



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

# eir's 2010-2011 Universal Service Funding Application

## Unfair burden assessment

Non-Confidential

### Response to Consultation and Final Determination

**Decision:** D17/24

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

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# Glossary

“**ALTO**” means Alternative operators in the communications market.

“**Base judgment**” means Base NV and Others v. Ministerraad, Case C-389/08, judgment of the CJEU, delivered by the CJEU on 6 October 2010.

“**BEREC**” means the Body of European Regulators for Electronic Communications.

“**BT**” means BT Communications Ireland Limited.

“**CJEU**” means the Court of Justice of the European Union.

“**CJEU judgment**” means Eircom Limited v. Commission for Communications Regulation, Case C-494/21, delivered by the CJEU 10 November 2022.

“**Code**” means the European Electronic Communications Code, established by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018.

“**Code Regulations**” means the European Union (Electronic Communications Code Regulations 2022 (S.I. 444 of 2022)).

“**ComReg**” means the Commission for Communications Regulation, established by section 6(1) of the 2002 Act.

“**ComReg Decision D05/19**” means “Assessment of eir’s 2010-11 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011”, ComReg Document No. 19/36, Decision No. D05/19, 17 April 2019.

“**Consultation 10/77**” means “Preliminary Consultation - Call for Input, Costing and Financing of Universal Service Obligations”, ComReg Document No. 10/77, 28 September 2010.

“**Consultation 11/15**” means “Response to Consultation and Draft Decision - Costing of universal service obligations: Principles and Methodologies”, ComReg Document No.11/15, 7 March 2011.

“**Consultation 11/77**” means “Consultation on sharing mechanism for any USO Fund: Principles and Methodologies”, ComReg Document No. 11/77, 28 October 2011.

“**Consultation 23/113**” means “eir’s 2010-2011 Universal Service Fund Application. Assessment of the unfair burden. Consultation and Draft Determination,” ComReg Document No. 23/113, 6 December 2023.

“**D06/10**” means “Decision Notice (and Decision Instrument) - Response to Consultation – The Provision of Telephony Services under Universal Service Obligations”, ComReg Document No. 10/35, Decision No. D06/10, 30 June 2010.

“**D04/11**” means “Decision on the Costing of universal service obligations: Principles and Methodologies”, ComReg Document No. 11/42, Decision No. D04/11, 31 May 2011.

“**D12/14**” means “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers”, Response to Consultation, ComReg 14/89, ComReg Decision D12/14, published 28 August 2014. This was a response to the 2012 FVA Consultation.

“**direct net cost**” of the USO is the avoidable costs attributable to the provision of the USO (both direct and indirect), minus revenues (both direct and indirect) attributable to the provision of the USO.

“**eir**” means Eircom Limited

“**Framework Regulations**” mean the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. 333 of 2011).

“**FVA**” means fixed voice access.

“**HCA**” means historical cost accounting.

“**Information Requirements**” means the additional information formally requested on 11 March 2024 from the relevant undertakings by ComReg, using its statutory powers (Section 13D(1) of the 2002 Act).

“**ISDN**” means integrated services digital network.

“**MCE**” means mean capital employed.

“**MDF**” means main distribution frame.

“**MDF area**” means a geographic area as described by the MDF map.

“**MEA**” means modern equivalent asset.

“**Minister**” means the Minister for the Environment, Climate and Communications.

“**net cost**” is calculated as the difference between the ‘direct net cost’ and the intangible benefits which accrue to the USP, by virtue of being the USP.

“**NRA**” means National Regulatory Authority.

“**OAO**” means other authorised operators.

“**Oxera Initial Unfair Burden Report 2010/11**”, refers to the initial report prepared by Oxera titled “Unfair burden report 2010/11” which was included as an annex to Consultation 23/113.

“**Oxera Unfair Burden Report 2010/11**”, refers to the final report prepared by Oxera, having considered responses to Consultation 23/113 titled “Unfair burden report 2010/11” (24/43a) and is included as Annex 3 of this decision document.

“**PSTN**” means the public switched telephone network.

“**QKDR**” means the Quarterly Key Data Reports published by ComReg.

“**RBB Report**” refers to the report submitted by eir and prepared by RBB Economics in response to ComReg Consultation 23/113, entitled “Assessment of ComReg’s approach to determine whether the USO cost represented an unfair burden for eir in 2010/11”.

“**RIA**” means regulatory impact assessment.

“**ROCE**” means the return on capital employed.

“**SB-WLR**” means single billing through wholesale line rental.

“**SMP**” means significant market power.

“**Three**” means Three Ireland (Hutchison) Limited.

“**Universal Service Regulations**” means the European Communities (Electronic Communications Networks and Services)(Universal Service and Users’ Rights) Regulations 2011 (S.I. 337 of 2011).

“**UPC**” means UPC Ireland, now Virgin Media.

“**USO**” means universal service obligations.

“**USO model**” refers to the USO direct net cost model underpinning eir’s USO funding applications to ComReg as a whole, including all calculations, data, spreadsheets, the model summary, and the individual net cost models (Area, Customer, Payphone, Directories, and Disabled End Users’ Services). These individual direct net cost models may be referred to cumulatively as “USO models.”

“**USP**” means universal service provider.

“**Virgin Media**” refers to Virgin Media Ireland Limited.

“**Vodafone**” means Vodafone Ireland Limited.

“**WACC**” means the weighted average cost of capital.

“**2002 Act**” means the Communications Regulation Act 2002, as amended.

“**2008 WACC**” means the WACC set by ComReg at 10.21% in the 2008 WACC decision.

“**2008 WACC Decision**” means “Response to Consultation and Decision Notice, Eircom’s Cost of Capital”, ComReg Document No. 08/35, Decision No. 01/08, 22 May 2008.

**“2012 FVA Consultation”** means “Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers”, ComReg Document 12/117, 26 October 2012.

## Additional Information

This document was revised on 27 June 2024 to amend the decision number and correct Footnote 34. The decision number was changed from ComReg Decision 06/24 to ComReg Decision 17/24. Page headers were amended to reflect the new document reference. The revised document was published as ComReg 24/43R.

Revised in ComReg 24/43R: Cover page, page headers, and Footnote 34.

## Redacted Information

In preparing this document ComReg has treated claims that information is confidential in accordance with its “Guidelines on the treatment of confidential information”<sup>1</sup>. Where information of a confidential nature is discussed in this Decision document or the accompanying consultant’s report, the relevant information has been redacted and a [X] symbol has been inserted.

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<sup>1</sup> “Guidelines on the treatment of confidential information”, ComReg Document No. 05/24, 22 March 2005, [https://www.comreg.ie/media/dlm\\_uploads/2015/12/ComReg0524.pdf](https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg0524.pdf).

# 1. Executive summary

- 1.1. Eircom Limited (“eir”), as the designated universal service provider (“USP”) submitted an application to the Commission for Communications Regulation (“ComReg”) for funding in respect of the net cost of meeting its universal service obligations (“USO”) during its financial year 2010-2011<sup>2</sup>. In this document ComReg outlines the unfair burden assessment for 2010-2011 and the reasons for its determination that for 2010-2011, the determined net cost of the provision of the USO did not represent an unfair burden on eir.
- 1.2. A USO is a safety net to ensure that a set of at least the minimum services are available to all end-users and at an affordable price<sup>3</sup>. In the context of electronic communications services, the universal service ensures that basic telephone services are available at an affordable price and specified quality.
- 1.3. In exercising its functions, ComReg has an objective to promote the interests of users within the Community and in that regard ComReg has an obligation to take all reasonable measures to ensure that all users have access to a universal service<sup>4</sup>. ComReg has statutory powers to designate one or more undertakings as USP and as such oblige them to provide certain telecommunications services.
- 1.4. A USP may submit applications for USO funding. ComReg is then required to determine:
  - (i) the net cost; and
  - (ii) whether that net cost is an unfair burden on the USP.
- 1.5. In D04/11<sup>5</sup>, ComReg set out: (i) how the net cost is to be calculated and (ii) principles and methodologies to apply to ComReg’s assessment as to whether a net cost associated with meeting the USO, if any, represents an unfair burden on the USP.
- 1.6. In July 2016, following a process of engagement between ComReg and eir, eir re-submitted its final 2010-2011 USO funding application in which it claimed a positive net cost of €7,929,495.
- 1.7. Following a consultation on its preliminary views in relation to eir’s final

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<sup>2</sup> Referred to as “2010-2011”

<sup>3</sup> Recital 212 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (the “Code”), <https://eur-lex.europa.eu/eli/dir/2018/1972/oj>.

<sup>4</sup> Section 12(2)(c)(i) of the Communications Regulation Act 2002, as amended (the “2002 Act”), [www.irishstatutebook.ie/eli/2002/act/20/enacted/en/html](http://www.irishstatutebook.ie/eli/2002/act/20/enacted/en/html).

<sup>5</sup> “Decision on the Costing of universal service obligations: Principles and Methodologies”, ComReg Document No. 11/42, Decision No. D04/11, 31 May 2011 (“D04/11”).



application for funding for 2010-2011, ComReg determined the net cost of provision of the universal service in that year and decided that this did not represent an unfair burden on eir in the financial year in question (“D05/19”).<sup>6</sup>

1.8. eir appealed D05/19 along with four other decisions made by ComReg relating to subsequent years. The High Court stayed these proceedings and referred a question concerning the unfair burden assessment to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling pursuant to Article 267 of the Treaty of the Functioning of the European Union.

1.9. The CJEU ruled that:

“Articles 12 and 13 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 (Universal Service Directive), must be interpreted as requiring the competent regulatory authority, in order to determine whether the net cost of universal service obligations represents an unfair burden on an operator entrusted with such obligations, to examine the characteristics particular to that operator, taking account of its situation relative to that of its competitors in the relevant market”.

1.10. Following the judgment of the CJEU (the “CJEU judgment”)<sup>7</sup>, the High Court made orders, amongst other things, setting aside one section of D05/19<sup>8</sup> i.e. the aspect of D05/19 which related to unfair burden assessment and remitting that aspect to ComReg for review in accordance with the CJEU judgment.

1.11. The ComReg determined positive net cost for 2010-2011 is €7,503,531. This was not disturbed and accordingly stands.

1.12. ComReg is of the view that, in order for D04/11 to be applied in a way that is consistent with the CJEU judgment, this means that, regardless of the impact of a positive net cost on the USP’s profitability (Decision 40 of D04/11), ComReg will conduct a competitive assessment as set out in Decision 41 and Decision 42 of D04/11, and assess whether the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38(iii)(b) of D04/11.

1.13. ComReg reconducted the unfair burden assessment on the basis of this

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<sup>6</sup> “Assessment of eir’s 2010-11 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011”, ComReg Document No. 19/36, Decision No. 05/19, 17 April 2019 <https://www.comreg.ie/publication/assessment-of-eirs-2010-2011-universal-service-fund-application-assessment-of-the-net-cost-and-unfair-burden-for-the-period-2010-2011>.

<sup>7</sup> Eircom Limited v. Commission for Communications Regulation, Case C-494/21, Judgment of the Court, delivered 10 November 2022 (“the CJEU judgment”), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CJ0494>.

<sup>8</sup> Section 1.3.

determined net cost and in accordance with D04/11 read in light of the CJEU judgment. ComReg received advice from its economic advisors Oxera Consulting (“Oxera”) which was carefully considered by ComReg, and which informed ComReg’s unfair burden assessment. In Consultation 23/113 ComReg consulted upon how it proposed to apply Decisions 38-42 of D04/11, in light of the CJEU judgment and its unfair burden assessment for 2010-2011<sup>9</sup>. In contrast to its approach in 2019, ComReg proposed to conduct a competitive assessment and assess whether the positive net cost caused a significant competitive disadvantage for eir as USP.

1.14. There were five respondents to Consultation 23/113. One respondent (eir) disagreed with ComReg’s preliminary views and provided a detailed report prepared by consultant economists. Submissions to Consultation 23/113 are considered and responded to in Chapter 5.

1.15. ComReg considers that the matters below are important to note:

- The assessment to be carried out is whether the “net cost” of meeting the USO represents an “unfair burden”. This is not a general assessment of unfairness of the burden of the USO. This focus on the net cost is central to the legislative regime and this fact is reflected in D04/11, the CJEU judgment, the Base judgment,<sup>10</sup> and the relevant legislation.
- ComReg in D04/11 set out the principles and methodologies for assessment of unfair burden. D04/11 was made following a public consultation, has been in place for a significant amount of time and has not been challenged.
- There is nothing in D04/11 or the CJEU judgment relating to promoting/demoting or weighting the criteria of assessment. Indeed, the CJEU judgment does not take issue with and cites ComReg’s application of Decision 40 (see paragraph 21 of the CJEU judgment).

1.16. ComReg asked Oxera to consider the submissions received to Consultation 23/113 and to revise its report as it considered appropriate. ComReg considered the advice received from Oxera. For the avoidance of doubt, ComReg agrees with Oxera’s analysis and conclusions in the report provided to ComReg. ComReg also considered submissions to Consultation 23/113 and further information received following information requirements.

1.17. In order to reflect the requirements of the CJEU judgment, when establishing if

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<sup>9</sup> “eir’s 2010-2011 Universal Service Fund Application. Assessment of the unfair burden. Consultation and Draft Determination”, ComReg Document No. 23/113, 6 December 2023 (“Consultation 23/113”) <https://www.comreg.ie/publication/eirs-2010-2011-universal-service-fund-application-assessment-of-the-unfair-burden-consultation-and-draft-determination>.

