Assessment of eir's 2010-2015 Universal Service Fund Applications: Submissions to Consultations 17/73, 17/81, 17/95, 17/109 and 18/36

NON-CONFIDENTIAL

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1. ALTO

alto

alternative operators in the communications market

Consultations: Assessments of eir's 2010 – 2011; 2011 – 2012; 2012 – 2013; 2013 – 2014; 2014 – 2015 Universal Service Fund Applications - Refs: 17/73; 17/81; 17/95; 17/109; & 18/36.

Submission By ALTO

Date: June 11th 2018

ALTO is pleased to respond to the Consultations: Assessments of eir's 2010 – 2011; 2011 – 2012; 2012 – 2013; 2013 – 2014; 2014 – 2015 Universal Service Fund Applications - Refs: 17/73; 17/81; 17/95; 17/109; & 18/36.

ALTO welcomes this opportunity to comment on this timely and important set of consultation papers.

ALTO notes that ComReg permitted industry to respond to each of the Assessment Consultations on a collective basis, six weeks in time from the publication of the 2014 – 2015 Universal Service Fund Application publication Ref. 18/36. ALTO responds on a collective basis.

Preliminary Remarks

ALTO notes and welcomes the fact that considerable effort has been expended in analysing the various eir USO funding claims.

It is highly undesirable to have taken over five years to reach this stage of the process with over €51.16m of claims being processed together, as a result creating a considerable risk and an unacceptable level of uncertainly for all operators. Nevertheless, we agree with ComReg's conclusions that there should be no funding awarded to eir.

ComReg must ensure that this level of delay and inertia on any regulatory subject is not permitted to occur again.

ALTO has already made various representations to Government seeking additional resources for ComReg in all areas of its work and we anticipate that if the resourcing issues are adequately addressed, there should be no reason for any future delays.

ALTO notes that the 2015 – 2016 period funding application is pending now. We seek that ComReg will not delay in producing high quality analysis and reports to support its findings for publication in due course.

It is evident that eir has failed on a number of counts within its funding applications – for example, they did not seek to recover amounts for which they were legally permitted to do so under the price cap regime, totalling **€45.5m**, they did not offset the benefits they achieved from the various discount schemes and promotions, together with various self-inflicted and obvious uneconomic decisions.

Substantial Increases In USO costs

ALTO notes with surprise that eir, while constantly cutting costs with *inter alia* voluntary redundancy schemes and closing old platforms, seem to see the value of USO claims growing considerably for the past four years where services included such as payphones in decline and a falling market of access lines according to ComReg[1]. Hence the market does not appear to be aligning with the increasing direct costs. We consider that ComReg should review this issue transparently and seek proper justification as to why the direct costs are increasing so substantially. For example Directory costs have risen from zero in year 2012 – 2013 to €1.4m in 2014 – 2016 which is a staggering increase and very little is said whether approach by eir was efficient. We would ask ComReg to review and consider the treatment of this issue in other jurisdictions where Directories can still make a profit and where innovation and a more flexible approach can reduce these costs.

ALTO is concerned that more of eir's costs are being outsourced, but the various studies undertaken by ComReg do not appear to consider whether the outsourcing company is offering value for money or whether it is applying the principle of avoidable costs, etc. We note ComReg in its review of the ECAS Call Handling Fee engaged and reduced the prices of an outsourcing company providing services to

[1] ComReg Quarter Reports documents 15/49, 14/97, 13/87, 12/101, 11/66 text and numbers around figure 2.2.1.1.

ECAS, hence we consider similar equivalent treatment should be applied for the USO both for items such as line work and directories.

Future benefit of the National Broadband Plan – NBP

ALTO submits that the existing eir copper is ubiquitous and has already assisted eir to reach most of the rural uneconomic locations in the country over past decades.

This investment has provided eir with an extensive duct and pole (PIA) infrastructure into rural areas to support copper phone lines that can significantly assist the rollout of high-speed broadband services for the winner of the Government NBP tender. ALTO considers this investment therefore adds considerable value beyond the existing assessments of uneconomic lines as considerable revenue can now be earned from leasing PIA facilities. This does not appear to have been considered in the review.

ALTO considers that this has considerable commercial value to eir and should be added to its intangible benefits. ALTO believes this is proven by the decision of eir to roll out the 300k area without State Aid as considerable infrastructure was already in place from less than economic copper deployment. We consider the 300k area should be reviewed as adding to the economic viably of USO deployments and a reduce claim submitted.

Funding Application Analysis: 2010 – 2015

USO funding sought by eir stood at **€51.16m** and was adjusted by ComReg to **€45.34m** spread across five separate applications dating back to 2010. A breakdown of the funding applications is as follows:

Period 2010 – 2011:

1. For the year 2010 to 2011 eir made a retrospective USO funding application to ComReg in the sum of **€9.95m** - Adjusted to **€7.93m**

Result: No Burden on assessment

ComReg Consultation/Decision Reference: 17/73

Positive net cost for 2010 – 2011 was €7.5m

WACC **10.21%**

ROCE **26.1%**

CPI 2009 – 2010 (CSO figures): 0.59%

Average annual air retail access lines (Quarterly Data): 1200

Price cap if availed of at €20.96 (price at 1 May 2008): €21.084

Price Cap under-recovery €1.8m

CPI 2010 - 2011: 2.26%

Average annual eir retail access lines: 1100

Price cap if availed of: €21.561

Price Cap under-recovery €7.9m

Period 2011 – 2012:

2. For the year 2011 to 2012 eir made a retrospective USO funding application to ComReg in the sum of **€7.26m** - Adjusted to **€6.97**

Result: No Burden on assessment

ComReg Consultation/Decision Reference: 17/81

Positive net cost for 2011 – 2012 was €6.7m

WACC **10.21%**

ROCE **22.3%**

CPI 2011 - 2012: 1.72%

Average annual eir retail access lines: 999

Price cap if availed of: €21.932

Price Cap under-recovery €11.6m

Period 2012 – 2013:

3. For the year 2012 to 2013 eir made a retrospective USO funding application to ComReg in the sum of **€7.95m** - Adjusted to **€8.01m**

Result: No Burden on assessment

ComReg Consultation/Decision Reference: 17/95

Positive net cost for 2012 – 2013 was €7.7m

WACC **10.21%**

ROCE **16.0%**

CPI 2012 - 2013: 0.28%

Average annual eir retail access lines: 961

Price cap if availed of: €21.994

Price Cap under-recovery €11.9m

Period 2013 – 2014:

4. For the year 2013 to 2014 eir made a retrospective USO funding application to ComReg in the sum of **€11.3m** - Adjusted to **€10.0m**

Result: No Burden on assessment

ComReg Consultation/Decision Reference: 17/109

Positive net cost for 2013 – 2014 was €9.5m

WACC **10.21%**

ROCE **12.6%**

CPI 2013 - 2014: 0.56%

Average annual eir retail access lines: 887

Price cap if availed of: €22.119

Price Cap under-recovery €12.3m

Period 2014 – 2015:

5. For the year 2014 to 2015 eir made a retrospective USO funding application to ComReg in the sum of **€14.7m** - Adjusted to **€12.43**

Result: No Burden on assessment

ComReg Decision Reference: 18/36

Positive net cost for 2014 – 2015 was €11.6m

Price Cap under-recovery: N/A

WACC **8.18%**

ROCE **11.4%**

Total Price Cap under-recovery: €45.5m

Price Cap and Promotions

ALTO submits that during the currency of the funding applications listed above, eir failed to recover revenues permitted for recovery by virtue of the existence of what is known as the price cap on copper lines.[2]

Since September 2008 eir has been free to raise retail access rental prices by CPI-0% each year under the existing price cap regime that was last amended in September 2007.[3] The price cap was replaced in the latest year under review, however the amount of €45.5m was not recovered by eir at all and appears to have not been considered by ComReg or its consultants in its analysis of the USO funding applications in each discrete year.

It should be noted that ALTO's calculations above do not include the additional revenue that would have been earned from SB-WLR rental that would have increased in parallel with any retail price increases. This is because SB-WLR pricing was determined by retail minus pricing regime, at circa CPI-14%.

ALTO further notes that ComReg appears to have not taken into account the position of promotions and operator discount schemes that were permitted and run

[2] This was later replaced by cost orientation

throughout the periods in question above. ComReg will be aware that in May 2013, eir ran a WLR promotion of a €3 monthly discount on WLR pricing. The said, the promotion ended on 1 January 2015. The decision to end the promotion was clearly motivated by eir's desire to drive uptake in its new NGA services.

It is submitted that if those promotions together with the price cap allowances were taken full account of, then eir's request for funding would have reduced dramatically. However, the reality is that eir's credibility and veracity of the pending USO funding applications is questionable. Furthermore, these are self-inflicted uneconomic decisions made by eir. ComReg noted in the statement accompanying Decision D04/11 that "*ComReg must ensure that the USP is not compensated for inefficient decisions in the past or costs incurred inefficiently*".[4] As it stands, eir failed to recover **€45.5m** in allowed revenues (a principle which should simply cancel out any and all USO funding applications) to underpin ComReg's findings, which ALTO also agrees with. ALTO previously made these points to ComReg in December 2015 under Consultation Reference 15/124.[5]

Decision Instrument D04/11

Decision D04/11[6] ComReg's "*Decision on the Costing of universal service obligations: Principles and Methodologies Ref. 11/42*" was consulted publicly and all parties had the opportunity to appeal the Decisions. Hence the formal public consultation process was executed correctly and the rules were set and not appealed or changed. eir and the wider industry must accept that basis..

Response to Consultation Questions:

Q. 1. Do you have any observations on the results of ComReg's direct net cost calculations?

[3] See ComReg document 07/76
[4] Paragraph 2.8, https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/
[5] https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg15124s.pdf
[6] https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-

A. 1. ALTO is of the opinion that ComReg has properly deployed the principles; processes and methodologies appropriate in order to calculate the direct net cost in the circumstances. However, we have two observations that are causing us concern:

1. Has ComReg applied the requirement to ensure the USO solutions offered by eir were efficient and cost effective? See Directories discussion and were there any efficiency benchmarks compared with other countries? and

2. Has ComReg reviewed the claims against what is happening in the market in its analysis? For example a falling access lines market would suggest less faults and less installations (two key USO costs), so substantial year on year increases in costs appear surprising and need to be justified in a transparent way.

ALTO notes that ComReg has undertaken a full and thorough consultation on the principles, processes and methodologies in Decision 04/11 whilst noting the above observations.

ALTO has reviewed ComReg's findings and the relevant decisions in each funding application period and submits that ComReg further transparency of activities for efficiency and benchmarking are required. appears to be correct.

ALTO also notes that ComReg has deployed the principles in Case C-389/08 *Base & Others v Ministerraad* concerning the discretion permitted when a National Regulatory Authority undertakes the task of assessing burdens.

Regarding the direct net costs part of the calculation:

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principles-and-methodologies/

ALTO is at a loss to understand how it is that eir's costs are substantially increasing year-on-year for the past four years given the extremely healthy position that eir is in, with certain legacy offerings simply becoming obsolete; and the uneconomic fixed line market appears to be growing in a declining fixed lines market. Hence the market does not appear to align with the substantially increasing direct USO costs and we consider ComReg should review and seek justification why the direct costs are increasing so substantially year-on-year. For example Directory costs have risen from zero in year 2012 – 2013 to €1.4m in 2014 – 2016 which is a staggering increase and little is said whether approach by eir is efficient. We would ask ComReg review other jurisdictions where Directories can still make a profit and where innovation and a more flexible approach can reduce these costs.

In the event that eir has outsourced costs, then this is a matter that must be considered outside of the USO, given that management decisions to outsource declining markets should not be simply paid for by the industry.

Directories

ALTO notes ComReg's comments that telephone directory aspects of the eir's business were outsourced for a fixed price and that this has simply been accepted by ComReg as the direct net cost.

We have two concerns in the matter as follows:

a. Directories were a good source of income in past years and there is little information whether any efforts were made to find a profitable solution rather than a straight cost. We consider efforts should be made to obtain a positive return for Directories whether by a more innovative approach to directories in line with the modern world such as a mobile app and other technological innovations.

b. We note the ComReg price review of the ECAS services investigated the outsourced party for a certain activity to force a reduction of the costs to BT which were then reflected in the ECAS call handling fee. There is no evidence in the USO consultation that such an approach was considered for the outsourcing of directories and we consider this both an oversight and is not consistent with how ComReg has treated other projects.

In conclusion we do not agree with the direct net cost of directories as there appears to have been no attempt to make this positive and the supplier should have also been reviewed to ensure the costs were appropriate.

Public payphones

ALTO notes that ComReg introduced procedures for reducing the number of public payphones some years ago, and although there is no underlying detail to consider we assume the programme actively continues to reduce this uneconomic cost and note the reductions highlighted by Terra in table 1[7]. If eir were to make a commercial decision to stop removing uneconomic payphones then we consider that would be a commercial decision of eir and at its own cost. As above, eir should not be compensated for inefficient decisions or inefficiently incurred costs.

Q. 2. Do you have any observations on ComReg's preliminary view that consultancy costs incurred in respect of a USO funding applications do not form part of the net cost?

A. 2. ALTO agrees with ComReg's preliminary views and findings across all five Consultation papers. In particular, ComReg's summary to the extent that:

> "*The decision to make a USO application for funding is eir's commercial*

decision and is not required by any universal service obligation. It should be noted that ComReg also considers that the costs attributable to preparing a USO funding application should decrease over time."

is correct, and at no stage should the incumbent be permitted to recover costs on the basis of hiring experts to undertake the task of ascertaining the recoverable amount under the USO framework.

ALTO submits that it would be incorrect to straddle industry with the following costs:

2010 – 2011: €419,717;

2011 – 2012: €269,797;

2012 – 2013: €269,797;

2013 – 2014: €291,369;

2014 – 2015: €291,369.

ALTO observes that the above figures were submitted to ComReg without any required and/or adequate explanations to assist ComReg in its work. Such an approach is not good practice. ALTO notes that ComReg state in each year that: *"No explanation[s] [were] given for the inclusion of [these] figure[s]"*

ALTO supports the view that having regard to the Universal Service Directive, the Universal Service Regulations and Decision 2 of D04/11, that consultants' fees incurred by eir should be disallowed from the net cost as they relate to the preparation and submission of the USO funding application and not to the provision of USO services.

Q. 3. Based on ComReg's assessment detailed in Sections 5, and 7 of this consultation, do you have any observations on ComReg's preliminary view that the positive net cost for:

[7] Assessment of Eir's US funding application – Direct net cost 2014-2015 – Non-Confidential

2010 – 2011 is €7,503,531;

2011 – 2012 is €6,712,966;

2012 – 2013 is €7,723,749;

2013 – 2014 is €9,514,559;

2014 – 2015 is €11,526,418?

A. 3. ALTO agrees with ComReg's assessments arising from Sections 5, and 7 of each Consultation paper.

ALTO would like to make the following observations concerning the net costs for each year:

> With regard to directories it is not clear whether there was any effort on eir's part to recover costs or make a profit from this activity as in the past.

ALTO notes, as it has above, that eir has failed to recover amounts legally permitted to it during the periods set out above. It is also submitted that during the periods in question, eir ran various discount schemes and promotions which had the effect of reducing the revenues ascertainable from their customer base.

ALTO considers that ComReg needs to review the USO investments in economic areas including the eir 300k area to determine whether eir could reasonably achieve a return on this investment by leasing infrastructure to the winner of the NBP bid or from the self-supply of FTTP services. Given recent press about the rental price of poles it appears eir could make a substantial recovery and we consider ComReg should consider making an assessment on the increasing value of the eir access network through USO investments.

Q. 4. Following ComReg's assessment, do you have any observations on ComReg's preliminary view that a positive net cost of:

> **1. €7,503,521 (or €7,929,495 as claimed by eir)**

2. €6,712,966 (or €6,986,518 as claimed by eir)

3. €7,723,749 (or €8,012,033 as claimed by eir)

4. €9,514,559 (or €10,008,142 as claimed by eir)

5. €11,526,418 (or €12,432,981 as claimed by eir)

is not an unfair burden on eir for the periods:

1. 2010 – 2011?

2. 2011 – 2012?

3. 2012 – 2013?

4. 2013 – 2014?

5. 2014 – 2015?

A. 4. ALTO agrees with ComReg's position in each year under consultation at this time.

ALTO notes that for there to be an unfair burden, three cumulative conditions must be met:

> *"i. There must be a verifiable and verified direct net cost*
>
> *ii. The benefits of the USO must not outweigh the net cost (i.e. there is a positive net cost)*
>
> *iii. This positive net cost is (a) material compared to administrative costs of a sharing mechanism, and (b) causes a significant competitive disadvantage for a USP."*

In each instance it is clear from eir's remarkable financial performance, its market share/dominance and significantly higher returns that anticipated, it is not the case that an unfair burden be determined on any objective assessment of the company's results and financial performance.

1. 2010 – 2011: WACC 10.21% - ROCE 26.1%
2. 2011 – 2012: WACC 10.21% - ROCE 22.3%
3. 2012 – 2013: WACC 10.21% - ROCE 16.0%
4. 2013 – 2014: WACC 10.21% - ROCE 12.6%
5. 2014 – 2015: WACC 8.18% - ROCE 11.4%

USO Assessment Rules

ALTO notes that ComReg set out a clear set of conditions for the USO in Decision D04/11[8] which was consulted publicly and all parties had the opportunity to appeal the Decisions. Hence the formal public consultation process was executed correctly and the rules were set and not appealed or changed. eir and the wider industry must accept that basis.

ALTO notes that ComReg and its consultants Oxera provide considerable clarity with the consultation and associated reported in the application of the various rules of D04/11 to assess whether the USO costs were an unfair burden on eir. On reading the various consultations the rules do appear to have been implemented correctly.

Unfair Burden

We agree with the assessments within each of the Oxera unfair burden reports that the USO cost was not an unfair burden. This is the case as eir was able to maintain a Return On Capital Employed (ROCE) well above the maximum of the range for the allowable Weighted Average Cost of Capital (WACC). i.e., it was able to maintain a return on investment well above the level expected by regulation.

In each instance below ALTO emphasises eir's position regarding unfair burden

[8] https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/

versus financial performance concerning unfair burden.

Oxera Report Extract 2010 – 2011 – Page 12:

> *"[A] comparison of eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). This shows that in 2010/11, eir's fixed-line business ROCE exceeded the WACC by 15.9%.*
>
> *To further contextualise eir's financial position, it is relevant to note that:*
>
> *• the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg, by 15.1%;*
>
> *• for there to be no returns above the WACC, the net cost of the USO would have to have been around **31 times higher**; or, alternatively,*
>
> *• the absolute profit (EBIT) for the fixed-line business would have to have been around 61% lower for the application period, 2010/11.[9]'*

Oxera Report Extract 2011 – 2012 – Page 12:

> *"[A] comparison of eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). This shows that in 2011/12, eir's fixed-line business ROCE exceeded the WACC by 12.1%.*
>
> *To further contextualise eir's financial position, it is relevant to note that:*
>
> *• the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg, by 11.2%;*

*• for there to be no returns above the WACC, the net cost of the USO would have to have been around **27 times higher**; or, alternatively,*

• the absolute profit (EBIT) for the fixed-line business would have to have been around <u>54% lower for the application period</u>, 2011/12.[10]"

Oxera Report Extract 2012 – 2013 – Page 13:

"[A] comparison of eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). This shows that in 2012/13, <u>eir's fixed-line business ROCE exceeded the WACC by 5.8%.</u>

To further contextualise eir's financial position, it is relevant to note that:

• the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the <u>upper end of the WACC range estimated by ComReg, by 5.0%;</u>

*• for there to be no returns above the WACC, the net cost of the USO would have to have been around **13 times higher**; or, alternatively,*

• the absolute profit (EBIT) for the fixed-line business would have to have been around <u>36% lower for the application period, 2012/13</u>.[11]"

Oxera Report Extract 2013 – 2014 – Page 13:

[9] https://www.comreg.ie/publication/oxera-report-unfair-burden-report-2010-2011/
[10] https://www.comreg.ie/publication/oxera-unfair-burden-report-201112/
[11] https://www.comreg.ie/publication/oxera-unfair-burden-report-201213/

"[A] comparison of eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). This shows that in 2013/14, eir's fixed-line business ROCE exceeded the WACC by 2.4%

To further contextualise eir's financial position, it is relevant to note that:

• the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg, by 1.5%;

• for there to be no returns above the WACC, the net cost of the USO would have to have been around ***5 times higher****; or, alternatively,*

• the absolute profit (EBIT) for the fixed-line business would have to have been around 19% lower for the application period, 2013/14.[12]*"*

Oxera Report Extract 2013 – 2014 – Page 12:

"[A] comparison of eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). This shows that in 2014/15, eir's fixed-line business ROCE exceeded the WACC by 3.2%.

To further contextualise eir's financial position, it is relevant to note that:

•the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg, by 2.0%;

•for there to be no returns above the WACC, the net cost of the USO would have to have been around ***5 times higher****; or, alternatively,*

[12] https://www.comreg.ie/publication/oxera-report-unfair-burden-report-2013-2014/

•*the absolute profit (EBIT) for the fixed-line business would have to have been around <u>28% lower for the application period</u>, 2014/15.*[13]"

Conclusion

ComReg and the industry can be left in <u>no doubt</u> that no unfair burden existed in the periods under consultation based on the assessments and independent expert information provided above.

ALTO

11th June 2018

Appendix: ALTO includes its submission to ComReg in response to ComReg Ref. 15/124

[13] https://www.comreg.ie/publication/oxera-report-unfair-burden-report-2014-2015/

Clifton House
Fitzwilliam Street
Dublin 2

18 December 2015

Ms Barbara Delaney
Director - Retail Division
Commission for Communications Regulation
Irish Life Centre
Lower Abbey Street
Dublin 1

Dear Barbara & Retail Division

Re.Universal Service Obligation – Provision of access at a fixed location

Consultation Ref: 15/124

We write in response to the above Consultation, the closing date for comments being today 18 December 2015.

As ComReg is very aware ALTO rejects the notion that Eir is entitled to claim any support from industry by means of funding for Universal Service Obligations – USO. We are aware that a sum between €36m and €38m is sought by means of retrospective applications to ComReg by Eir, which is a sum that may have to be met by industry in the event that an unfair burden is found.

Many ALTO members are publicly quoted and trading companies who are not in a position to facilitate reopening of statutory and other accounts and accounting processes to facilitate *ex post* and unnecessary funding applications by Eir, or any other party for that matter dating back four years in time.

The continuation of this position is deeply unsatisfactory to industry and fosters uncertainty in terms of the regulatory regime in Ireland, and in respect of operating costs.

ALTO has recently studied the historical context for fixed access regulation in Ireland and notes that Eir (previously Eircom) has failed to recover costs via the retail price cap, which we argue are now being sought in the context of USO (perhaps by means of cross recovery). The regulatory metric applicable is CPI-0%, which would have resulted in a recovery by Eir of in or about €45m during the USO funding periods currently under review within ComReg.

In terms of ComReg's previous findings of "*no unfair burden*", with regard to Eir, ALTO believes that a similar finding is appropriate in the context of all of the periods under review at this time.

Answers to Consultation Questions:

Q. 1. ComReg's preliminary view is that, pending completion of its review, it is appropriate that the current safeguards remain in place after 31 December 2015. Do you agree with ComReg's preliminary view that Eir should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months to complete the review? Please give reasons to support your view.

A. 1. ALTO agrees with this position as proposed by ComReg, strictly without prejudice to the generality of the foregoing remarks in this response, which obviously differ to the extent expressed regarding unfair burden and Eir's position relating to failed price cap recovery.

