



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Assessment of eir's 2015-2016 Universal Service Fund Application: Assessment of the net cost for the period 2015-2016

Submissions to Further Consultation

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**An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation**

1 Lárcheanter na nDugaí, Sráid na nGildeanna, BÁC 1, Éire, D01, E4X0.
One Dockland Central, Guild Street, Dublin 1, Ireland, D01, E4X0.
Teil | Tel +353 1 804 9600 Suíomh | Web www.comreg.ie

Submissions Received from Respondents

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Further Consultation:	23/11

Content

Section

1: ALTO

2: eir

alto

alternative operators in the communications market

Further Consultation: Assessment of eir's 2015-2016 Universal Service Fund Application - Ref: 23/11

Submission By ALTO

Date: March 7th 2023

ALTO is pleased to respond to the Further Consultation: Assessment of eir's 2015-2016 Universal Service Fund Application (USO) – Ref: 23/11.

ALTO welcomes this opportunity to comment on this important consultation.

Preliminary Remarks

ALTO reiterates that it is highly undesirable to have taken years to reach this stage of the process with millions of Euro worth of claims being processed together, as a result creating a considerable risk and an unacceptable level of uncertainty for all operators on the market.

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

ALTO notes that various other periodic funding applications remain 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.

Relevant calculations as adjusted:

Application to ComReg in the sum of €13.7m - Adjusted to €7.4m

Adjusted: ComReg in the sum of €13.7 – Adjusted to €12.2m

Result: No Burden on assessment

ComReg Decision Reference: 21/17

Positive net cost for 2015 – 2016 was €6.7m

Adjusted: Positive net cost for 2015 – 2016 is no €11.5m

Price Cap under-recovery: N/A

WACC 8.18%

ROCE 10.8%

Response to Consultation Questions:

Q. 1 Do you have any observations in relation to ComReg's proposed calculation adjustment to the Customer Model element of the direct net cost calculation?

A. 1. Having carefully reviewed the position in the updated TERA Report A and the Consultation paper, ALTO agrees generally with ComReg's proposed calculation adjustment to the Customer Model element of the direct net cost calculation.

Q. 2 Based on ComReg's assessment, detailed in chapters 3 and 4, do you have any observations on ComReg's preliminary view that the positive net cost for eir's 2015/16 Universal Service funding application is €11,530,321?

A. 2. ALTO agrees with ComReg's assessment detailed in chapters 3 and 4. We do not have any further observations on ComReg's preliminary view that the positive net cost for eir's 2015/16 Universal Service funding application is €11,530,321.

ALTO's submission to and position adopted in the previous round of consultations concerning USO and published by ComReg bearing ComReg Ref. 21/17 remains unchanged, save for the adjustments arising in this Further Consultation ComReg Ref. 23/11.

ALTO
7 March 2023

eir

Response to ComReg Consultation and Draft Determination:

Assessment of eir's 2015-2016 Universal Service Fund Application

Further consultation on the assessment of the net cost for the period 2015-2016

ComReg Document 23/11



7 March 2023

DOCUMENT CONTROL

Document name	eir response to ComReg 23/11
Document Owner	eir
Status	Non-Confidential

The comments submitted in response to this consultation document are those of Eircom Limited and Meteor Mobile Communications Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

EXECUTIVE SUMMARY

1. ComReg has acknowledged that eir's five previous applications for Universal Service Obligation (USO) funding were deemed fit for purpose and that providing universal services has resulted in a positive net cost for eir in each of these years. For the 2015/16 funding application, the adjustments made by ComReg and its consultant following from Consultation 23/11 bring the net cost back up to a level comparable with that originally claimed by eir and consistent with claims made in earlier years.
2. Despite the corrections made by ComReg to the customer model in response to eir's comments, eir remains concerned about the approach taken. However, eir can accept the changes that have been made to correct the errors identified.
3. ComReg has not provided sufficient justification for its claim that eir's approach is incorrect. ComReg has simply assumed its consultant's approach is better or more accurate without adequate justification, despite having accepted eir's previous results in previous years using a methodology that is not too dissimilar. While eir acknowledge that ComReg is relying on a newer cost model with more up-to-date information, the limited difference between the ComReg output and eir's original submission suggests that ComReg's new analysis serves as a supplement to eir's methodology rather than a complete replacement. In fact, given the relative limited difference in outcome, ComReg's new and corrected analysis appears to confirm eir's original analysis.
4. Without prejudice to eir's view that ComReg's new methodology is ultra vires to ComReg D04/11 and the underlying legislation, ComReg cannot simply introduce a new avoided cost methodology without providing substantial documentation for its methodological approach to justify that it is superior compared to previous approaches.
5. eir disputes ComReg's exclusion of Consultancy fees and the arguments made. These costs have to be incurred for the purpose of meeting the requirements of ComReg D04/11. Indeed, 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 only to comply with the requirements of ComReg D04/11. Additionally, eir disagree with ComReg's adjustments to the payphone model.
6. As ComReg is aware, ComReg's previous assessments of eir's USO funding applications are the subject of legal proceedings before the Irish High Court (Case 2019/167 MCA Eircom Limited and the Commission for Communication Regulation, the 'USO Case'). Further to a request first made by ComReg, this case was referred by the High Court to the Court of Justice of the European Union ('CJEU'), to rule on a point of EU law, relating to the question of what factors ComReg is required to take into account in assessing unfair burden. In November 2022 the Court of Justice of the European Union (CJEU) ruled in favour of Eircom on the question of how ComReg should assess unfair burden. This ruling, interpreting the relevant provisions of EU law on assessment of unfair burden is a binding ruling to be followed in any assessment of unfair burden carried out by ComReg (or any