<sup>10</sup> Base NV and Others v. Ministerraad, Case C 389/08, Judgment of the Court delivered on 6 October 2010 (“Base judgment”), <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-389/08>.

the net cost represents an unfair burden and applying D04/11 ComReg took account of eir's particular characteristics (the quality of eir's equipment, eir's economic and financial situation, and eir's market share), and when examining those characteristics took account of eir's situation relative to that of its competitors in the relevant market. In the application of Decisions 40 to 42 of D04/11, which are relevant for Decision 38 (iii) (b), ComReg's findings are summarised as follows:

- **Decision 40:** In 2010-11, the net cost did not significantly affect eir's profitability and/or ability to earn a fair rate of return on its capital employed. Indeed, eir's returns were in excess of the competitive benchmark of a 'fair rate of return' as measured by the regulated WACC.
  - **Decision 41:** In 2010-11 the net cost did not materially impact eir's ability to compete on equal terms with competitors going forward, as:
    - there is no available evidence of a causal link between the financial distress and challenges observed and the net cost of the USO; and
    - the results of the wider period of financial analysis undertaken (2009/20-2023/22) show that the USO did not prevent eir from undertaking necessary investment nor did it impede eir from making improvements to its financial health, as evidenced by improvements in its credit rating.
  - **Decision 42:** eir was profitable and was well positioned to cross-subsidise the provision of the USO by using profits earned in its fixed-line business. Indeed, when compared to its competitors, eir was able to maintain a steady ARPU over the assessed period and, despite a reduction in market shares, remained the main player in the market (by revenue and subscriber numbers). Indeed, indicative analysis shows that eir's EBIT at the group level exceeded that of its competitors, while eir's Irish group-level ROCE was broadly in line with those of its competitors.
- 1.18. **Decision 38(iii)(b):** Based on the analysis undertaken in the application of Decisions 40 to 42 and the findings in relation to these decisions, ComReg considers that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2010-2011.
- 1.19. Notwithstanding the information constraints identified, ComReg is satisfied that it had sufficient information available to conduct the unfair burden assessment for 2010-2011.
- 1.20. ComReg when concluding the unfair burden assessment considered the conclusions reached in relation to each of the decisions from D04/11 referenced.

No one of these decisions is, in and of itself, determinative. ComReg is of the view that the conclusions relating to each of the decisions referenced converge to indicate that the net cost of providing the USO in 2010/2011 did not constitute an unfair burden on eir.

- 1.21. Having fully considered all relevant information, including the responses to Consultation 23/113 and the advice received from Oxera, for the reasons summarised in this document, in particular in Chapter 4, ComReg has determined that the net cost of the provision of the USO in 2010-2011 did not represent an unfair burden on eir.

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## 2. Background

### 2.1. Context

- 2.1. The liberalisation of the telecommunications market in Ireland, driven by the European Union, commenced in the 1990s. In 2010, the Irish market was fully opened up to competition. eir as the incumbent telecommunications provider was the dominant player in the market<sup>11</sup>, however its competitors were gaining market share, as would be expected following deregulation of the market. eir owned and operated one fixed network which was ubiquitous (i.e. passed almost all premises in the country).
- 2.2. Requirements for a universal service were introduced as part of the process of liberalisation. The first USO designation was made in Ireland in 1999 and eir was designated as the USP. The universal service obligations imposed on eir were to ensure that basic fixed line telephone and other minimum telecommunications services, such as public payphones and printed directory services, were available to end-users at an affordable price.
- 2.3. ComReg, by way of ComReg Decision D06/10<sup>12</sup>, designated eir as the USP to provide certain telecommunications services, for the period 1 July 2010 to 30 June 2012.
- 2.4. In 2010-2011 there was a well-established wholesale regime in place which allowed competing operators (known as “other authorised operators” or “OAOs”) to offer service by purchasing from eir and reselling what was known as single billing wholesale line rental (“SB-WLR”). At that time all of eir’s competitors for fixed line services except one (UPC (Virgin Media)) were purchasing and re-selling eir’s SB-WLR product.
- 2.5. Regulated SB-WLR wholesale prices were set based on a price regulation regime whereby the nationally averaged price for this wholesale service was set

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<sup>11</sup> “Market Analysis: Retail Fixed Narrowband Access Markets”, ComReg Document No. 07/61, 24 August 2007 (the “2007 Market Review”), [https://www.comreg.ie/?dln\\_download=decision-notice-market-analysis-retail-fixed-narrowband-access-markets](https://www.comreg.ie/?dln_download=decision-notice-market-analysis-retail-fixed-narrowband-access-markets); “Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers”, Document No. 12/117, 26 October 2012 (the “2012 FVA Consultation”), <http://www.comreg.ie/fileupload/publications/ComReg12117.pdf>; “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers”, Response to Consultation, ComReg 14/89, ComReg Decision D12/14, published 28 August 2014 (“D12/14”) <https://www.comreg.ie/publication/market-review-retail-access-to-the-public-telephone-network-at-a-fixed-location-for-residential-and-non-residential-customers-2/>.

<sup>12</sup> “Decision Notice (and Decision Instrument) - Response to Consultation – The Provision of Telephony Services under Universal Service Obligations”, ComReg Document No. 10/35, Decision No. 06/10, 30 June 2010, (“D06/10”), [www.comreg.ie/publication/decision-notice-and-decision-instrument-response-to-consultation-the-provision-of-telephony-services-under-universal-service-obligations](http://www.comreg.ie/publication/decision-notice-and-decision-instrument-response-to-consultation-the-provision-of-telephony-services-under-universal-service-obligations).

by reference to eir's retail public switched telephony network ("PSTN") price (commonly referred to as 'a retail minus basis')<sup>13</sup>. Accordingly, the wholesale price paid by all undertakings (including eir retail) for SB-WLR was the same standard national wholesale price. As such, eir's competitors were making a contribution to the cost of funding the network used to provide USO equivalent to that being made by eir's retail arm.

- 2.6. The combination of the Irish telecommunications market opening up to competition and the USO obligation on eir meant there was a risk of calls revenue being depleted significantly reducing eir's ability to cross-subsidise any "access deficit"<sup>14</sup>. USO funding is designed to address this risk and to ensure that those who were availing of the access network were contributing to its cost.
- 2.7. Tariff rebalancing (where prices adjust to reflect costs) was one of the main regulatory objectives during the liberalisation of the telecommunications market. ComReg used price regulation to complete tariff rebalancing<sup>15</sup>. By 2007 ComReg considered that there was no "access deficit" in the Irish telecommunications market, tariffs were balanced (i.e. prices had adjusted to reflect costs)<sup>16</sup>. In summary, tariff re-balancing addressed the historic access deficit.

## 2.2. Universal service designation and funding

- 2.8. A USP may submit to ComReg a written request to receive funding for the net costs of meeting the USO. ComReg is required to determine, based on a verifiable and verified net cost calculation, whether the net cost of meeting the USO represents an unfair burden on the USP<sup>17</sup>. In D04/11<sup>18</sup>, ComReg set out the principles and methodologies to be applied to the calculation of the net cost and to the subsequent determination by ComReg of whether a resulting positive net cost (if any) constitutes an unfair burden on the USP.

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<sup>13</sup> Regulated wholesale prices have been set on a cost-oriented basis since 2016.

<sup>14</sup> Prior to the introduction of competition, when eir was a monopoly, there was a revenue deficit associated with access charges. Revenue from "calls" (i.e. connection and line rental charges) cross subsidised the cost of providing the access network (lines poles etc.). This is known as the "access deficit".

<sup>15</sup> In 2003 ComReg Telecommunications Tariff Regulation Order revoked the earlier 1996 and 1999 orders and set a CPI-0% price cap. [S.I. No. 31/2003 - Telecommunications Tariff Regulation Order, 2003 \(irishstatutebook.ie\)](#)

<sup>16</sup> 2007 Market Review.

<sup>17</sup> This process is provided for in Regulation 75 of the European Union (Electronic Communications Code Regulations 2022 (S.I. 444 of 2022) (the "Code Regulations") and was previously provided for in Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. 337 of 2011) ("the Universal Service Regulations").

<sup>18</sup> "Decision on the Costing of universal service obligations: Principles and Methodologies", ComReg Document No. 11/42, Decision No. 04/11, 31 May 2011 ("D04/11").

## 2.3. eir's 2010-2011 funding application

- 2.9. In September 2014 eir submitted its initial application for funding for provision of the universal service in 2010-2011. In that application eir claimed a net cost of €9,945,473 for this period, after taking account of intangible benefits of €1,463,421.
- 2.10. Following a process of engagement between ComReg and eir during which ComReg outlined certain clarifications and adjustments that it required, in February 2016 eir re-submitted its 2010-2011 USO funding application and in July 2016 re-submitted its final application. As a result of these clarifications, eir adjusted the positive net cost claimed for 2010-2011 from €9,945,47<sup>19</sup> to €7,929,495.
- 2.11. On 5 September 2017 ComReg published Consultation 17/73<sup>20</sup>, in which ComReg set out and consulted upon its preliminary views in relation to eir's final application for funding for 2010-2011, having regard to the Universal Service Regulations, D04/11, and the consultants' reports<sup>21</sup>.

## 2.4. ComReg's 2010-2015 funding decisions

- 2.12. On 18 April 2019, ComReg published the following ComReg decisions:
- D05/19 "Assessment of eir's 2010-2011 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2010-2011" ("ComReg Decision D05/19").
  - D06/19 "Assessment of eir's 2011-2012 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2011-2012" ("ComReg Decision D06/19").
  - D07/19 "Assessment of eir's 2012-2013 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2012-2013"

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<sup>19</sup> eir's USO Funding Submission – 15 July 2016.

<sup>20</sup> "Assessment of eir's 2010-2011 Universal Service Fund Application, Assessment of the net cost and unfair burden for the period 2010-2011, Consultation and Draft Determination", ComReg Document No.19/36, Decision No. 17/73, 05 September 2017 ("ComReg 17/73"), [https://www.comreg.ie/?dml\\_download=assessment-eirs-2010-2011-universal-service-fund-application-assessment-net-cost-unfair-burden-period-2010-2011](https://www.comreg.ie/?dml_download=assessment-eirs-2010-2011-universal-service-fund-application-assessment-net-cost-unfair-burden-period-2010-2011) .

<sup>21</sup> "TERA Assessment of eir's USO funding application – direct net cost 2010-2011", ComReg Document No.19/36a, 18 April 2019, <https://www.comreg.ie/publication/tera-assessment-of-eirs-uso-funding-application-direct-net-cost-2010-2011>; "Oxera Assessment of eir's calculation of intangible benefits for 2010-2011", ComReg Document No. 19/36b, 18 April 2019. <https://www.comreg.ie/publication/oxera-assessment-of-eirs-calculation-of-intangible-benefits-for-2010-11>; and "Oxera unfair burden report 2010/11", ComReg Document No. 19/36c, 18 April 2019, [https://www.comreg.ie/?dml\\_download=oxera-unfair-burden-report-2010-11](https://www.comreg.ie/?dml_download=oxera-unfair-burden-report-2010-11).

(“ComReg Decision D07/19”).

- D08/19 “Assessment of eir’s 2013-2014 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2013-2014” (“ComReg Decision D08/19”); and
- D09/19 “Assessment of eir’s 2014-2015 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2014-2015” (“ComReg Decision D09/19” and together “the Decisions”).

2.13. In each of the Decisions, ComReg determined the net cost of provision of the universal service and decided that it did not represent an unfair burden on eir in the financial year in question.

## 2.5. Appeal against the Decisions

2.14. On 15 May 2019, eir issued an appeal in the High Court against the Decisions<sup>22</sup>.

2.15. On 19 February 2021, the Court decided to stay the proceedings and refer a question concerning the unfair burden assessment to the CJEU for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. The following is the question referred:

“In circumstances where:- (i) the telecommunications market has been liberalised and there are multiple telecommunication services providers operating in the market; (ii) one service provider (the “Universal Service Provider” or “USP”) has been selected by the National Regulatory Authority (“NRA”) to perform Universal Service Obligations (“USOs”); (iii) it has been determined by the NRA that there is a positive net cost associated with the performance of the USOs (“USO Net Cost”); and (iv) it has been determined by the NRA that the USO Net Cost is material compared to the administrative costs of the establishment of a sharing mechanism in respect of the USO Net Cost amongst participants in the market;

If the NRA is required, pursuant to its obligations under the Universal Services Directive 2002/22, to consider whether the USO Net Cost is excessive in view of the ability of the USP to bear it, account being taken of all the USP's characteristics, in particular, the quality of its equipment, its economic and financial situation and its market share (as referred at paragraph 42 of Base) is it permissible under the Directives for the NRA to conduct that assessment by having regard exclusively to the characteristics/situation of the USP, or is it required to assess the characteristics/situation of the USP relative to its competitors in the relevant

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<sup>22</sup> Eircom Limited v. The Commission for Communications Regulation, High Court Commercial, Record No 2019/167 MCA.



market?”.