Q. 2. Do you agree or disagree with ComReg's draft high level assessment of the impact of the proposed regulatory options? Are there any other factors that you consider to be relevant? Please set out reasons for your answer.

A. 2. ALTO does not disagree with ComReg's draft high level assessment of the impact of the proposed regulatory options.

Q. 3. Do you have any comments on the Draft Decision Instrument at Annex 1? Please set out reasons for your answer.

A. 3. ALTO makes no comment on the Draft Decision Instrument at this time.

Finally, we request that ComReg conclude its deliberations in this area with due speed and efficiency in order to facilitate and foster the necessary certainty that

ALTO expects in EU markets where its members operate predominantly. We anticipate a finding of no unfair burden with regard to all of the Eir funding applications, and during the periods in question. We also expect ComReg to assess Eir's funding applications based on the cost recovery modelling allowed for within retail line rental pricing and with regard to our comments on Price Cap.

ALTO

18 December 2015

2. BT

BT Communications Ireland [“BT”] Response to the ComReg Assessment of the net cost and unfair burden for the periods 2010/2011, 2011.2012, 2012/2013, 2013/2014 and 2014-2015

Issue 1 – 11th June 2018

1.0 Introduction

We welcome that ComReg and its consultants have applied considerable effort into analysing the eir USO claims, however taking five years has created unnecessary uncertainty in the market due to the combined level of the claims. Whilst we appreciate the complexity, such delays should be avoided in future.

Scope - We note the consultations only concern the evaluation of eir’s claims for USO payments with reference to the Decisions set out in ComReg Decision D04/11, and not USO policy matters, hence our response is focused on addressing the eir claim against the Decisions in D04/11[1].

Growing USO costs – we find it surprising given years of eir cost cutting with voluntary redundancy schemes, closing old platforms etc. that the value of USO claims have grown substantially year-on-year over the past four years[2]. This is further surprising given the market for fixed line PSTN services has declined year-on-year as seen in the ComReg quarterly market reports[3] and Fig 1 below. We also note with concern that the cost of distributing telephone directories has grown from zero cost to 1.4 Million Euros in the last two years. Our experience from a neighbouring jurisdiction is directories can still provide a contribution hence the huge jump in costs is a concern. For both issues insufficient data has been provided within the consultations to understand the reasons for the rises and such should be further explained and justified as efficient[4].

2.0 Response to the detailed questions

Q1 Do you have any observations on the results of ComReg’s direct net cost calculation?

Response 1. We would like to make the following comments to the direct net costs part of the calculation as follows:

1. We consider there is a need for eir to explain why the USO fixed access line costs are substantially increasing at a time when the market for access lines used for copper access is decreasing (Fig 1). Reducing access lines should reduce the cost

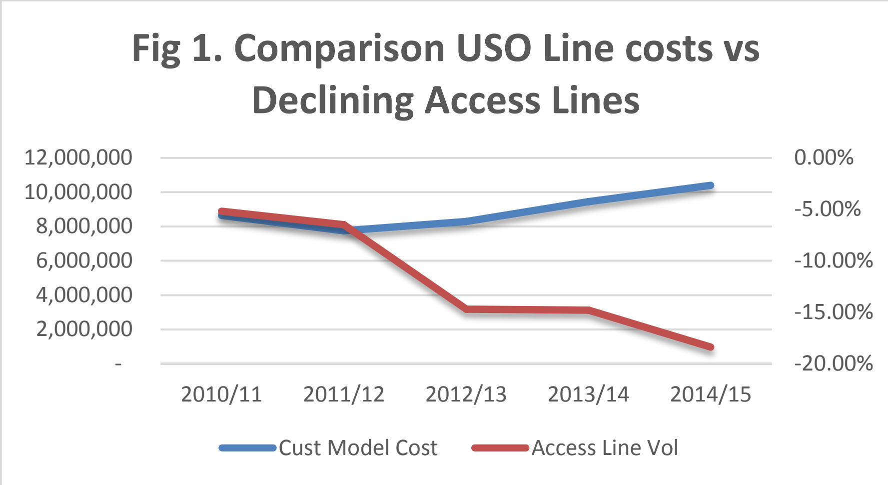
[1] ComReg document ref 11/42 (Decision D04/11) - Decision on the Costing of universal service obligations: Principles and Methodologies

[2] ComReg Reports doc refs. 15/49, 14/97,13/87, 12/101 and 11/66.

[3] ComReg Quarter Reports documents 15/49, 14/97, 13/87, 12/101, 11/66 Ref. Figures 2.2.1.1.

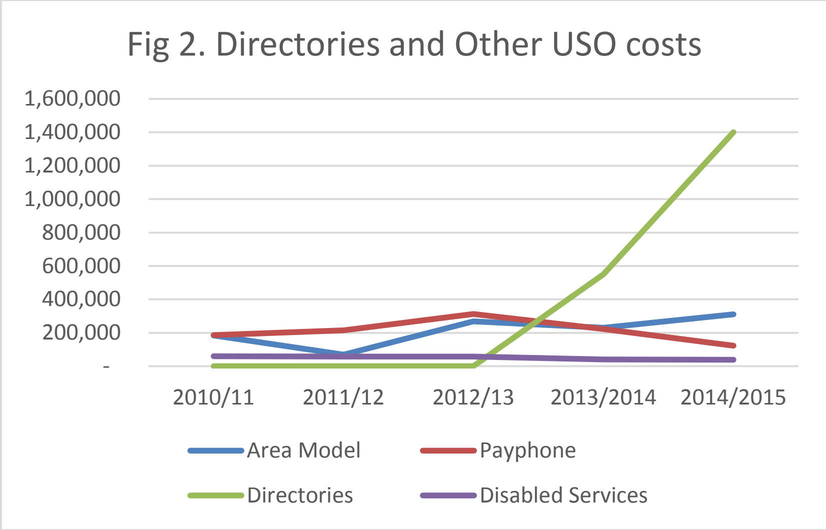
[4] D04/11 Decision No. 8. - The avoidable costs included in the net cost calculation, shall be those costs reflecting the provision of the USO which a commercial operator would not ordinarily have provided, and which were incurred in the most efficient way. These costs shall relate to: (a) the avoidable capital costs associated with CAPEX i.e. depreciation; (b) OPEX; and (c) overheads for the appropriate financial year.

of faults and installation hence we consider further explanation is required to justify the cost increases.



2. Directories – We note ComReg's comments that the Directories aspects of the eir were outsourced and this has been accepted by ComReg as the direct net cost. We have two concerns in the matter as follows:
    a. We note the Statutory Instrument[5] for the USO allows for either paper or electronic solutions for directories but can see no evidence that there has been an attempt to validate the demand for physical directory books, and to match print runs to demand rather than theoretical maximum demand.
    b. Directories used to be a good source of income in past years (they still make a positive contribution in the UK) and there is little information within the consultation whether any efforts were made to find a profitable solution rather than a straight cost. It's not clear whether reasonable efforts have been made to obtain a positive return for Directories.
    c. We note the ComReg price review of the ECAS CHF considered the reasonableness of the costs of our outsourced supplier but there is little evidence of this happening concerning efficiency in the USO analysis. Figure 2 below highlights the exceptional increase in Directory costs in the past two years which we believe could have been avoided.

[5] SI No. 337 of 2011 – European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulation 2011.



In conclusion we do not agree with the direct net cost of directories as there appears to have been little attempt to make this positive and the supplier should have also been reviewed to ensure the costs were appropriate.

Q2. Do you have any observations on ComReg's preliminary view that consultancy costs incurred in respect of a USO funding application do not form part of the net cost?

Response 2 – We agree with the ComReg analysis that it was called out clearly in the legislation and the Decision D04/11 that USO provision is not made for claiming consultant costs for making a claim.

Q3. Based on ComReg's assessment detailed in Sections 5, and 7 of this consultation, do you have any observations on ComReg's preliminary view that the positive net cost for 2014-2015 is €11,526,418?

Response 3 – We would like to make the following observations concerning the net cost for 2014-2015.

As highlighted in our response to question 1 we consider ComReg has not fully assessed the Lines costs or the Directories costs to understand whether the substantial year-on-year price rises are justified.

Q4. Following ComReg's assessment, do you have any observations on ComReg's preliminary view that a positive net cost of €11,526,418 (or €12,432,981 as claimed by eir) is not an unfair burden on eir for the period 2014-2015?

Response 4 – We would like to offer the following observations.

USO Assessment Rules

1. We observe ComReg set out a clear set of conditions for the USO in Decision D04/11 which was consulted publicly and all parties had the opportunity to appeal the Decisions. Hence the formal public consultation process was executed correctly and the rules were not appealed or changed. We base our observations purely on the rules in place.

Unfair Burden

2. Based on the rules in place in Ireland we agree with the ComReg assessment that USO did not provide an undue burden on the profitability to eir over the period of the claims.
3. To support our view that the USO was not an undue burden we would also like to add the following observations.
    a. Other eir price changes (for example SABB) suggest eir was actively managing its pricing over the periods in question and was well able to recover the USO costs within the price Caps allowed by ComReg, and we conclude this was not done.
    b. We observe eir forfeited some 3 Euros per month per applicable line for combined access line and high speed broadband service from circa May 2013 for 18 months, demonstrating both that eir could have recovered the USO costs but also it had sufficient profitability to sustain substantial voluntary price cuts during this period.

End

3. eir

eir

Response to Consultation and Draft Decision

Assessment of eir's Universal Service Fund Applications

Assessment of the net costs and unfair burdens

2010-2011 – ComReg Document 17/73

2011-2012 – ComReg Document 17/81

2012-2013 – ComReg Document 17/95

2013-2014 – ComReg Document 17/109

2014-2015 – ComReg Document 18/36

11 June 2018

DOCUMENT CONTROL

Document name	eir response to ComReg 17/73, 17/81,17/95, 17/109 & 18/36
Document Owner	eir
Status	Non-Confidential

Executive Summary

1. eir welcomes the opportunity to respond to these Consultations. As eir has repeatedly noted over the past number of years, these Consultations are long overdue, dealing, as they do, with five separate applications by eir for funding to compensate it for costs incurred in each financial year from 2010/11 through to 2014/15. This point is illustrated in the table below, which highlights the time ComReg took to evaluate each of eir's five applications.

Year	Eir Submission Date	Draft Decision Date	Elapsed Time (months)
2010/11	1st Sept. 2014	5th Sept. 2017	36
2011/12	31st Oct. 2014	10th Oct. 2017	35
2012/13	31st Oct. 2014	22nd Nov. 2017	37
2013/14	31st Mar. 2015	11th Dec. 2017	32
2014/15	31st Mar. 2016	30th Apr. 2018	25

2. This is a cumulative total of 165 months (or almost 14 years) to get to the present situation – and this does not count the additional time to reach a final Decision in each case, nor the time it would take for ComReg to set up a funding mechanism. As these costs have been incurred by eir up to seven years ago, it is not acceptable that eir is still waiting for its applications to be assessed and Decisions arrived at by ComReg. In this context, we also note that in its deliberations ComReg has taken no account of the time value of money, and that ComReg currently has a total of six applications from eir for consideration, relating to financial years 2010/11 to 2015/16. eir would encourage ComReg to expedite this process and complete these reviews without further delay.

3. eir notes ComReg's acknowledgement that each of eir's five applications for Universal Service Obligation (USO) funding currently under consideration by ComReg (covering the financial years from 2010/11 to 2014/15) was fit for purpose,[1] and that the provision of universal services represented a positive net cost for eir in each of these years[2].

4. We disagree with ComReg's preliminary view that consultancy costs do not form part of the direct net cost in each year. As we set out in our response to question 2 below, these costs had to be incurred solely for the purpose of meeting the requirements of ComReg Decision 04/11.

[1] ComReg 17/73, 17/81, 17/95, 17/109, 18/36 (paragraph 5 in each case).
[2] ComReg 17/73(para. 199)), ComReg 17/81(para. 207), ComReg 17/95 (para. 206), ComReg 17/109(para. 216), ComReg 18/36 (para. 234)

Recovery of these costs is permitted by the Regulations as these are costs that would have been avoided in their entirety had there been no USO imposed on eir. These costs were incurred in order to comply with the requirements of Decision D04/11. Specifically Decision 22 of D04/11 requires that "*An independent declaration shall be signed off by the Board of Directors of the* [Universal Service Provider] *USP and it must accompany the application. (The required declaration is included in Schedule 1). Financial information shall be provided with an appropriate audit opinion or verification report, where the Auditor (as approved by ComReg and who may be a person, or a corporation sole, or a body corporate, or an unincorporated body) has in no way assisted with the preparation of the* USO *funding application*." In addition, Decision 31 of D04/11 requires that "*calculation of the benefits of the USO shall be completed by an external expert, independent of the USP*". We expand on our arguments in our answer to question 2. The combined positive net cost of the five years under consideration is therefore **€45,369,169** in contrast to ComReg's preliminary view of **€42,981,223**.

5. Even if we were to take the more conservative €43m figure, and if we were to assume that Other Authorised Operators (OAOs) contributed only 70% to an overall USO fund[3], the receipt of a net €30m USO fund contribution by eir would equate to financing over 60,000 FTTH customer connections. The continuing failure of ComReg to set up a funding mechanism is a significant competitive distortion and reduces eir's ability to invest in modern technology and to upgrade our network for the future.

6. eir does not accept ComReg's preliminary view that a positive net cost of €43m / €45m over five years is not an unfair burden. In the context of eir's own characteristics, including the quality of its network, its economic and financial situation and its market share, such a sum manifestly amounts to an unfair burden and it is punitive to require eir to bear it on its own.

7. ComReg is plainly wrong in its conclusion that an amount in excess of €45m (or even €43m, as ComReg maintains) over five years is not an unfair burden and shows that it has approached the matter in such a restrictive way as to make it highly unlikely that any net cost would ever be considered to represent an unfair burden. It is eir's submission that ComReg's approach, as such, is unlawful and contrary to EU law. EU law, including in particular the Universal Service Directive, gives a clear right to the USP to have the burden of supporting the USO shared. The discretion granted to the Member States in deciding how to assess whether a burden is unfair is not properly exercised where it leads to a finding that, in a competitive market context, where

[3] Ref. ComReg D01/14, para. 9.16

cost savings and making marginal gains are considered the norm, an net cost over five years of the order of €45m is not regarded by ComReg as "unfair".

8. The concept of an unfair burden of the costs of the USO, however well-intentioned when conceived as part of the EC's USO directive, has been interpreted in a very restrictive way by ComReg and Oxera. ComReg's starting premise that an incumbent operator has sufficient market power to cross-subsidise the provision of USO is the wrong place to start. The competitive nature of the markets has transformed since the 2002 USO Directive and it is unreasonable to expect eir to shoulder the burden of USO alone.

Oxera's unfair burden assessment is inherently unfair

9. Furthermore, the methodology followed by ComReg for the purpose of assessing whether the positive net cost that it has calculated is an unfair burden is the least likely, among the methodologies considered, to lead to the establishment of an unfair burden. eir in this respect is of the view that ComReg's assessment is not objective and is unfair.

10. In particular, the number of hurdles set by ComReg and Oxera makes it unreasonably unlikely that an unfair burden will ever be found to exist – under the approach proposed by Oxera and followed by ComReg, any burden will appear "fair". As such, it is a methodology that is not consistent with the regulatory framework. There are seven distinct hurdles, as follows:

    (i) Is there a net cost of USO?
    (ii) Does it exceed indirect benefits?
    (iii) Does the net cost after indirect benefits exceed administration costs?
    (iv) Is eir's unable to earn a fair rate of return (profitability assessment)?
    (v) Is the impact of positive net cost 'material'?
    (vi) Is the net cost causing the profit shortfall?
    (vii) Does the net cost affect eir's ability to compete?

11. This complex approach, with a succession of ever-increasing and subjective tests, is very different to what has been done by other NRAs when assessing funding applications. Other NRA's have generally assessed whether the costs of the USO exceed the benefits and potentially also whether the net costs exceed a minimal threshold.

12. By contrast, under ComReg's approach, a single operator can be saddled with an additional cost and which can be considered as "fair", as long as it is not large enough. The existence of

thresholds such as the ones that have been laid out by Oxera/ComReg do not justify the existence of a burden - they just measure the magnitude of its unfairness. Measuring the magnitude of unfairness is not a condition precedent to sharing the cost of USO between operators that is required, or for that matter, is consistent with, the Universal Service Directive.

13. Oxera and ComReg reach the conclusion that the USO does not represent an unfair burden on eir as "*The analysis of the USP's financial position shows that the net cost of the USO did not constitute an unfair burden in 2010/11*"[4]. This disregards the principle that regulators should strive to create an environment where operators have an incentive to gain additional profits under fair competition. What Oxera and ComReg are implicitly stating is that the profits of the operators in the market should be the same as if a rate of return regulation on all services had been implemented. This is fundamentally incorrect and clearly at odds with the principle set by Recital 18 of the Universal Service Directive that a net cost should be funded when it falls outside normal standard commercial conditions.

14. Furthermore, in concluding that eir's operating profits are such that the USO is not an unfair burden, ComReg has completely disregarded eir's current condition, including the existing cost of servicing the debt. This is entirely inconsistent with the test set by the European Court of Justice which requires that account be had of the operator's "*own characteristics*", including in particular "*its economic and financial situation*". Indebtedness is clearly a very relevant matter to the financial, and economic, situation of a company.[5] A company can still be in a difficult situation despite having positive operating profits if these are not sufficient to service its liabilities. If, in addition to this, an additional burden is placed, the overall situation can only worsen.

15. Forcing eir to fund the positive net cost alone does not reflect the relative situation of other market players. While there could have been a valid argument in the past that there were benefits to being an incumbent, recent market trends show that all these incumbency benefits have disappeared. Therefore, there is no reason why the burden should be borne only by eir.

16. Even accepting that it could ever be found that imposing a multi-million euro burden can ever be fair, which eir does not, eir's ability to bear a burden of the order of €45m over five years must also be considered in the context of eir's specific circumstances and its declining profitability in the face of increased competition and regulation. In particular, over the past few

[4] Oxera Report 17/73c (Page 2) – (similar finding for the subsequent 4 years)

[5] We note in this context that ComReg failed to take account of the fact that eircom had to go through an examinership process in the period from March to June 2012

years ComReg has taken a series of Decisions that have had a significant impact on eir's profitability and viability, including Decisions on interconnection charges and wholesale access regulations, Leased Lines, among others. These, coupled with the erosion of profit in the areas where there is significant competition have resulted in a steady decrease in revenues by eir[6], even in nominal terms.

17. In making it impossible for any positive net cost to be found to be an unfair burden, ComReg's proposed Decision has a detrimental effect on today's value of the company. Decreasing revenues not only mean that there is increased risk to the viability of the USO. It also implies more subscribers are likely to become uneconomic in the future, thereby increasing the positive net cost. As a result, today's value of the company is affected by the expectation of a cost that will continue to increase with potentially decreasing revenues with which to fund it.

18. In doing so, ComReg ignores what constitute "normal standard commercial conditions". ComReg has allowed OAOs to make a ROCE[7] significantly above the WACC without them having to share part of the USO burden. This is despite the definitive benefits that other operators get from eir having the USO obligation; e.g. through their customers calling the uneconomic fixed-line customers. By contrast, any benefits that eir gets from its customers calling the USO customers have already been internalised and used to reduce the positive net cost as part of eir's calculation of the net costs of the USO.

19. In the context of an unfair burden, it is important to point out that Universal Service is not a commercial activity for eir. In a normal commercial arrangement for the procurement of services, the costs of administering the contractual terms would be built into the compensation model. It is not normal commercial practice to expect a supplier to provide a service at a loss when incremental administrative costs are incurred due to requirements specified in the terms of the commercial relationship

20. ComReg's approach to assessing whether the net cost of the USO represents an unfair burden does not comply with the test set out by the Court of Justice of the European Union (CJEU). Not only does the test applied by ComReg not comply with the EU law test but it also ensures that a finding of an unfair burden is almost impossible For example:

    - ComReg's assessment rests mainly on a comparison of eir's returns based on its regulatory accounts with ComReg's regulated WACC[8]. Given that such an assessment can

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[6] As per eir's HCA Separated Accounts, eir's "Consolidated Revenue" fell by over 25% between FY 2011 and FY 2016

[7] "Return on Capital Employed"

[8] "Weighted Average Cost of Capital"

be made without making use of the USO submissions, the assessment is at odds with ComReg's USO Decision D04/11. Decision No. 38 of D04/11 clearly states that the starting point for the assessment of an unfair burden is the USO net cost submissions.

- eir's financial strength - and hence its ability to internalise the USO cost - is reviewed with respect to a static and incorrectly specified analysis of its financial performance.
- eir's financial strength is presented as a sufficient condition to exempt other operators from making a contribution to the universal service cost, irrespective of the financial position of other telecommunications providers (and with disregard to the economic benefits that accrue to these providers from eir's USO, e.g. through their customers calling the uneconomic fixed-line customers). In contrast, any benefits that eir gets from its customers calling the USO customers have already been internalised and used in accordance with ComReg's rules to reduce the positive net cost as part of eir's calculation of the net costs of the USO
- The approach is fundamentally mute about the changes in telecom markets in Ireland and whether or not the USO causes a significant competitive disadvantage.

21. As outlined below, ComReg had plenty of material available to it to answer to the key concern: whether or not the absence of a properly designed funding mechanism was impeding "*the USP from competing fairly with the rest of the industry*".[9] In particular, in determining this key question ComReg did not have due regard to the matters listed below:

- Recital 3 of the Universal Service Directive (USD)[10] (referred to also in this response as the "Directive") states that "Such obligations will not be regarded as anti-competitive per se provided they are administered in a transparent, non-discriminatory and **competitively neutral manner**" [emphasis added].
- Recital 18 of the Directive states "It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with **minimum distortion to the market and to undertakings**" [emphasis added].
- Decision No. 38 (3b) of D04/11 implies that an assessment of the "**competitive disadvantage** for a USP" [emphasis added] must be carried out.

[9] ComReg D04/11, Decision on the Costing of universal service obligations: Principles and Methodologies, 31 May 2011, Paragraph 5.8.
[10] EU Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2012 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

- The European Court of Justice in the Base case[11] states that a burden "is excessive in view of the undertaking's **ability to bear** it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share" [emphasis added].
- eir is of the view that ComReg's approach to causality is wrong. The question is whether a net positive cost constitutes an unfair burden; it is not whether that unfair burden is directly linked to the USO. Such an interpretation is not consistent with the purpose of the Universal Service Directive, nor with the test set out in the Base case[12].

22. eir has very significant concerns in relation to ComReg's and Oxera's assessment whether the net positive cost of USO is an unfair burden. The following changes would need to be made to Oxera's profitability assessment to make it robust and in line with international best practice:

- Where profitability is assessed to determine whether a net cost is unfair, it must be determined in respect of the USO business, not the entirety of the fixed line business;
- The correct basis for the Mean Capital Employed (MCE) is the economic value, proxied by the replacement costs of assets, as opposed to the historical costs;
- eir's profitability needs to be compared to its actual cost of debt in the year in question, as opposed to the ex-ante WACC calculated years previously.

