



Consultation

**Consultation on sharing mechanism for any
USO Fund: Principles and Methodologies**

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All responses to this Consultation should be clearly marked:-
“Reference: Submission re ComReg 11/77” as indicated above,
and sent by post, facsimile or e-mail to arrive, on or before 1pm,
on Monday, 28 November 2011, to:

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1 Introduction

- 1.1 The European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, ("the Regulations"), provides that the Universal Service Provider ("USP") may submit a request for funding for the net cost of meeting the universal service obligation ("USO") and that the Commission for Communications Regulation ("ComReg") is obliged to assess such a request.
- 1.2 In ComReg D04/11, *Decision on the Costing of universal service obligations: Principles and Methodologies*,¹ ComReg set out its decision on the principles and methodologies on how the net cost of meeting the USO would be calculated — including identification of intangible benefits and the criteria which would be used to determine if the burden (if any) is unfair.
- 1.3 If the USP submits a USO funding application² and should ComReg determine that the net cost (post-intangible benefits)³ is an unfair burden on the USP, then Regulation 12 (1) of the Regulations provides that ComReg: "*shall apportion the net cost of the universal service obligation among providers of electronic communications networks and services.*"
- 1.4 Eircom is currently designated as the USP until June 2012. Article 3 (2) of the Directive⁴ provides that: "*Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.*"[emphasis added]. As such, ComReg does not rule out the possibility of seeking competitive tenders for the USO in the future.⁵
- 1.5 ComReg elicited the initial views of stakeholders on the establishment of a sharing mechanism in ComReg Document No. 10/77 ("Call for Input").⁶ This Consultation is intended to seek further views of stakeholders on a range of issues related to the development of an appropriate sharing mechanism of a positive net cost (if determined by ComReg to be an unfair burden).
- 1.6 ComReg proposes to issue a Draft Decision on this subject in the first quarter of 2012, with a view to publishing a Final Decision at the end of the second quarter.

¹ ComRegD04/11, *Decision on the Costing of universal service obligations: Principles and Methodologies*, 31 May 2011.

² USO funding applications must be consistent and in accordance with the Decision and Decision Instrument (as set out in ComReg D04/11).

³ A net cost calculation post intangible benefits is also commonly referred to as a positive net cost.

⁴ Recital 3 of Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ("the Directive").

⁵ ComReg intends to issue a separate consultation on the future of USO in which a number of related issues will be discussed.

⁶ ComReg 10/77, *Preliminary Consultation – Call for Input, Costing and Financing of Universal Service Obligations*, 28 September 2010.

2 Executive Summary

Introduction

2.1 This Consultation is intended to seek the views of interested parties on the development of an appropriate sharing mechanism, to determine how the positive net cost should be apportioned among providers of electronic communications networks and services (as provided for in the Regulations) — which will become effective in the event that this positive net cost is determined as an unfair burden.

Sharing Mechanism Principles (Section 3)

2.2 ComReg considers that due to the network effect of the telecommunications industry that it is appropriate (as clearly contemplated by the Regulations) that all providers who directly benefit from this effect and whose alternative offering may directly impact the burden the USO imposes on the USP should be prepared to contribute to the equitable provision of universal services to all end-users within the State. As such, ComReg proposes that it is appropriate that providers who generate revenue associated with electronic communications networks and services *excluding* revenues associated with networks and services used for radio and television broadcasting within Ireland should (subject to appropriate exemptions) be required to contribute to such a USO fund.

2.3 Regulation 12 (3) of the Regulations provides that: “[a] sharing mechanism established under paragraph (2) shall respect the principles of transparency, least market distortion, non-discrimination and proportionality.” ComReg is of the preliminary view that a form of adjusted turnover is the most appropriate means of attaining these principles. ComReg considers that turnover is a useful proxy for the “value” that each operator attains from the network effect and that as it provides a measure of relative market share it would facilitate contributions being proportionate and result in least market distortion for contributions to be informed on this basis.

2.4 ComReg is of the preliminary view, that consistent with the Levy Order⁷, that gross turnover (specifically turnover attributable to electronic communications networks and services excluding turnover generated from networks and services used for radio and television broadcasting)⁸ is the most appropriate basis for submitting annual declarations from liable undertakings. While retail turnover is used in some overseas jurisdictions, ComReg considers that as industry is already familiar with the concept of gross turnover — coupled with the potential definitional issues that retail turnover may create, gross turnover is a more appropriate basis to assess potential contribution levels (i.e. “Relevant Turnover”).

2.5 ComReg considers that in the interest of the long-term benefits of consumers that a *de minimis* threshold should be established — below which providers would not be required to contribute — so as not to discourage market entry and expansion. ComReg is of the preliminary view that the appropriate threshold level should be set at €500,000.

2.6 ComReg believes that it is appropriate that Relevant Turnover be presented on a consolidated group basis. This would facilitate a more transparent declaration and would minimise any possible distortions in turnover or threshold levels etc. which may arise from inter-company transactions.

⁷ Section 30 of the Communications Regulations Act 2002.

⁸ This is consistent with the exclusion of certain providers, outlined in the Schedule, in the Levy Order. See also paragraph 3.7.

2.7 ComReg is of the preliminary view that certain allowable deductions should be permitted to arrive at a form of Eligible Turnover (i.e. Relevant Turnover adjusted for Allowable Deductions). ComReg considers that it is appropriate to allow for certain deductions as it would mitigate the potential double-payment between certain wholesale payments and retail revenues. As such, ComReg considers that it would be appropriate to allow the deduction of certain payments (i.e. “Allowable Deductions”). ComReg considers that it is appropriate that Allowable Deductions include, *inter alia*:

- Interconnection link charges
- Access charges
- Origination charges
- Transit charges
- Fixed and Mobile Termination rate charges (excluding charges for outgoing international calls)
- Termination rate revenues from incoming international calls
- Leased lines charges
- Local loop unbundling charges
- Co-location charges

2.8 Furthermore, ComReg considers it would be appropriate to allow these Allowable Deduction adjustments to be made for certain payments between providers — as to restrict these adjustments to payments solely between liable undertakings and the USP may distort competition.

Administrative Issues (Section 4)

2.9 Regulation 12 (2) of the Regulations provides that: “*The Regulator shall establish a sharing mechanism administered by it or a body independent from the designated undertaking*”. ComReg is of the preliminary view that it is well positioned (due to the similarities with the Levy Order) to administer the USO funding mechanism. These administrative functions will include the collection and dissemination of declarations by liable undertakings and the notification of parties of their respective contribution levels. Liable undertakings will discharge their respective contributions to ComReg — which will then subsequently be disbursed to the USP.

2.10 ComReg is of the preliminary view that, in order to facilitate a timely notification of respective liable undertakings’ contributions, declarations should be made to ComReg within two months of the financial year end of respective parties. Similar to the Levy Order, ComReg considers that it would be appropriate for liable undertakings to use the corresponding financial year ending before or on the financial year ended of the USP as the basis of their declaration.

2.11 With respect to payment, should a USO funding application be received for the financial year ended 30 June 2010 — ComReg considers that allowing for initial implementation issues — it would be appropriate that liable undertakings pay their respective contributions within three months of notification (unless otherwise extended by ComReg). Should an initial or subsequent application be received for a financial year ending post 30 June 2010 ComReg is of the preliminary view that it would be appropriate to discharge such liabilities (if any) within one month of notification (unless otherwise extended by ComReg).