2.16. On 10 November 2022, the CJEU delivered its judgment<sup>23</sup>. The CJEU responded to the question referred as follows:

“In the light of all the foregoing considerations...Articles 12 and 13 of the Universal Service Directive must be interpreted as requiring the competent national regulatory authority, in order to determine whether the net cost of universal service obligations represents an unfair burden on an operator entrusted with such obligations, to examine the characteristics particular to that operator, taking account of its situation relative to that of its competitors in the relevant market.”<sup>24</sup>

## 2.6. High Court orders

2.17. On 10 July 2023, the High Court made orders<sup>25</sup> which, amongst other things:

- i. set aside the following determinations relating to ComReg’s unfair burden:
  - a) section 1.3 of the determination in ComReg Decision D05/19
  - b) the final paragraph of section 1.2 of the determination in ComReg Decision D06/19 (beginning “Pursuant to the calculation of the positive net cost...”)
  - c) section 1.3 of the determination in ComReg Decision D07/19
  - d) section 1.3 of the determination in ComReg Decision D08/19
  - e) section 1.3 of the determination in ComReg Decision D09/19;

and

- ii. ordered that those aspects of the Decisions identified above be remitted to ComReg for review in accordance with the CJEU judgment.

2.18. Accordingly, the net cost determined by ComReg in the Decisions remains undisturbed. The existence of a positive net cost does not automatically constitute an unfair burden or automatically give rise to the need for USO funding.

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<sup>23</sup> The CJEU Judgment.

<sup>24</sup> Paragraph 55 of the CJEU judgment.

<sup>25</sup> “Universal Service Funding Applications 2010-2015 Update”, ComReg Document No. 23/83, 13 September 2023, <https://www.comreg.ie/publication/universal-service-funding-applications-2010-2015-update>.

## 2.7. 2010-2011 unfair burden assessment

2.19. The High Court remitted to ComReg for review the aspect of ComReg Decision D05/19 which related to unfair burden assessment (section 1.3 of the determination).

2.20. The ComReg determined positive net cost for 2010-2011 is €7,503,531<sup>26</sup>.

**Table 1: Determined net cost calculation**

USO Net Cost 2010-2011		2010-2011 ComReg €
<b>Direct net cost (a)</b>	Uneconomic Areas	€183,793
	Uneconomic Customers	€8,643,518
	Directories	-
	Public Payphones	€185,310
	Services for disabled end users	€58,935
	Consultancy fees	-
	<b>Direct net cost</b>	<b>€9,071,556</b>
<b>Intangible benefits (b)</b>	Enhanced brand recognition	€1,298,367
	Life-cycle	€259,711
	Ubiquity	€3,596
	Marketing	€6,351
	<b>Total intangible benefits</b>	<b>€1,568,025</b>
<b>Net cost (after intangible benefits)/Positive net cost</b>		<b>€7,503,531</b>

2.21. ComReg undertook the unfair burden assessment for 2010-2011 in the light of the CJEU judgment. D04/11 sets out the principles and methodologies to be considered in determining whether a net cost represents an unfair burden on a USP. Those principles and methodologies have informed ComReg's assessment of whether the positive net cost of providing the USO constituted an unfair burden on eir.

## 2.8. Consultation 23/113

2.22. On 6 December 2023 ComReg published Consultation 23/113, and the "Oxera

<sup>26</sup> Note that this determined both that there is a direct net cost and that the benefits of the USO do not outweigh the net cost; see paragraph 205 and paragraph 217(ii).

Initial Unfair Burden Report 2010/11”<sup>27</sup>.

2.23. Consultation 23/113 sought the views of respondents in respect of the following three consultation questions:

1	Do you agree with ComReg’s approach to the unfair burden assessment? Please give reasons for your answer.
2	Do you agree with ComReg’s approach to information and information constraints? Please give reasons for your answer. If you are of the view that ComReg should consider any additional relevant information when conducting the unfair burden assessment, please provide copies of that information (including full source references and independent verification, where appropriate).
3	Do you agree with ComReg’s preliminary view that the positive net cost of the provision of the USO in 2010-2011 (i.e., €7,503,531) does not represent an unfair burden on eir? Please give reasons for your answer.

2.24. Submissions to Consultation 23/113 were received from the following five respondents:

- Alternative operators in the communications market (“ALTO”)
- BT Communications Ireland Limited (“BT”)
- eir<sup>28</sup>
- Three Ireland (Hutchison) Limited (“Three”)
- Vodafone Ireland Limited (“Vodafone”)

2.25. Copies of all non-confidential submissions to consultation are published on ComReg’s website. ComReg has considered the comments of the five respondents.

2.26. ComReg has summarised the key elements of the respondents’ comments, and

<sup>27</sup> “Oxera unfair burden report 2010/11”, ComReg Document No. 23/113a, 4 December 2023, (“Oxera Initial Unfair Burden Report 2010-11”) <https://www.comreg.ie/publication/oxera-unfair-burden-report-2010-11-2>.

<sup>28</sup> eir submitted a report prepared on its behalf by RBB Economics. “Assessment of ComReg’s approach to determine whether the USO cost represented an unfair burden for eir in 2010/11, Prepared for Eircom Limited”, RBB Economics, 7 February 2024 (“RBB Report”).

ComReg's views in relation to these, in Chapter 5.

Non-Confidential

## 3. Legal context

### 3.1. New Regime

- 3.1. The net cost upon which the unfair burden is to be assessed was calculated and determined pursuant to Regulation 11 of the Universal Service Regulations.
- 3.2. In June 2023, the Universal Service Regulations were revoked<sup>29</sup> and replaced by the Code Regulations. The Code Regulations are part of the transposition of Directive (EU) 2018/1972<sup>30</sup> which repealed and recast, amongst other things, the Universal Service Directive<sup>31</sup> and established the European Electronic Communications Code (“the Code”), a comprehensive set of new and revised rules for the electronic communications sector.
- 3.3. D04/11 continues in force as if it were made under the Code Regulations<sup>32</sup> and references to Regulations 11 and 12 of the Universal Service Regulations will, going forward, be read as references to Regulations 75 and 76 of the Code Regulations, respectively.
- 3.4. Any future determination of an unfair burden by ComReg will be made pursuant to Regulation 75 of the Code Regulations. Where ComReg determines that the net cost of meeting a USO represents an unfair burden on an undertaking it will (unless the Minister for the Environment, Climate and Communications (“the Minister”) intends to introduce a mechanism to compensate the undertaking for the determined net costs under transparent conditions from public funds) provide for financing of that net cost pursuant to Regulation 76 of the Code Regulations “Financing of universal service obligations and transparency” which replaces Regulation 12 of the Universal Service Regulations “Financing of universal service obligations”.

### 3.2. D04/11

- 3.5. In D04/11, ComReg set out the principles and methodologies to be applied to the calculation of the net cost and to the subsequent determination by ComReg of whether a resulting positive net cost (if any) constitutes an unfair burden on the

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<sup>29</sup> European Union (Electronic Communications Code) (Amendment) Regulations 2023 (S.I. No. 300/2023), <https://www.irishstatutebook.ie/eli/2023/si/300/made/en/pdf>.

<sup>30</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), <https://eur-lex.europa.eu/eli/dir/2018/1972/oj>.

<sup>31</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, page 51) (“the Universal Service Directive”), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0022>.

<sup>32</sup> Regulation 113 of the Code Regulations.

USP.

- 3.6. Decisions 1 to 37 of D04/11 set out the basis for calculating the direct net cost and the intangible benefits associated with being the USP and must be adhered to in any assessment of a USP's funding application.
- 3.7. Decisions 38 to 42 of D04/11 set out the general and objective criteria by which ComReg will assess whether a positive net cost, in the particular year of application, may be considered an unfair burden on the USP. The unfair burden assessment must be conducted in accordance with D04/11 (which has been continued under the new regime).
- 3.8. In D04/11 ComReg based its interpretation of the unfair burden on the Base judgment, where at paragraph 49 the CJEU previously ruled that a burden is unfair if it:
- “...is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share.”
- 3.9. D04/11 must now be read in light of the CJEU judgment of 10 November 2022. ComReg has considered the CJEU judgment and its impact on D04/11.
- 3.10. The CJEU judgment requires ComReg:
- “...in order to determine whether the net cost of universal service obligations represents an unfair burden on an operator entrusted with such obligations, to examine the characteristics particular to that operator, taking account of its situation relative to that of its competitors in the relevant market”.
- 3.11. As set out in Consultation 23/113, ComReg is of the view that, in order for D04/11 to be applied in a way that is consistent with the CJEU judgment, Decisions 40 to 42 of D04/11 cannot be applied sequentially. Therefore, going forward, when applying D04/11 ComReg must disregard the first ten words of Decision 41 (i.e., the text “If the positive net cost significantly affects a USP's profitability,”).
- 3.12. This means that, regardless of the impact of a positive net cost on the USP's profitability, ComReg will conduct a competitive assessment as set out in Decision 41 and Decision 42, and assess whether the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38(iii)(b).
- 3.13. ComReg will conduct an assessment of the characteristics particular to a universal service provider in light of the competitive environment in which that provider operates, and will in this way take account of the situation of the universal service provider relative to that of its competitors in the relevant market.

By carrying out its assessment in this way, ComReg will ensure the “comparative component” required by the CJEU is included.

- 3.14. In applying Decisions 38-42 (the aspects of D04/11 which relate to unfair burden assessment) ComReg will take account of the CJEU judgment. Therefore ComReg, when establishing if the net cost represents an unfair burden on the USP, will assess whether it: “...is excessive in view of the undertaking’s ability to bear it, account being taken of all the undertaking’s own characteristics” (Base judgment) and when examining those characteristics “ particular to that operator” “tak[e] account of its situation relative to that of its competitors in the relevant market”.
- 3.15. For ease of reading, Decisions 38-42 are set out below at Table 1 and the text ComReg considers necessary to disregard is struck through<sup>33</sup>. All subsequent references to Decision 41 in this document refer to Decision 41 as set out below.

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<sup>33</sup> See also Annex 1.

**Table 1: Decisions 38-42 (with strikethrough)**

Determining if there is an unfair burden	
<b>Decision 38</b>	<p>For an unfair burden on a USP, three cumulative conditions must be met:</p> <ol style="list-style-type: none"> <li>i. There must be a verifiable and verified direct net cost.</li> <li>ii. The benefits of the USO must not outweigh the net cost (i.e. there is a positive net cost).</li> <li>iii. This positive net cost is (a) material compared to administrative costs of a sharing mechanism, and (b) causes a significant competitive disadvantage for a USP.</li> </ol>
<b>Decision 39</b>	<p>If the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and taking into account whether these costs are disproportionate to any net transfers to a USP.</p>
<b>Decision 40</b>	<p>If the positive net cost is not relatively small, ComReg will assess whether or not this net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital employed; and</p>
<b>Decision 41</b>	<p><del>If the positive net cost significantly affects a USP's profitability,</del> ComReg will assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward.</p>
<b>Decision 42</b>	<p>ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair:</p> <ol style="list-style-type: none"> <li>i. Changes in profitability, including an understanding of where a USP generates most of its profits over time.</li> <li>ii. Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ("EBITDA") analysis.</li> <li>iii. Changes in direct USO net cost, if any, over time.</li> <li>iv. Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.</li> <li>v. Changes in prices over time.</li> <li>vi. Changes in market share and/or changes in related markets.</li> <li>vii. Market entry barriers.</li> </ol>

3.16. In Consultation 23/113 ComReg set out how it proposed to apply Decisions 38-42 of D04/11, in light of the CJEU judgment. Submissions to Consultation 23/113 relating to the legal context are considered by ComReg in Chapter 5 of this document. ComReg considers that the matters below are important to note:

- The assessment to be carried out is whether the "net cost" of meeting the USO represents an "unfair burden". This is not a general assessment of unfairness of the burden of the USO. This focus on the net cost is central to the legislative regime and this fact is reflected in D04/11, the CJEU judgment,



the Base judgment, and the relevant legislation.

- There is nothing in D04/11 or the CJEU judgment relating to promoting/demoting or weighting the criteria of assessment. Indeed, the CJEU judgment does not take issue with and cites ComReg's application of Decision 40 (see paragraph 21 of the CJEU judgment).
- ComReg in D04/11 set out the principles and methodologies for assessment of unfair burden. D04/11 was made following a public consultation, has been in place for a significant amount of time and has not been challenged.
- ComReg notes that aspects of eir's submission amount to a collateral challenge to elements of D04/11. These elements of D04/11 were not challenged when that decision was made, and are not required to be changed as a result of the CJEU judgment or the Order of the High Court. ComReg is of the view that it has made the required changes to D04/11 to be consistent with the CJEU judgment.

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## 4. Unfair burden assessment 2010-2011

- 4.1. This Chapter sets out ComReg’s assessment as to whether the positive net cost to eir of providing the USO in 2010-2011 constituted an unfair burden in 2010-2011. It summarises Oxera’s Unfair Burden Report, ComReg’s conclusions and determination.
- 4.2. The existence of a positive net cost does not automatically constitute an unfair burden or automatically give rise to the need for USO funding. The principles and methodologies of D04/11, the relevant statutory provisions, the CJEU judgment, the Oxera Unfair Burden Report<sup>34</sup>, submissions to Consultation 23/113, Chapter 5, the responses to ComReg’s information requirements<sup>35</sup> and other relevant information have informed ComReg’s assessment of whether the positive net cost of providing the USO constituted an unfair burden on eir.

### 4.2 Net cost

- 4.3. The 2010-2011 net cost determined by ComReg in Decision D05/19 remains undisturbed. Accordingly, ComReg’s assessment of the unfair burden for 2010-2011 is based on the determined positive net cost for 2010-2011 of €7,503,531.