23. Hence, to the extent that ComReg failed to properly exercise its discretion to assess whether there is an unfair burden or not, it is eir's submission that ComReg's (preliminary) view is contrary to EU law. EU law, and the Universal Service Directive in particular, provides that if "national regulatory authorities find that an undertaking is subject to an unfair burden" they "shall" introduce "a mechanism to compensate that undertaking" and/or "to share the net cost of universal service obligations between providers of electronic communications networks and services".[13]

24. ComReg's assessments are in essence a close reproduction of the assessment of eir's 2009/10 USO funding application. (Hence, the arguments conveyed in our response to the 2009/10 USO

[11] Base NV and Others vs Ministerraad, Case C-389/08, Judgment of the Court (Fourth Chamber), 6 October 2010.
[12] Base NV and Others vs Ministerraad
[13] Article 13 of the Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2012 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

consultation are equally valid in this response). However, significant market changes[14] have occurred since that year, which forcibly would warrant ComReg to modify its approach to make use of new information available. As we show in this response, the ongoing development of competition at various levels with increased penetration of large, international operators critically reinforces the need to ensure that the USO is competitively neutral. In this light, ComReg's position that a comfortable status-quo can be preserved is simply unsustainable.

25. It is eir's submission that the net cost (adjusted for the inclusion of consultancy costs) is an unfair burden on eir, and that consequently a funding mechanism must be established in accordance with the requirements of the Universal Service Directive and Regulations

[14] e.g. Since the end of 2013, eir's retail revenue market share has dropped by 11%, while Virgin Media's has grown by 23%, and Sky's share has risen from zero to 6%. Similar trends are evident in terms of overall fixed revenue market share – VM's share rose by over 18% while Sky is approaching 5% from a zero base in 2014.

RESPONSE TO CONSULTATION QUESTIONS

Question 1: Do you have any observations on the results of ComReg's direct net cost calculation

26. eir does not agree that the consultancy costs incurred in preparing the USO Funding applications in compliance with ComReg's Decision D04/11 should be excluded from the direct net cost. This matter is addressed more comprehensively in our response to question 2 below.

27. eir notes that the revised submissions of July 2016 were made, as ComReg is aware, in the context of a lengthy review process[15]. As part of this review process ComReg requested changes to the cost models. eir implemented these changes purely with a view to seeing a conclusion to the review process and a move towards a decision by ComReg on a funding mechanism.

28. In important areas ComReg requested methodological changes, which eir argued against, and which resulted in material reductions to the quantum of these claims. To a large extent, the changes reflected an unreasonable preoccupation to have the USO cost models aligned firstly with the Copper Access Model (the CAM) and only then with reality and sound economic judgment. The CAM rather than being a 'means to an end' become an 'end' in itself.

29. eir continues to believe that these changes were not justified on the basis of sound economic arguments. However, we recall them here in this response as they provide additional context to the assessment of whether the net costs submitted in July 2016 are an 'unfair burden' or not, as the net cost amounts are much lower than they should be.

30. One of such areas relates to the allocation of reactive maintenance costs to exchanges. In its original submissions eir had retained the allocation methodology from the 2009/10 submission, which was based on the relative number of fault occurrences per exchange and which ComReg had judged reasonable.[16] However, in contradiction to this judgment, ComReg requested that the allocation of costs mirrored that implemented in the CAM.[17]

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[15] Ref. eir's mail to ComReg of 21st Dec. 2015 – "*we are prepared to implement the approach suggested by ComReg … without prejudice to our right to challenge the approach for at a later stage in this process, or in future years*".
[16] Tera, "Assessment of eircom's USO funding application for 2009/2010 financial year", Tera document Réf : 2011-53-OS-ComReg – Task 3.
[17] We refer you to our correspondence of the 21 December 2015.

31. In this regard, the allocation of costs in the CAM is based (as a first allocating step) on the deployment of staff to service areas based on expected levels of faults, given the characteristics of the network. However, depending on the actual needs in any given area, staff may repair faults outside their attachment areas. This is the case where, for instance, areas are impacted by severe storms which are beyond a reasonable expectation. In other words, from the point of view of cost causality, an allocation of service repair costs on the basis of relative volumes of faults was a more reasonable cost allocator than the one imposed by ComReg, and more likely to reflect the true cost of service repair in remote, uneconomic areas.

32. We can illustrate this by taking a simple example. Assume that there are as many lines in rural areas as there are in urban areas and that the expected level of faults (i.e. the chance of faults occurring) is the same in both areas. Consider, in addition, that faults in rural areas take twice as much time to repair as faults in urban areas (e.g. because of longer travelling times, more extensive network in rural areas, more "once-off" faults in rural areas, etc.). This would suggest a cost allocation key of 1/3 to urban areas and 2/3 to rural areas. However, consider now that the level of faults is more than twice the urban areas (i.e., more than twice the original expectation). An allocation based on the number of faults would allocate more than 2/3 to rural areas and hence be reflective of the fact that the *actual* staff levels had to increase.

33. Given this, the net effect of ComReg's change was an implausible shift of costs between areas with high fault incidence (as result of unexpected events) to areas with lower fault incidence, i.e., between rural areas to urban areas and thus a significant reduction in the net costs of the USO.

34. The second material area is related to the allocation of overhead and underground costs between housing areas and isolated areas and how those costs are avoided in each of the areas in the counterfactual of a commercial operator without the USO. eir implemented changes to these methodologies following concerns from ComReg in the context of the review of the 2009/10 USO application for funding.[18]

35. The allocation of costs between housing areas and isolated areas and the avoidability of costs in isolated areas, in particular, reflected the typical behaviour of a commercial operator:[19]

- "*In housing areas fixed networks are typically built to pass all customers. They then connect all customers within the housing area where the expected margin from that*

[18] Tera, "Assessment of eircom's USO funding application for 2009/2010 financial year", Tera document Réf : 2011-53-OS-ComReg – Task 3.
[19] USO 10/11 Methodology document, section 3.1.5, 02 - eir USO model documentation_1011 - REVISED.pdf

customer is greater than the incremental costs of connecting that single customer. This implies that the relevant increment in the housing area is a single customer and the avoidable cost is the cost of 'thinning' the network (i.e. maintaining the same network coverage but serving fewer customers).

- *In isolated areas fixed networks typically only cover areas where the expected revenues in aggregate from an area exceed the cost of covering that area. This implies that the relevant increments in isolated areas are either big "clusters" of customers, or the isolated area as a whole. "*

36. Given this, the cost avoidability in eir's original submission depended primarily on the extent customers share the network. In isolated areas, whether the incremental network is underground or overhead, from a commercial operator point of view, the associated costs are completely avoidable – i.e., they can be economically justified only on the basis of the serving isolated individual customer or clusters of customers.

37. The changes requested by ComReg, however, signified a departure from this logic in that it implied that cost avoidability is dependent on the type of network used to service isolated areas. In simple terms, if underground network is used to serve isolated customers or isolated clusters of customers the associated cost is unavoidable, while if overhead network is used instead the cost is avoidable. Based on the CAM, ComReg described that underground assets are mainly used for connecting housing areas together, to connect street cabinets to exchanges, and to lay heavy cables serving a big number of customers, which cannot be held by poles. ComReg considered that with the exception of the costs of heavy cables all other underground cable costs were unavoidable.

38. However, eir argued that such an approach is at odds with economic principles and is conceptually inconsistent with the USO costing methodology defined by ComReg (D04/11). A profit-maximising commercial entity serving isolated customers or isolated clusters of customers, would consider whether the expected revenue outweighs the incremental cost of connecting these customers - irrespective of the type of network employed. If, for instance, installing a cabinet, as a flexible node, is the more efficient network deployment[20] that fact does not change the economic decision for the commercial operator. The costs of this node, including the underground exchange-side link, are part of the economic decision of serving

[20] In reality, in many cases streets cabinets are used because of local planning rules, which restrict operators installing direct overhead routes.

these isolated cluster of customers and are therefore – under the definition of D04/11 - fully avoidable.

39. ComReg's extreme assumption of complete unavoidability of street cabinet costs in isolated areas was further underpinned by comparing the number of uneconomic customers against the size of the smallest cabinet, i.e. the one with the smallest number of working lines attached to it. The approach assumed that if the number of uneconomic customers is smaller than the total number of lines connected to an exchange then the cabinet is unavoidable. In the review of this approach eir's advisers Frontier Economics noted the following issues:[21]

- "The basis of the approach underlying ComReg's analysis is not conceptually sound. First, there is a fundamental inconsistency in determining the avoidability of the cost of connecting street cabinets based on the analysis of uneconomic customers, as this leads to a fundamental issue of circularity in the analysis. This is because the decision on the avoidability of these costs will impact the number of uneconomic customers themselves, i.e., the higher the assumed level of avoidability of these costs, the larger the level of avoidable costs in the USO model and, in turn, the larger the number of uneconomic lines.
- In any case, the exercise of comparing the number of uneconomic customers to the minimum number of lines connected to a cabinet is not economically justified. In particular, the approach assumes that if the number of uneconomic customers is smaller than the total number of lines connected to an exchange then the cabinet is unavoidable, on the premise that it would still have been installed if the uneconomic customers were never served. However, this implicitly disregards the "joint costs" associated with serving isolated customers, such as the costs of links to street cabinets which, as highlighted in the previous section, would be considered by a profit-maximising operator when deciding whether to serve customers. In reality, if individual uneconomic customers were not served, then the joint costs would in fact be allocated to the remaining customers, potentially making some of them also uneconomic. If all remaining customers allocated to a cabinet become uneconomic as a result of this, then the cabinet would not have been installed, and the cost of connecting the cabinet would therefore be avoidable."
- "ComReg's analysis, only 30% of cabinetised exchanges have a number of uneconomic lines which is lower than the smallest cabinet. As such, the analysis, even if it were suitable for informing the avoidability of connecting street cabinets in isolated areas, could only inform the level of avoidability of such costs in these specific exchanges - the analysis does

[21] eir's email to ComReg, 03 June 2016, Frontier Economics document "160603_USOF_assessment of avoidability of connecting street cabinets.pdf".

not provide any information to assess if all or a part of the cabinets in the remaining 70% of exchanges are unavoidable or not. As such, even under the premise that the analysis is suitable, concluding that all cabinets in all exchanges are fully unavoidable based on this is a very extreme inference".

40. Frontier Economics concluded[22] that "the analysis presented by ComReg (…) provides little or no grounds for justifying that the cost of connecting all street cabinets in isolated areas is fully unavoidable."

41. Notwithstanding this, eir and its advisers Frontier Economics made proposals to review its original assumption of full avoidability of underground assets in isolated areas. In particular, eir noted that some street cabinets in isolated areas may equally serve customers in housing areas - in effect, these 'cross-border' street cabinets may be seen as part of the housing area. In these cases only the efficient economic decision to serving isolated customers might exclude the costs of the cabinet. In this regard, costs associated with 'cross-border' cabinets were proposed as unavoidable, while the costs associated with 'rural-only' cabinets were proposed as avoidable.

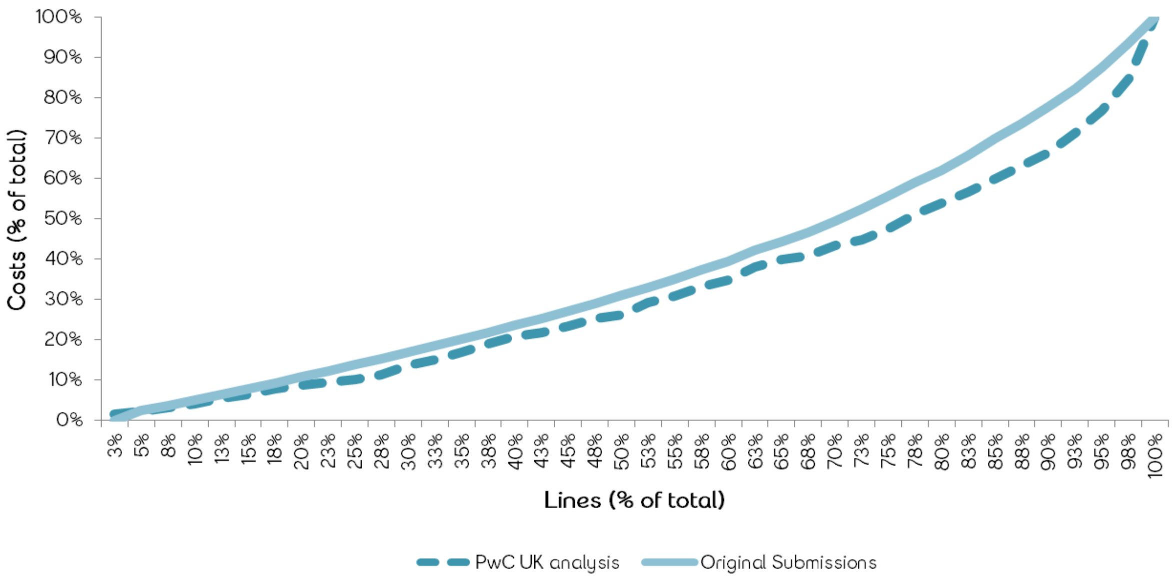
42. ComReg accepted the principle that not all street cabinets are fully unavoidable,[23] but effectively restricted the implementation of this approach to a limited number of exchanges where both the (old) CAM cost allocations and actual geographical data are aligned[24] and the number of uneconomic customers was low. In effect, materially speaking, ComReg's decision was to consider that the costs of deploying street cabinets in isolated areas is never part of the economic decision of serving customers in these areas.

43. eir submits that both these two changes described above illustrate how ComReg's approach was biased from the start, 'cherry-picking' changes to the models which directionally moved the costs in one direction only - that of reducing the quantum of the claims. Had ComReg considered the full set of potential methodological changes, the quantum of the claims would have likely increased from our original submissions as independent verification of our original submissions shows.

[22] eir's email to ComReg, 03 June 2016, Frontier Economics document "160603_USOF_assessment of avoidability of connecting street cabinets.pdf".
[23] ComReg's email to on 28 June 2016.
[24] Given the explicit limitations of the old CAM, eir proposed to correlate the avoidability of street cabinets costs in those exchanges to the remaining set of exchanges where such alignment does not exist.

44. PwC UK's verification of eir's methodology, which was submitted to ComReg as part of our original USO submissions,[25] shows that the methodology was likely conservative. In particular, based on analysis of ComReg's Revised CAM, PwC assessed that a higher degree of convexity in the cost functions could be expected than the one implemented by eir (as shown in **Figure 1**. PwC observed: "*It is likely that the avoidability of costs was significantly underestimated in eircom's funding applications relating to its NCUS* (Net Cost of Universal Service) *in 2009-2010, 2010-2011, 2011-2012 and 2012-2013*".

Figure 1: Cost avoidability: original submissions versus PwC UK analysis



Source: PwC report "Review of eircom's revised cost allocation methodology"

45. Also, regarding PwC UK's verification of eir's methodology, we note that this is quite a significant body of work, particularly as the methodology outlined in ComReg Decision D04/11 is not absolutely clear and is open to interpretation. As evidence of this ambiguity is the fact that (as mentioned previously) it took ComReg a considerable time to evaluate each of eir's applications. If the methodology was completely unambiguous it would appear reasonable to assume that ComReg's assessment would have been timelier. In that context we would also note that the fact that ComReg (in conjunction with Tera) proposes alternative approaches to those submitted by eir, and already independently verified as being appropriate by PwC UK, is not sufficient in itself to implement ComReg's proposed approach. It must reasonably be demonstrated by ComReg that eir's approach was wrong or lacking in accuracy, and that ComReg's approach leads to better outcomes. ComReg would also need to demonstrate that

[25] PwC UK, January 2015, "Review of eircom's revised cost allocation methodology". Refer to correspondence of 11 April 2016.

eir's approach is not consistent with the methodology outlined in D04/11. ComReg has not done this.

46. In summary, the methodology changes that were selected by ComReg, and subsequently implemented by eir, by reducing the NCUS, effectively 'pushed' the actual estimates of the costs away from the 'likely' cost of the USO. For this reason, eir continues to believe these changes were unwarranted and unjustified and should be reversed by ComReg.

47. As regards consideration of the NCUS in the "counterfactual" situation (i.e. the hypothetical situation in which eir does not have a USO) it is clear that, in the counterfactual scenario, being designated as the USP is not a single-year obligation but a cumulative multi-year one. It is also pertinent to consider that no other operator has submitted to ComReg any expression of interest to be considered to be designated as the USP for any aspect of the USO. This has resulted in eir being designated as the USP of last resort – an obligation that it neither sought nor wished to have. In that context, it is appropriate to view the USO through this multi-year prism, Consequently, the correct figure to consider is the €45m covering the five years currently under consideration. Indeed, the fact that ComReg has assessed these five applications together recognises the overlap and the cumulative nature of the NCUS.

Customer Model (FY2014/15)

48. ComReg has adjusted downwards the cost of uneconomic customers by €0.5m in the USO funding application for FY2014/15.[26] This adjustment was, according to ComReg, based on the fact that eir used a "mixture" of the 2009 CAM and the 2016 CAM in the Customer Model. As ComReg correctly described:
    - eir used the 2016 CAM to calculate the cost avoidability inputs to (a) the border of the housing area and (b) the split of costs (capex) between housing areas and isolated area; and
    - The 2009 CAM to calculate the level of avoidability of capex within isolated areas maintained at the FY 2013/14 level.

49. As we noted in correspondence with ComReg, eir regarded the use of both models (for different purposes) as an improvement to its previous methodology. This is because the 2016 CAM uses richer geographical data and the 2009 CAM provides "*a stylised view in terms of the*

[26] ComReg 18/36, "UNIVERSAL SERVICE OBLIGATION APPLICATION FOR FUNDING FROM THE UNIVERSAL SERVICE PROVIDER FOR THE PERIOD 2014-2015", Section 5.3.2.1

geographical deployment of housing in a given exchange area. The border of the housing area (an input into the USO model) is derived from this stylized view, i.e. the allocation of lines and assets between housing areas and isolated areas, and the choice of avoidability assumptions, is predicated on where the border of the housing area lies".[27]

50. We further noted to ComReg that "the cost avoidability assumptions were derived from the Old CAM model due to the fact that the cost categorisation upon which eir and ComReg agreed the levels of avoidability (as in the file "2014-68-CAM model cost allocation-avoidable share.xlsx" sent to eir 22nd February 2016) was not available in the Revised CAM. We also recall that ComReg accepted that eir "prepare avoidable cost shares by taking a single year (e.g. FY 2013/14) as a reference".

51. We cannot accept the argument that, having ComReg accepted a basis for avoidability assumptions for capex, eir could not use better (geographical) information to inform the areas where those avoidability assumptions could be applied or can we accept the argument that the loss in consistency between the cost avoidability and cost distribution assumptions used within the USO models outweighed the clear gain in using richer geographical data to estimate the distribution of costs across access lines.

52. Therefore, eir continues to believe that this adjustment is unwarranted and unnecessary, and submits it should be removed from the net cost of the USO for FY2014/15. As noted in our mail of 4th Jan. 2018, eir reserves its position in relation to this matter[28]

Payphones Model (FY2014/15)

53. ComReg made a downward adjustment to the FY 2014/15 direct net costs for uneconomic payphones of €122,057.[29] This adjustment was to reflect the "*appropriate payphone coverage (in areas where they are mandated)*".[30] eir disagrees with this adjustment. eir considers that the number of payphones used in the calculation of the net cost for uneconomic payphones is appropriate and therefore we disagree with the adjustment calculated by Tera consultants.[31] eir considers that:

[27] email to ComReg, 24 November 2017.
[28] Ref. eir's mail to ComReg of 4th Jan. 2018 – "*This acknowledgment is absolutely without prejudice to eir's right to challenge this adjustment at a subsequent stage in the process. For the avoidance of doubt, all of eir's legal rights in relation to this matter are hereby preserved*".
[29] ComReg Draft Decision 18/36, section 5.3.4.
[30] ComReg Decision 04/11, Decision 16.
[31] Tera, "Assessment of Eir's USO funding application – Direct net cost 2014-2015 – Non-Confidential", section 8.2.2.

- The ‘removals policy’ is not a basis to inform an appropriate level of coverage; and even if it was
- Tera’s approach to derive the quantum of the adjustment is flawed:

54. eir considers that the criteria set out in the removals policy[32] do not allow for the efficient management of the payphone base. eir pointed out in previous e-mail correspondence with ComReg[33] that the rationalisation of payphone numbers requires removal not on a “piecemeal” basis but in an orderly planned manner and on a scale allowing for commercial viability. Even if it was efficient to remove payphones one at a time (which it certainly is not), Tera’s approach fails to consider a number of practical issues. For instance, ComReg’s notification requirements state that “*The USP must notify ComReg eight (8) weeks in advance of any public payphone removal*”.[34] Therefore, the earliest that eir could have removed any public payphone was 8 weeks after January 2015 and not 6 weeks, as suggested by Tera. Furthermore, a number of operational activities need to be completed before a payphone is removed. For instance:

- Power dis-connection to the kiosks/pedestals.
- Road Opening Licences must be granted from the appropriate Local Authority (which entails eir supplying site maps, traffic management plans and submitting the necessary health & safety documentation the appropriate Local Authority.
- Selection, appointment and co-ordination of contractor with the necessary experience.
- Recovery notice posted to kiosk/pedestal six weeks in advance of the physical recovery.
- Address any queries raised on foot of the posting of the recovery notice.

55. In many cases, the completion of these activities extends far beyond the 8 week notification period. To suggest that it can be done within 6 weeks shows that ComReg has no awareness of (nor have they sought to understand) the practical issues involving the removal of public payphones.

56. Given this, eir disagrees that a downward adjustment should be considered to reflect an efficient and appropriate number of payphones. It is unwarranted that ComReg should deny funding for uneconomic payphones which are in place solely because of ComReg’s removals policy, which precludes the economically efficient discharge of the public payphone obligation

[32] ComReg Decision 08/14, “Universal Service Obligation - Relocation/Removal of Public Pay Telephones”.
[33] e-mails sent by eir to ComReg on 29th October 2015 and 1st February 2016.
[34] ComReg Decision 08/14, notification requirements, paragraph 4.3.

Directories Model (FY2013/14)

57. ComReg made a downward adjustment to the FY2013/14 direct net costs in the Directories Model of ✂[35]. eir notes that ComReg has disallowed the costs relating to the implementation of an opt-out mechanism. According to ComReg, Regulation 4 of the Universal Service Regulations and ComReg Decision D07/12[36] do not mandate the implementation of an opt-out mechanism. eir agrees that neither Regulation 4 nor D07/12 mandate in particular an opt-out mechanism. However, the Universal Service Regulations do establish that the obligations should be imposed in the most efficient way. Recital 3 of the Universal Service Directive (USD)[37] states that "*Such obligations will not be regarded as anti-competitive per se provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are* ***not more burdensome than necessary*** *for the kind of universal service defined by the member*." [emphasis added].

58. eir would argue that the costs of implementing an opt-out mechanism were incurred with the sole intent of discharging the obligation of providing a printed directory to an end user where such a need would be objectively justified, i.e. in the least burdensome way. As a result, the efficiently incurred costs of ✂ to implement an opt-out distribution model which is "**not more burdensome than necessary**" are fully justified and in scope for inclusion for USO Funding compensation, and eir disagrees with its exclusion.

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[35] ComReg Draft Decision 17/109, "Assessment of eir's 2013-2014 Universal Service Fund Application", section 5.3.3.1.

[36] Response to Consultation, Decision and Decision Instrument "The Provision of telephone services under Universal Service Obligations" D07/12, dated 29 June 2012.

[37] EU Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2012 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

Question 2: Do you have any observations on ComReg's preliminary view that consultancy costs incurred in respect of a USO funding application do not form part of the net cost?

59. eir does not agree that the consultancy costs incurred in respect of preparing applications should be excluded from the direct net cost. These costs were incurred solely for the purpose of meeting the requirements of ComReg Decision 04/11. Recovery of these costs is permitted by the Regulations as these are costs that would have been avoided in their entirety had there been no Universal Service Obligation (USO).

60. ComReg has justified this preliminary view by stating that the consultants' fees are not net costs of the universal service but were incurred in relation to the preparation of the funding applications. This is an unacceptably narrow interpretation of the applicable regulatory framework and therefore any decision to exclude these costs would be flawed.