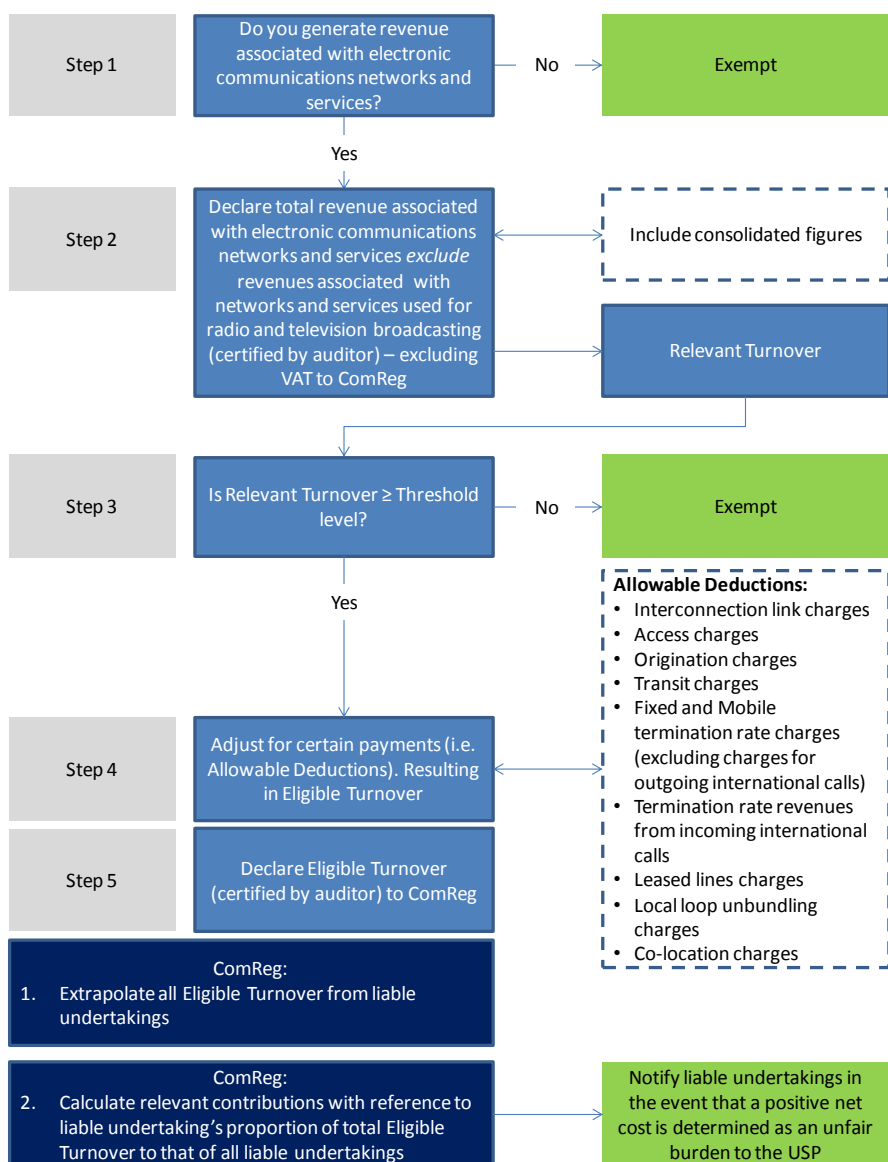
2.12 When a provider has recently changed status, its financial year-end may change, resulting in a financial year that is either longer or shorter than 12 months. In such cases, similar to the Levy Order, ComReg is of the preliminary view that it is appropriate to use a pro-rata estimate of 12 months Relevant Turnover and Eligible Turnover as appropriate.

Submitting Comments (Section 5)

2.13 ComReg requests that any stakeholders wishing to submit views on this consultation do so in writing by no later than 1pm on Monday, 28 November 2011. If the submission contains confidential information an additional document labelled “public version” should be provided. Where views are provided, please provide a supporting rationale for your comments, including if possible, an indication on the broader impact on industry of any changes proposed.

Illustrative flowchart of proposed approach

2.14 Below is an illustrative decision flowchart of ComReg’s preliminary view regarding how liable parties / undertakings will be identified as being potentially subject to a USO fund — which would become payable in the event that a positive net cost is determined as being an unfair burden.



3 Sharing Mechanism Principles

Overview

- 3.1 This section sets out ComReg’s preliminary views on the principles and methodologies for the development of an appropriate sharing mechanism for a USO funding application which demonstrates a positive net cost — if ComReg deems that such a positive net cost is an unfair burden.⁹
- 3.2 This section is structured under the following headings:
- *Relevant contributors*: ComReg’s preliminary views regarding the identification of the relevant providers which would be required to contribute to a fund — in the event that a positive net cost for a particular financial year is determined to be an unfair burden.
 - *Basis of allocation*: ComReg’s preliminary views regarding how the fund shall be apportioned amongst the relevant providers.
 - *Threshold*: ComReg’s preliminary views regarding the *de minimis* threshold under which relevant providers are not required to contribute.

Relevant contributors

- 3.3 The purpose of the USO is that “uneconomic” customers or areas are served — which would not otherwise continue to be or ever have been served by a commercial operator save for the legal obligation to do so.¹⁰
- 3.4 There may be a cost associated with serving these “uneconomic” customers or areas and where it is determined that such a positive net cost is an unfair burden, Regulation 12 (1) of the Regulations provides that the National Regulatory Authority (“NRA”): “...*shall apportion the net cost of the universal service obligation among providers of electronic communications networks and services.*”[emphasis added].
- 3.5 Article 2 of the Directive 2002/21 defines an electronic communications network as: “...*transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.*”
- 3.6 Electronic communications services is also defined by Article 2 of the Directive 2002/21, as meaning: “...*a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks*”.

⁹ See ComReg D04/11, supra n 1, section 5 for ComReg’s respective Decisions regarding the approach to determine if a net cost presents an unfair burden on the USP.

¹⁰ The universal service in Ireland consists of the provision of a defined minimum set of services to all end-users at an affordable price.

- 3.7 Industry participants should be familiar with these definitions — as they provide the scope of providers which may be subject to a levy as provided by the Levy Order under Section 30 of the Communications Regulations Act 2002. As specified in the Schedule of the Levy Order, the levy does not apply to: *“a provider of radio and television terrestrial transmission networks as defined under the Radio and Television Act 1988 as amended and the and the Broadcasting Act 1960, UHF deflector television networks as defined under the Wireless Telegraphy (UHF Television Programme Retransmission) Regulations 1999 and the Wireless Telegraphy (Carrigaline UHF Television Programme Retransmission) Regulations 1999, wired broadcast relay systems, television programme retransmission systems as defined under the Wireless Telegraphy (Programme Services Distribution) Regulations, 1999 and satellite broadcast transmission networks insofar as those networks are used for the delivery of programme content.”*

Call for Input submissions

- 3.8 Eircom noted that they were in favour of an allocation / collection mechanism should an unfair burden be established.¹¹ However, Vodafone noted that in their view: *“[i]ndustry financed compensation mechanisms have failed to provide a fair, non discriminatory and transparent way to fund Universal Service costs...In future, costs related to Universal Access objectives (particularly for broadband) should be financed through general taxation as the benefits derived from Universal Access are enjoyed by a wide range of actors in the internet and not only telecoms operators or their customers.”*¹² Alto¹³ and BT¹⁴ noted in their respective submissions that in their view Eircom should continue to fund its USO obligation, however, these views appear to be based on the premise that the USO does not impose an unfair burden on Eircom.

ComReg’s position

- 3.9 Irish legislation does not provide for state funding with respect to any potential positive net cost associated with the USO. Regulation 12 (1) of the Regulations is quite clear that, if a positive net cost is deemed to be an unfair burden, such a cost shall be apportioned amongst providers of electronic communications networks and services. For clarity, as provided by Regulation 12 (2) of the Regulations it is only the positive net cost of the USO that may be financed.
- 3.10 ComReg considers that it is appropriate that the positive net cost (in the event that an unfair burden is established) is allocated amongst those providers that benefit as a result of the USO. In telecommunications there are network effects: the more people who join a particular network the more valuable membership becomes, because people on the network are able to contact and be contacted by more people than they were before. The connection of consumers to the same network (or networks perfectly interconnected) creates additional value for providers and users. For example, the benefits from being able to access a broad range of end-users using the same network (or interconnected networks) increase customers’ willingness to pay for services. This network effect is not a benefit

¹¹ Eircom, *Response to “Call for Input” ComReg Doc. 10/77 “Costing and Financing of Universal Service Obligations”*, 22 October 2010, pg. 12.

¹² Vodafone, *Response to the Preliminary Consultation on the Costing and Financing of Universal Service Obligations*, 28 October 2010, pg. 7.

¹³ Alto, *Preliminary Consultation – Call for Input on Costing and Financing of Universal Service Obligations Ref: 10/77*, 28 October 2010, pg. 4.

¹⁴ BT, *Response to ComReg’s Consultation entitled “Costing and Financing of Universal Service Obligations” (ComReg 10/77)*, 28 October 2010, pg. 3.

that directly accrues to an individual provider — it is a benefit shared amongst all interconnected networks (e.g. fixed, mobile etc.) and their subscribers. Therefore, telecommunication providers benefit from the fact that uneconomic customers are served throughout Ireland (i.e. the wider roll-out of infrastructure throughout Ireland as a direct result of the USO and consequently the larger number of customers making and receiving calls).