### 4.3 Oxera Unfair Burden Report 2010-11

- 4.4. To assist ComReg in assessing whether the provision by eir of the USO in 2010-2011 represented an unfair burden on eir, ComReg engaged Oxera to provide expert economic analysis and advice.
- 4.5. ComReg instructed Oxera to conduct its analysis by reference to the principles and methodologies for assessing an unfair burden in Decisions 38 to 42 of D04/11, in light of the CJEU judgment. Oxera was provided with ComReg’s interpretation of how the CJEU judgment affected D04/11 and ComReg’s approach to the assessment process.
- 4.6. ComReg instructed Oxera to base its analysis on the determined positive net cost for 2010-2011 of €7,503,531.
- 4.7. ComReg provided Oxera with relevant information to inform its advice to ComReg. In particular, ComReg provided Oxera with: (i) eir’s historical cost separated accounts; (ii) accounts for service providers operating in the Irish fixed line market for the relevant periods, where available; (iii) ComReg quarterly key

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<sup>34</sup> Refers to the final report prepared by Oxera.

<sup>35</sup> On 11 March 2024, ComReg, using its statutory powers (Section 13D(1) of the 2002 Act), formally requested additional information from the relevant undertakings (“the Information Requirements”).

- data reports; (iv) relevant ComReg market analyses; (v) the 2010 USO designation and associated consultation documents; and (vi) ComReg Annual Report 2010-2011<sup>36</sup>.
- 4.8. ComReg asked Oxera to review the Oxera Initial Unfair Burden Report 2010/2011 in light of the information received.
  - 4.9. Oxera's assessment was provided to ComReg in the Oxera Initial Unfair Burden Report 2010/11, published at Annex 2 of Consultation 23/113.
  - 4.10. The Initial Oxera Unfair Burden Report set out Oxera's preferred profitability and competitive assessment analysis<sup>37</sup> and the associated data constraints. In question 2 of Consultation 23/113<sup>38</sup>, ComReg asked respondents whether (i) they agreed with ComReg's approach to information and information constraints; (ii) whether they were of the view that ComReg should consider any additional relevant information when conducting the unfair burden assessment; and (iii) to provide copies of that information (including the full source references and independent verification, where appropriate). No respondents provided copies of any additional relevant information that should be taken into consideration when conducting the unfair burden assessment.
  - 4.11. On 11 March 2024, ComReg sent the Information Requirements formally requesting additional information from the relevant undertakings. This information, where available, would have enabled Oxera to conduct its preferred analysis<sup>39</sup>. ComReg requested this information in order to ensure that it had fully considered all available information that could possibly be relevant and investigated all possible avenues.
  - 4.12. All responses to the Information Requirements were shared with Oxera. Some of the information sought was unavailable, and the information which was available and provided was at an aggregated level, so it was not possible to conduct all of the preferred analysis<sup>40</sup>.

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<sup>36</sup> A more detailed summary of the information provided is set out in Annex 3.

<sup>37</sup> See A2 of the Oxera Unfair Burden Report 2010/11.

<sup>38</sup> The submissions to question 2 are set out in Chapter 5.

<sup>39</sup> As set out at A2 in the Oxera Unfair Burden Report. This includes: data necessary to calculate EBIT and ROCE in the fixed line market; CapEx, depreciation and amortisation, to compare the ability to invest and as a proxy for quality of equipment in the fixed line market; number of subscribers, revenues and average broadband speed for retail fixed line subscribers split geographically by 26 counties, with the aim of understanding if prices were materially different between urban and rural areas; subscriber numbers and revenues at the retail fixed line level (split by single, dual and triple pay), to enable an assessment of whether certain operators exhibited competitive advantages through provision of bundled products.

<sup>40</sup> No respondent was able to provide data at the requested geographical split.

- 4.13. Oxera was provided with all submissions to Consultation 23/113.<sup>41</sup>
- 4.14. Having considered all of the aforementioned information, Oxera finalised its report titled Oxera Unfair Burden Report 2010/11<sup>42</sup> and provided it to ComReg.
- 4.15. In summary, Oxera carried out two assessments:
- **Administrative cost assessment (Decision 39 and 38(iii)(a))** – In Section 3 of the Oxera Unfair Burden Report 2010/2011.
  - **Assessment of eir’s financial and competitive position** – In Section 4 of the Oxera Unfair Burden Report 2010/2011, Oxera assessed eir’s financial and competitive position in the relevant period and market, to establish whether there was an unfair burden on eir (the USP). Specifically:
    - Section 4B sets out the scope of the relevant market in which the assessment of an unfair burden should be undertaken;
    - Section 4C applies **Decision 40**;
    - Section 4D applies **Decision 41**; and
    - Section 4E applies the **criteria of Decision 42** to determine whether or not the net cost burden is unfair.
- 4.16. In Section 5 of the Oxera Unfair Burden Report 2010-2011, Oxera concluded by applying the three cumulative conditions in Decision 38<sup>43</sup>. Oxera considered that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2010-2011 (i.e. that the condition in Decision 38(iii)(b) of D04/11 has not been met). Oxera concluded that the cumulative conditions of Decision 38 are not met and that the net cost of the USO did not represent an unfair burden on eir in 2010-2011.
- 4.17. In the first annex (A1) of the Oxera Unfair Burden Report 2010/2011 sets out Oxera’s understanding of sub-products within eir’s fixed line business that could potentially be dissociable from the USO<sup>44</sup>. The second annex (A2) of this report sets out the data constraints faced, and the analysis undertaken, in light of these constraints.

## 4.4 ComReg’s Assessment

- 4.18. ComReg when assessing whether the positive net cost of providing the USO

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<sup>41</sup> As set out in Section 13D(1) of the 2002 Act, [www.irishstatutebook.ie/eli/2002/act/20/enacted/en/html](http://www.irishstatutebook.ie/eli/2002/act/20/enacted/en/html)

<sup>42</sup> Dated 06 June 2024. This report is an update to the Initial Oxera Unfair Burden Report 2010/2011 and substantive additions to the analysis are summarised in section 1.4 of this report.

<sup>43</sup> Decision 38 iii (b) is informed by an assessment of whether the criteria under Decisions 40 to 42 are met, in the round.

<sup>44</sup> Following discussions with ComReg.

constituted an unfair burden on eir considered, amongst other things, the D04/11 principles and methodologies, the relevant statutory provisions, the CJEU judgment, the information which it provided to Oxera<sup>45</sup>, the Oxera Unfair Burden Report and submissions to Consultation 23/113.

- 4.19. Two of the three conditions in Decision 38 of D04/11 (outlined above) are met, as:
- i. There is a verified direct net cost to eir of €7,503,531. This figure represents the net cost as determined by ComReg; and
  - ii. The benefits of the USO do not outweigh the net cost (i.e., there is a positive net cost).
- 4.20. Decision 38(i) and 38(ii) were established as part of ComReg's original assessment of eir's funding application, finding that there is a direct net cost, and that the benefits of the USO do not outweigh the net cost.<sup>46</sup>

#### 4.4.1 Administrative cost assessment

- 4.21. Decision 38(iii)(a) states:

"The positive net cost is (a) material compared to administrative costs of a sharing mechanism".

- 4.22. Decision 39 states:

"If the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and taking into account whether these cost are disproportionate to any net transfers to a USP".

- 4.23. The administrative cost assessment (Decision 38(iii)(a) and Decision 39) was conducted as part of ComReg's original assessment of eir's funding application. This aspect also remains undisturbed. For completeness, ComReg asked Oxera to review this aspect.
- 4.24. ComReg has considered Section 3 of Oxera's Unfair Burden Report 2010/11. ComReg agrees with Oxera's analysis and conclusions in this regard. ComReg is of the following views:

- the positive net cost of the USO in 2010-2011 (i.e., €7,503,531) is

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<sup>45</sup> As summarised in Annex 3.

<sup>46</sup> ComReg Decision D05/19.

material compared to the estimated administrative costs of a sharing mechanism (estimated at €200,000);

- The positive net cost is not relatively small; and
- The estimated administrative costs of establishing and operating a sharing mechanism would not be disproportionate to the estimated net transfers to the USP (which ComReg agrees with).

4.25. Therefore, and having taken the above factors into account, ComReg remains of the view that Decision 38(iii)(a) has been met and that USO financing would be justified if it were found that the provision of the USO in 2010-2011 represented an unfair burden on the USP (Decision 39).

## 4.4.2 Assessment of eir's financial and competitive position

### 4.4.2.1 Valuation Method

4.26. Historical cost accounting ("HCA") and the regulatory weighted cost of capital ("WACC")<sup>47</sup> are prescribed by D04/11 for use when determining the "net cost". Accordingly, ComReg in assessing unfair burden of the net cost of the USO has used similar methodologies. Using a different valuation method (i.e. different to HCA) and/or different rate of return on capital (i.e. different to the regulatory WACC) when assessing unfair burden of that same net cost would not make sense. Such an approach would in essence involve using different parameters for two aspects of the one exercise and mean that the internal consistency of the exercise would be compromised.

### 4.4.2.2 Scope of the market

4.27. ComReg in Consultation 23/113 set out that to conduct the unfair burden assessment, the relevant market<sup>48</sup> must firstly be identified and described.

4.28. The relevant market is the basis for the assessment of the USP's profitability relative to its competitors (Decision 40) and competitive position (Decision 41 and 42) and whether the positive net cost causes a significant competitive disadvantage for a USP (Decision 38(iii)(b)). The USP's situation relative to that of its competitors can then be assessed and taken into account, as is required

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<sup>47</sup> Where the pricing of regulated wholesale products is based on the regulatory weighted cost of capital (WACC).

<sup>48</sup> For the avoidance of doubt, in this context ComReg uses the term "relevant" to mean "appropriate" and is not referring to the term "relevant market" as it was defined in the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 ("the Framework Regulations"), or the term as it is used in the context of a Regulation 49 of the Code Regulations market analysis.

by the CJEU judgment<sup>49</sup>.

- 4.29. ComReg has considered the relevant aspects of Oxera's Unfair Burden Report 2010/11.
- 4.30. eir's fixed-line business includes most activities within its fixed-line wholesale and retail divisions<sup>50</sup> and covers business and residential, data communications and interconnection services. Mobile services are excluded.
- 4.31. The activities included within eir's fixed line business are largely non-dissociable from the USO. ComReg recognises that there are a very small number of sub-products<sup>51</sup> that could potentially be dissociable from the USO business relating to the "Wholesale Residual" (unregulated) and the "Retail Residual". However, the data required to assess the impact of excluding these sub-products from the profitability analysis is not available.
- 4.32. Comparable competitor information is needed to facilitate a 'like for like' fixed line business analysis. Unlike eir, its competitors were not required to produce historical cost accounts and associated financial statements (with the requisite granular level of information).
- 4.33. ComReg agrees with Oxera's analysis and conclusions. Therefore ComReg has decided that for the purpose of the 2010-2011 unfair burden assessment the appropriate market to use to analyse eir's competitive position is the Irish fixed-line market, and where competitor information is unavailable at the Irish fixed-line market level, the aggregate group (Ireland) level market should be used.

#### 4.4.2.3 Profitability assessment

- 4.34. Decision 40 states:

" If the positive net cost is not relatively small, ComReg will assess whether or not this net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital employed; and".

- 4.35. ComReg has considered Section 4C (Application of Decision 40) of Oxera's

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<sup>49</sup> ComReg does not consider that an unfair burden assessment pursuant to Regulation 75 of the Code Regulations requires a full market analysis as provided for in Part 8 Chapter 3 of the Code Regulations. ComReg's view is based upon its interpretation of the Code, the Universal Service Directive, the Universal Service Regulations the Framework Regulations and the CJEU judgment and it is supported by submissions made in the context of previous related consultations and eir's 2019 legal challenge.

<sup>50</sup> As defined in eircom Limited (2011), 'Historical Cost Separated Accounts: For the year ended 30 June 2011', page 32.

<sup>51</sup> Interconnect International Access; Mast Access; TV Service Connections/Rental; Global conferencing services; Staff on Loan Agency; Tera Business; Meteor Mobile re emobile; eMobile handsets.

Unfair Burden Report 2010/11 in which it assesses changes in eir's accounting profits (using EBIT), changes in profitability (using ROCE), and the use of the WACC as the benchmark to assess profitability. ComReg agrees with Oxera's analysis and conclusions in this regard.

