

Universal service in telecommunications: guidance for determining when it represents an unfair burden and the adoption of a cost-sharing system is appropriate

The Court of Justice of the European Union has ruled once again on the financing of the universal telecommunications service: there are no reasons for mobile telephony operators to be excluded from the cost-sharing system; the decision based on market competition lies with national regulatory authorities.

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1. Introduction

The Judgment of the Court of Justice of the European Union (First Chamber) of 19 September 2024, Case C-273/23, refers for a preliminary ruling a question on the mechanism for financing the universal service for telecommunications provided for in Article 5 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommuni-

cations with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)¹ and Article 13 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)² - which repeals the former directive - applicable to the facts in dispute.

¹ *Official Journal of the European Union* 1997, L 199, p. 32.

² *Official Journal of the European Union* 2002, L 108, p. 51.

It should be noted that Directive (EU) 2002/22 was repealed by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code³), with effect from 21 December 2020. This new directive establishes a system of financing the costs of universal service almost identical to that of its predecessors (Arts. 89 and 90), so that the interpretative rules established in the referred judgment are equally applicable in the new legislative context.

2. Origin of the conflict: must mobile telephony service operators contribute to the financing of the net cost of providing the universal telecommunications service?

The dispute arises from a decision of the Italian National Regulatory Authority (NRA) which found, inter alia, that, during the period from 2002 to 2009, the provision of the universal service represented an unfair net cost for Telecom Italia, with the result that the sharing mechanism provided for by the Italian legislation was applicable and that, therefore, the operators covered by that legislation, including mobile telephone operators, had an obligation to contribute to the financing of that cost.

A number of mobile telephony operators considered that their participation in the mechanism for financing the net cost of the universal service was subject to the condition that there was a competitive relationship, i.e. a relationship of substitutability between fixed and mobile telephony services.

For their part, the NRA and Telecom Italia submit that neither European Union law nor Italian law makes the participation of mobile telephone operators in the mechanism for financing the net cost of the universal service subject to that condition. In their view, such operators, like fixed telephony operators, are authorised to provide electronic communications services and are therefore required to participate in that mechanism.

3. Question referred for a preliminary ruling

The national court referred the following question to the Court of Justice of the European Union for a preliminary ruling:

Must Directive [97/33], and in particular Article 5 thereof, and Directive [2002/22], and in particular Article 13, applicable *ratione temporis*, and the principles of transparency, *least market distortion*, non-discrimination and proportionality, be interpreted as meaning that:

- a) it is permissible for national legislation to impose by law the extension to mobile telephone operators of obligations to contribute to the financing of unfair burdens arising from the provision of the same universal service, without making such cases subject to verification by the NRA that there is a competitive relationship or substitutability between the

³ *Official Journal of the European Union* 2018, L 321, p. 36.

contributing operators and the designated operator for the provision of that service within the same relevant market under competition law;

- b) NRAs are permitted, in addition to or as an alternative to the criterion of substitutability between fixed and mobile network services, for the purposes of verifying the unfair nature of the burden, to use other criteria - and if so, which ones - to establish a financing obligation on mobile [telephone] operators?

4. Rules on the financing mechanism for the universal telecommunications service in the European Union

- 1st *The adoption of a system for sharing the cost of the universal service between operators is conditional on the calculation of the cost and its classification as an unfair or undue burden.*

The Member States of the European Union shall implement a mechanism for financing the net cost of universal service obligations if a twofold condition is met: a) that the cost of the provision be calculated and b) that the burden which the provision of that service represents for the designated undertaking be found to be unfair or

undue on the basis of that calculation (paragraph 63 of the judgment). Not every net cost of universal service provision automatically gives rise to a right to compensation (paragraph 69 of the judgment).

- 2nd *The cost sharing system for the provision of the universal service can only be extended to fixed telephony networks and services.*

This has been declared by the Court of Justice of the European Union in several rulings⁴ and is also established in Article 4 of Directive 2002/22, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November⁵.

- 3rd *Member States must quantify the cost of providing the universal service and, where appropriate, decide whether the burden is unfair in accordance with the criteria established by the States themselves.*

The EU legislature has not intended to prescribe the conditions in which the NRAs are to consider that the provision of universal service may represent an unfair or undue burden. It is for the NRAs to decide whether an undertaking designated to provide a universal service is in fact subject to an unfair or undue burden; in this case, it is for the Member States to regulate the condi-

⁴ Judgment of the Court of 11 June 2015, *Base Company and Mobistar*, C-1/14, EU:C:2015:378, paragraphs 37 and 43, and in paragraphs 64 and 65 of the reviewed judgment.

⁵ *Official Journal of the European Union* 2009, L 337, p. 11.

tions of compensation on account of that cost⁶.

