of Decision D11/21 and two weeks after Eircom filed its appeal to this Court, telling the world in no uncertain terms that it has agreed a deal which will allow Eircom to increase the pace of expansion of its fibre broadband by 25% to 250,000 from 2023, and that it will also have significant connection to homes in 2022. In my view, it is impossible to square that with what is said in Mr. Hartog's affidavit and Mr. Maunder's report, neither of whom mention the agreement described by Mr. Leavy. In saying that, I am very conscious that there has been no cross-examination and I am also very conscious that the timetable was so tight that a replying affidavit from Eircom was not built into the timetable. But all of that said, it is incomprehensible, in my view, that Eircom would not have adverted to this announcement in its own affidavit and, if it was capable of explanation, provided that explanation in the affidavit. It is not something that should have been required to be the subject of cross-examination. It should have been explained, in my view. The announcement seems to me to render wholly implausible the case made by Eircom on this issue. Paragraph 51 of Mr. Carpenter's affidavit should also be noted. He refers there to an announcement by Virgin Media in the wake of the decision in December to invest €200 million in the upgrade of its relevant network.

**52.** Furthermore, the case made by Eircom is really constructed on a series of hypotheses as to what might happen in the future. Thus, even if the announcement did not exist, it would be open to question whether Eircom could be said to have established that its hypotheses are likely to eventuate. In addition to this, it seems to me that the plausibility of this element of Eircom's concerns is very comprehensively addressed – and I have to say demolished – in paragraphs 34 to 38 of the report of Ms. Helen Weeds, who has provided a report on behalf of ComReg. In particular, she identifies in her report that any investment decisions by operators such as Eircom are much more likely to be affected by the uncertainty stemming from the appeal than the level of regulated wholesale prices between now and the determination of the appeal.

**53.** The next element of irreparable damage alleged by Eircom is harm to Eircom's competitive position on the market. This is addressed in paragraphs 22 to 28 of Mr. Hartog's affidavit. It has to be said that the evidence here is put at a very high level. In paragraph 23, it is asserted that, if Eircom is required to adhere to the pricing structures fixed by ComReg, this will constrain its ability to price competitively in urban unregulated markets. But no detail is given as to why Eircom is constrained in this way. Moreover, as noted earlier, the evidence before the Court suggests that the

prices currently paid to Eircom significantly exceed its costs. I would need a lot more by way of detail in order to understand how Eircom can be said to be constrained in this way. Without supporting detail, it seems to me that paragraph 23 is no more than an assertion.

**54.** A similar issue arises in relation to paragraph 25, where Mr. Hartog says that Eircom has a contractual obligation to a large number of large wholesale customers in unregulated markets not to charge them any more than the regulated market price. But nothing has been exhibited. This is important in light of the very clear statement in paragraph 82 of Mr. Leavy's affidavit that ComReg (who one would expect would know this) is unaware of such benchmarking provision in Eircom's contracts. And, while Mr. Sreenan, on his feet, has put forward a series of reasons as to why it would have been problematic to exhibit this material, none of those explanations is given on affidavit. In addition, if there were any confidentiality or competition law concerns, there are many ways in which to treat a confidential exhibit, including limiting its circulation to the Court and to the lawyers involved. I have to say that in the absence of appropriate detail, I cannot accept that Eircom has established that losses of this kind are likely sufficient to satisfy the *Zuckerfabrik* test.

**55.** A similar issues also arises in relation to what is said in paragraph 28 of the affidavit, where it is asserted in very broad brush terms that wholesale customers would be incentivised to contract for as much of their future needs prior to determination of the appeal as possible. Again, this would need to be addressed in considerably more detail before I could determine that there is a likelihood of such happening.