- ComReg considers that the use of ROCE is appropriate for the reasons outlined in the Oxera Unfair Burden Report 2010/2011, and in particular notes that ROCE is widely used to assess profitability in market investigations and inquiries by the Competition and Markets Authority (CMA) in the UK, as well as by the European Commission. ComReg also used ROCE in its RTE excessive pricing investigation<sup>52</sup>.
- 4.36. ComReg considers the 2008 WACC of 10.21%, to be the appropriate benchmark against which to measure eir's profitability in 2010-2011. ComReg considers this approach to be appropriate for the following reasons:
- the WACC is prescribed by D04/11 for use when determining the "net cost";
  - the 2008 WACC was calculated specifically for eir, using assumptions of a notional efficient network in line with good regulatory practice and, in ComReg's view, is an appropriate and a robust estimate of the cost of capital for eir's regulated fixed-line business, which includes the USO. The WACC is calculated to allow a reasonable return on investment for eir, as an operator designated with SMP<sup>53</sup>;
  - for regulated businesses, it is standard practice for the allowed rate of return, or allowed WACC, to be determined on an ex-ante basis as the allowed profit on invested capital;
  - the potential impact of financial turmoil and volatility in financial markets was taken into account<sup>54</sup>. The 2008 WACC Decision relied on the substantial body of empirical estimation and analysis conducted by Oxera on behalf of ComReg. As part of this analysis, Oxera assessed the potential impact of the then-ongoing financial turmoil on the individual cost of capital parameter estimates to investigate whether an adjustment to the original estimates consulted on would be appropriate<sup>55</sup>;

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<sup>52</sup> "Investigation into an alleged abuse of an alleged dominant position by RTÉ/RTÉNL, contrary to Section 5 of the Competition Act 2002, and/or Article 102 of the Treaty on the Functioning of the European Union", ComReg Document No. 14/62, 20 June 2014, paragraphs 110-2 and 131, <https://www.comreg.ie/publication/information-notice-closure-of-investigation-into-an-alleged-abuse-of-an-alleged-dominant-position-by-rtartanl>.

<sup>53</sup> In 2010, eir had SMP in fixed line access markets at the wholesale and retail levels.

<sup>54</sup> Paragraph 4.3 page 28 of the 2008 WACC Decision.

<sup>55</sup> "Oxera Report – eircom's cost of capital – Prepared for Commission for Communications Regulation", ComReg Document No. 07/88a, 1 November 2007, [https://www.comreg.ie/?dln\\_download=oxeras-report-on-eircoms-cost-of-capital-appendix-c](https://www.comreg.ie/?dln_download=oxeras-report-on-eircoms-cost-of-capital-appendix-c).



- the regulatory allowed WACC gives the best approximation of the forward-looking return that stakeholders can expect in an efficiently run business<sup>56</sup>;
  - the WACC level was established using robust and well recognised techniques<sup>57</sup>; and
  - departing from a regulatory WACC, would result in uncertainty and inconsistency in regulatory decisions<sup>58</sup>.
- 4.37. Conducting a profitability assessment using a comparison of the ROCE to WACC is consistent with the requirements of Decision 42 i (changes in profitability, including an understanding of where a USP generates most of its profits over time); and Decision 42 ii (changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation, and amortisation ('EBITDA')).
- 4.38. Therefore, ComReg considers it appropriate to conduct a profitability assessment using a comparison of ROCE to WACC in the context of the unfair burden assessment.

#### 4.4.2.4 Competitive assessment

- 4.39. The CJEU judgment requires ComReg to conduct a competitive assessment, that is, assessment of the USP's situation relative to its competitors.
- 4.40. Decision 41 of D04/11 states:
- “ComReg will assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward.”
- 4.41. Decision 42 of D04/11 states:
- “ComReg will use the following criteria, statically and dynamically, to

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<sup>56</sup> The WACC is based on a Hypothetical Efficient Fixed Line Operator with an efficient capital structure, a standard approach widely used by regulators. A regulator's estimate of the allowed WACC may not necessarily align with the actual ROCE earned by the regulated company. The objective of the WACC allowance is not to determine the exact out-turn return that will be earned; rather, it is to incentivise an efficiently run business – investors have to outperform the regulator's cost assumptions to earn higher than a benchmark return (e.g. a return on regulated equity that exceeds the ex-ante cost of equity allowance). It should also be noted that ComReg does not have any obligation to ensure that eir maintains any particular level of profitability.

<sup>57</sup> In reaching the 2008 WACC Decision and the 2014 WACC Decision, ComReg undertook a rigorous and comprehensive assessment of all aspects underlying the WACC value and adopted international best practice in its estimation techniques and methodologies. ComReg and Oxera used extensive evidence from primary research, peer comparison and regulatory precedent.

<sup>58</sup> As the WACC is a key input in the setting of cost recovery/price control obligations, it has implications for setting of efficient prices for consumers and the creation of ongoing investment incentives for eir's regulated services.

determine whether or not a net cost burden is actually unfair:

- i. Changes in profitability, including an understanding of where a USP generates most of its profits over time.
- ii. Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation, and amortisation (“EBITDA”) analysis.
- iii. Changes in direct USO net cost, if any, over time.
- iv. Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.
- v. Changes in prices over time.
- vi. Changes in market share and/or changes in related markets.
- vii. Market entry barriers”.

4.42. ComReg, in light of the elapsed time between 2010-2011 and when the unfair burden assessment is taking place, instructed Oxera to cross-check the results of its analysis of Decision 41 (Section 4D.1) with the results conducting the same analysis using up to date available data (latest full financial year of 2021/2022)<sup>59</sup>.

4.43. The ‘going forward’ aspect of the competitive assessment looked at the next financial year, as USO funding applications may be made on an annual basis. In exceptional circumstances, where there is a significant time lag between the year of application and the assessment, ComReg did consider additional relevant information pertaining to subsequent years. For the avoidance of doubt, should not be taken as indication of how ComReg will assess annual funding applications in the future.

4.44. ComReg considered Section 4D (Application of Decision 41) and Section 4E (Application of Decision 42) of Oxera’s Unfair Burden Report 2010/11 in which it assesses eir’s operational performance<sup>60</sup> and changes in profitability, accounting profits and related financial measures, changes in the USO net cost over time, changes in the level of cross-subsidies between products and changes over time, and assessment of eir’s position relative to its competitors in the market. ComReg agrees with Oxera’s analysis and conclusions in this regard.

4.45. The CJEU judgment highlights the importance of considering the impact of the USO on eir’s ability to finance its investment in new technologies and markets.

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<sup>59</sup> This analysis is set out in Section 4D.2 of the Oxera Unfair Burden Report.

<sup>60</sup> 2009/10 and 2010/11.

Similarly, the Base judgment<sup>61</sup> requires that quality of equipment should be considered as one of the characteristics to be taken into account when considering if the USO net cost is excessive. ComReg has considered and agrees with Oxera's use of the ability to invest<sup>62</sup> as a proxy for quality of equipment, in the fixed-line market. ComReg also considered the relevant regulatory context. This included analysis conducted by ComReg prior to the imposition of regulatory obligations. These obligations (namely eir's SMP obligations, price control measures and USP designation) were imposed following full public consultations and in some instances consultation with the Body of European Regulators for Electronic Communications ("BEREC"), the Competition Authority<sup>63</sup> and the European Commission. The analysis underpinning these regulatory obligations provides near-contemporaneous analysis, which is used *inter alia* to inform ComReg's assessment of unfair burden in 2010-2011.

- 4.46. In particular, ComReg considered previous market analyses conducted, i.e. the 2007 Market Review and the 2014 FVA Market Analysis<sup>64</sup>. The products, services and operators in these markets overlap considerably with the 'fixed line market' which has been identified as the relevant market for the competitive assessment. Therefore, these market analyses are very relevant to this unfair burden assessment. 2010-2011 is midway between these market analyses and therefore these market analyses provide a valuable insight into the situation in the relevant market at the time.
- 4.47. Where the analysis underpinning the FVA Market Analysis shows that certain market conditions did not exist in the period 2012-2014, it is reasonable to infer that they equally did not exist in the preceding period (i.e. 2010-2012).
- 4.48. ComReg has considered the following: (i) the level of competition (ii) differences in competitive conditions: urban/rural and retail pricing (national/regional); and (iii) voice-only or bundled voice, based on extracts from the FVA Market Analysis in forming its decision. Extracts from the documents relating to the FVA Market Analysis which relate to these areas are set out below.

### Level of competition

- 4.49. In Section 5 of D12/14 ComReg summarised the situation in relation to "Existing

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<sup>61</sup> Case C-389/08, Base NV and Others vs Ministerraad, Judgment of the Court of Justice (Fourth Chamber) of 6 October 2010.

<sup>62</sup> As measured by CAPEX and depreciation and amortisation. See Oxera Unfair Burden Report 2010/11.

<sup>63</sup> In 2014 the Competition Authority was amalgamated with the National Consumer Agency to form the Competition and Consumer Protection Commission.

<sup>64</sup> ComReg provided Oxera with copies of the published documentation relating to these market analyses.

and potential competition” as follows:

“In the presence of regulation (CPS/SB-WLR) in the market concerned, existing competition continued to evolve, though high and non-transitory barriers to entry into the LLVA market remained. In this regard, FSPs had not widely replicated the ubiquity of Eircom’s network to supply FVA in the LLVA market. Absent regulation ComReg believed that existing competition would be virtually non-existent in the LLVA market. [...] While competition was emerging in the form of voice services provided by other operators via broadband infrastructure using managed VOIP services, ComReg’s preliminary view was that competition in the LLVA market was currently not effective. Because voice over broadband is not currently offered on a standalone basis to end-users in Ireland, alternative broadband platforms represent an additional choice of supply for only a subset of the population that place a higher value on broadband and the wider bundle of communication services. ComReg’s preliminary view was that suppliers of managed voice over broadband did not act as a sufficient constraint on the PSTN/ISDN network nationally (though may have exerted a degree of competitive pressure for a subset of end users that primarily value broadband and bundles of broadband and add on voice services) in view of the significant proportion of the population that value voice as the primary fixed telephony service. The relative competitive strength of alternative FSPs was dampened, with the majority of FVA suppliers being SB-WLR resellers. In addition, the increased uptake of LLU (primarily by BT) has not played a significant role in the supply of FVA since BT which is the largest LLU operator is acting as an intermediary in the sale of SB-WLR at a wholesale level (i.e. a resale of Eircom’s inputs).”<sup>65</sup>

4.50. ComReg’s conclusion in relation to “Existing and potential competition” states:

“In the presence of regulation, existing competition continues to evolve, though high and non-transitory barriers to entry into each of the relevant FVA markets remain. Absent appropriate regulation in wholesale upstream markets, Eircom’s ability to act to an appreciate extent, independently of competitors, customers, and consumers in terms of FVA whether standalone or in a bundle as evidence above will not be mitigated on a prospective basis over the period of the review;“

4.51. Of note is that the vast majority of OAOs (referred to as “alternative FSPs”) were reliant on eir for their wholesale inputs. ComReg was of the view that “Absent appropriate regulation in wholesale upstream markets, Eircom’s ability to act to an appreciate [sic] extent, independently of competitors, customers and consumers in terms of FVA whether standalone or in a bundle as evidence above

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<sup>65</sup> D12/14 paragraph 5.12

will not be mitigated on a prospective basis over the period of the review” and this was one of the factors that led to the conclusions that each of the “Relevant FVA Markets” was not effectively competitive and the designation of eir with SMP.

#### **Differences in competitive conditions – urban/rural**

- 4.52. In the 2012 FVA Consultation ComReg outlined that in urban areas where “the competitive dynamic is... enhanced by the existence of multiple suppliers of multi-bundled products” there had been no change in the pricing or marketing of standalone FVA products. ComReg stated that while the initial availability of FVA bundled offers had a regional (predominantly urban) emphasis, suppliers of such bundles had not yet differentiated their pricing structure within the areas in which they were available.
- 4.53. eir, in response to the 2012 FVA Consultation, took issue with this point of view, as is outlined in D12/14 in a section titled “Significant differences in competitive conditions between urban and rural areas” as follows:

“Eircom commented on the differences in competitive conditions between urban and rural areas. It considered that ComReg’s analysis failed to acknowledge the increasing level of competition in urban areas. Eircom argued that the emergence of major competitors, such as UPC and Vodafone, combined with the continuing expansion of LLU and the entry of Sky Ireland has made urban areas highly competitive as opposed to the less competitive rural areas. Eircom also pointed to its decreased national market share and argued that the reductions are much more pronounced in the urban areas. In doing so, Eircom presented their analysis of projected urban, rural, and national market shares in the fixed voice access (FVA) market for lower-level services.

All-important trends and market developments, such as, the presence of operators relying on [local loop unbundling] LLU as well as other eir wholesale inputs, the continuing expansion of UPC’s cable network and presence of other fixed service providers (FSPs) including those prospectively providing broadband with managed VOIP were described in detail in the fixed voice access (FVA) Consultation and taken into account in the subsequent analysis. Essentially, ComReg analysed in detail the potential impact of these trends and market developments on market definition, market power and the need for any regulatory obligations, in Chapters 4 and 5 of the fixed voice access (FVA) Consultation. On that basis, ComReg considered that geographically differentiated competitive conditions were adequately assessed in the FVA Consultation.

With regard to Eircom’s analysis on the likely development of market shares

in the [low level fixed voice access] LLVA market, ComReg notes that Eircom has not provided detailed documentation of the forecasting model. While Eircom listed the factors taken into consideration when producing the forecast of market shares it is not clear what weight was assigned to each of these factors. Furthermore, information on the selected forecasting methodology was not provided. Thus, ComReg considers it inappropriate to attach much weight to the projections of the market shares in the LLVA market. However, ComReg considers this information together with the wider market share information and trends that is available.