other national regulatory authority). As ComReg is aware, eir has confirmed in correspondence its agreement to ComReg's proposal that the decisions appealed (Decisions 05-09/19) now be set aside in part, with the unfair burden assessment remitted to ComReg for reconsideration in light of the CJEU judgement. Similarly, any unfair burden assessment for any later USO net cost (including in relation to the present 2015/16 USO costs) will also have to follow the CJEU's ruling. In the circumstances and to avoid any further unnecessary delay, eir submits that the assessment of whether the 2015/16 costs are an unfair burden should be carried out by ComReg at the same time as the above new assessments.

7. eir's submits that eir's net cost is an unfair burden, and that consequently a funding mechanism must be established in accordance with the requirements of the Universal Service Directive and Regulations.

RESPONSE TO QUESTIONS IN CONSULTATION

Question 1: Do you have any observations in relation to ComReg's proposed calculation adjustment to the Customer Model element of the direct net cost calculation?

8. ComReg has implemented a new methodology which in comparison to eir's approach results in a downwards "adjustment" to the cost of uneconomic customers in economic areas by €852,422 leading to a total net cost of the adjusted customer model of €11,118,560 (as compared to €11,970,982 proposed by eir).
9. eir has reviewed the description in the consultation (not the model itself) of the modelling changes to the customer model and is satisfied based on this review that ComReg and its consultant have made adjustments that correct errors of the previous approach. However, despite these corrections, eir remains concerned about the approach taken. ComReg has not provided any sensitivity analysis, nor rigorously compared the results to previous years or actual network build, as required by ComReg D04/11. In previous submissions, eir has provided real-life comparisons that have substantiated the accepted net cost claims. Additionally, while PwC has performed procedures to verify eir's net cost calculation, no such procedures have been conducted on ComReg's adjusted customer model.
10. Further, ComReg has not provided sufficient justification for dismissing eir's approach. ComReg has simply assumed its consultant's approach is better or more accurate without adequate justification, despite having accepted eir's previous results in previous years using a methodology that is not too dissimilar to that employed in its 2015/16 funding application.
11. While eir acknowledge that ComReg's approach uses more up-to-date and detailed costing information, the limited difference between the ComReg output and eir's original submission suggests that ComReg's new analysis acts as a supplement to eir's methodology rather than a replacement. In fact, given the relatively minor difference in outcome ComReg's corrected analysis appears to support the original outcome of eir's analysis.
12. eir notes that there is no principle in ComReg D04/11 that allows for the unilateral substitution of methodology based on alleged "better" outcomes. The requirement in Decision 15 is that 'material discrepancies' must first be identified based on carrying out reality "sense" checks, before any 'proportionate adjustment' can be proposed. Further, ComReg fail to demonstrate how their proposed approach is consistent with their own requirements outlined in D04/11. ComReg cannot reasonably propose an alternative calculation without also clearly setting out how it is compliant with its own requirements, this despite the responsibility for development of the customer model resides with eir. Given that the responsibility resides with eir, it is not clear on what basis, ComReg is entitled to unilaterally substitute its assessment for eir's.

Question 2: Based on ComReg's assessment, detailed in chapters 3 and 4, do you have any observations on ComReg's preliminary view that the positive net cost for eir's 2015/16 Universal Service funding application is €11,530,321?

13. eir acknowledge that changes made by ComReg and its consultant to the customer model to address the comments of eir. While areas of disagreement remain, eir can accept the changes made, see response to question 1.
14. In terms of the other elements of the direct net cost calculation, eir note that ComReg has made downward adjustments to the net cost of consultancy fees and public payphones. eir continues to disagree with these adjustments, as set out in eir's response to ComReg 21/17 and summarised below.
15. In terms of consultancy fees the legislative framework clearly establishes that net costs should be determined against a counterfactual which departs from standard commercial decision-making.¹ In this regard, ComReg has determined that an independent verification must be carried out and the estimation of indirect benefits associated with the USO must be conducted separately from eir. Both these stipulations mean that eir must incur these costs when preparing and submitting an application due to the requirements imposed on it by ComReg D04/11. As such the consultancy fees 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*".² The consultancy fees clearly fall into the category of avoidable costs if there had been no USO. This conclusion is also consistent with international precedent.
16. In terms of public payphones, ComReg determine a reduction of €360,331 compared to the amount of €383,260 claimed by eir. eir has some fundamental issues with the adjustments made, especially the payphone removal policy which leads to a reduction on the number of payphones used in the calculation. eir believes the 'removals policy' is inadequate as a basis on which to inform an adjustment to the payphone model. eir considers that the criteria set out in the 'removals policy' do not allow for the efficient management of the payphone base and that the approach suffers from several practical issues, none of which have been addressed by ComReg or its consultant.
17. There are real costs from provision of the existing payphone base, and as part of the USO, eir is required to maintain a significant number of payphones throughout the country, including locations where demand is too modest to cover the costs of service provision. These could have been avoided had eir not had the obligation and hence should be treated

¹ 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"

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



eir response to ComReg 23/11

as such in the net cost calculation. It is unwarranted for ComReg to deny funding for uneconomic payphones that are only in place because of the removals policy, which hinders the economically efficient discharge of the public payphone obligation.