**56.** For completeness, I should also deal with paragraph 26 of Mr. Hartog's affidavit where he asserts that "*...as a matter of commercial practice, regulated prices serve as a ceiling and that commercial prices in unregulated markets 'can be' invariably lower than these regulated prices,*" and he asserts that a reduction in a regulated price "*...spills over into pricing in unregulated markets.*" I am left in the same position in relation to these assertions. I have no detail to support these assertions. In the absence of that detail, I cannot find that this element of claimed harm is likely to occur if a stay is not granted. I should explain in this context that if, for example, a witness in the witness box had given evidence at this level of generality, I would immediately have demanded that the witness explain the basis for the evidence. Without any supporting detail, it seems to me that these paragraphs in the affidavit are, in truth, no more than assertion. Given the nature of the reliefs sought by Eircom, it seems to me that Eircom was required to go further than these high level assertions.

**57.** The final element of harm alleged is in respect of administrative costs and burden. This

is addressed in paragraph 41 and following paragraphs of Mr. Hartog's affidavit. The harm here is not quantified, so it is impossible to assess where, on the scale of seriousness, this element might be said to fall. I accept, however, that it would undoubtedly give rise to a cost to Eircom which could not be recovered in the event that a stay is refused and Eircom subsequently succeeds in its appeal. To that extent, the cost and administrative burden is irreparable. However, in the absence of evidence of the cost involved, it is difficult to envisage that this would be of sufficient seriousness to pass the *Zuckerfabrik* test. While I have not accepted ComReg's argument based on the *Greece* case insofar as Eircom's loss of direct revenue is concerned, the *Zuckerfabrik* case requires an applicant to establish that the losses that will be likely to be suffered are serious in scale, and I do not think that the administrative costs fall into this category, at least when considered in isolation. Those costs are nonetheless an element that will require to be borne in mind in the balancing exercise, which is the issue to which I next turn.

**58.** There are, as I have previously indicated, a number of interests to be weighed in the balance. First, weighing in favour of a stay is the interest of Eircom in relation to the revenue which it is entitled to receive for the access to its network. As previously noted, that is somewhere in excess of a range running from €4.5 million to €7 million on an annualised basis. In the absence of some appropriate mechanism to ameliorate this loss of revenue, those losses will be irrecoverable if a stay is not granted. In addition, there are the unquantified administrative costs and the burden that arises in having to update Eircom's systems, perhaps twice, once to give effect to the decision and also, in the event that the appeal succeeds, to restore the prices to their pre-decision level.

**59.** Secondly, also weighing in favour of a stay is the desirability of ensuring the appeal will be effective. This consideration is linked with the first factor that I have identified. If Eircom is unable to recover the revenues it will lose under the decision pending a hearing, that calls into question whether the appeal mechanism will be effective in the event that a stay is not granted or some other mechanism found to ameliorate the loss to which Eircom will be exposed.

**60.** On the other side of the equation, there are the interests of Vodafone and Sky, who, in the absence of any undertaking, will, if a stay is refused, have to continue to pay overly inflated prices in the event that the appeal does not succeed. In the absence of an undertaking, they would have no means of recovering their losses if a stay is granted. But Sky and Vodafone are not the only customers of Eircom who are affected by a stay on the decision. They happen to be the only customers who have sought to be heard in these proceedings and are the two largest affected customers. Nonetheless,

the interests of all of the wholesale customers in the relevant markets must be borne in mind and weighed in the balance.

**61.** Next, on this side of the equation is the interest of the ultimate consumer in having lower prices, something that one would think should follow from the effect of a decision in issue if no stay is granted. However, for reasons which I will come to in a moment, I do not think that there is any realistic prospect of a reduction in retail prices between now and the determination of the appeal in the event that a stay is refused.

**62.** Also, on this side of the equation is the public interest in ensuring that effect is given to regulatory decisions of this kind. This is reflected in the *Zuckerfabrik* case, where the Court made clear that account should be taken of the interest of the EU. In a domestic context such as this, I think the equivalent interest to be taken into account is the public interest in respecting the decisions of regulatory bodies, whose decisions are to be treated as *prima facie* valid, notwithstanding the existence of an appeal. It seems to me that the approach taken in *Okunade* provides helpful guidance here. While I appreciate that *Okunade* involved judicial review proceedings, the observations of Clarke J. in that case were made in respect of the balancing exercise to be conducted on an application for a stay, and the exercise is very similar to that envisaged in the European case law. In that case, Clarke J. said at paragraph 92:

*"The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases."*

**63.** Then, further down the same paragraph, he continued:

*"An order or measure which is at least prima facie valid (even if arguable grounds are put*

*forward for suggesting invalidity) should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience."*

**64.** All of that said, it is also important to emphasise that this interest will not necessarily trump all others, and Clarke J. made that clear in paragraph 94 of his judgment, where he said:

*"That is not to say, however, that there may not also be weighty factors on the other side. It is necessary for the court to assess the extent to which, in a practical way, there is a real risk of injustice to an applicant for judicial review in being forced to comply with a challenged measure in circumstances where it may ultimately be found that the relevant measure is unlawful."*

Accordingly, it is an interest which is to be weighed in the balance. Where the ultimate balance lies is always a case-specific exercise.

**65.** Having identified the interests that require to be balanced, it is next necessary to consider how they should be weighed one against the other. In doing so, it will also be necessary to have regard to undertakings which were offered both by Eircom and the Notice Parties during the course of the hearing. But, before considering those undertakings, it may be worthwhile considering the outcome of the balancing exercise in their absence. In their absence, it seems to me that the interests of Eircom in avoiding the loss of revenue and the related interest in securing the effectiveness of the appeal are equally balanced, on the other side of the scales, by the interests of the Notice Parties and other wholesale customers in avoiding any stay. Depending on the outcome, both Eircom and the Notice Parties stand to lose very substantial sums of money, which everyone agrees will be irrecoverable. Accordingly, their respective concerns are equally balanced.

**66.** That would leave three other interests in play: firstly, Eircom's irrecoverable administrative costs; secondly, the interests of the ultimate consumer; and, thirdly, the public interest in the enforcement of regulatory decisions of a competent regulator. On the basis of the evidence before the Court, I do not believe that much weight can be assigned to consumer interests. While ordinarily that would be a very important factor and while it has been emphasised by counsel for ComReg, it seems to me to be uncertain on the evidence that the benefit of the price reduction would be passed on to consumers during the period between now and determination of the appeal. I believe that counsel for Eircom was correct in this regard to point to the rather guarded way in which the issue was addressed by Mr. Carpenter in his affidavit on behalf of Sky, where he said in paragraph

112 "[w]hilst an appeal is pending, it is possible that wholesale customers might be cautious about revising their prices." And he did go on to say something further, but it is just that part of the paragraph that I highlight. In the light of that evidence, it is questionable whether consumers would get the benefit of the reduction between now and the determination of the appeal.

67. So, the real weighing exercise would arise as between the public interest and the enforcement of the regulatory decision as against the administrative cost and inconvenience to Eircom in having to change its system to the new price regime between now and the conclusion of the appeal, and the possibility, if it wins the appeal, to change it back again. In my view, if they were the only considerations, I believe that the balance would plainly tilt in favour of the public interest in upholding the regulatory regime. While Eircom would be exposed to some level of irreparable harm and while it has not been quantified, it seems to me to be unlikely to be of such a scale as to justify the suspension of a regulatory decision of this kind. In fact, I cannot imagine that Eircom would have had the temerity to seek a stay had that been the only element of loss at issue.

68. I now have to consider the effect of the undertakings on the balance of interests. The first undertaking is that offered by Eircom at the outset of the hearing. The terms of that undertaking extend not only to the Notice Parties, but also all wholesale customers. The undertaking was in the following terms, and I quote:

*"...if a stay was to be granted and if Eircom was unsuccessful in the substantive appeal, that Eircom would undertake to reimburse wholesale customers for the difference between the existing prices in the market under Decision D11/18 and the prices that would have been charged under Decision D11/21 in the interim period between 1st March 2022 and the judgment in the substantive appeal. And just for the avoidance of any doubt, that reimbursement relates to the payments received during that interim period."*

69. Both ComReg and the Notice Parties have complained about the late point at which this undertaking was given, but the fact is that it has been given and, in my view, the undertaking has the potential to significantly affect the balance of interests. If it were the only undertaking in place, the Court would be faced with serious and irreparable damage to Eircom on one side of the scales in terms of the loss of revenue it would suffer in the period between now and the determination of the appeal, as against the public interest in upholding the regulatory regime and the decision of the regulator on the other side of the scale. The wholesale customers, however, would no longer feature in the equation. That would, undoubtedly, be a difficult weighing exercise, particularly in



circumstances where a significant issue would arise as to whether Eircom, in the absence of a stay, would be deprived of an effective appeal.