ComReg notes that due to the limited availability of reliable data, the precise market shares in the FVA market(s) in urban and rural areas are not known. Figure 3 which is based on household survey evidence categorised at county level, gives some high-level indication of the growing residential presence of UPC 's cable service in particular urban areas, particularly in the Dublin region. However, it is important to note that Figure 3 does not represent actual market shares for Dublin and other regions where UPC is present – it is based on survey evidence only and hence can be interpreted only as indicative evidence. In addition, it should be recalled that ComReg identified a relevant FVA product market that incorporates both residential and non-residential services. UPC 's share of the non-residential customer segment is likely to be significantly lower than that of Eircom across all regions, with the 2013 Business ICT Survey indicating only a 3% national share of business FVA customers for UPC.”<sup>66</sup> (emphasis added)

- 4.54. In D12/14 ComReg concluded that the above-mentioned analysis in the 2012 FVA Consultation remained valid<sup>67</sup>.
- 4.55. It is clear that in 2012 ComReg was of the view that in urban areas, where there was more competition due to multiple suppliers of multi-bundled products, there had been no change in the pricing or marketing of standalone FVA products. Similarly, while the initial availability of FVA bundled offers had a regional (predominantly urban) emphasis, suppliers of such bundles had not yet differentiated their pricing structure within these areas. In general, the Updated Retail Trends Analysis and Updated Pricing Structures in 13/95 showed no major changes to those trends identified in the 2012 FVA Consultation, such that they would materially impact upon the analysis set out in the 2012 FVA Consultation or impact the conclusions of D12/14.

### Retail pricing (national/regional)

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<sup>66</sup> D12/14 paragraphs 3.36 to 3.39.

<sup>67</sup> D12/14 paragraph 3.41.

4.56. In D12/14 it was stated that:

“(in the 2012 FVA Consultation (setting out ComReg’s preliminary views)) ComReg observed that there was no apparent evidence of any significant sub-national pricing or marketing in the supply of FVA. At the retail level, FSPs pursued a business policy of marketing and pricing uniformly on a national basis, which suggested that competitive conditions for FVA were homogenous nationwide. In urban areas where the competitive dynamic is relatively more enhanced by the existence of multiple suppliers of multi-bundled products, including UPC, there had been no change in the pricing or marketing of standalone FVA products. Equally, suppliers of FVA bundled services have not yet differentiated their pricing structure within the areas in which they were available.” (emphasis added)

4.57. In D12/14 it was concluded that:

“While it is apparent that consumers are responding to UPC’s relatively attractive product bundles, variations of competitive conditions with respect to bundled FVA is not limited to the presence of UPC. Recent developments such as the entry of Sky into the broadband and telephony market, Vodafone’s presence and the launch of IPTV over Eircom’s NGA network suggest that service providers will increasingly compete for subscribers on the basis of popular bundled services on a national basis. Although UPC’s market share of FVA continues to grow, that rate of growth appears to have somewhat levelled off on entry of Sky, an FSP likely to be too large over time to ignore.”<sup>68</sup>

4.58. In relation to “Geographic variation in products and pricing” in D12/14 response to the 2012 FVA Consultation it states:

“Eircom suggests that the product types and quality available to the market are different in UPC areas and rural areas and it responds differently depending on UPC’s presence. However, if there are sufficiently differentiated conditions of demand and supply to justify the identification of sub-national markets for FVA and in particular bundled FVA, ComReg would expect more evidence of FSPs engaging in geographically differentiated pricing strategies for FVA. However, despite Eircom’s contention, there is currently no apparent evidence of any significant sub-national pricing or marketing—irrespective of whether FVA is standalone or bundled, all operators have continued to price and market on a national basis at both the retail and wholesale level.”(emphasis added)

In particular, the headline price of Eircom’s standalone FVA remains

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<sup>68</sup> D12/14 paragraph 4.184.

constant over time. Although Eircom is subject to a [retail price cap] RPC on its narrowband FVA, [public switched telephony network] PSTN and ISDN access respectively, it is nevertheless free to reduce its standalone FVA prices, which ComReg would expect it to do if, it faced sufficient competitive pressure. On the other hand, given Eircom's 2014 USO designation, it is currently required to offer FVA (and calls) at geographically averaged prices.

In addition, the headline prices of Eircom's (non-NGA [next generation access]) bundles including an FVA component have remained broadly constant over time for the same product categories (see for example, Table 2 at paragraph 4.94 above). Despite Eircom's declining market share, Eircom had not responded to UPC's offers by reducing its prices to the extent it could have within the boundaries of regulatory price controls (price floors in the wholesale broadband access market, in particular).<sup>69</sup> So far, Eircom's competitive response has manifested itself predominantly through increasing the value of certain broadband bundles with quality upgrades and time limited promotions, primarily in urban areas which may infer differences for certain high speed fibre based broadband services if prices are compared in quality-adjusted terms. There are differences in terms of availability of faster broadband speeds, Eircom has introduced upgrades in urban areas only and some products do not exist in rural areas."<sup>70</sup> (emphasis added)

- 4.59. The aforementioned analysis was conducted by ComReg in 2012. Market conditions tend to progress not regress and therefore ComReg does not consider it likely that geographic differences in retail product characteristics or retail prices were present in 2010-2011, when there was no evidence of either in 2012.
- 4.60. In summary, ComReg found no evidence of OAOs (FSPs) engaging in geographically differentiated pricing strategies for FVA. eir was free to reduce its standalone FVA prices, which ComReg would have expected it to do if it faced sufficient competitive pressure. eir's competitive response manifested itself predominantly through increasing the value of certain broadband bundles with quality upgrades and time limited promotions, primarily in urban areas. eir had not responded to UPC's offers by reducing its prices to the extent it could have within the boundaries of regulatory price controls.

### **Differences in competitive conditions – voice only or bundled voice**

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<sup>69</sup> Oxera (2013), "Assessment of retail pricing constraints - Response to submissions on consultation 12/27: 'Next Generation Access ("NGA"): Proposed Remedies for NGA Markets", January. <https://www.oxera.com/wp-content/uploads/media/Oxera/downloads/reports/Assessment-of-retail-pricing-constraints.pdf>.

<sup>70</sup> D12/14 paragraphs 4.188 to 4.190.



4.61. In D12/14 ComReg stated:

“Eircom considers that there is a clear distinction between the characteristics and preferences of the different groups of customers depending on whether they are voice only or bundled voice. The latter market should, according to Eircom be further broken down into separate geographic markets defined to recognise the differing competitive constraints that exist within and outside of the [local exchange areas] LEAs.

As part of its consideration of these issues, ComReg conducted a Supplementary Consultation and considered further the matter of the candidate market (i.e. the appropriate focal products) and market definition, regarding in particular, the treatment of bundled services.”<sup>71</sup>

4.62. ComReg concluded in relation to the “Appropriate focal product”:

“On the basis of the analysis set out in the [fixed voice access] FVA and Supplementary Consultations, as well as the Oxa report and, having taken into account the respondents’ views and the national circumstances, ComReg has decided that, consistent with the European Commissions’ 2007 Recommendation, other European Commission guidance, the BEREC report, best practice analysis consistent with competition law and the practice of other NRA’s, standalone FVA remains the correct focal product and the starting point for it to carry out the FVA market definition and SMP analysis according to circumstances in Ireland.”<sup>72</sup> (emphasis added).

4.63. In the 2012 FVA Consultation ComReg’s preliminary view was that the relevant geographic market for both the wide LLVA (FVA sold standalone and in a bundle) and HLVA product markets was national in scope<sup>73</sup>. ComReg noted that eir had the largest nationwide market share, and supplied FVA nationwide over its ubiquitous PSTN network (whether sold inside or outside bundles)<sup>74</sup>.

4.64. In D12/14 ComReg stated:

“Regarding competition from alternative infrastructure, UPC’s network covers the most densely populated areas within the State with its coverage extending to some 746,100 households (approximately 45% of households in Ireland). ComReg’s view was that in locations where, in particular, cable-based voice services are available, Eircom is facing increasing risk of its voice customers substituting away to cable broadband with managed VOIP.

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<sup>71</sup> D12/14 paragraphs 4.10 and 4.11

<sup>72</sup> D12/14 paragraph 4.37

<sup>73</sup> Paragraphs 4.209 to 4.241 of the 2012 FVA Consultation.

<sup>74</sup> 2012 FVA Consultation, paragraph 4.217.

ComReg indicated that broadly Eircom has a lower share of FVA subscriptions in areas where UPC is offering FVA, relative to areas where UPC is not, though this difference primarily related to the wider Dublin region. This suggested a degree of localised competitive pressure in relation to the provision of FVA. It was noted, however, that UPC's services were primarily targeted at households, and it had a much smaller share of business subscriptions, providing only 3% of business FVA subscriptions in Ireland."<sup>75</sup>

4.65. ComReg in the 2012 FVA Consultation:

“acknowledged some localised competitive pressures, particularly insofar as FVA is sold as part of a bundle with other services, it considered the conditions of competition were not considered to be materially different and stable across different geographic areas to define FVA markets sub-nationally.”

4.66. However, in D12/14 ComReg maintained:

“that the geographic market is national in scope, but that the competitive conditions are sufficient for the purposes of the adoption of differentiated remedies. ComReg will monitor the situation with respect to the geographic conditions however.”<sup>76</sup>

4.67. In summary, in the context of the FVA Market Analysis eir argued that there should be a bundled voice market further broken down into separate geographic markets. ComReg concluded that standalone FVA was the correct focal point and starting point for the FVA market definition. Having considered eir's arguments relating to geographic segmentation, ComReg was of the view that “conditions of competition were not considered to be materially different and stable across different geographic areas to define FVA markets sub-nationally.” ComReg therefore considered the geographic market to be national in scope. (emphasis added)

### Competitive conditions 2012-2014

4.68. In summary, in the FVA market analysis conducted between 2012-2014, ComReg found that:

- the level of competition was evolving, but high and non-transitory barriers to entry into the LLVA market remained, with the majority of operators reliant on eir for wholesale services;

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<sup>75</sup> D12/14 paragraph 4.157.

<sup>76</sup> D12/14 paragraph 4.156.

- there were no significant differences in competitive conditions between urban and rural areas. Despite the presence of multiple suppliers of bundled products in urban areas, ComReg identified no change in the pricing or marketing of standalone FVA products relative to rural areas;
- FVA retail pricing was uniform on a national basis, with no evidence of sub-national pricing or marketing; and
- competitive conditions were not significantly affected by whether voice services were offered standalone or bundled. ComReg considered the market to be national in scope for standalone FVA.

4.69. These findings from ComReg's near-contemporaneous consultations demonstrate that eir did not face competitive pressure from OAOs in the aforementioned segmental and geographic markets.

#### 4.4.3 Conclusion

4.70. In the application of Decisions 40 to 42, which are relevant for Decision 38(iii)(b), ComReg's findings are summarised as follows:

- **Decision 40:** In 2010-11, the net cost did not significantly affect eir's profitability and/or ability to earn a fair rate of return on its capital employed. Indeed, eir's returns were in excess of the competitive benchmark of a 'fair rate of return' as measured by the regulated WACC.
- **Decision 41:** In 2010-11 the net cost did not materially impact eir's ability to compete on equal terms with competitors going forward, as:
  - there is no available evidence of a causal link between the financial distress and challenges observed and the net cost of the USO; and
  - the results of the wider period of financial analysis undertaken (2009/20-2023/22) show that the USO did not prevent eir from undertaking necessary investment nor did it impede eir from making improvements to its financial health, as evidenced by improvements in its credit rating.
- **Decision 42:** eir was profitable and was well positioned to cross-subsidise the provision of the USO by using profits earned in its fixed-line business. Indeed, when compared to its competitors, eir was able to maintain a steady ARPU over the assessed period and, despite a reduction in market shares, remained the main player in the market (by revenue and subscriber numbers). Indeed, indicative analysis shows that eir's EBIT at

the group level exceeded that of its competitors, while eir's Irish group-level ROCE was broadly in line with those of its competitors.

- 4.71. **Decision 38(iii)(b):** Based on the analysis undertaken in the application of Decisions 40 to 42 and the findings in relation to these decisions, ComReg finds that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2010-2011.
- 4.72. Notwithstanding the information constraints identified, ComReg is satisfied that it had sufficient information available to conduct the unfair burden assessment for the period 2010-2011.
- 4.73. ComReg, when concluding the unfair burden assessment, considered the findings reached in relation to each of the decisions from D04/11 referenced. No one of these decisions is, in and of itself, determinative. ComReg notes that the findings relating to each of the decisions converge to indicate that the net cost of providing the USO in 2010/2011 did not constitute an unfair burden on eir.
- 4.74. ComReg having applied Decisions 40 to 42 and considered the related findings has decided, for the reasons summarised above, that the condition in Decision 38(iii)(b) of D04/11, has not been met. As a result, ComReg determines that the provision of the USO in 2010-2011 did not represent an unfair burden on eir.

Non-Confidential

## 5. Submissions to Consultation 23/113

- 5.1. There were five respondents to Consultation 23/113. These were ALTO, BT, eir, Three and Vodafone.

### 5.1. Question 1 - Submissions to Consultation

- 5.2. ComReg asked in question 1:

“Do you agree with ComReg’s approach to the unfair burden assessment? Please give reasons for your answer.”

- 5.3. ALTO states that:

“ALTO agrees with ComReg’s approach to the unfair burden assessment – save in so far as the model for assessment represents similar to that which has gone before. We note that the market for leased lines has found its way into the latest USO assessment and that inclusion in our submission appears to be an error.”<sup>77</sup>

- 5.4. BT states that:

“... we accept the approach is in line with the established rules.”<sup>78</sup>

- 5.5. eir disagrees with many aspects of ComReg’s approach to the unfair burden assessment. For ease of reading, ComReg has grouped eir’s submission by topic.