61. Under the Universal Service Directive, "It is important to ensure that the net cost of universal service obligations is properly calculated and that any financing is undertaken with minimum distortion to the market and to undertakings".[38] This means that ensuring that the financing of the USO - be it in the form of the USP internalising its costs, or through a sharing mechanism - is undertaken in a competitively neutral manner. This requires, naturally, that the net costs to the USP be determined in the first place.

62. eir's decision to seek funding is made within the scope of the Universal Service Directive and in particular in the context of ensuring that the USO does not represent an unfair burden, a requirement that undoubtedly rests with ComReg to satisfy. It is not, as ComReg's puts it, that "The decision to make a USO application for funding is eir's commercial decision and is not required by any universal service obligation".[39]

63. The legislative framework establishes that these costs should be determined against a counterfactual which departs from standard commercial decision-making.[40] In this regard,

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[38] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2012 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Recital 18.
[39] ComReg 17/73, Paragraph 154.
[40] European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (SI 337 or 2011), Schedule 2, Part A, "In undertaking a calculation exercise, the net cost of universal service obligations is to be calculated as the difference between the net cost for a designated undertaking of operating with the universal service obligations and operating without the universal service obligations".

ComReg has determined that an independent verification must be completed[41] and the estimation of indirect benefits associated with the USO must be conducted separately to eir.[42] Both these stipulations by ComReg meant that eir had no discretion to avoid these costs when preparing and submitting its applications[43] due to the requirements imposed on it by ComReg under D04/11. As such the consultancy costs are solely and directly attributable to eir's USO designation. The Regulations require that "*Due attention is to be given to correctly assessing the costs that any designated undertaking would have chosen to avoid had there been no universal service obligation*"[44]. The consultancy costs clearly fall into the category of avoidable costs if there had been no USO.

64. eir's view is supported by international precedent. For example, in France the funding of the net cost of USO is done through a sharing mechanism (a fund managed by Caisse des Dépôts on behalf of the regulator ARCEP), which includes the costs of managing the fund itself (including regulatory audits required to calculate the net cost and turnover relevant for the assessment of contributions, costs of preparation of statements and in payment by the operators, the cost of calculating the net cost of universal service by the Authority and the management of social tariff reduction device").[45] In Italy, where it was judged that sharing mechanism was not necessary (given that the benefits were in excess of the costs calculated), the verification costs incurred by AGCOM were nevertheless shared between operators.[46]

65. eir also notes that Article 12(2) of the Universal Service Directive provides the following:

"*The accounts and/or other information serving as the basis for the calculation of the net cost of universal service obligations under paragraph 1(a)* ***shall be audited or verified by the***

[41] ComReg D04/11, Decision 22, "Financial information shall be provided with an appropriate audit opinion or verification report, where the Auditor (as approved by ComReg and who may be a person, or a corporation sole, or a body corporate, or an unincorporated body) has in no way assisted with the preparation of the [Universal Service Obligation] USO funding application".

[42] ComReg Decision 31 of D04/11 requires that "calculation of the benefits of the USO shall be completed by an external expert, independent of the USP

[43] For these reasons we find that ComReg's comment that "No explanation was given for the inclusion of this figure" (i.e. Consultancy fees costs) disingenuous. The explanation, as ComReg is well aware, resides in the applicable legal requirements associated with the preparation of a USO funding application.

[44] European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (SI 337 or 2011), Schedule 2, Part A

[45] ARCEP, "Il convient de comparer cette somme au coût de mise en œuvre du mécanisme de financement. Celui-ci comprend les frais de gestion du fonds par la Caisse des dépôts, les coûts des audits réglementaires nécessaires au calcul du coût net et à la production des chiffres d'affaires pertinents en vue de l'évaluation des contributions, les coûts liés à l'élaboration des déclarations et des mises en paiement par les opérateurs, les coûts liés au calcul du coût net du service universel par l'Autorité et à la gestion du dispositif de reduction sociale tarifaire. Ce coût total de mise en œuvre est d'un montant inférieur à 4 millions d'euros, dont la majorité est imputable au dispositif de réduction sociale tarifaire". p13. http://www.arcep.fr/uploads/tx_gsavis/12-0484.pdf.

[46] AGCOM, Decision 100/14/CIR (information obtained from Cullen International).

> ***national regulatory authority or a body independent of the relevant parties and approved by the national regulatory authority****. The results of the cost calculation and the conclusions of the audit shall be publicly available*". (Emphasis added)

This has been transposed into Irish law by Regulation 11(7) of the Universal Service Regulations 2011 which provides:

> "*The accuracy of the accounts or other information, serving as the basis for the calculation of the net cost of an obligation,* ***shall be audited or verified, as appropriate, by the Regulator or a body approved of by the Regulator*** *and independent of the undertaking concerned*". (Emphasis added)

It seems to eir from the above that the obligation to verify or audit any accounts, data or information provided as part of the funding application actually rests with ComReg and not with eir. There is no obligation on eir to engage any independent third party. However, ComReg has sought to impose this obligation on eir through its Decision 04/11. It is unfair that ComReg should seek to place the financial burden of its responsibilities solely on the USP. Not only has ComReg imposed this obligation on eir but it is now also refusing to allow eir to recoup these costs. This further compounds the unfair burden.

Question 3: Based on ComReg's assessment detailed in Sections 5, and 7, do you have any observations on ComReg's preliminary view that the positive net cost for [20xx-20xx] is €xx? [€42,981,213 in total for the years 2010/11 to 2014/15]

66. We do not agree with ComReg's preliminary view that the direct net cost for these five financial years (2010/11 to 2014/15) is **€42,981,213**. As explained above the legitimately incurred consultancy costs of €2,387,956 must also be included, bringing the total to €45,369,169.

67. eir has pointed out elsewhere in this response (such as in response to Question 1) the areas where it disagrees with the approach taken by ComReg in assessing eir's funding applications. Apart from these areas, eir has reviewed the remaining proposed adjustments to the direct net cost calculations in ComReg Consultations 17/73, 17/81, 17/95, 17/109 and 18/36, and considers most of them to be reasonable.

Question 4: Following ComReg's assessment, do you have any observations on ComReg's preliminary view that a positive net cost of €42,981,213 (or €45,369,169 as claimed by eir) is not an unfair burden on eir for the periods from 2010-2011 to 2014/15?

68. eir does not agree with ComReg's preliminary view. A positive net cost over five years of in excess of €45m, or for that matter, €43m as (incorrectly) suggested by ComReg, is clearly an unfair burden to impose exclusively on a single operator. It is a charge that is manifestly excessive for one operator to bear, taking into account that no positive benefit whatsoever accrues to the operator concerned, as any benefit is included in determining the net positive cost.

69. The question is not whether eir is profitable enough to bear the cost of the USO, as is the thrust of ComReg's approach. Instead, **the crucial question for ComReg is to assess whether or not, having decided to impose a USO, this regulatory intervention led to significant market structure distortions to the extent that have impeded "*the USP from competing fairly with the rest of the industry*"**.[47] If it has – as we believe we show in this response – a correcting mechanism is desirable and is welfare-enhancing.

70. Such a correcting mechanism is contemplated in Article 13 of the Universal Service Directive: "a mechanism to compensate that undertaking" and/or "to share the net cost of universal service obligations between providers of electronic communications networks and services".

ComReg's assessment makes no material use of the USO net cost submissions

71. ComReg's assessment is mainly based on a comparison of eir's return on capital from its regulatory accounts with ComReg's regulated WACC of 10.21%, presented as a 'competitive benchmark'. It concluded that there was no evidence of the net cost of the USO being an unfair burden given that eir's returns on capital were above the regulated WACC. However, this conclusion could have been derived without making use of the USO submissions.

72. It is clear from ComReg's D04/11[48] that the USO funding claims are the basis for an assessment. The fact that ComReg could have arrived to a conclusion which to a large extent

[47] ComReg D04/11, Decision on the Costing of universal service obligations: Principles and Methodologies, 31 May 2011, Paragraph 5.8.

[48] Or for example, ComReg 10/46, Response to Consultation – The Provision of Telephony Services under Universal Service Obligations, p. 37, "In general, the analysis of a potential unfair burden is conducted once there is a net cost of USO, taking into account intangible benefits (also referred to as a positive net cost).

makes no use of the USO funding claims is absolutely illogical, anomalous and at odds with D04/11.

ComReg's approach is based on a static and incorrectly specified analysis of eir's financial performance, leading it to conclude that eir had the ability to internalise the costs of the USO.

73. ComReg's profitability assessment based on a comparison between eir's profitability and a "competitive benchmark" is flawed. eir strongly disagrees with the competitive benchmark used by ComReg and the measurement of eir's profitability, in terms of the scope of the services used, and the basis of measurement for capital employed. Underpinning ComReg's analysis is also an inappropriate judgment of what the relevant time-period for analysis should be. These issues are discussed in more detail below.

Competitive Benchmark

74. ComReg has deemed that the "competitive benchmark" is eir's regulated WACC set by ComReg in Decision D01/08 (the "WACC Decision")[49]. While the determination of a regulatory WACC for ex-ante remedies is generally in line with international practice, the assessment of the existence of the unfair burden is carried out as ex-post analysis. ComReg can therefore use existing historical information from the relevant periods (i.e. from 2010/11 to 2014/15) as a basis for its analysis.

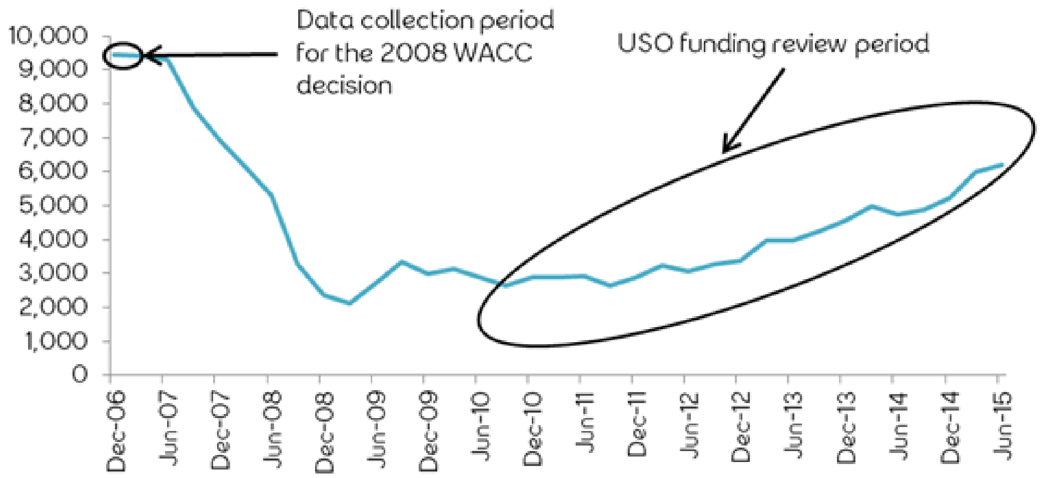
75. ComReg's WACC Decision is from May 2008. This Decision was informed by Oxera's report of November 2007 (which in turn was based on financial data relating to the 1st Half of 2007 (i.e. Jan.-June 2007)). However, significant changes in financial and economic conditions took place following the global financial crisis of 2008 and therefore ComReg should have considered that this WACC Decision was fundamentally inappropriate for a benchmark of returns available to investors in 2010/11 and the subsequent four years. Ireland was one of the countries hardest hit by the fallout of the global financial crisis. Not only did the stock market plunge, but Irish bond yields rose to levels which eventually required the country to request a bailout and impose severe austerity measures.

Whether a burden is unfair, depends not only on there being a positive net cost, but also on whether this impedes the USP from competing fairly with the rest of the industry".

[49] The regulated WACC was subsequently updated by ComReg in D15/14 of December 2014

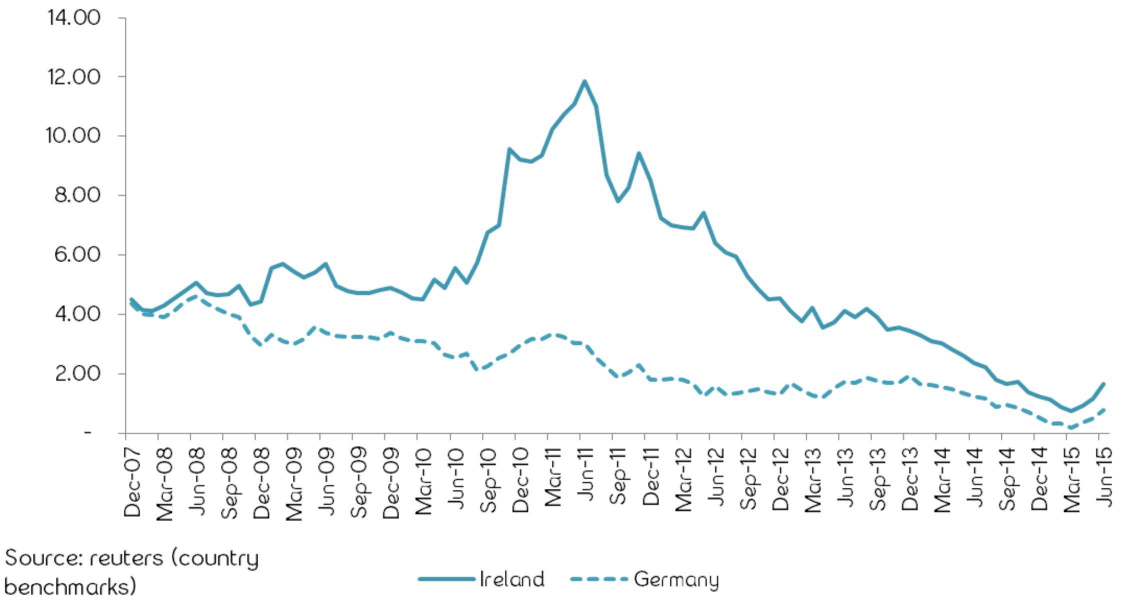
76. In Ireland alone, at the start of the review period in June 2010 the ISEQ had dropped by over 70% compared its value during the data collection period in early 2007. This trend was maintained throughout the entire review period, such that the average value of the ISEQ in the period from 2010/11 to 2014/15 was almost 60% less than the average in the period Jan.-June 2007. This trend is shown in Figure 2: ISEQ Trend – Jan. 2007 to June 2015**Figure 2** below. Yields on Irish bonds averaged at a premium of circa 600 base points over their German counterparts in 2010/11 (and 2011/12) - close to double their 2007 levels during the 2010/11 period - and only started to decline towards the end of 2012. **Figure 3** below show the evolution of yields since ComReg's WACC Decision of 2008.

Figure 2: ISEQ Trend – Jan. 2007 to June 2015



Source: www.tradingeconomics.com

Figure 3: 10-year government bond yields



77. Irish companies were not immune to this environment. In effect, ComReg's WACC Decision of December 2014[50] considered the effect of the severe financing conditions facing Irish operators in the aftermath of the sovereign debt crisis.[51]

78. In fact, at the time of review of the 2014 WACC Decision, ComReg's advisers Europe Economics pointed to evidence of the additional difficulties by Irish companies seeking re-financing in international bond markets: "The additional spread Irish energy utilities paid over their German peers currently stood at around 75 bps in September 2013 and 55 bps in December 2013".[52] Moreover, from the evidence presented[53] by Europe Economics it is also results that premia in the years 2010 to 2012 were significantly higher than in late 2013.

79. Therefore, an appropriate benchmark for profitability in 2010/11 and subsequent years cannot ignore the prevailing expectations in the year (which, undoubtedly, were less certain of a return to normality), reflected in significantly high spreads. As a result, the financing conditions available to eir led to a significantly higher cost of capital in the years from 2010/11 to 2014/15 than that suggested by ComReg's 2008 WACC decision, and therefore a higher cost of capital

[50] ComReg Decision 14/136.
[51] It is worth pointing out the WACC Decision of 2014 was made in the context of setting a forward-looking WACC using the CAPM model, acknowledging that in 2014 economic agents were facing the prospect of a "normalisation" of economic conditions.
[52] Europe Economics, "Cost of Capital for Mobile, Fixed Line and Broadcasting Price Controls", April 2014, p41.
[53] Europe Economics, "Cost of Capital for Mobile, Fixed Line and Broadcasting Price Controls", April 2014, p.41, Figure 5.2.

should be considered when assessing eir's profitability in those years. The fact that ComReg and its consultants have not on this occasion made any attempts to review and quantify a benchmark for profitability which considered the actual financing conditions in these years of financial turmoil is simply untenable.

80. We do not purport to present here a fully-fledged calculation of the cost of capital. However, **Table 1** below attempts (at a high level) to quantify the impact of the effects discussed above. We do so by firstly setting the yields of the Irish sovereign debt as the benchmark for a risk-free rate. Secondly, we take from Oxera's report the 'upper-bound' estimate of 190 base points for the debt premium. In doing so, we give some acknowledgment to the fact that reasonably geared Irish companies are constrained by the country-specific circumstances in which they operate, including the prevailing expectations in the year. The implicit spreads (over German bonds) presented below approach 800 base points in 2010/11 and 2011/12 but would have been still below the actual cost of debt for eir. Indeed, as Europe Economics puts it "*At the time of issuance, the debt premium — measured as the spread over the appropriate German government bond — on Eircom's bond was around 900 bps*".[54]

Table 1: Modified Cost of Capital

	2008 WACC(1) (Mid-Point Estimate)	**2008 WACC(2) (Upper Bound)**	**2010/11**	**2011/12**	**2012/13**	**2013/14**	**2014/15**
Risk Free rate % (2)	4.75	5.00	8.82	7.98	4.56	3.31	1.38
Cost of debt % (2)	6.90	6.90	10.72	9.88	6.46	5.21	3.28
Equity Beta	1.02	1.39	1.02	1.02	1.02	1.02	1.02
Cost of equity % (3)	12.4	15.2	17.1	16.1	12.2	10.8	8.6
WACC % (3)	10.2	11.1	14.5	13.6	9.9	8.6	6.5

Notes:
(1) Point estimate.
(2) For 2010/11 to 2014/15 from Reuters (country benchmarks)
(3) On a pre-tax basis.

81. The resulting estimates for pre-tax WACC for 2010/11 and 2011/12 are significantly above the upper-bound estimate calculated by ComReg in 2008. This suggests ComReg's WACC Decision of 2008 underestimates unreasonably the cost of capital for an Irish operator and therefore is inappropriate as a "competitive benchmark" in the years of 2010/11 and 2011/12. For 2012/13, the modified WACC appears to suggest that the 2008 Decision provided a reasonably proxy. However, in this year, eir's financing was still being met under severe conditions. As noted by Europe Economics the premium on eircom's bond only "*came down*

[54] Europe Economics, "Cost of Capital for Mobile, Fixed Line and Broadcasting Price Controls", April 2014, p.69. (Report for ComReg)

steadily [from the level of 900 base points] *over the course of 2013. On 11 February, 2014, Moody's upgraded Eircom's credit rating from Caa1 to B3 with a stable outlook. The ratings upgrade was met with a sharp fall in the debt premium on Eircom's 2020 9.25 notes.* […] *The debt premium fell to around 515 bps and has stabilised around that level since then*"[55]. In effect, for the years 2012/13 to 2014/15 this indicates that the cost of debt for eir was indeed higher than that implied from the debt parameters presented in **Table 1** above. A higher debt parameter for eir, on this basis, would have meant that only in 2014/15 would the cost of capital have dropped below the 10% level. Yet eir's profitability continued to decline, as shown below.

82. Therefore, in the absence of other information presented by ComReg in its Draft Decision, eir believes – for the reasons outlined above – that the 2008 WACC decision is not an appropriate benchmark for eir's profitability for the years 2010/11 to 2011/13 as it underestimates the real cost of capital for eir at that time. Given the extraordinary and unprecedented financial conditions facing eir in 2010/11 and 2011/12 such a Decision underestimates grossly the actual cost of capital. Without further inspection, for FY2013/14 and FY2014/15 the estimates provided by both the 2008 WACC Decision and the 2014 Decision are within an acceptable range.

Scope of the eir business

83. We consider that 'Fixed-line business' is not the correct definition for the purpose of ComReg's assessment, and instead consider the 'USO business' to be a more appropriate definition in that it includes only those services which are related to the discharge of the USO - therefore a better representation of the return on capital of a USP operator.

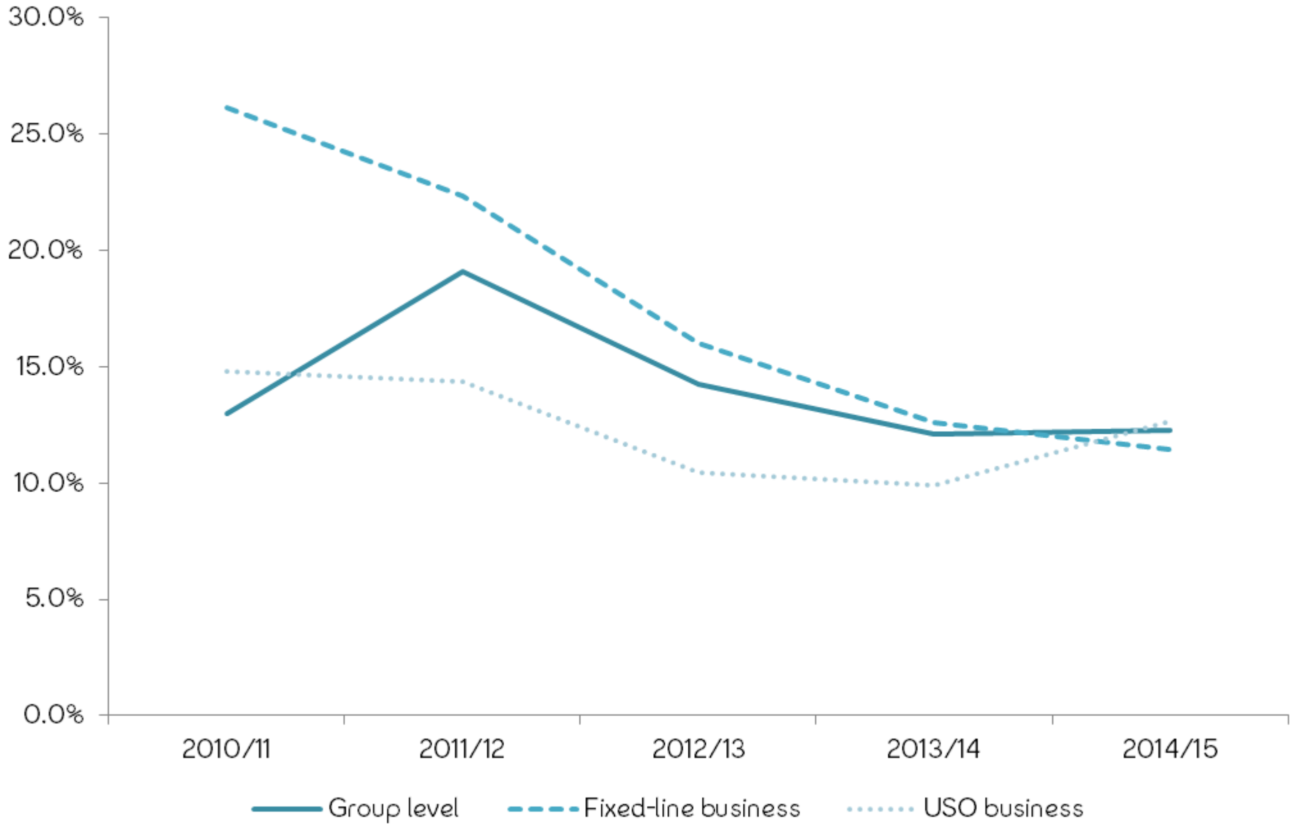
84. The rationale for choosing the fixed line business to be the preferred definition is that whilst the additional services will incur costs that are unrelated to the USO network, nevertheless there will be cost elements that are shared between the USO and non-USO businesses. As a result the separate businesses are intrinsically linked. We consider that this is not the correct definition of the business. A similar argument could be made for the inclusion of mobile services (or even another completely unrelated service that eir may choose to offer in the future) as there will be common costs (e.g. IT, billing costs, etc.) that are shared between the services. The reason for eir preparing Separated Accounts and allocating costs to different services is precisely to allow ComReg to understand the costs and revenues associated with each individual service. It seems counter-intuitive to then group all the separate markets together

[55] Ref. - Europe Economics, "Cost of Capital for Mobile, Fixed Line and Broadcasting Price Controls", April 2014, p.69. (Report for ComReg)

when making a regulatory decision on the basis that they share costs. Moreover any benefits flowing from non-USO services (e.g. broadband) to customers in uneconomic areas have already been internalised by eir within the net costs of the USO. Instead intuitively the USO business is the correct definition, as this includes only those services which are related to the USO provision.