- 3.11 Furthermore, as discussed in ComReg 11/15,¹⁵ if for example a USP were operating under a monopoly position any funding of a positive net cost could be sustained through cross-subsidies from profitable customers to unprofitable customers (which may not be served in the absence of the USO).¹⁶ A monopoly position can protect a USP's financial stability and enable it to provide the USO over the fixed telephone network. However, if a USP is facing a growing presence of alternative providers in the most profitable segments of the market, its ability to cross-subsidise USO customers may be undermined and could eventually impact on the USP's ability to bear a positive USO net cost.
- 3.12 Consequently, ComReg believes that providers of electronic communications networks and services *excluding* networks and services used for radio and television broadcasting within Ireland (i.e. those providers of electronic communication services and networks to which the Levy Order applies) should be prepared to contribute to the equitable provision of universal services to all end-users — as this definition appropriately identifies those providers which benefit directly as a result of the USO (see paragraph 3.10) and whose alternative offering may directly impact the burden the USO imposes on the USP.
- 3.13 With respect to the identification of contributing parties in other overseas jurisdictions, BEREC notes that: “[t]he categories of the contributors vary from one country to another, with the providers of publicly available telephone services being mentioned in almost all the answers.”¹⁷ [emphasis added]. Furthermore, ComReg notes that in overseas jurisdictions where a fund has been established that revenues associated with VOIP and VOB have also been included.¹⁸ As such, ComReg considers that the inclusion and to a certain extent exclusion of certain “*providers of electronic communications networks and services*” is consistent with international best practice and that those parties which may be required to contribute have been correctly identified.
- 3.14 Regulation 12 (5) of the Regulations provides that: “[t]he Regulator shall not impose any charges under this Regulation on undertakings that are not providing services within the State”. As such, it is only that proportion of revenues generated within the Republic of Ireland which will be used to identify and assess the potential contributors to such a fund. For clarity, this would include revenues associated with domestic customers in originating international or cross-border calls and revenues received from foreign operators resulting from the interconnection, transit and termination of international calls to domestic customers.¹⁹

¹⁵ ComReg 11/15, *Response to Consultation and Draft Decision - Costing of universal service obligations: Principles and Methodologies*, 7 March 2011.

¹⁶ See also ComReg D04/11, *supra* n 1, paragraph 3.99.

¹⁷ Body of European Regulators for Electronic Communications (“BEREC”), (10) 35 - *BEREC Report on Universal Service – reflections for the future*, June 2010, pg. 43.

¹⁸ For example: Belgium, France, Spain.

¹⁹ See also paragraph 3.46.

ComReg's preliminary view

- 3.15 ComReg is of the preliminary view that in the event of an unfair burden, it is appropriate that all providers of electronic communications networks and services to which the Levy Order under Section 30 of the Communications Regulations Act 2002 applies (known hereafter collectively as “liable parties / undertakings”) should contribute to a USO fund (subject to any *de minimis* threshold or other exclusions).

Q. 1. Given the legislative requirement, in the event of a positive net cost representing an unfair burden, to share such a net cost amongst providers of electronic communications networks and services — do you consider ComReg’s approach (see paragraph 3.15) to be appropriate? Are there providers of electronic communications networks and services which you consider should be included or excluded in the definition? Please provide detailed reasoning for your views.

Basis for assessing contributions

- 3.16 Regulation 12 (3) of the Regulations provides that: “*A sharing mechanism established under paragraph (2) shall respect the principles of transparency, least market distortion, non-discrimination and proportionality.*” Therefore, the determination of an appropriate basis for calculating individual contributions is a fundamental principal corner-stone of the sharing mechanism meeting these objectives. As such, one of ComReg’s regulatory objectives in establishing a funding mechanism is to ensure that it meets these principles.

- 3.17 BEREC has provided guidance on these principles in “(10) 35 - *BEREC Report on Universal Service – reflections for the future*”²⁰, and for completeness these are summarised in turn below:

- **Transparency:** “*NRAs must ensure that the principles for cost sharing, and details of the mechanism used, are publicly available...NRAs have to ensure that an annual report is published giving the calculated cost of USO, identifying the contributions made by all the undertakings involved...*”
- **Least market distortion:** “*The imposition and collection of contributions must not hinder competition or market entry beyond what is required to ensure that the undertaking(s) delivering universal service get(s) reimbursed for the net cost. This principle can also be seen as an expression of the proportionality principle. In line with it, Member States may choose not to require contributions from undertakings whose national turnover is less than a set limit.*”
- **Non-discrimination:** “*Without prejudice to the possibility to exempt undertakings of smaller size from participating in the sharing mechanism, the imposition and collection of contributions must not unduly discriminate among undertakings.*”
- **Proportionality:** “*The imposition and collection of contributions must be proportional to the objectives of the financing mechanism...In accordance with Article 13(3), a sharing mechanism based on a fund should use a transparent and neutral means for collecting contributions that avoids the danger of a*

²⁰ supra n 17, pg 41.

double imposition of contributions falling on both outputs and inputs of undertakings.”

- 3.18 In a European context, BEREC notes that: “[m]ost of the BEREC countries have indicated that the least market distortion principle is safeguarded by exempting from contribution the small operators, identified by a variety of criteria...Also, in recognition of the fact that this principle could also be regarded as an expression of proportionality principle, some respondents consider that the market distortion is minimised by the imposition of contributions in proportion to undertaking’s position in the market, generally reflected by turnover.”²¹

Call for Input submissions

- 3.19 Eircom made the only submission which considered this issue specifically. Eircom outlined a number of factors which it considered drawbacks of using: timed traffic volume, call minutes, profits, gross revenues (without adjustment for certain deductions) and retail revenues as potential indicators for assessing relative industry contributions.²² Eircom noted that in their view: “gross revenues net of payments made to other contributing operators for interconnection, wholesale services and leased lines is the appropriate basis for assessing contributions.”²³ Furthermore, that: “[t]here is no reason to subtract payments to organisations that are exempted from the scheme since such payments do not already incorporate a contribution to the fund”²⁴ and suggested that: “...the USO provider should be allowed to deduct net revenues attributable to uneconomic customers or revenues capped by regulation from its total net revenue figure” if “regulatory constraints prevent the USO provider from passing on the burden to those customers”.²⁵ Eircom also highlighted what it considered to be a potential political issue arising from incoming international calls, from what they perceive could lead to the: “contributions of operators in one country to the USF [universal service fund] of another country” and as such submitted that revenues from incoming international calls should be excluded.²⁶

ComReg’s position

- 3.20 There are a number of potential allocation methodologies for assessing contributions including: call minutes, timed traffic volume, number of subscribers, profit levels and turnover. Each of these is considered in turn below.

Call minutes

- 3.21 Call minutes provide a useful measure of how much end-users utilise the network. Furthermore, it could provide a proxy for the respective provider’s “benefit” attained from the network effect — although not in monetary terms.
- 3.22 However, call minutes would not provide a measure of the “worth” of those calls and as such may be disproportionate. For example, a provider may have a high volume of call minutes at “local” or cheaper priced call minutes than other providers — who generate greater revenue from a lower volume of call minutes but at a higher price per minute.

²¹ supra n 17, pgs 42-43.

²² Eircom, supra n 11, pgs. 9-10.

²³ ibid, pg.10.

²⁴ ibid.

²⁵ ibid, pg.11.

²⁶ ibid.

Consequently, ComReg considers that call minutes in isolation would not provide an adequate and *proportionate* indicator for determining appropriate individual contributions nor provide a reasonable estimate for the “value” attained from the network effect by individual providers (and as such is not considered to ensure the *least market distortion* principle).

Timed Traffic Volume

- 3.23 Timed traffic volume provide a useful estimate of the utilisation of the network over a period of time.
- 3.24 However, as this measurement is based on call minutes the same limitations apply to this metric as discussed in paragraph 3.22.

Number of subscribers

- 3.25 The number of subscribers per provider presents a useful metric to ascertain the relative size of the respective provider’s end-user base.
- 3.26 However, similar to the drawbacks of call minutes, this metric may be *disproportionate* to providers that have a high number of low value customers and therefore may create a level of *market distortion* — if such a metric was used. As such, ComReg considers that the number of subscribers metric in isolation would not provide an adequate and proportionate indicator for determining appropriate individual contributions.

Profit levels

- 3.27 Profit levels, in particular earning before interest tax depreciation and amortisation, provides a useful indicator of the relative cost of operating within the telecommunications industry year-on-year. As such, this measure could provide a potential method to how much individual providers can afford to contribute.
- 3.28 However, profit levels can fluctuate year-on-year and the quantum can be largely influenced by one-off gains or losses (e.g. the one-off disposal of an asset — which contributed significantly to the quantum of profit / loss for the particular year in question). As such, the relative affordability of individual providers may fluctuate year-on-year and the respective quantum of contributions from other individual providers may increase / decrease accordingly. Consequently, ComReg considers that this approach increases uncertainty for liable undertakings and as such would not be consistent with the *least market distortion* principle.
- 3.29 While adjustments could be made to individual profit levels to reflect an estimate of “normalised” profit levels, ComReg considers that the relative administrative burden and resources required to make these adjustments may render this approach unworkable. Furthermore, due to the potential subjective nature of determining “normalised” profit levels this approach may not be *transparent* or *proportionate*.
- 3.30 In addition, as higher costs would lower the respective contribution required by providers, the use of profit levels to determine respective contribution may create perverse incentives for inefficiencies (creating an element of *market distortion*) — which would be to the detriment of end-users.