70. But, there is now an additional factor that must be weighed in the balance, and that is the undertaking which was offered by Sky and Vodafone on the afternoon of Day 2 of the hearing. The undertaking was offered in the following terms:

*"So, Judge, Sky and Vodafone respectively are each prepared to give undertakings to the Court to account to Eircom for the difference or such portion of the difference between the decision price and the 2018 prices as the trial court should direct. And that's an undertaking which they're prepared to give for a period from 1st March 2022 to 31st October 2022. But if the Court thinks it desirable that the undertaking ought to be extended for a further four weeks to end of November to allow the Court ample time to deliver any judgment, then the Notice Parties would be also prepared to so undertake, Judge."*

71. There are a number of issues of concern about the way in which that undertaking is framed, both by reference to the words *"such portion of the difference"* and by reference to the time limited nature of the undertaking. However, my understanding of what is intended is that the Notice Parties are prepared to offer an undertaking to repay to Eircom the difference between the decision price and the pre-decision price and, if lower than the pre-decision price, the price to which Eircom may be found to be entitled following determination of the appeal in respect of wholesale prices paid by the Notice Parties in respect of the period between 1st March 2022 and, at the very least, the date of the hearing of the appeal on the basis that Eircom does nothing in the meantime which would jeopardise the hearing date which has now been fixed for July 2022. I will proceed to consider the balance of interests on that basis and will return at the conclusion of this ruling to the time limited nature of the undertaking as outlined by counsel for the Notice Parties.

72. When the Notice Parties' undertaking as understood by me is added to the scales, that seems to me to substantially ameliorate the irrecoverable loss to which Eircom is exposed in the event that a stay is refused. It does not wholly address the loss because: (a) the Notice Parties do not represent 100% of the relevant wholesale customers, and (b) it does not address the administrative inconvenience and cost. But, in circumstances where there is no dispute between the parties that Sky and Vodafone represent the lion's share of the relevant wholesale customers, it secures for Eircom a very substantial level of protection. Insofar as Eircom remains exposed in respect of the remaining wholesale customers and in respect of the administrative burden and costs, that exposure to

irrecoverable losses falls to be weighed against the public interest in upholding the decision of ComReg as regulator. There is no doubt that favouring the latter interest will leave Eircom exposed to loss which is irrecoverable. However, there are a number of factors that seem to me to weigh against the grant of a stay when all interests are taken into account. In the first place, Eircom will still have very significant protection as a consequence of the undertaking by the Notice Parties, who, as I have said, represent the lion's share of the relevant markets.

73. Secondly, having regard to their status as Eircom's principal customers in these markets, it could not plausibly be said that Eircom's appeal will be rendered ineffective. On the contrary, the appeal, if successful, will have a substantial benefit for Eircom. Thirdly, a very early trial date has now been set for July, so the period between now and the determination of the appeal will be remarkably short. In this context, I have no doubt that, just as I have sought to give a relatively prompt ruling on this application, the trial judge will likewise seek to determine the appeal as soon as reasonably practicable. Fourthly, on the evidence before the Court, certainly on the basis of the evidence currently before the Court, it seems likely that the prices set by Decision D11/2021 will not require Eircom to provide access below cost. Fifthly, while I rejected the suggestion that the *Greece* case could be used to defeat Eircom on the serious harm issue, the fact that the revenue from the wholesale customers not covered by the undertaking is only a relatively small proportion of Eircom's overall revenue, it does seem to me that the relatively insignificant size of that affected revenues is also a factor that weighs in favour of a refusal of the stay.