#### **Dynamic/static analysis**

- 5.6. eir states that:

“...under ComReg’s revised approach, eir’s ability to earn a fair return is no longer regarded as a sufficient condition to determine the fairness of the USO burden. However, we observe that Oxera applies ComReg’s revised approach in a manner that still attaches excessive weight to an aggregate and static analysis of eir’s profitability and, more generally, eir’s financial position. This constitutes an overly restrictive benchmark and could lead to erroneous conclusions.”<sup>79</sup>

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<sup>77</sup> ALTO, “Consultation: 2010-2011 USO funding application – Assessment of the unfair burden – Ref: 23/113. Submission By ALTO”, 7 February 2024, page 2.

<sup>78</sup> BT, “BT Response to the ComReg Consultation: eir’s 2010-2011 Universal Service Funding Application Unfair burden assessment”. 7 February 2024, page 2.

<sup>79</sup> RBB Report, page 29.

5.7. eir considers that:

“...a more appropriate framework should rely primarily on a dynamic analysis of the competitive landscape, and be aimed at evaluating whether the USO resulted in competitive distortions and caused a competitive disadvantage to eir. Competitive distortions arise as a result of rivals employing cream-skimming strategies, which involve selectively targeting the more profitable segments/geographic areas of the market. ComReg should complement such an assessment with an examination of eir’s profitability at a granular segment/area level, to determine whether and to what extent competition in more profitable parts of the business undermined eir’s capacity to internalise/cross-subsidise the USO net cost.”<sup>80</sup>

### **Market scope**

5.8. In eir’s view:

“ComReg should consider a narrower market scope, restricted to non-regulated USO services, and aimed at assessing specifically whether eir faces effective competition, especially in more profitable parts of the business, that may result in competitive distortions and limit its ability to cross-subsidise the USO net cost.”<sup>81</sup>

### **Application of Decision 40**

5.9. eir disagrees with ComReg’s application of Decision 40 stating that:

“The analysis of eir’s aggregate profitability based on accounting metrics should only be used by ComReg as supplementary evidence. Furthermore, this analysis should be conducted addressing the following flaws identified in Oxera’s approach:

- ComReg’s review of eir’s accounting profits should span a sufficiently long timeframe. A static analysis over one or two years is unlikely to capture whether and to what extent the USO affected eir’s profitability.
- When valuing eir’s capital employed for calculating ROCE, ComReg should adopt a value-to-the owner (fair value) approach rather than relying on book value;
- The WACC is not an appropriate benchmark for defining a fair return on capital. Hence, ComReg should consider alternative benchmarks alongside WACC. A meaningful alternative benchmark might be the

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<sup>80</sup> RBB Report, page 29.

<sup>81</sup> RBB Report, page 29.

ROCE achieved by eir's rivals in the same relevant market considered by ComReg for its overall assessment. If available evidence indicates that eir's ROCE is in line with that obtained by its rivals, this would be indicative that eir's rivals are not in a worse position than eir to bear the USO net cost;

- When the WACC is used by ComReg as a benchmark to evaluate eir's ROCE, this should account for the actual cost of capital for eir in the relevant application year.”<sup>82</sup>

### **Application of Decisions 41 and 42**

5.10. In relation to the application of Decisions 41 and 42, eir states that:

“Oxera's approach proves insufficient and ill-suited for determining whether the USO affected eir's ability to compete on equal terms and internalise the net cost of USO through cross-subsidisation. Moreover, Oxera's approach appears overly restrictive, as it implies considering the USO burden unfair only if it prevented eir from obtaining a fair profit, investing, or improving its financial situation.

In our view, ComReg's assessment of how the USO affected eir's ability to compete on equal terms should rest on an analysis of the competitive and financial position of eir relative to its rivals, based on criteria 5, 6 and 7 of Decision 42. Particularly, the focus should be on evaluating whether eir's rivals implemented cream-skimming strategies resulting in competitive distortions and adhere to the following criteria:

- The assessment should span a sufficiently long timeframe: a static picture is unlikely to capture structural changes in eir's competitive position resulting from the USO;
- The assessment should be conducted by segment/area, to determine whether eir's rivals have implemented cream-skimming strategies and how these affected eir's profitability in the segments targeted by competition. A sole assessment at the national/aggregate level is insufficient and could lead to erroneous conclusions;
- eir's financial and competitive position should be evaluated against a meaningful counterfactual. In our view, the appropriate counterfactual is the one where the USO burden is not solely borne by eir, but is shared among eir and its competitors.”

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<sup>82</sup> RBB Report page29-30.

5.11. Three states that:

“Three supports ComReg’s proposed approach to the assessment of eir’s situation relative to that of its competitors in the relevant market”.

5.12. Three states that it:

“... is of the view that the primary focus on a full market analysis as provided for in Part 8 Chapter 3 of the Code Regulations is the assessment of whether an undertaking exercises Significant Market Power on the market. This is different to the assessment arising from the CJEU judgment which requires ComReg to examine the characteristics particular to that operator, taking account of its situation relative to that of its competitors in the relevant market”.

5.13. Three further notes that:

“The process consulted on did not explicitly take account of the very long interval between the determination of the quantum of any contribution by a specific authorised undertaking and the period to what the liability relates. In this regard Three is of the view that the proposed process for administration of any fund would require to be reconsulted upon and that the resulting final mechanism is likely to be more complex than that used by ComReg in its estimation... it is not clear whether contributions which are unrecoverable due to market exit would be considered a cost related to the administration of the fund”.<sup>83</sup>

5.14. Vodafone states that:

“Vodafone is satisfied with the findings that there is no USO unfair burden.”<sup>84</sup>

## 5.2. Question 1 – ComReg’s response

5.15. ComReg notes that the majority of respondents (ALTO, BT, Three and Vodafone) agreed with its approach to the unfair burden assessment. eir disagreed with ComReg’s approach. For ease of reading, ComReg has grouped its responses to each submission by topic.

### **Inclusion of leased lines**

5.16. ComReg notes ALTO’s comments relating to the inclusion of leased lines. The

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<sup>83</sup> Three, “Three’s response to the Consultation by ComReg on eir’s 2010-2011 Universal Service Funding Application, Unfair burden assessment”, 7 February 2024, page 4.

<sup>84</sup> Vodafone, “Vodafone Response to Consultation Eir’s 2010-2011 Universal Service Funding Application. Unfair Burden Assessment”, 7 February 2024, page 2.



inclusion of leased lines in the fixed-line business for the purpose of the unfair burden assessment is neither new nor erroneous. ComReg's position in respect of leased lines remains unchanged. In 2019 leased lines was one of the activities included by ComReg (and Oxera) in the fixed-line business for the purpose of the unfair burden assessment<sup>85</sup>. ComReg and Oxera consider leased lines non-dissociable from eir's fixed lined business in this context. ComReg considers this approach to be correct as leased lines and the universal service use the same network elements to deliver service.

- 5.17. eir disagrees with many aspects of ComReg's approach to the unfair burden assessment.

### **Dynamic/static analysis**

- 5.18. ComReg disagrees with eir's contention that "ComReg's revised approach is applied by Oxera in a manner that attaches excessive weight to an aggregate and static analysis of eir's profitability and, more generally, eir's financial position".

- 5.19. ComReg notes eir's statement that:

"... a more appropriate framework should rely primarily on a dynamic analysis of the competitive landscape, and be aimed at evaluating whether the USO resulted in competitive distortions and caused a competitive disadvantage to eir."<sup>86</sup>

- 5.20. ComReg disagrees with eir's position for the following reasons:

- The framework for assessment of unfair burden was set out by ComReg in D04/11 following consultation and ComReg has now interpreted D04/11 in light of the CJEU judgment. eir did not take issue with D04/11 at the time and is not entitled to reopen this decision at this stage.
- A general competitive assessment relying primarily on a dynamic analysis considered by eir to be "a more appropriate framework" is not consistent with D04/11 and was not prescribed by the CJEU judgment. ComReg cannot at this stage simply substitute new frameworks for assessment of unfair burden,

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<sup>85</sup> See "Oxera unfair burden report 2010/11", ComReg Document No. 19/36c, 18 April 2019, [https://www.comreg.ie/?dln\\_download=oxera-unfair-burden-report-2010-11](https://www.comreg.ie/?dln_download=oxera-unfair-burden-report-2010-11). See footnote 33 which states "In particular, Oxera and ComReg reviewed the following products included in the fixed-line business and concluded that these are characterised as being not dissociable from the USO: 'Wholesale Residual (Unregulated)', 'Retail voice calls', 'Retail broadband', 'Leased lines', 'Data services', 'Apparatus Supply', 'Legacy Operator Services', 'Value Added Voice', 'Value Added Non-Voice', 'Directory Enquiry', 'Public Payphones', 'Other Remaining Activities' and 'Other Internet Services'".

<sup>86</sup> RBB Report page 29.

which is in essence what is proposed by eir.

- 5.21. Aspects of the unfair burden assessment conducted are dynamic, in particular Decision 41 (which refers to “going forward”) and Decision 42 (which refers to “static and dynamic” and in particular (i), (iii), (iv) and (v) have dynamic elements). D04/11 also requires “static” analysis. There is nothing in D04/11 or in the CJEU judgment or in the jurisprudence of the CJEU to support eir’s assertion that a “dynamic analysis” should take precedence. To give this precedence would fundamentally change the existing framework for assessment of unfair burden. ComReg considers that both static and dynamic analysis have been considered as appropriate and in accordance with D04/11 and that the appropriate weighting have been given to each.

### **Cream Skimming**

- 5.22. ComReg notes eir’s statement that:

“Competitive distortions arise as a result of rivals employing cream-skimming strategies, which involve selectively targeting the more profitable segments/geographic areas of the market. ComReg should complement such an assessment with an examination of eir’s profitability at a granular segment/area level, to determine whether and to what extent competition in more profitable parts of the business undermined eir’s capacity to internalise/cross-subsidise the USO net cost.”<sup>87</sup>

- 5.23. ComReg does not consider that a granular examination of eir’s profitability of the type proposed by eir is warranted, for the following reasons:

- In 2014 ComReg found that the fixed voice market was not effectively competitive and that there was no evidence to support eir’s assertions of cream-skimming. Market conditions tend to progress not regress and therefore ComReg does not consider it likely that geographic differences in retail product characteristics or retail prices were present in 2010-2011, when there was no evidence of either in 2012. This analysis is set out in Chapter 4.
- In 2010/2011 all of eir’s competitors that were active in the retail fixed market, with the exception of UPC, were re-sellers of eir’s fixed network. These re-sellers were paying a regulated national price for the wholesale service (SB-WLR). Accordingly, the wholesale price that eir retail and most of its competitors had to recover in their respective retail prices did not vary by geography. This means that there was little incentive for these re-sellers to vary their prices on a geographic basis to their advantage. Accordingly, it

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<sup>87</sup> RBB Report page 29.

is exceedingly unlikely that any of eir's retail competitors engaged in price skimming during the period in question.

- The net cost of the USO is calculated based on the designation area, which was national. Therefore, eir's capacity to internalise/cross-subsidise the USO net cost should also be assessed at a national level.
- Decision 42(iv) of D04/11 refers to “estimates of the average level of cross-subsidy between classes of more or less separately accounted for services and changes in these over time.” (emphasis added) It does not call for an analysis at a ‘segmental’ or geographic level. Accordingly, what must be assessed is whether the USP has the ability to cross subsidise the net cost based on the average level of cross-subsidy between services and changes in these over time, not at a geographic level.
- Any potential ‘cream-skimming’ by eir's retail rivals who relied on wholesale inputs from eir<sup>88</sup> would increase eir's wholesale revenues. Where a competitor ‘wins’ a subscriber from eir Retail, eir's retail revenues reduce (by the price the customer previously paid eir for the service). However, eir's wholesale revenues will increase, as the competitor pays a wholesale charge to eir to provide a service to its new customer over eir's wholesale access network. The regulatory requirements on eir<sup>89</sup> specified that these wholesale access charges were required to make the same contribution to eir's access network costs (on a per retail customer basis) as transfer payments from eir Retail. These requirements mean that eir had the capability to recover its fixed network costs even where there was retail competition from rivals in more profitable areas.
- As noted in the Oxera Unfair Burden Report 2010/11, it is important to understand whether any decline in profitability is causally related to the provision of the USO. Some products or areas of declining profitability may be offset by areas of higher profitability, such that the aggregate analysis is relevant to understanding whether eir is able to bear the USO net cost.
- As noted in the Oxera Unfair Burden Report 2010/11, Oxera agrees with eir that, in principle, a disaggregated profitability analysis of eir's fixed-line business products using a method such as that which eir cites from the Oxera 2013 report, would be informative to the assessment of the USP's financial and competitive position. However, in the context of applying

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<sup>88</sup> In 2010/11, all of eir's main retail rivals in the fixed-line market relied on wholesale inputs from eir's fixed network, with the exception of UPC. ComReg, ‘Annual report 2010/11’.

<sup>89</sup> “Response to Consultation and Decision Document: Market Review: Wholesale Broadband Access (Market 5)”, ComReg Document No. 11/49, Decision 06/11, 8 July 2011, section 9, <https://www.comreg.ie/csv/downloads/ComReg1149.pdf>.