Turnover

- 3.31 As discussed in paragraphs 3.10, as the telecommunications industry benefits from the size of the telecommunications market (which is larger as a direct consequence of the USO, interconnection and interoperability) ComReg considers that turnover may be a transparent

indicator to the value of these benefits to industry (i.e. it provides an indicator of the relative value end-users place on the ability to make and receive calls — which is measured to a large degree through the revenues generated from end-users).

- 3.32 Furthermore, as noted by BEREC: “*The principle of non-discrimination and the proportionality principle find a common reflection in the practice to impose contributions in proportion to undertakings’ turnover.*”²⁷
- 3.33 Turnover levels are relatively steady year-on-year and hence provide liable undertakings with greater certainty as to their likely contribution towards a potential USO fund. Furthermore, turnover provides a *proportionate* and *non-discriminatory* measure regarding the relative market share of providers. ComReg considers that the respective market share of providers offers a useful proxy to the relative benefit each provider derives from the network effect (as discussed in paragraph 3.10) and as such creates *the least market distortion* — as contributions are based on providers’ relative market share and may be subject to a *de minimis* threshold (below which liable undertakings are not required to contribute (see paragraphs 3.54-3.65)).
- 3.34 ComReg considers that it is appropriate that turnover levels are adjusted so that it wholly represents the turnover generated by providers specifically from electronic communications networks and services excluding any turnover generated from networks and services used for radio and television broadcasting. For foreign resident licensees the relevant turnover includes all such revenues generated within Ireland. Examples of non-relevant revenue might be revenue generated from non-communications related business e.g. consultancy services, bank interest etc.
- 3.35 An important consideration is what measure of relevant turnover is most appropriate. A contribution based on retail turnover would militate against a double charge on inputs and outputs (e.g. a provider may be paying on the basis of its own activities and in relation to inputs purchased from other providers). However, while this approach may be preferable — ComReg considers that this approach would require significant analysis by providers to separate turnover by retail and wholesale. Furthermore, ComReg considers that it would represent an increased burden to both providers and ComReg from a compliance perspective to ensure consistency of approach and application of appropriate definitions.
- 3.36 Due to the difficulties associated with the calculation of applicable retail turnovers a number of overseas regulators have favoured the use of relevant gross turnovers.²⁸ ComReg notes that a relevant gross turnover level (which includes revenues both retail and wholesale (“Relevant Turnover”)) is easier to identify and is already reported by industry participants as part of the Levy Order.
- 3.37 Relevant Turnover as defined in Communications Regulation Act, 2002 Section 30, Levy Order, 2003 as: “*in relation to a provider of electronic communications services or networks the gross revenue excluding value added tax paid or payable to the provider in respect of such services or networks*”. As such, it is a definition widely known and accepted by industry — consequently it should be relatively cost effective to implement and administer on an ongoing basis (see also paragraph 3.7).
- 3.38 Similar to the levy declarations, required contribution calculations will be fully transparent (see paragraphs 4.4-4.17) and the relevant principles for cost sharing and details of the

²⁷ supra n 17, pg. 41.

²⁸ For example: Italy, Romania, Slovenia, Spain and Switzerland.

mechanism used will be publicly available. Consequently, ComReg considers that Relevant Turnover is the most appropriate metric to meet the required principles of *transparency, least market distortion, non-discrimination and proportionality* for the basis of allocation of a USO fund sharing mechanism.

- 3.39 ComReg considers that it is appropriate that Relevant Turnover be presented on a consolidated group basis. ComReg believes that basing the contribution assessment on a consolidated financial statement will reduce any potential opportunity for reducing or minimising Relevant Turnover, allows for the elimination of inter-company payments within a corporate group and provides for a more comprehensive audit trail. However, in circumstances where Levy Order declarations are currently presented on an individual company basis — ComReg will consider the appropriateness of same for this assessment (should effected providers request to continue this arrangement).
- 3.40 However, the use of Relevant Turnover on a stand-alone basis to determine individual contributions may in effect result in a double-payment by some providers (see paragraph 3.42) and as such may not in isolation fully meet the *proportionality* principle. As such, ComReg considers that it would be appropriate that certain “Allowable Deductions” be made to Relevant Turnover.
- 3.41 In overseas jurisdictions where sharing mechanisms have been established to fund the positive net cost of the USO — in circumstances where an unfair burden has been determined — a form of adjusted turnover is typically used as the basis for determining contribution levels.²⁹

Allowable Deductions

- 3.42 ComReg considers that if respective contributions were based solely on gross turnover then providers who pay certain wholesale charges may in effect be paying twice — firstly through the payment of those charges to the USP and secondly through its contribution to the USO fund (i.e. once on the reduction of its gross revenues (i.e. as a result of these charges) as a contribution payment to the USO fund based on its gross revenues). ComReg considers that in order to militate against the potential double-payment that certain adjustments be identified and allowable as deductions to Relevant Turnover.
- 3.43 However, ComReg considers that to restrict these adjustments solely to payments between liable undertakings and the USP (in order to mitigate against the double-payment issue discussed above) may act as a disincentive for providers to undertake commercial activities with a provider who is not the USP — as payments made to other providers would not be allowable as a potential adjustment (which in turn may act as a disincentive for operators to climb the “ladder of investment”³⁰). Consequently, ComReg considers that to allow adjustments for certain payments between liable undertakings would be consistent with the *least market distortion* principle.
- 3.44 Consequently, ComReg considers that it would be appropriate to allow the deduction of certain payments (i.e. “Allowable Deductions”) made by liable undertakings. ComReg considers that Allowable Deductions would include, *inter alia*:

²⁹ For example: Italy and Spain.

³⁰ An economic concept. For further information see www.ictregulationtoolkit.org/en/Document.2916.pdf and ComReg, 11/40 *Next Generation Access (NGA) Remedies in Wholesale Regulated Markets*, 26 May 2011.

- Interconnection link charges
- Access charges
- Origination charges
- Transit charges
- Fixed and Mobile Termination rate charges (excluding charges for outgoing international calls)
- Leased lines charges
- Local loop unbundling charges
- Co-location charges

3.45 Allowable Deductions should only relate to those charges that are payable with respect to charges incurred within the Republic of Ireland. This would be consistent with the matching appropriate Relevant Turnover generated within the State.

3.46 In relation to Eircom's submission regarding the treatment of revenues from incoming international calls, ComReg considers that it may be appropriate to allow these as a deduction to determine Eligible Turnover. ComReg considers that not to do so may buoy-up the Eligible Turnover of certain liable undertakings which would in turn decrease the relevant contributions required from other liable undertakings — as such the outgoing calls from international countries could be directly impacting the required relevant contributions from liable undertakings for a USO fund within the State (which would be contrary to Recital 21 of the Directive, which notes that: “[a]ny funding mechanism should ensure that users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another.” Consequently, ComReg considers that it would be appropriate to allow termination rate revenues from incoming international traffic as an Allowable Deduction.

3.47 ComReg considers that Eircom's proposed approach — that payments to non-contributing parties should not be deductible, would un-necessarily increase the regulatory burden on contributing parties. ComReg is unaware of any such adjustments in overseas jurisdictions. ComReg considers that Eircom's proposed approach would create a significant administrative burden and cost for industry — in that respective payments which are Allowable Deductions would have to be identified and relevant revenue re-calculated following the identification of non-contributing parties (which may create a further timing issue). In addition, ComReg considers that as these non-contributing parties would be below the relevant threshold,³¹ the respective payments from liable undertakings to these exempt parties may not be material. Additionally, they may not materially impact the relevant contributions required by liable undertakings to justify the increased complexity and administrative burden required to identify and isolate these payments. ComReg would be interested in receiving views from interested parties in relation to this potential issue.

3.48 Similarly, ComReg considers that it would not be appropriate to allow the USP to deduct revenues associated with uneconomic customers — in order to determine the respective contributions of liable undertakings. ComReg is unaware of any such adjustments in overseas jurisdictions. ComReg considers that on a principle basis, that the proposed calculation of Eligible Turnover is a way to derive a contribution amount and does not

³¹ See paragraphs 3.54-3.65.

constitute a ‘tax’ on the revenues used in that calculation — as such there is no reasonable basis on which to exclude revenues from uneconomic customers from Relevant Turnover. Furthermore, the calculation of whether a customer is “uneconomic” requires *inter alia* assessment of avoidable costs and revenues, whereas this calculation is concerned only with revenues for the reasons discussed in paragraph 3.31. Finally, on a practicality basis, to allow the USP to deduct revenues associated with uneconomic customers would create uncertainty for industry (including the USP) regarding their respective contributions. Should a USO funding application be submitted ComReg will assess the net cost calculation, as such the quantum of uneconomic customers or areas may require adjustment following inspection.