85. As is shown in **Figure 4** below the pattern of profitability (on any of the three business definitions) is one of decline in profitability from the levels of 2010/11, with returns on capital converging to a range of around 11% to 12%. We believe that in a context of a multi-year obligation this pattern is a much more meaningful measure of eir's profitability. Given this ComReg should have taken account of this pattern in its assessment of the funding application for the financial years 2010/11 to 2014/15.

Figure 4: ROCE under different business definitions



Source: eir's regulatory accounts

86. ComReg's consultants Oxera have argued on the basis of a nebulous 'dissociability' concept and increased subjectivity in reviewing eir's accounts in greater detail. We consider these

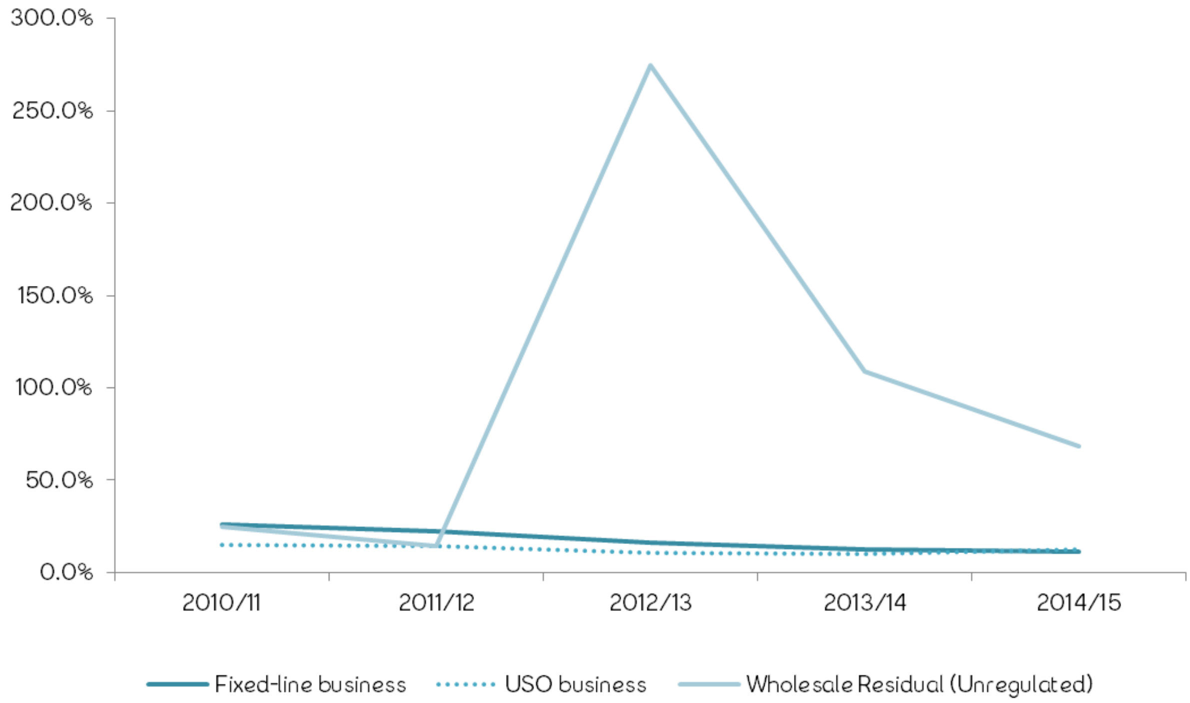
arguments to be weak. For starters, the use of the 'dissociability' concept is plainly inconsistent as far as a decision is made, for instance, to exclude mobile services but to include retail calls, broadband and the residual services within 'Retail Other'. Common costs (IT, billing costs, etc.) are shared between fixed and mobile services and network elements (leased lines, partial private circuits, core fibre capacity, etc.) are provided by the fixed-line business to eir's mobile operator. In contrast, services are included by ComReg that are clearly dissociable from the USO such as high-speed leased lines and data services, web hosting or managed network services.

87. At a different level, services that fall out of the narrower USO business definition are to a large extent provided under competitive conditions or in markets that have no explicit ex-ante regulation. In addition, returns can differ significantly. For instance, as Oxera correctly pointed out, for low-capital businesses using return on capital as a measure of profitability may not be appropriate. Other non-USO services such as international access and inpayments (and other unregulated wholesale businesses) have returns on capital which are significantly unstable (see **Figure 5** below). Oxera considered whether a temporary fluctuation in conditions could affect the returns in a given year. However, stating that "to the extent that any boost or reduction in eir's profitability in a given year is attributable to temporary market fluctuations, this would be expected to reverse in future years, and this would be observed in the analysis of eir's ROCE in subsequent application periods"[56] is clearly not a satisfactory way to deal with this issue.

88. Using the fixed-line business definition is in fact double-penalising given that the benefits flowing from non-USO services (e.g. broadband) have already been internalised by eir - within the net costs of the USO.

[56] Oxera, Oxera Unfair burden report 2010/11, 31 August 2017, p14.

Figure 5: 'Fixed-line business' return on capital decomposed



Source: eir's regulatory accounts

Relevant time period

89. eir considers that given the multi-year nature of the USO, the assessment of whether it constitutes an unfair burden or not should be made with reference to a period longer than one year. The amortisation of capital expenditure related to the USO will in most cases exceed a one-year period and frequently will exceed the designation period. From this point of view, the designation period could be seen as a lower-bound for a relevant period of assessment of eir's profitability.

90. An approach consistent with a longer view appears to have been given some consideration by ComReg and Oxera in the 2013 assessment of the 2009/10 USO funding application. In its report, Oxera states that eir's results over the 7-year period to 2011/12 show "a consistent **pattern** of profitability"[57] (emphasis added). Furthermore, a test of profitability under different business definitions is performed using eir's accounts for financial year 2011/12 and not 2009/10 (or 2010/11, if the issue was the format change of the regulatory accounts).

[57] Oxera, Oxera unfair burden report 2009/10, 1 February 2013, p.12.

91. However, in its assessment of eir's USO application for 2010/11 (and 2011/12) Oxera submitted that a review of eir's profitability over time was not possible "due to changes in the format of the regulatory accounts".[58] While we would agree that a like-for-like comparison to the financial year 2009/10 would have been complicated given the change in regulatory accounts, Oxera could have examined the pattern of profitability based on 2010/11 and subsequent years.

Capital Employed

92. eir considers that using a MCE figure set on the basis of a historical cost convention is inappropriate for profitability (measured by ROCE) assessments and is at odds with best practice. Best practice assessments of a company's return on capital are based on the 'fair value' of assets to calculate the capital employed.

93. The MCE is the denominator in the profitability equation and acts as the reference point to determine whether profits are low or high. The absolute level of profits is not relevant in this assessment, only this in reference to the MCE (i.e. the ROCE). It is therefore critical that the valuation basis for the MCE is correct.

94. The UK Competition Commission (CC) guidelines for measuring profitability explain clearly that this is the most meaningful measure to use for these assessments: "*Under current accounting standards, most assets are held at historical cost and this may differ substantially from the 'replacement cost' or 'Modern Equivalent Asset value' which the CC considers to be the economically meaningful measure for its purposes in most cases*".[59] The UK Competition Commission also explains in its guidelines for competition investigations that getting a reliable fair value valuation for the capital employed is an indispensable factor before applying this ROCE profitability assessment - "*In situations where capital employed cannot be reliably valued the CC may consider alternative measures, such as the return on sales or other relevant financial ratios*".[60]

95. Despite this guidance and the well-understood economic rationale behind it, in its profitability assessment Oxera have taken the inputs directly from eir's HCA Separated Accounts. We would have expected Oxera to attempt to obtain or derive CCA or "fair value" figures for its calculation, given the clear rationale for using a fair value approach.

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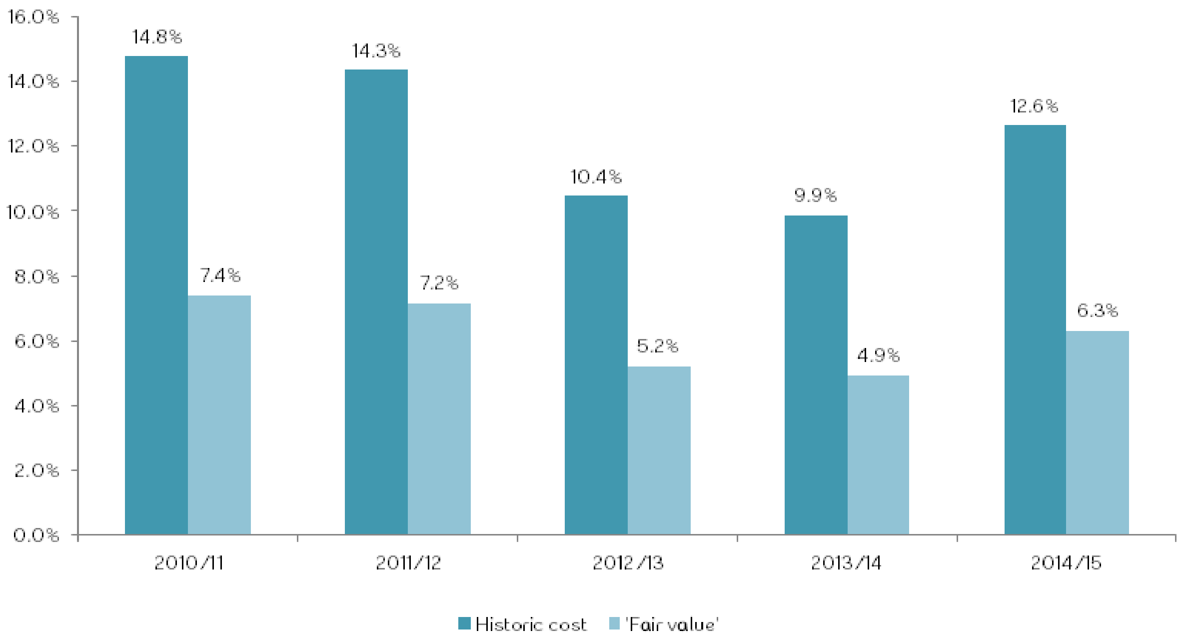
[58] Oxera, Oxera Unfair burden report 2010/11, 31 August 2017, p.10.
[59] Competition Commission, Guidelines for market investigations, Annex A, paragraph 13 (found at http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/consultations/market_guidlines_annexes.pdf)
[60] Competition Commission, Guidelines for market investigations, Annex A, paragraph 14

96. We are of the view that if capital employed was calculated based on a fair valuation, the level of capital employed would have been materially higher. This would then mean that the ROCE would be lower, impacting on the conclusions drawn on profitability. For example, net to gross book value ratios for poles, aerial cable, duct and civils averaged close to 30% in the six years to financial year 2014/15. To illustrate further this point we refer to our response to ComReg's Decision 13/45 relative to eir's application for financial year 2009/10.[61] In this response eir showed that an analysis based on 'fair value' would result in a significantly higher level of capital employed ("Using a "fair value" approach would lead to the MCE being approximately 50% higher"). The implicit levels of returns are plotted below in **Figure 6** and indicate that for instance for 2010/11 the return on capital employed would have been 7.4% on 'fair value' basis compared to 14.8% on an historic basis.

Figure 6: USO business return on capital under alternative asset valuation methodologies



Note: Assumes a 50% uplift on MCE for all years, historic cost based on eir's regulatory accounts

97. **Table** 2 is a modified comparison of eir's return on capital with a competitive benchmark. While ComReg's analysis would suggest that eir's returns have been declining but nevertheless been consistently above the competitive benchmark, eir's analysis suggests a different pattern - returns have declined, but also they have been below the competitive benchmark for the five

[61] eircom Group, Response to Consultation Paper: Consultation and Draft Determination on the Assessment of eircom's Universal Service Fund Application for 2009-2010, p16.

years to 2014/15. Furthermore, the revised ROCE figures are consistently below ComReg's competitive benchmark WACC in all five years.

Table 2: eir's return on capital versus competitive benchmark

	2010/11	2011/12	2012/13	2013/14	2014/15
ComReg					
WACC %	10.2	10.2	10.2	10.2	8.2
ROCE %	26.2	22.3	16.0	12.6	11.4
eir					
WACC %	14.5	13.6	9.9	8.6	6.5
ROCE %	7.4	7.2	5.2	4.9	6.3

98. In summary, eir ability's to internalise the USO cost is reviewed with respect to a static and incorrectly specified analysis of its financial performance. It does not take into account the information available over a longer period, where it is clear that eir's financial performance is rapidly declining. It specifies incorrectly some of the relevant parameters leading to conclusions which most likely do not hold once these parameters are corrected (as we have attempted to do above).

The profitability of eir alone should not be viewed as an absolute criteria

99. ComReg has presented eir's profitability and its financial strength as evidence that eir had the ability to internalise the net costs associated with the USO. However, if this is a valid criterion to justify that eir should bear in part or in total the costs of the USO, ComReg have not explained why other market participants were excluded from a similar examination.

100. In **Table 3** below we show how other relevant telecommunications operators compare with eir in terms of revenues and operating income. This is based on publically available information.

Table 3: Group Level Revenues € million (Operating Income %), main operators in the Ireland

	2011	2012	2013	2014	2015
Vodafone	53,994 (12%)	45,018 (14%)	46,698 (-6%)	45,469 (-10%)	48,385 (4%)
Liberty Global	6,559 (18%)	7,144 (18%)	9,486 (13%)	12,261 (11%)	12,274 (10%)
Hutchison (1)	n/a	n/a	n/a	2,242 (58%)	15,411 (23%)
Telefonica (1)	62,837 (16%)	62,356 (17%)	57,061 (17%)	n/a	n/a
BT	23,139 (13%)	22,356 (14%)	21,137 (15%)	21,077 (16%)	20,574 (18%)
eir	2,232 (10%)	1,981 (15%)	1,819 (13%)	1,686 (12%)	1,662 (13%)

Source: eir (regulatory accounts), all other (Reuters)
Notes:
(1) Hutchison acquired O2 from Telefonica in 2014.

101. Naturally, the size and profitability of the Irish operations for each of these companies should be considered. However, there is no doubt that each one of these companies command a sizable portion of the market in Ireland and to this effect international practice has been that where sharing mechanisms are established they are normally based on operator revenues. As indicated in D01/14[62], the expectation is that OAOs would contribute of the order of 70% to any funding mechanism, and eir the remaining 30%.

102. In the case of Hutchinson, results for the Irish operations are publically available. These indicated that revenues were €436m and €689m, for 2014 and 2015 respectively.[63] After completing the acquisition of O2 (2014), EBIT was €109m (15.8%) in 2015. Telefonica[64] reported revenues of €723m in 2011 (EBITDA of 28.5%), €629m in 2012 (EBITDA of 20.7%)[65] and €556m (approximate EBITDA of 21%) in 2013. Vodafone[66] and BT do not provide disaggregated results[67] for Ireland. In the case of Liberty Global (Virgin Media's parent company) report revenues of €430m in 2011, €426m in 2012, €464m in 2013 and €469m in 2014 but the profitability of the Irish operations is not disclosed.[68] With BT, it is safe to say BT Ireland operates profitably, given their strong presence in the more profitable business channels.[69]

103. Customers on these and other networks can call uneconomic areas and customers, which they wouldn't be able to do in the absence of the USO. The same is true for eir customers. However, the net benefits of 'off-net' and 'on-net' calls have already been internalised in the net cost of the USO. Furthermore, the value of networks to customers and therefore the revenues operators are able to generate is undoubtedly associated with the fact that there is a ubiquitous network. That alternative operators are able to retain the value of this externality is yet again effectively an additional form of 'free-riding'.

[62] ComReg Decision D01/14, para. 9.16
[63] CK Hutchison Holdings Limited, Operations review report 2014, http://file.irasia.com/listco/hk/ckh/annual/2015/en/ortelecom.pdf
CK Hutchison Holdings Limited, Operations review report 2015, http://file.irasia.com/listco/hk/ckh/annual/2016/en/ortelecom.pdf
[64] Telefonica 2013 Annual Report, http://annualreport2013.telefonica.com/pdf/en/WEB_Informe_Financiero_ENG.pdf
[65] Telefonica 2012 Annual Report, https://www.telefonica.com/documents/153952/13347920/informe_anual_2012_en.pdf
[66] Vodafone annual reports, http://www.vodafone.com/content/index/investors/investor_information/annual_report.html#
[67] BT annual reports, http://www.btplc.com/Sharesandperformance/Annualreportandreview/Archivedreports/index.htm
[68] Liberty Global annual reports, http://www.libertyglobal.com/ir-ar-archive.html
[69] Notwithstanding the fact that in UK over the period April 2005 to March 2013 "BT's regulated services were consistently above the rate required to compensate investors, as determined by Ofcom", Frontier Economics 2013, http://www.frontier-economics.com/publication/the-profitability-of-bts-regulated-services/

104. The fact that other operators are not sharing the NCUS is intrinsically unfair. Other operators benefit from the existence of a USP as it provides connectivity to areas and people who would not be served otherwise. These people and areas can call other operators' subscribers and be called by them, thereby increasing the value of the other operators' services. In spite of this, ComReg's principles effectively state that it is fair for them to reap these benefits while the cost is borne by eir alone. In spite of the fact that eir is obliged by ComReg to incur massive costs as a direct consequence of being the USP, and that other operators can readily leverage off these investments to sustain business cases and make substantial profits as a direct result, ComReg, by concluding that the burden of USO provision is not "unfair" to eir, allows all other operators, in effect, to enjoy a "free ride" at eir's expense. This is hardly consistent with ComReg's Mission Statement which aspires to "*promote sustainable competition …. and protecting the interests of consumers in areas where competition is not established*"[70].

105. Again, it is worth reiterating at this point that no OAO expressed any interest to ComReg in being designated as the USP for any aspect of the USO. This suggests strongly that the cost to being the USP is indeed great (even in the context of other operators' performance) and therefore the burden of that cost is in fact material and considered by all operators (including eir) as a cumulative cost as opposed to the year by year assessment.

106. Given the size of revenues of operators other than eir, and notwithstanding the fact that the more relevant operators are major international telecoms (i.e., having, arguably, the ability to explore greater scale and scope economies, including access to lower cost finance), ComReg's approach is unjustifiably narrow: eir's ability to internalise the costs of the universal service, should not be taken by ComReg as a sufficient condition to exempt other operators from contributing to this cost.

107. ComReg's position means that eir must subsidise its competitors. It raises the costs incurred by eir while lowering the costs of eir's competitors. This is not consistent with the principle of fair competition and is in fundamental contradiction with the principles of the regulatory framework for electronic communications which is designed to ensure a level playing field for all operators. In eir's view, ComReg is also acting in breach of section 12 of the 2002 Act as it has failed to take steps to promote competition and to avoid distortion or restriction of competition.

[70] Ref. ComReg's Annual Report for 2014/15 (https://www.comreg.ie/media/2016/05/COMREG-AR-2015-ENGLISH.pdf")

The approach is fundamentally mute about the changes in telecom markets in Ireland and how in this context the USO creates additional competitive distortions.

108. Under the Universal Service Directive the key concern is to assess whether or not in the absence of a properly designed funding mechanism the USP is able to compete "fairly with the rest of the industry". Determining if a competitive disadvantage exists requires that ComReg review the changes in market structure and how these changes interact with the universal service obligation. It also requires that ComReg employ a level of commercial judgment to the materiality of the costs involved.

Competitive Distortions

109. ComReg's advisers Oxera have considered year-on-year changes to eir's fixed revenue market share in their reports and conclude that "eir's share of revenues generated from fixed-line activities remained high in 2010/11. Its fixed-line market share by revenue in this period was 62%".[71] (A similar statement is included in the Oxera report for subsequent years). However, structural changes in the market are unlikely to be observed on the basis of a year-on-year analysis.

110. eir's competitive position has seen a significant and continuous deterioration since 2009/10. Network shares have declined significantly as result of cable and mobile competition. In urban areas in particular eir has experienced a very significant loss of customers. In other words, eir's ability to cross-subsidise is greatly undermined by this line loss. Moreover, the lines that are lost tend to be those that are most profitable. Line loss has been more significant in the low-cost urban areas where competition between operators is consistently most vigorous. This loss of market share on the part of eir has coincided with eir having to endure the unfair burden of financing the USO on an ongoing basis. This imposition seriously constrained eir's ability to invest in competitive technology to counteract the progressive erosion of our market share.

111. **Figure 7** below illustrates the severe decline in national market shares. From 66% at the end of June 2010, market shares have gone below the 50% mark at the end of 2013 and the general downward trend is continuing.