4th *It is also up to the Member States to define the circle of participants in the mechanism for sharing the net cost of universal service obligations, subject to compliance with a number of requirements (paragraph 89).*

The market share of the undertaking cannot be analysed in isolation in order to determine whether the burden is unfair

5th *The principles of objectivity, transparency, non-discrimination and proportionality, as well as the need to minimise market distortions and the safeguarding of the public interest, limit the discretion of the Member States when establishing the mechanism for financing the net cost of the universal service (paragraphs 68, 81 and 83 of the judgment).*

The judgment itself refers to the concept of *least market distortion*, which requires that contributions to the financing of the net cost of universal service obligations should be recovered ‘in a way that as far as possible minimises the impact of the financial burden falling on end users, for example

by spreading contributions as widely as possible’ (paragraph 87).

6th *An unfair or undue burden is a burden which is excessive having regard to the circumstances of the undertaking required to provide the universal service.*

An unfair or undue burden, which must be found to exist by the NRA before any compensation is paid, is a burden which, for each undertaking concerned, is excessive in view of the undertaking’s ability to bear it, account being taken of all the undertaking’s own characteristics,

in particular the quality of its equipment, its economic and financial situation and its market share⁷.

7th *The market share of the undertaking cannot be analysed in isolation in order to determine whether the burden is unfair.*

The mere finding of facts relating to the market share of that provider, considered in isolation, does not allow any useful conclusions to be drawn in the absence of a comparison with the market shares held by its competitors. Those conclusions may vary according to the number of competitors present in the market, the links which may exist between them, or even the different

⁶ Judgment of the Court of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 38, and paragraphs 67 and 81 of the reviewed judgment.

⁷ Judgment of the Court of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 39, and paragraph 69 of the reviewed judgment.

sectors of the relevant market in which those competitors are present⁸.

8th In order to implement a cost sharing system, the competent NRA is required to take account of the situation of the universal service provider relative to that of its competitors in the relevant market.

The assessment of the competitive situation in the relevant market forms an integral part of the conditions for the application of the mechanism for financing the net cost of universal service provision⁹. Taking into account the situation of a universal service provider relative to that of its competitors, the NRA shall determine whether the net cost of its universal service obligations constitutes, by reason of the resulting distortions of competition in the relevant market to the detriment of that provider, an unfair burden on the latter¹⁰.

9th The cost of providing universal service may constitute an unfair burden, even if the operator remains profitable, despite bearing the net cost of universal service.

The NRA must assess the repercussions of this net cost on the provider's ability to compete with other operators present in an evolving market. It cannot be ruled out that that burden prevents, or makes more difficult or more complicated, the financing of investments in new technologies or related markets, investments which its competitors might possibly be in a position to make and which are therefore likely to procure significant competitive advantages for those competitors¹¹.

10th Substitutability between different telecommunications services, and in particular between fixed and mobile telephony services, can be examined to determine the competitive environment, but the NRA must take into account all the competitive constraints to which that provider is subject, including those which are less effective and immediate than demand substitution¹².

11th The participation of mobile telecommunications service operators in the mechanism for sharing the net cost of universal service obligations must not be subject to substitutability between

⁸ Judgment of the Court of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 43, and paragraph 71 of the reviewed judgment.

⁹ Judgment of the Court of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraphs 44 and 47, and paragraphs 72 and 81 of the reviewed judgment.

¹⁰ Judgment of the Court of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 50, and paragraph 75 of the reviewed judgment.

¹¹ Judgment of the Court of 10 November 2022, *Eircom*, C-494/21, EU:C:2022:867, paragraph 49, and paragraph 74 of the reviewed judgment.

¹² The reviewed judgment of 19 September 2024, paragraphs 77, 78, 81 and 94.

fixed and mobile telephony services (paragraphs 90 and 92 of the judgment).

Similarly, national legislation which does not make the participation of mobile telecommunications service operators in the mechanism for sharing the net cost of universal service obligations between providers of electronic communications networks and services subject to the existence of a certain degree of substitutability between fixed telephony services and mobile telephony services is not precluded by EU law, provided that that legislation complies with, inter alia, the principles of transparency, non-discrimination, proportionality, objectivity and minimisation of the impact of the financial burden falling on end users (paragraph 96 of the judgment).

12th *The wording of the provisions of the directives applied does not lead to the conclusion that the legislature intended to exclude certain providers of electronic communications networks and services, in particular mobile telecommunications service operators, from the mechanism for sharing the net cost of universal service obligations.*

The use of expressions such as ‘organisations operating public telecommu-

nications networks and/or publicly available voice telephony services’ and ‘providers of electronic communications networks and services’ means that certain types of operators, in particular mobile telecommunications operators, are not excluded (paragraphs 85 and 86 of the judgment).

5. Application to the specific case

The result of this analysis (competitive pressure exerted by mobile telephony services on fixed telephony services) carried out in the specific case in question can be extrapolated to other markets: although fixed and mobile telephony services were not perfectly substitutable and therefore not a single market, mobile telephony services nevertheless exerted increasing competitive pressure on fixed telephony services in the form of loss of volumes and revenues on the part of fixed telephone operators, in particular when customers decided to use only their mobile phone or to use their mobile phone and to retain the fixed network service, but to use the mobile telephone service also from their homes.

This, together with the examination of other elements of the competitive context, led to a finding that providers of mobile telephone networks and services may also be required to contribute to the cost of providing universal service in telecommunications.