ComReg’s preliminary view

- 3.49 ComReg is of the preliminary view that it is appropriate that the relevant gross revenues (“Relevant Turnover”) of all liable parties / undertakings (subject to any *de minimis* threshold or other exclusions) should be a component in determining their respective relevant contributions (excluding VAT).
- 3.50 ComReg is of the preliminary view that where a liable party / undertaking has the same ultimate parent entity as one or more other liable party / undertaking; or where a liable party is the ultimate parent entity of one or more other liable party / undertaking; and those parties generate Relevant Turnover, then those parties shall represent their Relevant Turnover on a consolidated group basis (excluding VAT). However, in circumstances where group companies currently provide their respective information on a stand alone basis as part of the Levy Order, ComReg is of the preliminary view that group companies may present their respective Relevant Turnover declaration on a similar basis.
- 3.51 ComReg is of the preliminary view that Relevant Turnover should be adjusted for Allowable Deductions as appropriate — resulting in Eligible Turnover.
- 3.52 ComReg is of the preliminary view that Allowable Deductions, at a minimum, should include:
- Interconnection link charges
 - Access charges
 - Origination charges
 - Transit charges
 - Fixed and Mobile Termination rate charges (excluding charges for outgoing international calls)
 - Termination rate revenues from incoming international calls
 - Leased lines charges
 - Local loop unbundling charges
 - Co-location charges
- 3.53 ComReg is of the preliminary view that the relative contribution per liable party / undertaking, which are above the specified Threshold level, will be calculated in direct proportion to that liable party’s Eligible Turnover compared to the total of all liable parties’ Eligible Turnover.

- Q. 2. Do you consider the use and definition of Relevant Turnover as a component to determine relevant contributions appropriate? Please provide detailed reasoning for your views.
- Q. 3. Do you agree with the proposed consolidated group approach?
- Q. 4. Do you agree with the list of identified Allowable Deductions? What other deductions do you consider should be taken into consideration? Please provide adequate reasoning to support your views.
- Q. 5. Do you consider that the materiality of Allowable Deductions justifies the additional computational requirements to determine the respective allocation contributions from liable parties? Which, if any, of the Allowable Deductions do you consider immaterial? Please provide sufficient information to justify your views.
- Q. 6. Do you agree that the relevant contributions per liable parties / undertakings, which are above the specified Threshold limit, will be calculated in direct proportion to that liable party's Eligible Turnover? If not, what alternative approach would you consider to be most appropriate — please justify your approach with adequate reasoning.

Threshold

- 3.54 The establishment of an appropriate threshold is clearly contemplated in the Regulations — Regulation 12 (3) provides that: *“The Regulator may choose not to require contributions from undertakings whose audited national turnover is less than such amount as may, from time to time, be specified by the Regulator, having regard to any views expressed to it pursuant to any consultations carried out in accordance with Regulation 26.”*
- 3.55 Some overseas regulators utilise a turnover threshold, in relation to a USO sharing mechanism — under which providers are not required to contribute. In France there is an exemption for providers with turnover below €5m, similarly in Spain there is a revenue threshold of ca. €6m³². However, in Italy contributions are set at 1% of turnover and new entrants may be exempted from contributing to the fund. In Austria, large providers voluntarily agreed to share the net costs.
- 3.56 Due to the legislative framework ComReg cannot impose a cap on contributions similar to that implemented in Italy. Capping contributions to the universal service fund in such a way may result in a requirement to finance the residual amount by public funds — which as discussed in paragraph 3.9 is precluded under Irish law.

Call for Input submissions

- 3.57 Eircom made the only submission which considered this issue specifically in their response. Eircom noted that it believes that: *“exemptions for an undertaking from contributing to a USO service fund should be on a similar basis as Levy exemptions (relevant turnover is less than €500,000).”*³³

³² €6,010,124.04.

³³ Eircom, supra n 11, pg. 13.

ComReg's position

- 3.58 ComReg considers that a turnover threshold provides a means of equitable proportionality to the USO funding mechanism — as it ensures that the financial position of those providers (which may include low revenue providers or start-ups) is not jeopardised by removing their requirement to contribute to such a fund. Furthermore, the relative contribution required by smaller providers is alleviated relative to their proportion of industry turnover³⁴ — ensuring that contributions are consistent with the principles of proportionality and least market distortion.
- 3.59 Furthermore, ComReg considers that the administrative burden (including cost) for smaller providers may exceed their actual contribution. As such, the use of an appropriate turnover threshold — below which providers are not required to contribute, will ensure that possible market distortions are mitigated — as new or smaller providers are not discouraged from either:
- a. entering the market — as a *carte blanche* levy on all providers irrespective of size may act as a barrier to entry; and
 - b. from continuing to compete for certain areas or customers — as the threshold will allow providers to reach a certain turnover level before they are required to contribute.
- 3.60 ComReg notes that industry is already familiar with the concept of a turnover threshold and that the appropriate levy contributions utilises such a mechanism. Under the Levy Order regulated entities whose relevant turnover is less than €500,000 are not required to contribute. This threshold was set in order to minimise the regulatory burden facing those wishing to enter the electronic communications market and replaced the previous threshold of €634,869 under which parties were required contributors to pay a fixed administrative fee.³⁵ While in overseas jurisdictions the *de minimis* threshold is comparatively higher than this proposed level — it is important to note they are not necessarily consistent in terms of the quantum of the threshold applied. The European Commission provides that *de minimis* threshold is at the discretion of each respective NRA and that in setting the threshold level that the relative national characteristics of the market structures must be taken into account. Therefore, while a €6m threshold level may be appropriate for Spain a similar threshold level may not necessarily be appropriate for Ireland (see paragraphs 3.62-3.64).
- 3.61 ComReg considers that it would be appropriate that the “audited national turnover” should relate to the audited national turnover specifically associated with the provision of electronic communications networks and services excluding networks and services used for radio and television broadcasting (see paragraph 3.12). This would reduce the regulatory burden on non-liable undertakings / parties and ensure that the sharing mechanism is proportionate to those parties directly benefiting from the network effect and whose offering may be directly impacting on the burden the USO imposes on the USP (see paragraph 3.11).
- 3.62 ComReg has taken a preliminary assessment of the number of contributing parties which would be liable to potentially contributing to a USO fund — in the event that a USO funding application is received for the financial year 2009/10 and the positive net cost (if

³⁴ See paragraph 3.53.

³⁵ ComReg 03/46, *Response to Consultation: Future Regulation of Electronic Communications Networks and Services – Fees for Authorisations and Rights of Use*, 1 May 2003.

any) contained therein is determined as an unfair burden, based on a range of Relevant Turnover Thresholds. The top ten potential contributors account for ca. 98% of total Relevant Turnover (including the USP) at a *de minimis* threshold of €500,000. This preliminary assessment is based on the levy order declarations made by liable undertakings for the levy year 2009/10 (it should be noted that this preliminary assessment is for illustrative purposes only and will be subject to further review and analysis). The impact on the total proportion of the top ten's respective turnover by increasing the Relevant Turnover Threshold over a range of potential *de minimis* thresholds is outlined below.

Figure 1: Relevant Turnover Threshold and respective contribution levels

Relevant Turnover Threshold	€0.5m	€1.0m	€2.0m	€5.0m
Top ten % of Relevant Turnover	98.08%	98.10%	98.20%	98.46%
Top five % of Relevant Turnover	91.88%	91.91%	92.01%	92.25%

- 3.63 As demonstrated in Figure 1, the respective proportion of contribution increases amongst the top ten as the *de minimis* threshold is increased. ComReg considers that to be equitable (and minimise market distortions) that the burden of a positive net cost (which if deemed to be an unfair burden) should be spread over a wide base. ComReg is of the preliminary view that it would be appropriate to establish a *de minimis* threshold — below which liable parties would not be required to contribute to a USO fund.
- 3.64 ComReg considers that such a threshold should be set at €500,000. ComReg considers that such a threshold level will provide the necessary safeguards as outlined in paragraphs 3.58-3.60 for small or newly established businesses and creates the correct incentives for investment and expansion — which will benefit the long term interests of end-users, while still providing a sizeable base of liable parties such that the burden is adequately shared amongst a number of providers. ComReg considers that potentially the level of the *de minimis* threshold could be adjusted over time (subject to appropriate future consultation) as experience is gained with its use.

ComReg's preliminary view

- 3.65 ComReg is of the preliminary view that a Relevant Turnover threshold of € 500,000 (five hundred thousand euro) is appropriate (excluding VAT).

Q. 7. Do you agree with the proposed threshold level? If not, what threshold level would you consider appropriate? Please provide detailed reasoning for your views.