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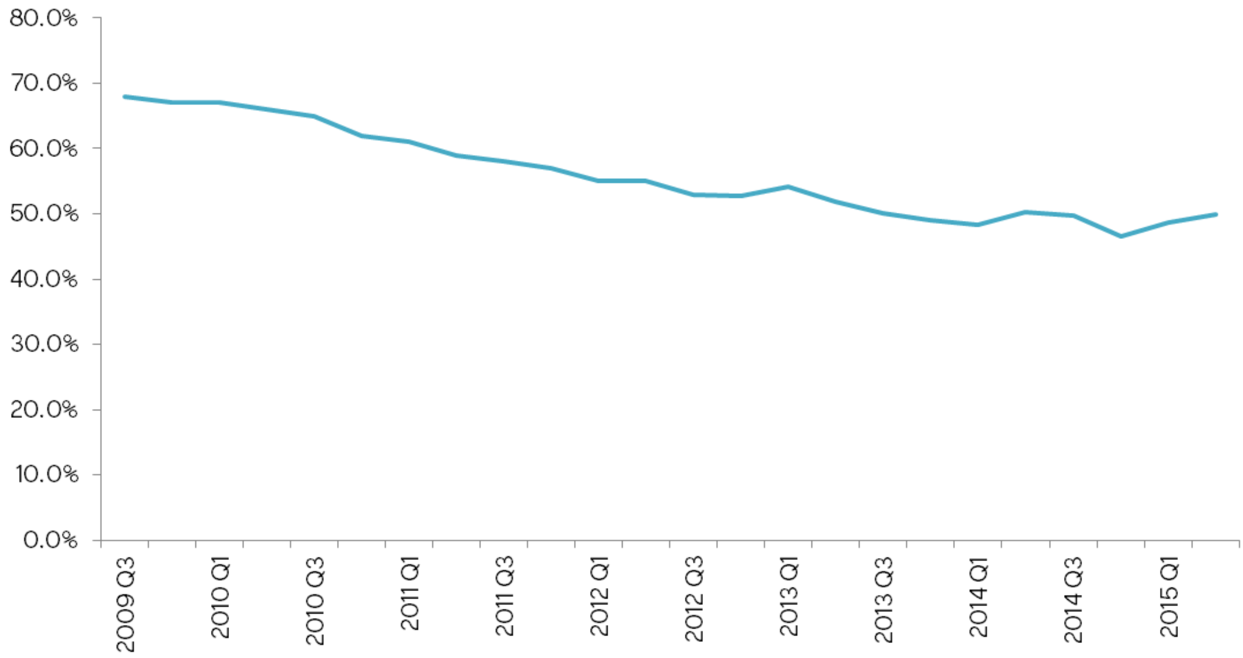
[71] ComReg 17/73c, page 19

Figure 7: eir Fixed-line market revenue share



Source: ComReg quarterly key data report

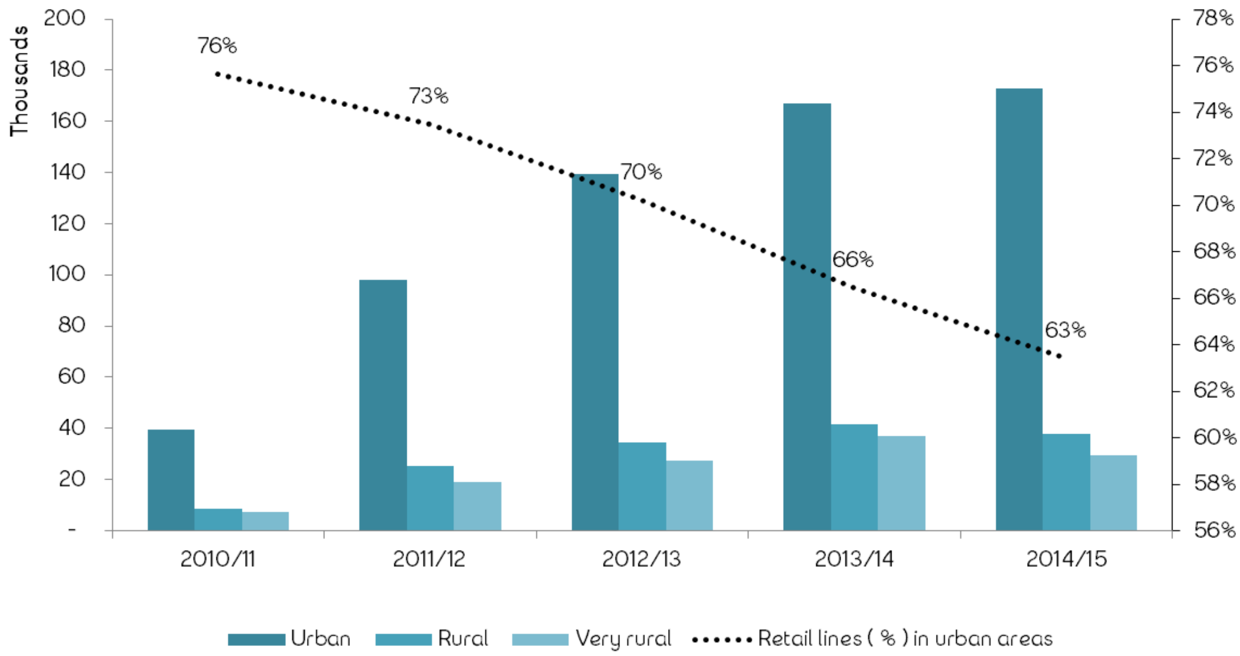
112. The USO has been applied as a multi-year obligation, with the NCUS doubling from ~€6m to ~€12m in the 6 years from 2009/10 to 2014/15. Its effects however spill-over beyond the designation periods. On one hand, the amortisation of capital expenditure related to the USO will invariably exceed a one-year period and frequently will exceed the designation period. On the other hand, uniform pricing in the context of competition in the market creates additional market distortions,[72] by setting an opportunity for 'cream-skimming' and inefficient entry of operators. In other words, looking for the changes in eir's competitive position by looking at changes in eir's market shares over the previous periods is quite clearly insufficient.

113. The loss of market shares would significantly impact on the ability of the USP to finance the cost of the USO. Furthermore, given that the financing of the USO is done through cross-subsidizing unprofitable customers (or areas) with margins on profitable customers and that these are predominantly located in urban areas, a review of market shares in urban areas is an indicator of the USP's ability to finance the cost of the USO. As a result, an analysis at national level, such as the one presented by ComReg and its advisers, is clearly insufficient.

[72] i.e., additional to the welfare 'deadweight loss' of having uniform pricing set nationally.

114. In **Figure** 8 we show how urban customers in eir's network have changed over the six years to financial year 2015/16. The chart shows that approximately 70% of the line losses experienced by eir between the end of financial year 2009/10 and 2014/15 were in urban areas. In urban areas retail lines accounted for 76% of the total base in 2010/11 reducing to 58% in 2014/15.

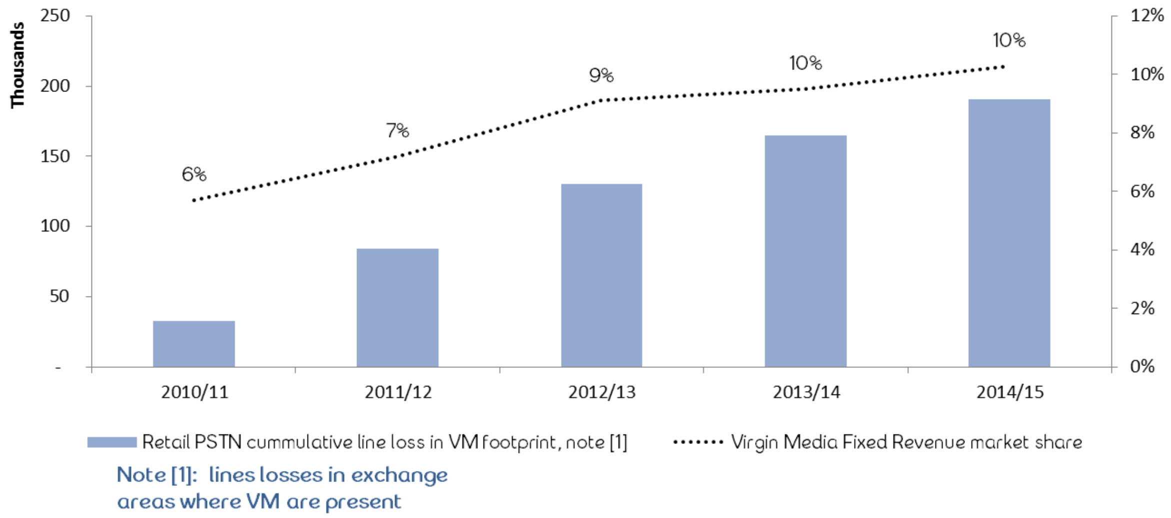
Figure 8: Cumulative lines losses by geo-strata



Source: USO submissions
(based on exchanges classified by geo-strata)

115. The loss in lines in urban areas is the result of the increased competition of alternative network providers - Virgin Media, in particular. This is illustrated in **Figure 9** where it is shown how the growth in the market share of Virgin Media coincides with eir's increase in line losses in the urban areas.

Figure 9: Retail PSTN line losses in the Virgin Media footprint



Source: Fixed Revenue Market Share, ComReg quarterly key data reports. Line losses calculated from the USO submissions

116. ComReg's market research of 2015[73] and 2013[74] describes the significant changes in market structure, pointing to increasing geographical variations in market share: In the 2015 survey, in urban areas, Virgin Media (UPC) had 34% market share of the home landline telephony service (slightly above eir's market share), up from 26% in the 2013 survey. Vodafone also saw an increase in the two-year period from 13% in 2013 to 16% in 2015. In the fixed broadband markets the changes are similar. Virgin Media (UPC)'s share increases from 35% to 41% and Vodafone's share increases from 13% to 18%. In both markets the increases of OAOs re counter-balanced by significant decreases in eir's market share. These findings are shown below (Table 4 and Table 5).

Table 4: Fixed landline market shares, 2015 survey (2013 survey), (source: ComReg/ICT market research)

	Urban Areas	Rural Areas	National
Virgin Media (UPC)	34 (26)	2 (3)	23 (18)
eir	36 (53)	67 (61)	46 (56)
Vodafone	16 (13)	20 (23)	17 (16)
Other	14 (n.a.)	10 (n.a.)	14 (10)

[73] ComReg 15/123a
[74] ComReg 1346

Table 5: Fixed broadband market shares, 2015 survey (2013 survey), (source: ComReg/ICT market research)

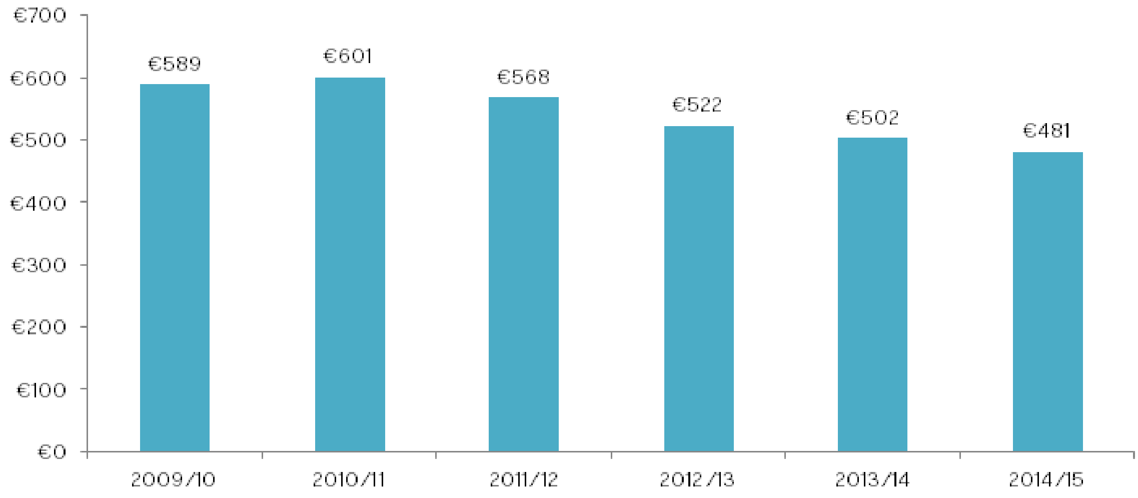
	Urban Areas	Rural Areas	National
Virgin Media (UPC)	41 (35)	1 (5)	28 (25)
eir	26 (38)	53 (43)	35 (39)
Vodafone	18 (13)	27 (26)	21 (17)
Other	14 (n.a.)	17 (n.a.)	17 (19)

117. ComReg's market research also reviews the switching behavior of consumers, which is informative as to what the nature of competition is. In this respect, in the 2015 survey 68% (versus 49% in the 2013 survey) of the survey respondents quoted 'competitive price' as the reason for switching landline provider, while 56% (37% in the 2013 survey) of the survey respondents indicated 'better price' as the reason for switching fixed broadband provider. In urban areas, where the incidence of bundling is significantly higher, 76% of bundle owners responded in the 2015 survey that 'competitive price' was the reason for switching provider.[75] This suggests that the market changes in urban areas have been predominantly driven by price competition.

118. Price competition resulted in a decrease in eir's retail market shares in urban areas and fundamentally resulted in a decrease of eir's network market share, given the growth of alternative network providers. For eir, the change in market structure in the urban footprint also resulted in the significant decrease of unit revenues. Between 2009/10 and 2014/15 total (retail and wholesale) revenues per user in urban areas reduced by almost 20%. This is illustrated in **Figure 10**.

[75] ComReg 15/123a, pages 48, 94 and 31.

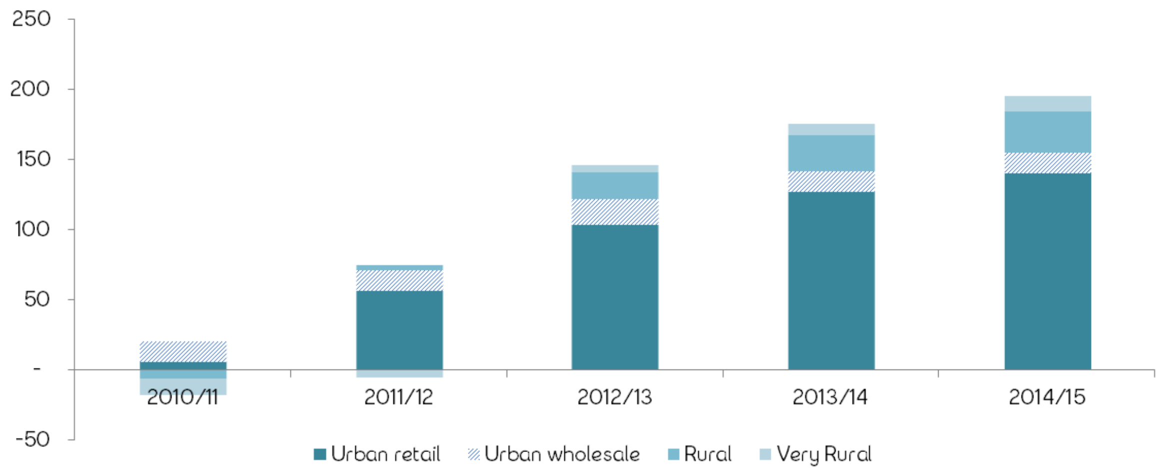
Figure 10: Unit revenues (total) in urban areas



Source: USO submissions

119. The decline in ARPUs and the loss of customers in urban areas imply logically that the profitability surplus available to fund the uneconomic areas and uneconomic customers has been rapidly eroding. Based on information from the USO model submissions eir calculated[76] that between 2009/10 and 2014/15 the total surplus was reduced by almost €200m (almost 40%). In urban areas alone this surplus reduced by €155m (80% of the total), of which €140m related to losses in retail surplus. This is shown in **Figure 11** below.

Figure 11: Cumulative total surplus losses by geo-strata

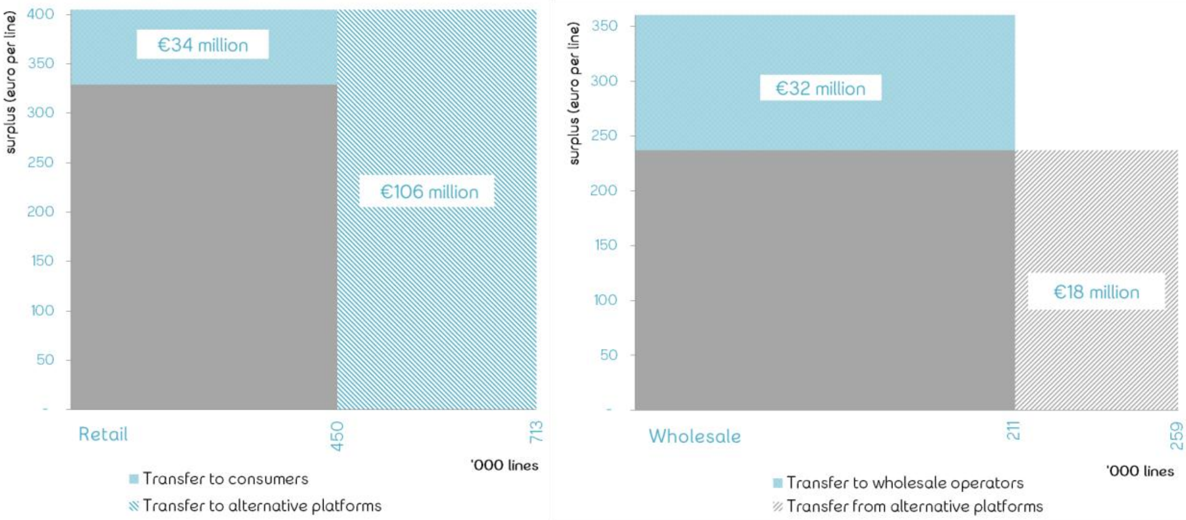


Source: USO submissions, excludes leased lines
(based on exchanges classified by geo-strata)

[76] Excludes losses in surplus associated with leased lines.

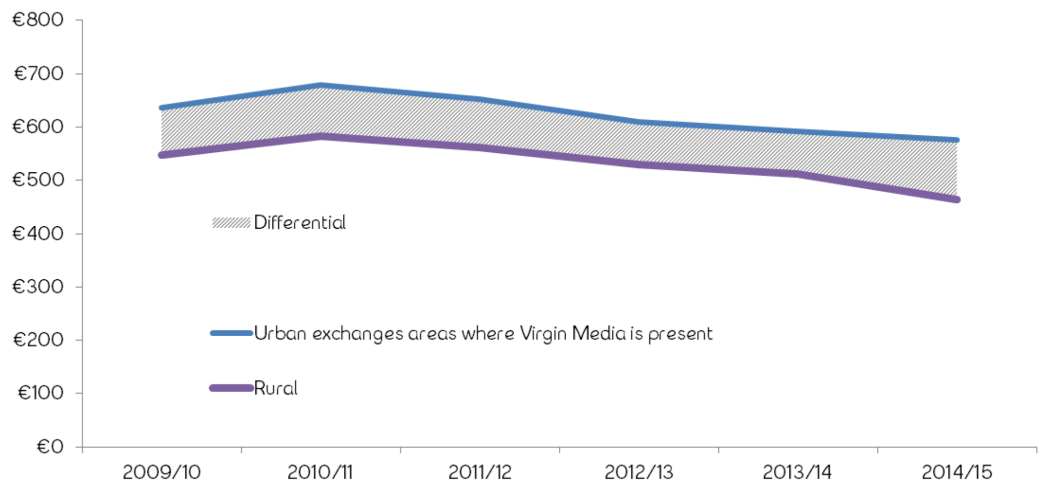
120. With the decline in unit revenues some of the surplus was undoubtedly transferred from eir to consumers. However, the other effect has been a transfer to other operators: to alternative network providers such as Virgin Media (and mobile operators) and those operators re-selling eir's network at various levels. The precise quantification of the transfers which occurred in urban areas is far from being doable. Nevertheless, an approximation to the 'first-order' transfers is possible and insightful. Using the information in the USO submissions we estimated that a surplus of roughly €120m was transferred to OAOs between 2009/10 and 2014/15, of which approximately €90m to alternative network platforms (**Figure 12**). The main take-away, however, is that a significant share of the profitability surplus available in urban areas was transferred to other platform operators.

Figure 12: Transfers of surplus in urban areas



121. The levels of line losses in urban areas suggest that a competitive level of prices may have been situated below the level of eir's prices in the period, which (as we have shown) reduced nevertheless. **Figure 13** shows how geographical pricing differentials have essentially been maintained, between areas where platform competition has developed strongly (i.e. where Virgin Media is present) and those areas which, for the most part, continue to rely on eir's network for access to fixed voice telephony and fixed broadband.

Figure 13: retail unit revenues geographical differentials



Source: USO submissions

122. Given that eir is required to set prices nationally on a geographically averaged basis, the USO price regulation has acted as a binding constraint to eir's pricing in urban areas,[77] reducing its ability to compete effectively in urban areas: if it sets prices higher to reduce the deficit in rural areas, clearly – given the nature of competition - it will risk accelerating the line losses in urban areas (and reduce the surplus to finance rural areas). On the other hand, if it sets prices lower to address line losses in urban areas, it will increase the deficit in rural areas. The essential point here is that eir is a regulated entity. Therefore, in the counterfactual scenario eir's profitability would have been higher than it is when eir is burdened with the USO. From this it is clear that the availability of a mechanism that compensates for the negative impact of USO price regulation is a condition for eir to pursue market-based, efficient pricing strategies in urban areas. In other words, the absence of funding for the USO does not allow eir to compete fairly with other market participants. As we have stated the correcting mechanism is that contemplated in Article 13 of the 2002 USD: "a mechanism to compensate that undertaking" and/or "to share the net cost of universal service obligations between providers of electronic communications networks and services".

Additional indicators of eir's financial position

123. ComReg's analysis has considered the impact of the USO with respect to additional indicators of eir's financial position. In particular, the net cost of the USO is presented as a proportion of

[77] In this discussion we do not consider the other regulatory pricing constrains eir is subject to and which impact on price setting of USO services.

eir's revenues and EBIT. The conclusions it leads to though show a manifest lack of commercial judgment. **Table 6** shows the values of a 'notional' net cost if a similar ratio of net cost to revenues of 0.62% (FY2010/11) was applied to some of eir's main competitors

Table 6: Notional NCUS

	2011	2012	2013	2014	2015
Vodafone	335	279	290	282	300
Liberty Global	41	44	59	76	76
BT	143	139	131	131	128

124. To put these values into context, a value of €300m is close to what Vodafone on average expensed in research and development between 2011 and 2014. Likewise, for BT a value of approximately €140m is broadly what BT incurred with pay costs in 2010 with voluntary leavers (or its average payment for the 3 years to 2011).[78] In this context, to suggest that these companies would be neutral to the imposition of a cost with this materiality is obviously untenable. In essence, therefore, eir contends that the imposition of a cost of the order of €45m is far too material in the context of eir to be considered "fair" and therefore to be borne exclusively by eir.

International Precedent

125. ComReg's analysis has shown no concern for international precedent. There is international precedent for providing USO funding. In such cases, the practical approaches employed by national regulators vary from that of ComReg. If any of these approaches were applied to eir, they would lead to a judgment of an unfair burden.

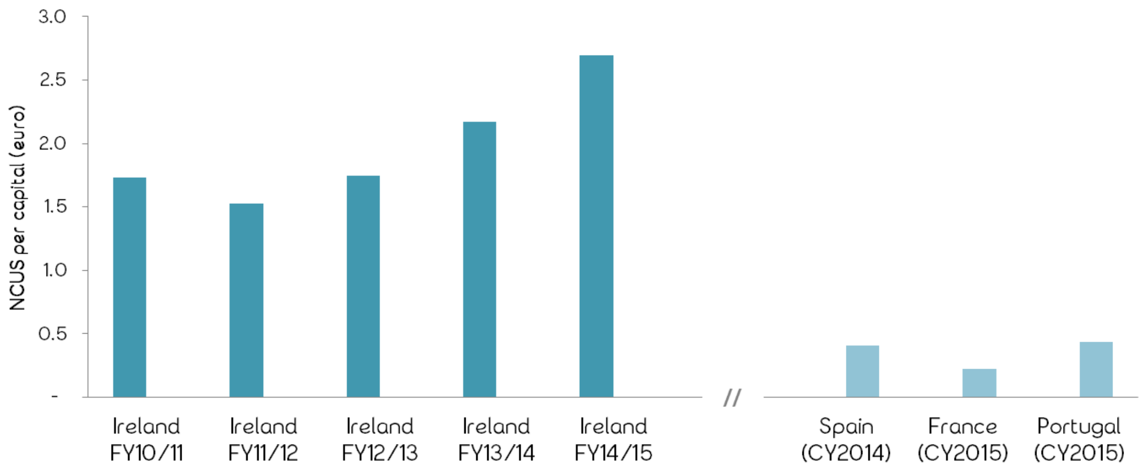
126. While in a number of European jurisdictions national regulators have not set up funding mechanisms, precedents where funding is available exist and are relevant. Of the 28 EU countries, 18 countries have currently a designated USP for fixed voice access.[79] Of these, 9 (Ireland included) have had USO net cost submissions with 4 of these (Spain, Portugal, France, and Malta) being awarded funding by their respective regulators. In the case of Italy no funding was awarded given that it was determined that the benefits of the USO exceeded its costs. In Greece, costs have been submitted since 2010 but the national regulator's decisions are still pending.