74. Sixthly and very importantly, as the European law and European cases which underpin the 2011 Regulations illustrate, the importance afforded to similar public interests, such as those identified in *Okunade*, and the importance of the public interest at play here is described in some detail at paragraphs 9 to 18 of Mr. Leavy's affidavit. Now, it should be said that I am not sure these should really have appeared in an affidavit; they are more by way of legal submission. I should also say that while I have all of these paragraphs in mind, I do not propose to quote those paragraphs in full, but a number of important matters are highlighted in the paragraphs and I take these really as legal submission, rather than as evidence. The first is that:

*"At a general level, ComReg is tasked with...ensuring compliance by undertakings with their 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."*

That is a statutory obligation.

75. Secondly:

*"ComReg is required to apply objective, transparent, non-discriminatory and proportionate regulatory principles in pursuit of the objectives assigned to it by statute. These include promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods, safeguarding competition to the benefit of consumers, and promoting, where appropriate, infrastructure-based competition."*

76. Thirdly, as Mr. Leavy says:

*"...all of ComReg's objectives are not always aligned and the evidence on which ComReg must rely is not always conclusive. Therefore, ComReg has to exercise its regulatory expertise, skill and judgement, based on the best available evidence and taking into account policy considerations, to determine when and how to exercise its regulatory powers."*

77. Fourthly:

*"Under Regulation 6, ComReg, acting in pursuit of its general objectives, is tasked with encouraging and, where appropriate, ensuring adequate access by one service provider to another in such a way as to promote efficiency, sustainable competition, efficient investment and innovation and to give the maximum benefit to end-users."*

78. Fifthly:

*"If ComReg has determined that there are failings in given markets that require it to intervene to achieve the objectives it is obliged by legislation to pursue, and has made a Decision to address these failings, it is important that the Decision has effect. If ComReg's decisions are stayed, then the failings that it has identified will persist during the period that the stay is in force and end users will suffer the detriment during the period of the stay."*

79. And, finally, Mr. Leavy also refers to an issue which I have previously highlighted, namely: *"Regulation 7 of the Framework Regulations provides that lodging an appeal with the High Court from a decision of the Regulator does not of itself affect the operation of the decision or prevent action from being taken to implement it."*

80. These seem to me to be very important considerations, which support a conclusion that

significant weight should be given to the public interest in upholding the Decision. In my view, given the extent to which the undertaking of the Notice Parties will preserve to a very substantial extent Eircom's decision pending the hearing of the appeal, and given the relatively short time that should elapse between now and a final determination of the appeal, I believe that the balance tilts in favour of the refusal of the application for a stay.

**81.** But before concluding this ruling, I must return to the time-limited nature of the undertaking on offer from the Notice Parties. In my view, any undertaking would have to extend up to the determination of the appeal by the Court. It is wholly wrong for a party to seek to put a gun to the Court's head by saying that an undertaking would only be until the end of October in respect of a hearing that will take place at the end of July. In light of this concern and in light of the need for the Notice Parties to confirm that I have correctly understood the ambit of the undertaking on their part, I will list the matter for 3:00p.m. on Monday on the basis that the terms of the undertaking are circulated by the Notice Parties by e-mail to the Registrar and the other parties to the proceedings not later than twelve noon on Monday next.

### **Postscript**

**82.** When the proceedings were listed before the Court on Wednesday 9 March, 2022, counsel for the Notice Parties confirmed that the Notice Parties were prepared to furnish undertakings to the Court in the following terms:-

*“The Notice Parties are each prepared to offer an undertaking to repay to Eircom the difference between the decision price and the pre decision price and, if lower than the pre decision price, the price to which Eircom may be found to be entitled following determination of the appeal in respect of wholesale prices paid by the Notice Parties.*

*This undertaking applies to all wholesale charges the subject of Decision D11/21 respectively incurred by them from 01 March 2022 until the determination of the Appeal.”*

**83.** I considered that this undertaking was in accordance with the form of undertaking identified in paragraphs 70 to 71 above. I noted and received the undertaking in these terms and I confirmed that I was refusing to grant the application for a stay.