4 Administrative Issues

Overview

- 4.1 Following the receipt of a USO funding application ComReg will publish a draft determination, on whether it considers that the USP bears a positive net cost (if any) which represents an unfair burden — within four months of receiving an application. This draft determination will be the subject to a consultation process with stakeholders. Taking the utmost account of submissions and European Commission comments, ComReg will publish a final determination on the positive net cost and unfair burden (if any). Irrespective of whether an unfair burden is determined a Decision on the sharing mechanism principles and methodologies to allocate a positive net cost amongst liable undertakings will be published in Q2 2012.³⁶
- 4.2 This section sets out ComReg’s preliminary views on the administrative issues regarding the notification of the quantum of a USO fund, Relevant Turnover and determination of Eligible Turnover and the proposed timelines for the payment of the respective contributions by the required undertakings.
- 4.3 This section is structured under the following headings:
- *Declarations – information requirements and timing:* ComReg’s preliminary view on the relative information requirements and timing of required declarations. The administration responsibilities of the various notification and declarations are also considered.
 - *Payment:* ComReg’s preliminary view on the appropriate timeframe for liable undertakings to discharge their respective allocation payments.
 - *Change in corporate ownership / group structure:* ComReg’s preliminary view on the various notification requirements should there be a change in the liable parties / undertakings group structure.

Declarations – information requirements and timing

- 4.4 In order to identify potential contributing parties to a USO fund for a particular financial year, liable parties / undertaking will need to provide ComReg with the necessary information to determine if they are below the specified threshold level (below which parties are not required to contribute)³⁷ and to allow ComReg to determine the respective contributions required by liable parties.³⁸
- 4.5 Regulation 12 (2) of the Regulations provides that: “*The Regulator shall establish a sharing mechanism administered by it or by a body independent from the designated undertakings, which body shall be under the supervision of the Regulator.*” ComReg considers that the administration of a USO fund is similar to the requirements of operating the levy (as provided by the Levy Order) and as such considers that it has the necessary competency to undertake this requirement. Furthermore, given ComReg’s knowledge and understanding of the administrative issues some level of efficiencies should be achievable

³⁶ Should a USO funding application be received for the financial year 2009/10, ComReg has 7 months to issue a final determination. Thereafter, for any potential subsequent applications, ComReg will have in total 6 months following receipt of an application to issue a final determination. See ComReg D04/11, supra n 1.

³⁷ See paragraphs 3.54-3.65.

³⁸ As specified in Regulation 12 (6) of the Regulations, ComReg is required to notify undertakings required to share the cost of a USO.

— in particular if the notification requirements are amalgamated as part of the information requirements provided by the Levy Order.

Call for Input submissions

- 4.6 Eircom made the only submission which considered this issue as part of its response. In summary, Eircom suggested that the notification and collection of the USO fund should be administered as part of the current Levy Order collection mechanism.³⁹

ComReg's position

- 4.7 With respect to the current USP, Eircom's current financial year end is 30 June. While undertakings may not necessarily have the same financial year end as the USP, ComReg considers that it would be appropriate for liable undertakings to use the corresponding financial year ending before or on the financial year ended of the USP.⁴⁰ While this may not necessarily match the financial period with which a fund may be provided for, it is a close proxy for the relevant financial year — while also providing such time as being capable of being assessed *prior* to ComReg publishing a draft determination: on whether it considers that the USP bears a net cost (if any) which represents an unfair burden.
- 4.8 As discussed in paragraphs 3.54-3.65, the corresponding financial year information from liable undertakings will need to be assessed with respect to the determined *de minimis* threshold level. Following this assessment, the relative information to determine the respective allocation amongst liable parties / undertakings will be required by ComReg.
- 4.9 For transparency purposes, ComReg considers that it would be appropriate that the liable parties' declaration / statement include a reconciliation of Relevant Turnover to the turnover per the financial statements (this is similar to the current requirements of the Levy Order). Furthermore, that an analysis / break-down of Allowable Deductions be separately specified and Eligible Turnover by declared. An extract from a sample declaration / statement is provided in Appendix A.
- 4.10 Regulation 11 (6) of the Regulations provides that: "*The Regulator shall notify each undertaking required to share the cost of a universal service obligation of that undertaking's obligation to contribute to such cost including the amount, manner and timing of payments to be made.*" Should a USO fund application be received — which is deemed to be an unfair burden, ComReg will publish (a full list of contributing parties and their respective contributions) and separately notify each of the providers of their required respective contributions. ComReg notes that such a publication of respective providers' contribution requirements is consistent with overseas regulators, where a fund has been established, and would facilitate greater transparency.⁴¹
- 4.11 To facilitate a timely notification, ComReg considers that it would be appropriate to receive respective declarations from liable undertakings (as set out in paragraph 4.9) within a short period of time following their respective financial year end. ComReg notes that potentially the information is similar to that required to determine the current Levy Order contributions, as acknowledged by the submitter, and as such it should impose no additional burden on industry participants — save for the fact that the necessary

³⁹ Eircom, *supra* n 11, pg. 13.

⁴⁰ For example, if a company has a financial year ending on 31 December, its relevant contribution (should a USO funding application be received) for the financial year ending 30 June 2010 will be based on its Eligible Turnover in the financial year ended 31 December 2009.

⁴¹ See also paragraph 3.17.

adjustments to the information to determine the relative contributions by industry may be slightly higher (e.g. any potential adjustment for Allowable Deductions, see paragraphs 3.42-3.48) if liable undertakings combined their Levy Order declarations with a Eligible Revenue declaration. ComReg notes that currently under the Levy Order, providers make their respective declarations within two months following their respective financial year ends.

- 4.12 ComReg is cognisant that due to the relative timing of a decision being published in relation to the principles and methodologies of a USO fund sharing mechanism and the current USP's financial year end — coupled with the current designation ending 30 June 2012, that providers will not have submitted respective declarations (as referred to in paragraph 4.9) with respect to the USP's financial year ended 2009/10, 2010/11 and 2011/2012.⁴² As such, ComReg considers that in order to collate and disseminate this information that it would be appropriate for providers to submit these declarations to ComReg by 31 August 2012.

ComReg's preliminary view

- 4.13 ComReg is of the preliminary view that it would be responsible for administering the relevant functions required for collecting and disseminating the relative declarations and notifying liable parties of their respective liabilities.
- 4.14 ComReg is of the preliminary view that providers that may be liable to contribute to a USO fund, should provide a declaration / statement containing all the necessary information to ComReg within two months of their respective financial year end. ComReg may extend this deadline, but only where it considers that there are exceptional reasons for doing so.
- 4.15 With respect to the current USP's financial year ended 2009/10, 2010/11 and 2011/2012, ComReg is of the preliminary view that providers that may be liable to contribute to a USO fund, should provide a declaration / statement containing all the necessary information to ComReg by 31 August 2012.
- 4.16 ComReg is of the preliminary view that in circumstances where a provider is exempt, due to the *de minimis* threshold level, from making a contribution a declaration by the provider (certified by their auditors) should be made to ComReg (stating the reason for their exemption) within two months of their respective financial year end. ComReg may extend this deadline, but only where it considers that there are exceptional reasons for doing so.
- 4.17 ComReg is of the preliminary view that providers may, if they so choose, make a joint or combined declaration / statement for the Levy Order and detail on their Eligible Turnover / reason for exemption.

Q. 8. Do you agree with the proposed time frame for required providers to provide a declaration / statement containing the necessary information to ComReg? If not, please reason the proposed timing frame you consider appropriate.

Q. 9. Do you consider that the required information to determine the liable undertakings / parties contribution (i.e. Relevant Turnover and Eligible Turnover) could be included as part of the Levy Order declaration?

⁴² See also ComReg D04/11, supra n 1, Decision No. 32 and Decision No. 33.

4.18 ComReg is interested in receiving views from interested parties regarding the potential amendment to ComReg's proposed time frame of a declaration / statement to be received by no later than two months following the respective financial year end of the USP. This should facilitate a greater timeframe for liable undertakings to prepare the necessary document / information etc. — should liable undertakings so choose to do so. For example, in the context of the current USP, a declaration by a provider would be required no later than 31 August (i.e. two months following the USP's financial year end of 30 June) — as such, assuming the provider has an alternative year end to the USP, this would facilitate a longer timeframe to assimilate the required information. However, ComReg is cognisant that this would not coincide with the Levy Order declaration and as such may increase the regulatory burden on liable undertakings (i.e. two declarations would be required annually).

Payment

4.19 Regulation 12 (7) of the Regulations specifies that: “[a]n undertaking which has been notified of its obligation to contribute an amount specified by the Regulator under paragraph (6) shall pay that amount in the time and manner specified by the Regulator.”

Call for Input submissions

4.20 Eircom made the only submission which considered this issue specifically in their response. Eircom suggested that in their view ComReg: “...should consider whether all operators – including the USP – pay gross amounts into the fund on an ongoing basis, and the USP only get the (gross) money after audited reports are made. Alternatively, the USP might obtain net payments on an ongoing basis, with a later adjustment.”⁴³

ComReg's Position

4.21 ComReg considers that the payment of contributing parties to a USO fund would occur under two potential scenarios:

- First, where a fund has not previously been determined in the preceding financial year; and
- Secondly, where a fund has previously been determined in the preceding financial year.