[78] Vodafone and BT annual reports.
[79] Cullen International.

127. The relevant precedents of Spain, Portugal and France, where on a per capita basis the NCUS is significantly lower than that calculated by eir (

128. Figure 14), strongly suggest that the criteria employed by ComReg are excessively narrow.

Figure 14: NCUS per capita



Source: NCUS (Cullen International), Population (OECD)

129. In the case of Spain, the regulator CNMC compared the net cost with respect to total revenues, capital employed and operating profit measures to assess whether or not the NCUS has a financial impact on the operator. We show below (**Table** 7) how eir compares with two of CNMC benchmarks.[80] It is apparent from this information, that on the basis of the criteria defined by the Spanish regulator, eir's costs are material and "have a financial impact on the operator and in particular on results and the operator's ability to replenish the equity value".[81]

Table 7: CNMC revenue and profitability benchmarks

	2010/11	**2011/12**	**2012/13**	**2013/14**	**2014/15**
NCUS/Revenues					
eir (1)	0.43	0.43	0.55	0.75	0.95
Telefonica (2)	0.19 (3)	0.19(3)	0.19	0.21	0.23
NCUS/Operating Profit					
eir (1)	2.04	2.07	3.09	4.66	6.31
Telefonica (2)	0.98(3)	0.98(3)	0.98	0.67	0.69

Notes:
(1) Fixed line business.
(2) Telefonica benchmarks are in calendar years.

[80] CNMC, 2014 NCUS https://www.cnmc.es/expedientes/sudtsa00916
CNMC, 2013 NCUS https://www.cnmc.es/expedientes/sudtsa00415
CNMC, 2012 NCUS https://www.cnmc.es/expedientes/sudtsa174614
[81] Free translation from CNMC documentation.

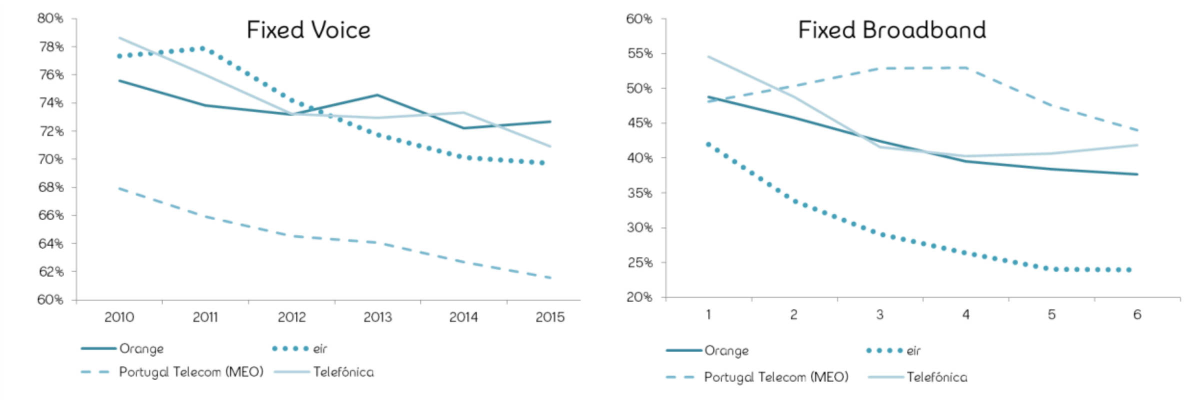
(3) Data not available for 2011 and 2012.

130. In Portugal, since 2014 the designation of the USP follows a public tender with the associated funding being one element of the tender. Until then the regulator[82] considered the USO an excessive burden if USP's market share of revenues from fixed telephone services was below the 80% level and the net cost represented at least €2.5m. It is obvious based on this precedent that eir's NCUS is an "excessive" burden.

131. In the case of France, the regulator has regard to the financial strength of the provider as well as its competitive position.[83] In particular, as a guide to absolute materiality, the regulator compares the absolute cost of the USO with the cost of potential liabilities arising from legal proceedings taken by Orange's competitors, those being described as having a significant impact on Orange's financial situation, as disclosed in its annual report.

132. In these 3 countries USPs saw a reduction of market shares for fixed voice and broadband. **Figure 15** shows how these USPs have compared to eir.

Figure 15: USP retail market shares



Source: Analysys Mason

133. For fixed voice while eir would have started at a high level in 2010 the rate of decline has been similar to these operators. In the case of broadband – a major element of horizontal cross-subsidization – eir's share has been significantly lower than the other USPs with the rate of decline being similar to Orange and Telefonica. In short, compared to USPs which were awarded funding, eir shows a similar deterioration of its competitive position.

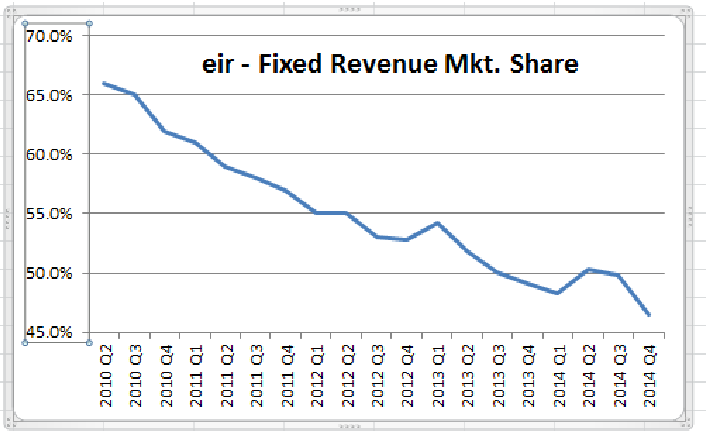
[82] Anacom, https://www.anacom.pt/render.jsp?categoryId=341749
[83] ARCEP, Décision n° 2017-0468, https://www.arcep.fr/?id=8102#c61928

Conclusion

134. It is clear under the case law of the Court of Justice of the European Union that in assessing whether there is an unfair burden, consideration must be given to whether that burden is excessive in view of the undertaking's ability to bear it, account being taken of all the USP's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share. It is eir's view that, in the light of this, it is an inescapable conclusion that a positive net cost of around €45m over five years constitutes an unfair burden for it to bear, that is, an excessive charge.

135. It is useful to recall the evolution of market shares in Ireland. **Figure 16** shows eir's revenue share in the fixed line market in Ireland around the period under review, from mid-2010 to the end of 2014. In the space of that 4½ year period, eir's market share dropped by 30% (from 66% to 46%), or more than 8% per annum on average. Given this level of eir's market share loss (including an examinership during this period), and given the trend involved, it would be extremely difficult for anyone to argue that the Irish telecoms sector is akin to a monopolistic environment in which there is a strong incumbent who can be asked to single-handedly shoulder the burden without any concern for its long term viability.

Figure 16: eir's Fixed Revenue Market Share



136. An even more drastic picture emerges when one considers the more relevant market of International Direct Dialing and national calls, and corporate customer revenues. In this market, eir lost over 70% as competitors, naturally, have concentrated on high margin products and customers – often without committing to infrastructure investment anywhere near the order of magnitude of eir's.

137. Given that these revenues now accrue to several operators in the market, clearly, the funding of the positive net cost should be provided by all of those parties including – but not limited to – eir.

138. eir fundamentally disagrees with Oxera's approach to determining the existence of an unfair burden. We believe that the following changes need to be made to Oxera's profitability assessment to make it robust and in line with international best practice:

- The correct definition of eir for the profitability assessment is the USO business, as opposed to the fixed line business;
- The correct basis for the Mean Capital Employed is the economic value, proxied by the replacement costs of assets, as opposed to the historical costs;
- eir's profitability needs to be compared to its actual cost of debt from the relevant year, as opposed to the ex-ante WACC calculated in 2007/08.

139. These changes would lead to eir's ROCE falling significantly under a fair value or under a replacement value approach to MCE, while the appropriate WACC to compare against is the actual WACC in the year in question. It is clear therefore that there is no reasonable evidence to support ComReg's proposition that there are super-normal profits to subsidise the USO costs in the years under review here.

140. Regarding materiality, that such a sum of €45m over five years could ever be considered negligible is a proposition that is simply untenable. In this context, it is not necessary to seek to set the level of materiality at which the net positive cost becomes an unfair burden. €45m is clearly a material amount. However, eir notes, in any event, that a sum of this magnitude will be considered to be material, both when compared with the costs of implementing a funding mechanism and where compared against international benchmarks.

141. We note in this regard that the cost of the funding mechanism was previously estimated at a maximum of €400,000 by ComReg[84] and there is no doubt that the positive net cost (whether as calculated by eir or as adjusted by ComReg) significantly exceeds this threshold.

142. As for international benchmarks, we are aware of two other countries only where a materiality threshold has been imposed in the context of funding: France and Portugal. The thresholds

[84] ComReg Consultation 13/45, para.6.14 - "*Oxera provided an indicative range for the administrative costs involved in the establishment of a sharing mechanism of no more than €300,000 to €400,000. ComReg broadly agrees with Oxera's approach …*"

were set at €2.5m (Portugal) and €4m (France). The positive net cost in Ireland as adjusted by ComReg exceeds both of these values, even without making any adjustments for country size. Adjusting for country and/or network size only makes it even more evident that eir's net positive cost exceeds the benchmark thresholds by a large margin.

143. eir accordingly submits that ComReg's preliminary finding that a positive net cost does not constitute an unfair burden, that is, that it does not constitute an excessive charge for eir having regard to eir's own characteristics, is simply untenable.

144. Taking all of the above into consideration the only reasonable conclusion that can be reached is that the positive net cost of the order of €45m over five years was an unfair burden on eir. ComReg must therefore move forward to establish a funding mechanism.

4. Sky

SKY'S RESPONSE TO EIRCOM LTD ("EIRCOM") USF APPLICATIONS KY RESPONSE TO EIRCOM LTD ("EIRCOM") USF APPLICATIONS 2010/11, 2011/12, 2012/13, 2013/14 & 2015/16

1. Sky has made a number of submissions to ComReg in relation to Eircom's USF applications to which we have not received a response nor indeed is there evidence that much of the material submitted has been given due consideration by ComReg in examining key issues, in particular the concepts of "intangible benefits" and "unfair burden". Consequently, Sky are resubmitting this material for full consideration in the context of all of Eircom's outstanding USF applications. These are included as an annex to this response and include:

   i. Sky's letter to ComReg 13 August 2015 entitled "Eircom USO application 2013/14"
   ii. Sky's letter to ComReg 7 October 2016 entitled "Status of USO funding – NBP considerations"
   iii. Sky's response to consultation 15/124

Assessment of "unfair burden" and "intangible benefits" concepts ought to broadened to properly account for impact on Eircom

2. ComReg ought to widen the existing ("*at a minimum*") categories in examining intangible benefits and consider new information in assessing the "unfair burden". The latter is a concept that has not been clearly defined from a legal perspective and as such Sky consider ComReg is taking too narrow a view of factors that should be considered in offsetting any alleged "unfair burden". In particular it seems clear from market developments that Eircom place a significant value on maintaining monopoly status in its access network where possible and the value it places on such an outcome significantly overrides concerns about having to provide access services to un-economic customers within such geographical boundaries.

3. As noted in our letter to ComReg on 7 of October 2016, following the conclusion of a Commitment Agreement[1] with Eircom, the Government removed 300,000 premises ("300k Footprint") from the National Broadband intervention area as Eircom indicated (and committed to) providing service to all customers within this footprint without the need for an access network subsidy. In the letter Sky noted "*this is tantamount to a self-declaration by Eircom that the cost of providing access services to all uneconomic customers within this footprint does not constitute an unfair burden. On the contrary it is clearly seen as a benefit in order to enhance its competitive position and as such is a representation by Eircom of its "economic and financial situation"*[2] *as it pertains to this geographic area and its "ability to bear" the costs of any uneconomic customers in those areas.*"

[1] Agreement between Minister and Eircom Ltd in relation to "National Broadband Plan – Commercial Deployment Commitment".

[2] See Judgment of the Court (Fourth Chamber) of 6 October 2010, base NV and Others v Ministerraad

4. It is an inconsistent position for Eircom to take, where on the one hand it is facilitating FTTH access connections to uneconomic customers within this footprint on a voluntary basis for commercial reasons while arguing that being required historically to do the same for copper access connections within the same footprint represented an unfair burden.

5. The reality is Eircom has an access network monopoly in this footprint and its desire to maintain that monopoly was made clear in signing up to the Commitment Agreement with the government. Eircom recognised that it was not in its commercial interest to risk the prospect of another operator entering this footprint under the guise of the National Broadband Plan. In fact, rather than seeking to win the available subsidy the government was offering to build high speed broadband under the scheme, Eircom chose to forego that opportunity in order to remove the prospect/risk of failing to win the tender to another provider and thus cede its monopoly status within the footprint.

6. By signing up to the Commitment agreement Eircom were able to ensure it would continue to face no fixed access network competition in the 300k Footprint. A logical and legitimate extension of this signalling by Eircom would suggest that historically covering the access costs of uneconomic AFL customers in this footprint not only did not constitute an unfair burden on Eircom but in fact afforded Eircom a commercial advantage.

7. Any challenge that suggests comparing a willingness to invest in uneconomic customers in providing FTTH is not directly comparable in providing services via copper (AFL) ignores the fact that large portion of underlying infrastructure costs such as ducts, poles and trenches are identical. Indeed while Eircom remained in the bidding process for the National Broadband Plan it advised bondholders in its Annual Report that it intended competing for this 'funding by leveraging its existing [access] infrastructure'.

8. It is this same infrastructure that has allowed Eircom to pursue its commercial strategy of ensuring no other operator can economically deploy a FTTH network in the 300k Footprint and has thereby unquestionably contributed to enabling Eircom to maintain an access network monopoly in this geographic stronghold. It is difficult to see how an argument could be made that this does not confer a significant 'intangible benefit' on Eircom. Eircom's status as the USP in providing AFL in this footprint has ensured the infrastructural ubiquity that allowed it to underwrite its Commitment Agreement with the government.

9. While ComReg historically would not have considered this issue in the context of 'intangible benefits' as there was no commitment from Eir in relation to this footprint when D04/11 was published, ComReg nevertheless recognised that other factors may become relevant over time as it outlined that brand recognition, ubiquity, life-cycle and marketing would be considered at a minimum. The clear implication being that other factors should be considered if there was evidence that those factors implied an intangible benefit to Eircom.

10. The benefits of maintaining a monopoly in the 300k footprint as a consequence of Eircom's status as USP could logically be considered in the context of the "life-cycle" benefit and specifically on future earnings of these access lines. The extensive public relations activity[3] carried out by Eir in relation to the roll out could further be considered under the 'marketing'

[3] E.g. https://www.siliconrepublic.com/comms/open-eir-interview-carol-lennon-rural-fibre and http://www.thejournal.ie/eir-broadband-plans-rollout-2803832-Jun2016/ and from Eir's own website https://www.openeir.ie/news/First-rural-FTTH-locations-announced/

heading in consideration of intangible benefits.. Irrespective of what heading under which it is considered, there can be no clearer signal from Eircom that having uneconomic customers remains an attractive proposition (intangible benefit) if it means keeping other access providers out of the market. It is also indisputable that Eir's existing access network within this footprint as a consequence of being the AFL USP has allowed it to profitably pursue such a strategy.

11. It is therefore of concern that ComReg has not assessed this issue based on the evidence of the latest Oxera report[4]. Furthermore, ComReg makes no reference in its Draft Determination 18/36 to Sky's letter of 7 October 2016 where this issue was outlined in detail. It would be irrational for ComReg to ignore the weight of the intangible benefit argument presented on this point and in particular, given the magnitude of likely monetary value of such a benefit. ComReg cannot arbitrarily dismiss representations on such a key issue but rather is required to outline specific reasons as to why (if it is so minded) to not consider it an intangible benefit.

12. As determined by ComReg in D04/11 for there to be an unfair burden certain conditions, including any positive net cost "*causing significant competitive disadvantage to the USP*" [**Decision 38**] must be satisfied. ComReg ought to consider whether in the context of the 300k Footprint, being the USP has not only, not caused a competitive disadvantage to Eircom but has in fact afforded it the opportunity to exploit a competitive advantage.

13. Indeed the ubiquity of Eircom's network within the 300k Footprint means Eircom has remained a key figure and likely beneficiary in the governments NBP plans despite having formally withdrawn from the tendering process earlier in the year. The extent to which Eircom will benefit from NBP in this regard remains to be seen but there is no doubt it will seek to maximise its leverage based on the ubiquity of its access network in its negotiations with the government and the remaining bidder in the process. It would appear indisputable that should Eircom strike a deal with the government/remaining bidder on NBP that any such outcome should be considered in the context of both intangible benefit and assessment of whether Eircom are suffering significant "competitive disadvantage" by virtue of its USP designation.

Revenues forgone by Eircom on a voluntary basis that leads to a higher volume of uneconomic customers or an increase in 'net costs' cannot justly be reclaimed from other providers.

14. In August 2015, Sky wrote to ComReg to outline our concerns about the duplicitous nature of Eircom's commercial strategy in pursuing funding as a USP for AFL services while simultaneously discounting revenue from this source to drive take up in its strategically important Fibre to the Cabinet ("FTTC") investment. In this regard we referred to a promotion that was impacting on Eircom's line rental revenue that ran from May 2013 to August 2015. In particular we noted:

[4] Although it is unclear that Oxera would have been briefed on this point or made aware of Sky's previous submission in relation to this matter.

"ComReg will be aware that in May 2013, eircom ran a WLR promotion[5] of a €3 monthly discount on WLR pricing. It was a decision that was clearly motivated by eircom's desire to drive uptake in its new NGA services. However, if the existing WLR prices were not covering alleged costs of AFL services then it is difficult to fathom how eircom can seek to recover any alleged cost shortfall while at the same time having adopted an aggressive price reduction promotion for the service that was aimed at promoting uptake of a non-USO service i.e. fibre broadband."

15. It seems clear that Eircom were using its ability to leverage its fixed access infrastructure to leverage its take up of FTTC services. The strategy proved to be **highly successful** and thus conferred a significant intangible benefit on Eircom. The manner in which it has been able to use its AFL network to leverage such a promotion should therefore be considered and measured as an intangible benefit. There is no evidence this has occurred or that it has even been considered by either ComReg or Oxera despite Sky (and others) having raised this point previously.

16. Equally, the extent to which the discount resulted in a decline in retail revenue for line rental (via direct pass through of WLR reduction coupled with the requirement for geographic pricing) may have caused certain customers to cross the threshold into the "uneconomic customer" category. Such customers should be excluded from the calculation of the 'net cost'. If Eircom chose to pursue a commercial strategy that has a net positive impact on its business as a whole (and this clearly was the case) by sacrificing retail line rental revenue for AFL services an adjustment is required to the net cost calculation to offset the revenue foregone.

17. Eircom's primary motivation for the €3 WLR discount was to allow it to reduce its retail price for POTs based FTTC bundles without violating its margin squeeze obligations. The foregone retail revenue can therefore be linked **directly linked** to the WLR discount and would have meant (a) the level of uneconomic AFL retail customers was bound to increase and (b) the net cost of existing uneconomic customers was bound to increase. The net cost calculation ought to be adjusted to account for both given the discount was implemented for a net commercial gain and allowing recovery through USO would result in a double recovery. It simple terms, based on a technicality Eircom is seeking to "tax" the industry for its own decisions even when these have proved to be commercially advantageous. The technicality of course only arises if ComReg's considerations on intangible benefits and unfair burden are unnecessarily narrow.

18. This is also true of the revenue foregone by Eircom in relation to the Retail Price Cap ("RPC") on line rental which operated for several of the years under consideration in relation to Eircom's USF applications. This issue has been pointed out by Sky on a number of occasions but has not been dealt with by ComReg. The RPC was inextricably linked by ComReg to Eircom's affordability obligations under its designation as the AFL USP. In this regard, Sky noted in its response to 15/124:

19. "As noted on ComReg's public website in the section entitled 'Consumer Initiatives – Universal Service Obligation';

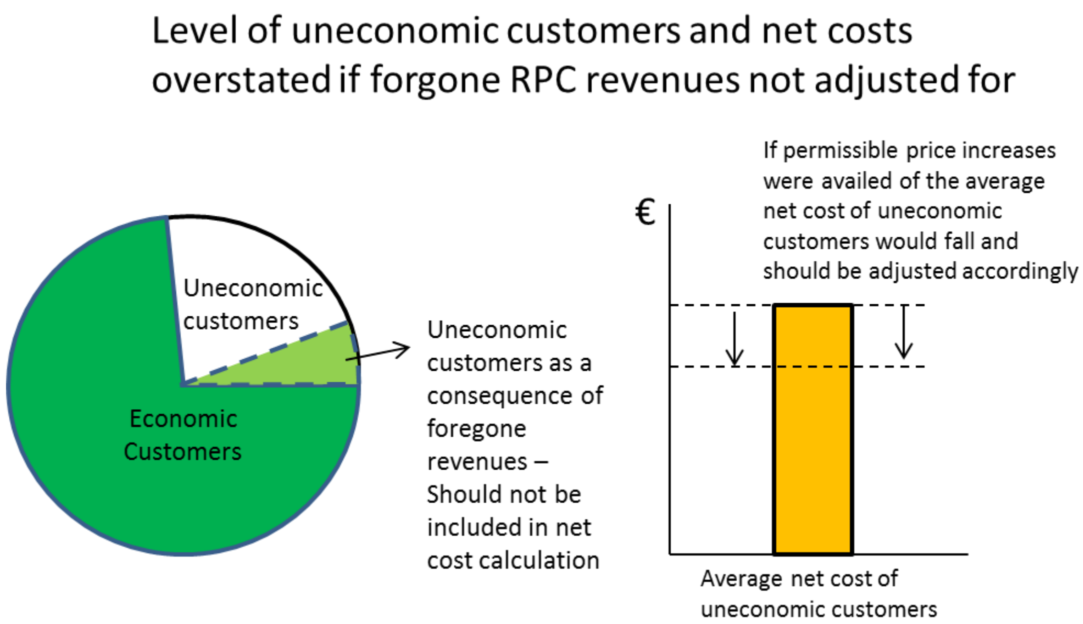
"The regulations [USO] require that the USP adheres to the principal of maintaining affordability for universal services. Currently, ***affordability is maintained*** ***by*** *way of a*

[5] Promotion ended on 1 January, 2015.

*number of different measures which include…within **the retail price cap** regime, overall safeguard control on consumer bills…"* [Emphasis added]"

20. As such the RPC was set with regard to Eircom's affordability obligation for AFL. ComReg in essence determined a level of price within the cap that consumers could afford to pay and in turn Eircom were entitled to charge. Where Eircom chose not to charge at the permissible affordable level means that a portion of customers that would otherwise be "economic" (at the higher permissible/affordable price as defined by the RPC) now fall into the "uneconomic customer" classification. Furthermore the level of the net cost of customers that would have remained uneconomic in any event (i.e. even if the prices had been increased to the affordable level) will have an exaggerated net cost due to revenues unnecessarily forgone (see chart 1).

Chart 1



21. If ComReg were to determine that an adjustment to the net cost is not merited by including the forgone revenue, it would in Sky's view fall into error. By way of demonstration and in extending the principle, Eircom could in theory have charged little or nothing for retail line rental for several years, seen its net cost balloon accordingly and seek to recover the entire cost of this commercial decision from a USF. The unlikelihood that Eircom would have pursued such a strategy is neither here nor there in terms of testing the logic of the principle being applied by ComReg. In not taking accounting of revenues forgone by Eircom where it did not avail of permissible price increases under the RPC – which as already noted ComReg has linked to Eircom's USP affordability obligations – is an invitation to Eircom to bill the broader telecom's industry to either (a) recompense it for its own inefficient[6]/incompetent business choices or (b) over pay it by ignoring the intangible benefits derived from not availing for the permissible price increases.