4.22 In the first scenario, the relative required contributions by liable undertakings will not be known until a USO funding application has been received by ComReg and the positive net cost (if any) is determined to be an unfair burden. As such, ComReg considers that it would not be prudent or justifiable for liable undertakings to discharge either on an ongoing basis or as a gross amount *prior* to ComReg publishing a final determination (see paragraph 4.1). Furthermore, the relative quantum of the fund (if any) would not be known pre-application and therefore it is likely that any contributions made by liable parties will require a form of reconciliation (i.e. providers' respective contributions may have been under or over the determined required contribution amount (if any) by ComReg) and thereby increasing the burden on all parties.

4.23 Under the second scenario, a fund has been established in the preceding year. ComReg is interested in receiving views from stakeholders regarding the payment by liable parties in advance of receiving a subsequent USO fund application — but only in circumstances

⁴³ Eircom, supra n 11, pg. 9.

where a fund has previously been determined in the preceding financial year. The relative contribution per liable party could be based on the previously determined allocation. While the respective payments would be received in advance of an application, where a USO funding application is not received or the respective contribution is less than that paid by respective liable undertakings — the residual balance will be paid back to those liable parties. Similarly, should the determined contribution by liable undertakings be greater the respective residual balance will be required to be paid by liable parties. ComReg considers that such a mechanism may provide an efficient means of collecting and dispersing USO funds for a given USO funding application. Furthermore, ComReg considers that such a mechanism may provide a safeguard against a potential increase in the relative contribution from liable parties should a provider subsequently withdraw from the market — if their relative contribution was collected on an ex-post basis and withdrew from the market pre-allocation of relative contributions. However, similar to the drawbacks of the approach identified in paragraph 4.22, it is likely that any contributions made by liable parties will require a form of reconciliation and thereby increasing the burden on all parties. Furthermore, it should be noted that if an unfair burden is determined in a preceding financial year it is not a predestined unfair burden thereafter (and vice versa) (i.e. ComReg will be required to undertake an unfair burden assessment for each USO funding application received).

- 4.24 Consequently, ComReg considers that potentially it would be more efficient to collect relative contributions (if any) from liable undertakings *after* ComReg has issued its final determination. While this would appear to create an initial timing issue for the USP, ComReg considers that given the reconciliation requirements from an alternative approach it may have in any event resulted in a similar timing issue. In addition, payment on an ex-post basis would be subject to less uncertainty and administrative burden than where liable parties pay in advance.
- 4.25 Where a liable party is not in a position to discharge their liability due to financial reasons (e.g. such as bankruptcy) as discussed in paragraph 4.23, ComReg notes that the French Regulator, ARCEP, has established a remedy to resolve this potential scenario — the amount of the required contribution (which the provider is unable to discharge) is simply added to the following year's application and shared between all liable parties. ComReg would be interested in receiving views on such a potential scenario from stakeholders.

Time period allowed for payment

- 4.26 ComReg must determine the period of time by which liable undertakings will be required to discharge their respective contributions. On receipt of a USO funding application ComReg will immediately notify industry of the total net cost included in the USO funding application — which will provide industry ca. 6 months⁴⁴ notice before the publication of a final determination.⁴⁵
- 4.27 In the majority of overseas jurisdictions liable undertakings have to discharge the respective obligations within one month of their respective final determination.⁴⁶ ComReg considers that such a time period may be appropriate as it provides reimbursement to the

⁴⁴ See also footnote 36.

⁴⁵ It should be noted that ComReg on receipt of a USO funding application will then assess the application and the positive net cost may be subject to change following assessment.

⁴⁶ For example: Spain, Denmark, Poland and France.

USP in a relatively timely manner. However, ComReg would be interested in receiving the views from stakeholders whether an alternative time period may be more appropriate — for example a six month period and allowing liable undertakings to make payments in two equal instalments during this time-frame.

- 4.28 In ComReg D04/11,⁴⁷ ComReg noted that, in circumstances where a fund has previously been determined in the preceding financial year and where liable undertakings are obliged to contribute to such a USO fund — that they could base their respective accruals (for their corresponding financial year) on the previously determined USO fund (if any). However, liable undertakings must be prudent when making their accrual, the respective size of the fund (if any) could change year-on-year depending on the actual historic cost for that financial year (appropriately adjusted for efficiencies) and the assessment of the unfair burden (if any) — which will include an assessment of impact of competition on the USP’s ability to cross-subsidise uneconomic customers and areas.⁴⁸
- 4.29 With respect to Regulation 12 (7) of the Regulations,⁴⁹ ComReg considers that there are two potential methods by which liable undertakings could discharge their respective contributions. The first approach, is that payments are placed in an escrow account and ComReg would disperse such payments to the USP. The second approach is that payments are made directly between the organisations concerned.
- 4.30 ComReg considers that the first approach — where providers concerned discharge their liability to ComReg and are then subsequently distributed to the USP, is more transparent and does not unnecessarily involve additional parties, increase the administrative burden on the USP or increase the complexity of what should be a straight-forward payment. In relation to the amount specified, liable parties should take account of Regulation 12 (12) of the Regulations which provides that: “[a]n undertaking that fails to comply with a requirement imposed under paragraph (7) commits an offence”.⁵⁰

Time period allowed for payment for the financial period 2009/10

- 4.31 ComReg considers that should a USO funding application be received for the financial period 2009/10 and where this positive net cost (if any) is determined to be an unfair burden — ComReg considers that as the various declarations and notifications (i.e. Eligible Turnover) will not have been yet received, with the required information on foot of a decision on the principles and methodologies for a USO fund sharing mechanism, that a longer time period than the one month time period as proposed in paragraph 4.27 may be appropriate.

ComReg’s preliminary view

- 4.32 ComReg is of the preliminary view that liable undertakings that are notified regarding their respective contribution levels — should a USO initial funding application be received for

⁴⁷ ComReg, supra n 1.

⁴⁸ See ComReg D04/11, supra n 1, section 5 for ComReg’s respective Decisions regarding the approach to determine if a net cost presents an unfair burden on the USP.

⁴⁹ See paragraph 4.19.

⁵⁰ Furthermore, Regulation 12 (8) of the Regulations provides that: “[a]n amount payable to the Regulator under this Regulation that remains unpaid may be recovered by the Regulator as a simple contract debt in any court of competent jurisdiction and any such amount shall include interest...”. As such, it is the intention of ComReg — should a liable undertaking not pay its required contribution to the USP, to pursue such parties.

the financial period 1 July 2009 to 30 June 2010, shall discharge such required amounts within three months of notification⁵¹. ComReg may extend this deadline, but only where it considers that there are exceptional reasons for doing so.

- 4.33 ComReg is of the preliminary view that liable undertakings that are notified regarding their respective contribution levels — should a USO subsequent funding application be received (in respect of a relevant financial year post the financial period 1 July 2009 to 30 June 2010), shall discharge such required amounts within one month of notification. ComReg may extend this deadline, but only where it considers that there are exceptional reasons for doing so.
- 4.34 ComReg is of the preliminary view that all payments from liable undertakings / parties should be discharged as appropriate directly to the USP.

Q. 10. Do you agree with the proposed time frame for required providers to discharge their liability? If not, please provide an alternative and justify your proposed timings.

Q. 11. Do you agree with the proposed time frame for circumstances where a USO fund may require a material contribution from industry (and in particular from individual liable undertakings) that it may be appropriate that liable parties be given sufficient notice of their liability?

Q. 12. Do you agree with the proposed approach of payments being paid directly to the USP? If not, please provide sufficient reasoning to justify your views.

- 4.35 ComReg is interested in the views of parties as to whether consideration should be given to a potential scenario where: either the required fund size is such that it may impose an unfair burden on industry to seek payment in a given financial, or, that the required contribution from a particular liable party would place that party under a significant financial disadvantage. This issue was initially discussed in ComReg 10/94, where the possibility of a delayed payment scheme or sinking fund was considered.⁵²
- 4.36 ComReg considers that given the proposed threshold level the possibility that a liable party's contribution would place that party under significant financial disadvantage is somewhat mitigated. However, where this is not the case, ComReg considers that where such a liable party can reasonable demonstrate to the satisfaction of ComReg that such a payment would place it under significant financial disadvantage — then it may be appropriate to structure such payments (for that liable party) over a period of time. However, such payments would incur interest charges (as appropriate) to take account of the increased timeframe. However, ComReg notes that in the majority of overseas jurisdictions that contributing parties discharge their liability in one instalment — with the exception of France, where the annual contribution is allowed to be discharged in two instalments. ComReg would be interested in receiving views from interested parties in relation to this potential issue.

⁵¹ With respect to the financial year ended 31 June 2010, while relevant parties may have already submitted a declaration as part of the Levy Order for that financial year, ComReg requests that for the purposes of completeness and allowing for the potential Allowable Deductions that liable undertakings' submit their respective declarations by 31 August 2012.

⁵² See ComReg 10/94, paragraph 4.75 and ComReg 11/15, paragraph 3.88.

- 4.37 Similarly, where a fund may impose an unfair burden on industry such a delayed payment scheme may be appropriate. However, ComReg considers that as the USP is likely to incur the largest proportion of such a fund that the likelihood that this would occur would be minute.

Q. 13. Do you consider the provision of a delayed payment scheme appropriate under certain circumstances? What level of interest costs would you consider to be appropriate in circumstances where a delayed payment scheme is implemented? Please provide sufficient detail to justify your views.

Change in corporate ownership / group structure

- 4.38 In certain cases, particularly when a provider has recently changed status, its financial year-end may change, resulting in a financial year that is either longer or shorter than 12 months. In such cases, ComReg is of the preliminary view that it is appropriate to use a pro-rata estimate of 12 months Relevant Turnover and Eligible Turnover as appropriate.
- 4.39 Similarly, if a liable party / undertaking is involved in a purchase, merger, takeover, disposal, or other similar transaction (“Transaction”) with another liable party / undertaking, it is required to take the Transaction into account in its annual declaration / notification.
- 4.40 ComReg is of the preliminary view that for the given financial year in which a liable party / undertaking completes a Transaction with another liable party / undertaking, both parties are required to make an annual declaration on an individual basis, thereafter, those parties are required to provide the annual declaration on a consolidated basis (see paragraph 3.50).

Q. 14. Do you agree with the proposed pro-rata estimate for providers whose financial year is either shorter or longer than 12 months? If not, please reason an alternative approach which you consider appropriate.

Q. 15. Do you consider the proposed approach for the given financial year in which a Transaction occurs appropriate? Please justify your response.

5 Submitting Comments

- 5.1 The consultation period will run to Monday 28 November 2011, during which the Commission welcomes written comments on any of the issues raised in this paper. It is requested that comments be referenced to the relevant question numbers and/or paragraph numbers from this document. Where views are provided, please provide a supporting rationale for your comments, including if possible, an indication on the broader impact on industry of any changes proposed.
- 5.2 Having analysed and considered the comments received, ComReg will publish a response to consultation and decision in Q1 2012.
- 5.3 In order to promote further openness and transparency, ComReg will publish all respondent's submissions to this consultation, subject to the provisions of ComReg's Guidelines on the Treatment of Confidential Information – ComReg 05/24. If the submission contains confidential information an additional document labelled “public version” should be provided.
- 5.4 We would request that electronic submissions be submitted in an unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.

Appendix A – Extract Sample Declaration / Statement

[EXTRACT]

Opinion

1. In our opinion the financial statements give a true and fair view of the state of the affairs of the company and the group as at 31 March XY and of the profit of the group for the year then ended and have been properly prepared in accordance with the Companies Acts, 1963 to 2001.

We have obtained all the information and explanations we considered necessary for the purpose of our audit. In our opinion proper books of account have been kept by the company. The company's balance sheet is in agreement with the books of account.

In our opinion the information given in the directors' report is consistent with the financial statements.

The net assets of the company, as stated in the balance sheet of the company are more than half the amount of its called-up share capital and, in our opinion, on that basis there did not exist at 31 March XX a financial situation which, under section 40 (1) of the Companies (Amendment) Act, 1983, would require the convening of an extraordinary general meeting of the company.

Bloggs and Bloggs
Chartered Accountants and Registered Auditors
Dublin
[date]

2. In our opinion the total of the relevant and non relevant turnover for the period from 1 April XX to 31 March XY amounting to €20,000,000 has been properly extracted from the books and records of the company with which the audited financial statements are in agreement. Non Relevant Turnover comprised:

Non Relevant Turnover	€
Consultancy Services	800,000
Interest Income	200,000
Total Non Relevant Turnover	1,000,000

Relevant Turnover as defined in Section 30 Communications Regulation Act, 2002 Levy Order, 2003 amounted to €19,000,000.

Bloggs and Bloggs
Chartered Accountants and Registered Auditors
Dublin
[date]

3. In our opinion the total of the Eligible Turnover for the period from 1 April XX to 31 March XY amounting to €17,000,000 has been properly extracted from the books and records of the company with which the audited financial statements are in agreement. Allowable Deductions comprised:

Allowable Deductions	€
Interconnection link charges	250,000
Access charges	250,000
Origination charges	500,000
Transit charges	500,000
Fixed and Mobile Termination rate charges (excluding charges for outgoing international calls)	250,000
Termination rate revenues from incoming international calls	250,000
Leased lines charges	nil
Local loop unbundling charges	nil
Co-location charges	nil
Total Allowable Deductions	2,000,000

Bloggs and Bloggs
 Chartered Accountants and Registered Auditors
 Dublin
 [date]

Appendix B – Consultation Questions

List of Questions

- Q. 1. Given the legislative requirement, in the event of a positive net cost representing an unfair burden, to share such a net cost amongst providers of electronic communications networks and services — do you consider ComReg’s approach (see paragraph 3.15) to be appropriate? Are there providers of electronic communications networks and services which you consider should be included or excluded in the definition? Please provide detailed reasoning for your views.
- Q. 2. Do you consider the use and definition of Relevant Turnover as a component to determine relevant contributions appropriate? Please provide detailed reasoning for your views.
- Q. 3. Do you agree with the proposed consolidated group approach?
- Q. 4. Do you agree with the list of identified Allowable Deductions? What other deductions do you consider should be taken into consideration? Please provide adequate reasoning to support your views.
- Q. 5. Do you consider that the materiality of Allowable Deductions justifies the additional computational requirements to determine the respective allocation contributions from liable parties? Which, if any, of the Allowable Deductions do you consider immaterial? Please provide sufficient information to justify your views.
- Q. 6. Do you agree that the relevant contributions per liable parties / undertakings, which are above the specified Threshold limit, will be calculated in direct proportion to that liable party’s Eligible Turnover? If not, what alternative approach would you consider to be most appropriate — please justify your approach with adequate reasoning.
- Q. 7. Do you agree with the proposed threshold level? If not, what threshold level would you consider appropriate? Please provide detailed reasoning for your views.
- Q. 8. Do you agree with the proposed time frame for required providers to provide a declaration / statement containing the necessary information to ComReg? If not, please reason the proposed timing frame you consider appropriate.
- Q. 9. Do you consider that the required information to determine the liable undertakings / parties contribution (i.e. Relevant Turnover and Eligible Turnover) could be included as part of the Levy Order declaration?
- Q. 10. Do you agree with the proposed time frame for required providers to discharge their liability? If not, please provide an alternative and justify your proposed timings.
- Q. 11. Do you agree with the proposed time frame for circumstances where a USO fund may require a material contribution from industry (and in particular from individual liable undertakings) that it may be appropriate that liable parties be given sufficient notice of their liability?

- Q. 12. Do you agree with the proposed approach of payments being paid directly to the USP?
- Q. 13. Do you consider the provision of a delayed payment scheme appropriate under certain circumstances? What level of interest costs would you consider to be appropriate in circumstances where a delayed payment scheme is implemented? Please provide sufficient detail to justify your views.
- Q. 14. Do you agree with the proposed pro-rata estimate for providers whose financial year is either shorter or longer than 12 months? If not, please reason an alternative approach which you consider appropriate.
- Q. 15. Do you consider the proposed approach for the given financial year in which a Transaction occurs appropriate? Please justify your response.

Appendix C – Glossary of Terms

Acronym	Full Title / Description
Allowable Deduction	A category of certain payments which are allowable as adjustment to providers' Relevant Turnover
BEREC	Body of European Regulators for Electronic Communications
ComReg	Commission for Communications Regulation
Eligible Turnover	Relevant Turnover adjusted for Allowable Deductions
Relevant Turnover	Gross turnover (specifically turnover attributable to electronic communications networks and services excluding turnover generated from networks and services used for radio and television broadcasting)
Levy Order	Section 30 of the Communications Regulations Act 2002.
NRA	National Regulatory Authority
Regulations	The European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011
USO	Universal Service Obligation
USP	Universal Service Provider
VAT	Value Added Tax
VoIP	Voice over Internet Protocol
VoB	Voice over Broadband

Appendix D – Regulatory Impact Assessment

ComReg is of the view that there is no requirement to conduct a Regulatory Impact Assessment (“RIA”) on these principles and methodologies at this consultation stage as no obligations are being proposed. However, ComReg will consider the appropriateness of a RIA at a later stage in the consultation process.

ComReg’s approach to a RIA is set out in the guidelines, published in August 2007, in ComReg Document No. 07/56 & 07/56a.