[6] If ComReg do not consider there is a case to make an adjustment to the net cost calculation it remains open to them to make an efficiency adjustment that reflects the revenue foregone Eircom.

Conclusion

22. In conclusion Sky considers ComReg are obliged to give greater consideration to the widening of its current interpretation of the concepts of intangible benefits and "unfair burden". ComReg has recognised in D04/11 that it can do so. The case for not doing so in Sky's view would be irrational based on the weight of the evidence that has come to light since D04/11 in particular with respect to commercial decisions Eircom has made in terms of maintaining access monopoly in the 300k Footprint and with respect to various elements of its retail line rental strategy as outlined above.

Sky 11/06/2018

Annex

- Sky's letter to ComReg 13 August 2015 entitled "Eircom USO application 2013/14"
- Sky's letter to ComReg 7 October 2016 entitled "Status of USO funding – NBP considerations"
- Sky's response to consultation 15/124

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RESPONSE TO COMRGE 15/124: UNIVERSAL SERVICE OBLIGATION, PROVISION OF ACCESS AT A FIXED LOCATION

1. Sky agrees with ComReg's preliminary view that it is appropriate that the current USO safeguards remain in place after 31 December 2015. We also agree that Eircom Ltd ("Eircom") should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months pending the completion of ComReg's review.

2. ComReg has queried whether other factors are relevant in consideration of its assessment of the impact of the proposed regulatory options outlined in the consultation. Sky consider of particular importance is the fact that ComReg has determined in the past that the net cost of being Universal Service Provider ("USP") to Eircom did not pose an "unfair burden" on the company. Sky concurs with that view based on foot of the analysis presented on the historical claim. However, Sky considers that in recent years not only does Eircom not have an *"unfair burden"* but in fact is unlikely to have a positive net cost when all appropriate factors are taken into account.

3. In this regard a positive net cost cannot be deemed legitimate where the USP has elected not to mitigate against any such alleged loss through either act or omission. Eircom are clearly culpable of such behaviour with respect to the pricing strategy it has adopted for its Access at a Fixed Location ("AFL") services in recent years. It has chosen not to avail of the incentive to drive additional profits on its USO service through the Retail Price Cap ("RCP") that was specifically designed to facilitate such an outcome. Furthermore, in 2013 it decided for strategic reasons to discount the price of the USO service below cost[1] in Large Exchange Areas ("LEAs") in order to drive uptake in a non-USO service. It is imperative that current and future assessments of any alleged net cost to Eircom as the USP takes account of the extent to which Eircom has failed to mitigate against any such alleged losses. ComReg may also wish to take these factors in account (expanded on below) in assessing the regulatory impact of extending obligations on Eircom for a further 6 months.

Retail Price Cap inextricably linked to Eircom's USO affordability obligation

4. At paragraph 47 of the consultation ComReg note that the RCP on Eircom is not a Universal Service Obligation but rather the result of a market definition and analysis exercise and the finding of SMP in the market for retail fixed voice access ("FVA"). Nevertheless, it is clear that ComReg has always regarded the same RCP on FVA services as being inextricably linked to Eircom's affordability obligation under its USO. As noted on ComReg's public website in the section entitled 'Consumer Initiatives - Universal Service Obligation';

[1] Comparing a cost based assessment of €16.72 for WLR by ComReg in 15/67 versus a price of €15.03 charged by Eircom.

Sky Ireland, One Burlington Plaza, Burlington Road, Dublin 4
Visit sky.ie

"The regulations [USO] require that the USP adheres to the principal of maintaining affordability for universal services. Currently, ***affordability is maintained by*** *way of a number of different measures which include...within* ***the retail price cap*** *regime, overall safeguard control on consumer bills..."* [Emphasis added]

5. This is a crucial point in the context of Eircom's claims that a fund ought to be established to cover an alleged net cost of being the USP. That claim will need to be tested against ComReg's longstanding barometer of affordability for AFL, namely the RCP on FVA. If Eircom has of its own volition charged retail prices below those permissible under the RCP then any grounds for a claim of a USP fund would be severely undermined. Given that Eircom also has SMP in the FVA market (a designation it did not challenge) it follows that it is capable of firstly, profitably making such price increases[2] (which would be marginal in any event) and secondly doing so without breaching its obligation with respect to affordability by complying with the RCP.

6. In the event that Eircom has chosen not to relieve itself of any alleged net cost as a consequence of not making permissible price increases, any such purported 'burden' associated with that net cost cannot be deemed to be an 'unfair burden'. Eircom must not be permitted to voluntarily take on a purported regulatory burden and subsequently seek to tax/have the associated costs passed on to other operators in the market

Additional profits voluntarily forgone by Eircom

7. Indeed Eircom has previously advocated that ComReg take an approach to regulation that seeks *"to strive to create an environment where operators have an incentive to gain additional profits under fair competition"*[3]. This is precisely the approach ComReg took in adopting an incentive based regulatory policy via the RPC whereby an operator that is subject to a RPC is allowed to keep above normal profits (cost of capital) on additional efficiency gains to those initially envisaged by the regulator when the RPC was put in place.

8. That Eircom chose not to avail of the pricing flexibility it was granted under the RCP is neither the fault of ComReg nor the OAOs it has sought to receive USP funding from. As per Sky's letter to ComReg on 13 August 2015 we estimate between September 2009 and August 2014 forgone revenue by Eircom as a consequence of not availing of allowances under the RCP was conservatively estimated in excess of **€45m**.

Eircom strategy of subsidising USO services with non-USO services

9. Furthermore, Eircom has previously argued that *'no regulator could expect it to cross-subsidise its USO through profits from other areas of its business*[4]*'*. However, this is the approach Eircom itself took as part of its NGA roll-out strategy whereby it reduced the

[2] Indeed eircom itself indicated that other operators (without market power unlike itself) could make *"substantial profits"* as a consequence of Eircom's investment in Universal Service areas on retail services. As such it must logically follow that the SMP operator would equally be able to profitably raise retail prices (see Eircom response to ComReg 13/45, page 9).
[3] Eircom response to ComReg 13/45, page 11.
[4] Eircom response to ComReg 13/45 page 14.

price of its WLR service[5] and cross-subsidised the service with profits from other services. In this example a key component (WLR revenues) of the revenue stream Eircom are permitted to tap into to offset any purported net cost was not only not maximised (by availing of permissible increases under the RCP[6]) but was in fact substantially discounted.

10. Finally, as part of the WLR discount strategy adopted by Eircom, it exercised considerable control over the retail strategies of its competitors which is an issue that was covered extensively by Sky in its response to ComReg's consultation 15/67. That ability to impact/disrupt the retail pricing strategies of its competitors is a benefit Eircom enjoys as the USP not afforded to other operators. This is a matter that ought to be taken into account in future assessment of any "unfair burden" review.

Current consultation and future USP claim reviews

11. Sky considers that the above factors ought to be taken into account by ComReg as part of the current consultation. It is also imperative that the above factors are taken into account in any outstanding or future claims for USP funding by Eircom.

Sky Ireland, 18 December 2015

[5] From May 2013 to January 2015 a €3 discount was applied to monthly WLR charges for large sections of the country particularly in urban and suburban areas.
[6] WLR prices would increase in line with increases in the retail price under the Retail minus pricing regime for WLR.

5. Verizon

Verizon Response to ComReg's "Universal Service Obligation - eir's USO Funding Applications" consultations

Introduction

1. Verizon Enterprise Solutions ("Verizon") welcomes the opportunity to respond to ComReg's "Universal Service Obligation - eir's USO Funding Applications" consultations.[1]

2. Verizon is the global IT solutions partner to business and government. As part of Verizon Communications – a company with nearly $131 billion in annual revenue – Verizon serves 98 per cent of the Fortune 500. Verizon caters to large and medium businesses and government agencies and is connecting systems, machines, ideas and people around the world for altogether better outcomes.

3. Please note the views expressed in this response are specific to the Irish market environment and regulatory regime and should not be taken as expressing Verizon's views in other jurisdictions where the regulatory and market environments could differ from that in Ireland.

Response to the consultation

4. We welcome ComReg's and its consultants' work on the various universal service funding applications made by eir. This issue has created significant uncertainty in the Irish market and we are pleased to see it finally getting resolved. This response is a collective response to all five of the Universal Service Funding application consultations.

5. With regards to the analysis conducted, we agree with ComReg's conclusion that eir does not face an unfair burden for being the universal service provider in any of the years considered (2010-2015).

6. While there is some financial "burden" identified, it is clear that this is not unfair in eir's specific circumstances as per the framework defined for assessment, i.e. under Decisions 38 to 42 of D04/11 and in particular the three cumulative conditions.[2]

[1] All available from this page: https://www.comreg.ie/publication/universal-service-obligation-eirs-uso-funding-applications/

7. We also note that eir appears to be over-recovering on certain regulated products, earning a return greater than the expected weighted average cost of capital (WACC)[3] and so is easily off-setting the burden identified. For example in 2014/15, Oxera found that eir's Return on the Capital Employed (ROCE) "exceeded the WACC by 3.2 [percentage points]" and was even above ComReg's top range estimate of the allowed WACC for eir.[4] This is even more apparent in the earlier years under consideration – for example, in 2010/11 eir had a ROCE of 26.1%, 15.1 percentage points above the top range estimate of the allowed WACC.[5]

8. Finally, we urge ComReg to ensure that it deals with any future applications for universal service funding in a timely and efficient manner so as to reduce the impact of the regulatory certainty on industry.

Verizon Enterprise Solutions

June 2018

[2] https://www.comreg.ie/publication-download/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies

[3] For example, in the Oxera report, it states "During the financial year 2014/15, **eir provided the USO while earning profits that were in excess of the regulatory allowed weighted average cost of capital (WACC)**, referred to as the 'competitive benchmark" [Emphasis added] – page 2 of the Report. Oxera Report - Unfair Burden Report 2014-2015, https://www.comreg.ie/publication-download/oxera-report-unfair-burden-report-2014-2015

[4] Page 12, Oxera Report - Unfair Burden Report 2014-2015, https://www.comreg.ie/publication-download/oxera-report-unfair-burden-report-2014-2015

[5] Page 12, Oxera Report – Unfair Burden Report 2010-2011, https://www.comreg.ie/publication-download/oxera-report-unfair-burden-report-2010-2011

6. Virgin Media

Virgin Media response to:

Assessment of eir's Universal Service Fund Applications for 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015

ComReg references: 17/73, 17/81, 17/95, 17/109, 18/36

June 2018

Virgin Media Ireland Limited ('**Virgin Media**') welcomes the opportunity to respond to the various consultations on ComReg's assessment on eir's applications for Universal Service Funding for the years 2010 to 2015 (ComReg references 17/73, 17/81, 17/95, 17/109, 18/36).

On a general note, Virgin Media would offer the following remarks:

1. Virgin Media welcomes the finding that eir does not incur any unfair burden in fulfilling the Universal Service Obligations that are placed on it. Virgin Media supports the finding by ComReg and, would note for the record, that we continue to hold the view that we consider the underlying findings on aspects of the net cost of provision to be extremely overestimated.

2. As previously stated (in our responses to consultations on ComReg 11/77 and ComReg 15/89, – among others), Virgin Media believes that eir's claims for USO funding (and by extension ComReg's assessment thereof) to be deeply flawed. This is due in part because we believe the net cost of serving uneconomic customers in economic areas to be considerably overestimated (and also due to the lack of detailed consideration for technological alternatives, such as the ability to use a mobile network, to provide access at a fixed location).

3. Virgin Media supports ALTO's submission made to ComReg on these consultations.

More specifically, Virgin Media would take the opportunity to reiterate a number of key concerns that remain:

- ComReg has not provided sufficient or persuasive evidence to support its assessment of 'uneconomic' households. ComReg has relied too heavily on eir's partial assessment of uneconomic households, which was presented for the purpose of applying for USO funding. This information was heavily redacted, which limits the ability of third parties such as Virgin Media or otherwise from testing the veracity of eir's claims.

- In most cases, even in the absence of the USO, consumers are able to obtain access to basic electronic communications services. For example, a consumer can purchase access from a fixed location (AFL) services from a competing supplier (including a mobile provider). ComReg has not given sufficient weight to the role that mobile networks play in meeting the basic electronic communications needs of consumers. Mobile networks are used widely for the provision of basic voice calls and internet services, and should therefore be taken into account in any assessment of net costs where they represent a cheaper USO delivery solution than fixed networks.

- The USO Functional Internet Access obligation is defunct. Virgin Media considers that the NBP will ensure universal access to internet services going forward, thereby superseding the requirement for a Functional Internet Access ('FIA') USO obligation.

7. Vodafone

Vodafone non-Confidential Response –

Non - Confidential

Assessment of eirs Universal Service Fund Applications
Years 2010 to 2015

Response to Consultation

Vodafone non-Confidential Response –

Executive Summary

I. Vodafone welcomes the opportunity to respond to the ComReg assessments of the net cost of Universal Service and the assessments of unfair burden for the years 2010 to 2015.

II. Vodafone agree with the findings of the reviews that there is no USO unfair burden. We have provided answers to the specific consultation questions below. In addition, ComReg needs to consider a number of additional factors in particular the extent over recovery by eir on the back of high wholesale pricing and poor USO performance for the period under review.

<u>Eir financial performance:</u>

III. To provide some context it is worth noting the significant returns that eir has achieved given its position as the dominant access provider in the Irish market. Eir has significantly over recovered in the period under review – the ROCE for eir has consistently exceeded the regulated WACC driven. This over recovery has been driven by high wholesale prices.

IV. The fixed line EBITDA of eir at 45% means it is one of the most profitable incumbent telecom operators in Europe. It is extremely reliant on wholesale to maintain high profits and against this backdrop it defies any logic that industry would be required to provide additional funding to eir in the form of any Universal service payment.

<u>Provision of USO – Performance</u>

V. Regulation 11(1) of the European Communities (Electronic Communications, Networks and Services) (Universal Service and Users Rights) Regulations 2011 provides that 'Where an undertaking designated as having an obligation under Regulation 3,4,5,6,8 or 9 seeks to receive funding for the net cost of meeting the obligation concerned, it may submit to the Regulator a written request for such funding.

VI. The key consideration here is that the USO provider is requesting funding for 'meeting the obligation'. This suggests that a condition for the validity of any funding request is that the designated undertaking must have met the obligation. The USO performance data for the periods in question would indicate otherwise. In its analysis of 2015 USO performance[1] ComReg identified a number of areas where eir failed to meet its USO performance improvement targets and as result has failed to meet the obligation and for this reason the submission of funding claims are invalid.

Timing of USO cost assessments

VII. Vodafone wish to highlight its concerns around the timing and duration of this round of USO funding assessments. It is very clear that this is a complex assessment and one which requires significant and extended bilateral engagement with eir, however, the aggregate amount under consideration over a 5-year period acts as a constraint against further investment decisions. We anticipate that the consistent methodology adopted in this process and the expertise that has developed as a consequence of the process will ensure assessments progress more quickly moving forward.

VIII. The current status is that ComReg have received a claim of €12.6m net cost claim from eir for the period 2015 to 2016 and the date for submission of any claim for 2016-2017 was extended to 31 July 2018. It is important that ComReg provides clarity on its planned approach to assessment of these further claims as soon as is practically possible.

[1] ComReg document 17/27

Consultation Questions

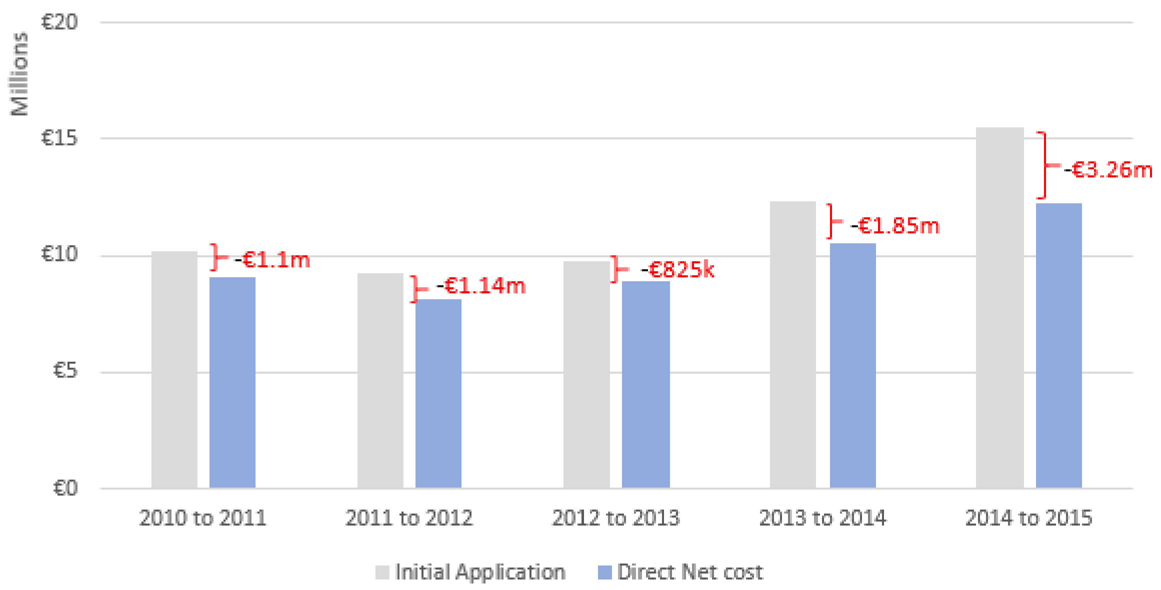
Question 1

Do you have any observations on the results of ComReg's direct net cost calculation?

1. Vodafone consider that ComReg have undergone a thorough examination of USO funding submissions and Vodafone agree with the overall findings.

2. There is a question arising on some costs and, notwithstanding the detailed analysis by ComReg, it is our view that elements of cost are potentially overstated. This is highlighted below by the trend in eir submissions over the years in question to submit increasingly high direct net cost submissions. It is in our view not possible that the number of uneconomic lines and associated costs, for an efficient operator would be growing. It is also clear that there is an increasing level of downward correction required as part of the ComReg/TERA assessment each year.

Figure 1: Net cost initial submission vs ComReg calculation



3. Directories: In Paragraphs 119 to 133 of the 2013-2014 assessment and paragraphs 144 to 150 of the 2014-2015 assessment TERA have assessed the revised commercial agreement for

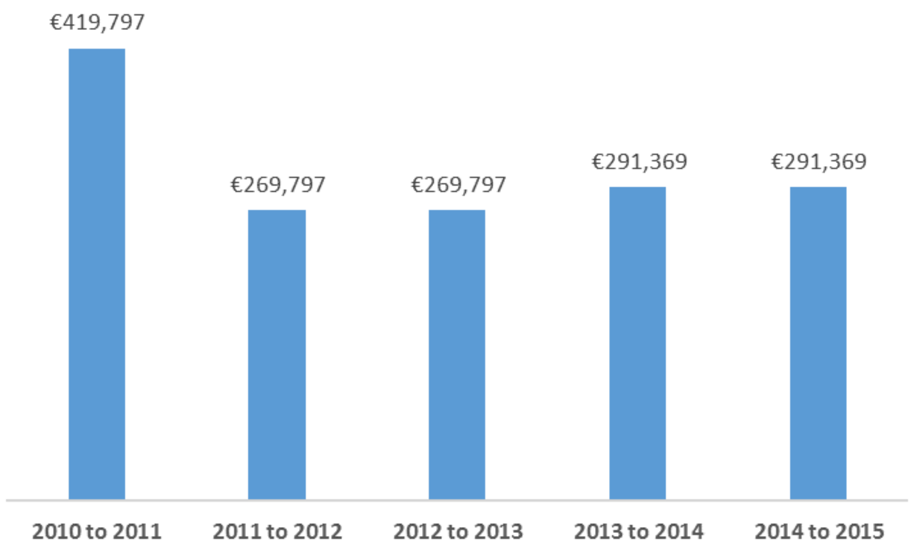
provision of the printed directory. This printed directory has provided a reliable revenue stream for eir until recently and it is not clear in reaching a revised agreement, which removed the revenue flow to eir, whether an efficient and more innovative solution for provision of printed directories had been sought. The increase in costs in the 2014-2015 submission to €1.4m is a significant concern in this regard and it is our view that more efficient solutions should be sought and this cost should be excluded from the net cost calculation.

Question 2

Do you have any observations on ComReg's preliminary view that consultancy costs incurred in respect of a USO funding application do not form part of the net cost?

4. Vodafone agree with the ComReg assessment for each of the years from 2010/2011 to 2014/2015 and specifically the position from ComReg that 'consultant's fees should be disallowed from the net cost as they relate to the preparation and submission of the USO funding applications and not the provision of USO services'.

Figure 2: Consultancy costs



5. In addition, it is Vodafone's view that as part of a standard business process an operator would need to establish detailed cost and revenue modelling to assess customer profitability. It seems a central theme of the funding applications by eir, is that absent USO obligations, would not

service unprofitable customers and would limit its business to profitable customers. This demonstrates the need for assessment of customer profitability regardless of any USO obligation. The only way for eir to determine profitability is to conduct a detailed costs and revenue assessment analogous to that which has been carried out for the USO submission. It is Vodafone's contention that eir would have incurred cost/revenue assessment costs regardless of their USO designation, that this is a standard commercial cost and that these costs are not a cost solely attributable to provision of USO services.

6. Vodafone note the reference for each eir submission that no explanation was provided within submissions for the inclusion of a consultancy figure. From a general standpoint Vodafone would is concerned that any cost input could be included in a funding application without full advance explanation and justification.

Question 3

Based on ComReg's assessment detailed in Sections 5, and 7 of this consultation, do you have any observations on ComReg's preliminary view that the positive net cost for

- **2014-2015 is €11,526,418**
- **2013-2014 is €9,514,559**
- **2012-2013 is €7,723,749**
- **2011-2012 is €6,712,966**
- **2010-2011 is €7,503,531**

7. As demonstrated in 2017 with changes to the National Broadband Plan subvention areas there is potential for a significant proportion eir lines to quickly move from an uneconomic to an economic status. The timing of this agreement is outside the period under review however the agreement demonstrates the intangible benefits that accrues to eir from maintaining its status as monopoly provider for access.

8. This became clear when homes initially targeted for State Intervention under National Broadband Plan were subsequently removed from the subvention area and eir made it clear it could rollout FTTH services on a commercial basis to these areas. It is possible that certain

customers within the 300K footprint may be uneconomic however overall eir has made a commercial call to service these areas. The removal of these homes from the NBP ensure that eir remains the monopoly access provider in the 300K footprint

Question 4

Following ComReg's assessment, do you have any observations on ComReg's preliminary view that for

- **2014-2015 a positive net cost of €11,526,418 (or €12,432,981 as claimed by eir);**
- **2013-2014 a positive net cost of €9,514,559 (or €10,008,142 as claimed by eir);**
- **2012-2013 a positive net cost of €7,723,749 (or €8,012,033 as claimed by eir);**
- **2011-2012 a positive net cost of €6,712,966 (or €6,986,518 as claimed by eir);**
- **2010-2011 a positive net cost of €7,503,531 (or €7,929,495 as claimed by eir);**

is not an unfair burden.

9. Vodafone agree with the finding that there is no unfair burden. An important consideration is whether the designated USO provider could have recovered the costs and whether it did recover the cost. If due to its own inefficiency, internal prioritisation and commercial decision making it decided not to recover cost then there is no case for inclusion of any funding shortfall in ComReg's analysis.