Decision 42(i) and (iv), Oxera was unable to analyse disaggregated/segmental profitability due to limitations in the data, as noted in the Oxera Unfair Burden Report 2010/2011.<sup>90</sup> These limitations arose from lack of available data, including differences in the format of eir's accounts between 2009/10 and 2010/11 following ComReg's D08/10, which prescribed changes to eir's historical separated accounts to increase transparency.<sup>91</sup> It is notable that even if disaggregated profits were to be analysed and were seen to decline in some areas, this would be a secondary consideration to eir's financial and competitive position, given the necessity and importance of examining eir's aggregated profitability, as ComReg and Oxera have done.

- 5.24. To ensure that it had fully considered all available information that could possibly be relevant and investigated all possible avenues, ComReg using its statutory information gathering powers (section 13D of the 2002 Act) requested information from operators in relation to specific geographic areas (by county) and segments of business (single play/double play etc.). This is the information which ComReg would require in order to conduct the type of granular segment/area level analysis proposed by eir. None of the operators asked had all of the information requested. Therefore even if ComReg considered that this type of granular examination was required (which it does not for the reasons outlined above), it would not be able to conduct this type of examination.
- 5.25. ComReg therefore considers the additional level of geographic granularity proposed by eir as secondary to the national-level analysis required by D04/11. Notwithstanding, ComReg notes that such analysis (provided the information is available) could be used to complement the national assessment by showing differences in profitability trends over time between more and less densely populated areas of Ireland, although any causal links between the net cost of the USO and such differences cannot be presumed.

### **Market scope**

- 5.26. ComReg notes eir's statement:

"ComReg should consider a narrower market scope, restricted to non-regulated USO services, and aimed at assessing specifically whether eir faces effective competition, especially in more profitable parts of the business, that may result in competitive distortions and limit its ability to cross-subsidise the USO net

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<sup>90</sup> Oxera Unfair Burden Report 2010/11, Table A2.1.

<sup>91</sup> ComReg (2010), 'Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited', Document No. 10/67, Decision No. D08/10.

cost.”<sup>92</sup>

5.27. ComReg does not agree with eir’s contention that “ComReg should consider a narrower market scope, restricted to non-regulated USO services” for the following reasons:

- A USO designation is only made where the provision of a minimum set of services in the State cannot be ensured. Accordingly, there is likely to be very limited or no competition for USO services from other undertakings. Therefore, a competitive assessment based on eir’s proposed restricted market scope is not a logical proposition.
- While the net cost must be calculated with reference to the scope of the universal service itself, the analysis of the impact of the USO on eir should take into account the relevant parts of the USP’s business, which incur both costs and revenues as a result of the USO. A similar view is expressed in the Oxera Unfair Burden Report 2010/11.
- USO services are by their very nature regulated services. Even if that were not so, in 2010/2011 fixed line voice services were subject to regulation (SMP and pricing remedies) and the only USO services which were not subject to SMP and pricing remedies (and “unregulated” from a wholesale perspective) were the services for which there was very limited competition (i.e. payphones, directory enquiries).
- Certain parts of eir’s fixed line business are subject to price regulation and controls that may limit its ability to cross-subsidise the net cost of the USO. However, eir has the ability to out-perform its incentive-based price control through increasing its efficiency and thereby achieving profitability levels greater than the regulated WACC and retaining the proceeds.
- OAOs and eir Retail using regulated products to access eir’s network make the same contribution to the cost of the network, on a per customer basis. In this context the distinction between regulated and unregulated services is not relevant.
- The 2010-2011 regulated accounts show that eir earned rates in excess of the regulated WACC of 10.21%, on the regulated wholesale access rental prices for PSTN and ISDN rentals (Figure 1 below). The wholesale access connections and rental revenue is generated by selling to both OAOs and to eir retail. Any retail margin associated with retail customers is excluded.

Figure 1

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<sup>92</sup> RBB Report page29.

**Wholesale Access**

Wholesale Fixed Narrowband Access

**Note 1: Statement of average cost and revenue by service**

For the year ended 30 June 2011

**Market summary**

	External revenue	Internal revenue	Total revenue	Total operating costs	Return	Return on Turnover	Mean capital employed	ROCE
	€'000	€'000	€'000	€'000	€'000		€'000	
2011	81,676	282,138	363,814	258,652	105,162	28.91%	872,801	12.05%

Service	External revenue	Internal revenue	Total revenue	Volume	Unit	Average revenue	FAC average cost	Average revenue / cost
	€'000	€'000	€'000	000's		€	€	
PSTN SB-WLR Rental	70,095	233,912	304,007	1,428	Lines	17.74	16.40	108%
ISDN BRA SB-WLR Rentals	6,679	22,039	28,718	85	Lines	28.15	17.04	165%
ISDN PRA/FRA SB-WLR Rentals	3,825	21,272	25,097	9	Lines	232.38	160.52	145%
PSTN & ISDN SB-WLR Connections	1,077	4,915	5,992	118	Connections	50.78	271.29	19%

Average Rental revenue and costs are monthly averages  
Rental volumes are average volumes

Extract from eircom Limited (2011), 'Historical Cost Separated Accounts: For the year ended 30 June 2011' page 16

- Regulated services are provided under ex-ante conditions designed by ComReg specifically to prevent eir from exerting undue market power and ensure rivals fair and non-discriminatory access to eir's network. Where eir is earning returns above the regulated price (i.e. the regulated WACC) as it did in 2010-2011<sup>93</sup> it follows that eir may internalise aspects of the USO burden where it earns profits that exceed the regulatory WACC from fixed regulated services. Accordingly, it is appropriate to evaluate eir's position including both regulated and unregulated services.
- 5.28. ComReg disagrees with eir's view that its proposed narrower market scope "aimed at whether eir faces effective competition in more profitable segments or areas that limits its ability to cross-subsidise the USO cost" aligns with "economic principles"; Decision 42 criteria (i) and (iv) of D04/11 or the wording of paragraph 43 of the CJEU judgment.
- 5.29. A net cost arises because of the counterfactual approach that is used to calculate the net cost i.e. the profitability of the USP if a certain sub-set of customers are served is compared to the profitability if they are not. This means that it is possible to identify a USO net cost for a USP that is profitable overall and has 100% market share. Therefore it is clear that when Decision 42(i) states: "Changes in profitability, including an understanding of where a USP generates most of its profits over time" (emphasis added), the reference to "its profits" in this context is a reference to all of the USP's profits, not merely the profits earned

<sup>93</sup> 2010-2011 HCA accounts.

within the universal service.

5.30. Paragraph 43 of the CJEU judgement states that:

“In that regard, it should be noted at the outset that any consideration of the market share of the universal service provider implies that the process of determining whether the burden on that provider by virtue of its universal service obligations may be unjustified has an integral comparative component which cannot be disregarded by the NRA. The mere finding of facts relating to the market share of that provider considered in isolation, does not allow any useful conclusions to be drawn in the absence of a comparison with the market share held by its competitors. Those conclusions may vary according to the number of competitors present in the market, the links which may exist between them, or even the different sectors of the relevant market in which those competitors are present.”  
(emphasis added)

5.31. ComReg does not consider that paragraph 43 supports eir’s proposed narrower market scope. The reference to “the different sectors of the relevant market” when viewed in the context of the whole of paragraph 43 contradicts eir’s proposition.

5.32. The Oxera Report of 1 February 2013 set out a potential segmentation approach to eir’s business to analyse the USO trends and market distortion: geography; retail/wholesale split and measures (i.e. volumes, price, cost, profitability, and market share). In principle, this type of analysis would be informative to the assessment of the USP’s financial and competitive position. Such analysis could be used to complement the national assessment by showing differences in profitability trends over time between more and less densely populated areas of Ireland, although any causal links between the net cost of the USO and such differences cannot be presumed.

5.33. Therefore, ComReg, using its statutory powers<sup>94</sup>, requested additional information from the relevant undertakings to ensure that it had all available information that could possibly be relevant.

5.34. While the relevant undertakings had some of the requested information, there was a lack of commonality within the available information. There was very limited additional common information available. Accordingly, ComReg and Oxera were constrained in their ability to undertake more detailed analysis at a market segment or area level.

5.35. The Oxera Unfair Burden Report 2010/2011 sets out the importance of

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<sup>94</sup> Section 13D of the 2002 Act. Information Requirements sent 11 March 2024.

understanding whether any decline in profitability is causally related to the provision of the USO. Some areas of declining profitability in eir's fixed line business may be (more than) offset by areas of higher profitability. Accordingly, an aggregate national-level analysis is relevant to understanding whether eir is able to bear the USO net cost.

5.36. In the FVA Market Analysis, ComReg found that:

'the evidence on differentiated conditions of demand and supply is not sufficient at this time so as to justify the definition of sub-national markets within the lifetime of this review'.<sup>95</sup>

5.37. It then noted that "ComReg will keep this under review",<sup>96</sup> which suggests that future conditions could differ to the extent that sub-national market definitions would be more appropriate. The 2014 finding that the market was national in scope did not change from the conclusions reached in ComReg's previous market review in 2007, suggesting that, over the period 2007–14, there was insufficient evidence of different sub-national competitive dynamics to justify defining narrower markets for fixed voice services.

5.38. Any potential 'cream-skimming' by eir's retail rivals who relied on wholesale inputs from eir would increase eir's wholesale revenues. Where a competitor 'wins' a subscriber from eir Retail, eir's retail revenues reduce (by the price the customer previously paid eir for the service). However, eir's wholesale revenues will increase, as the competitor pays a wholesale charge to eir to provide a service to its new customer over eir's wholesale access network. The regulatory requirements on eir specified that these wholesale access charges were required to make the same contribution to eir's access network costs (on a per retail customer basis) as transfer payments from eir Retail. These requirements mean that eir had the capability to recover its fixed network costs even where there was retail competition from rivals in more profitable areas.

5.39. ComReg disagrees with eir's position that ComReg's assessment of which elements are dissociable, and which are non-dissociable in the fixed line business "appears to a significant extent, arbitrary". While eir agrees that "dissociability issues apply" to telecommunications providers, it contends that this:

"does not justify conducting the unfair burden assessment at an aggregate level, combining USO and non USO services. Such an approach would erroneously assume the possibility of cross-subsidising the USO net cost

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<sup>95</sup> "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers", ComReg Document No. 14/89, Decision No. D12/14, page 108.

<sup>96</sup> D12/14, page 108.



with profits obtained from non-USO services”.<sup>97</sup>

- 5.40. The net cost relating to the USO can be subsidised with profits obtained from non-USO services. This is because non-USO services share the same infrastructure as USO services and therefore profits of non-USO services have emerged as result of eir having that infrastructure. As outlined above, the net cost calculation is based on this premise. The approach is based on this premise, and this is not in error.
- 5.41. ComReg has set out its position in relation to the relevant market in Chapter 4.
- 5.42. Furthermore, Chapter 4 sets out that regulated services are provided under ex-ante regulatory conditions designed by ComReg specifically to prevent eir from exerting undue market power and ensure rivals fair and non-discriminatory access to eir’s network. Where eir is earning returns above the regulated price (i.e. the regulated WACC) it follows that eir may internalise aspects of the USO burden where it earns profits from fixed regulated services. Accordingly, it is appropriate to evaluate eir’s position in a market that includes both regulated and unregulated aspects.
- 5.43. ComReg’s rationale for using the fixed line market as the most appropriate relevant market is based on a number of factors (summarised in Chapter 4), and not just the fact that there are common or shared costs between the services.
- 5.44. In conclusion, ComReg firmly rejects eir’s position on the market scope, namely that ComReg should: (i) include only USO services in the relevant market; (ii) be an assessment of eir’s financial and competitive position by segment/geographic area and (iii) should exclude fixed regulated services.

#### **Application of Decision 40<sup>98</sup>**

- 5.45. Decision 40 states:

“ComReg will assess whether or not this net cost significantly affects a USP’s profitability and/or ability to earn a fair rate of return on its capital employed;” (emphasis added).

- 5.46. ComReg does not agree with eir’s views in relation to the application of Decision 40. In particular, ComReg disagrees with eir’s statement that:

“The analysis of eir’s aggregate profitability based on accounting metrics should only be used by ComReg as supplementary evidence”.

- 5.47. eir is essentially proposing that Decision 40 should be demoted to

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<sup>97</sup> RBB Report, page 12.

<sup>98</sup> RBB Report p13-15.

“supplementary evidence”. This proposal has no basis in D04/11 or in the CJEU judgment and eir gives no basis for this proposal. There is nothing in D04/11 or CJEU judgment regarding demoting or weighting of criteria of assessment. Indeed, the CJEU does not take issue with and cites ComReg’s application of Decision 40 (see paragraph 21).

5.48. In addition to ComReg’s primary stance as set out in the above paragraph, ComReg does not agree with eir that the analysis undertaken by Oxera suffers from “flaws”.

5.49. Paragraph 51 of the CJEU judgment states:

...in so far as the deterioration in the competitive position of a universal service provider by virtue of its universal service obligations would adversely affect effective competition in the relevant market, such a circumstance would be liable to undermine the conditions for providing the universal service and, ultimately, the achievement of that objective” (emphasis added).

5.50. There is no evidence that the deterioration in eir’s competitive position is attributable to its universal service obligations or that its designation adversely impacted competition in the relevant market. In 2014 eir was found to have SMP in the FVA market as there was no evidence of effective competition.

5.51. ComReg has set out its position on the relevant market at Chapter 4 of this document. The ComReg FVA Market Analysis (which commenced in 2012) and relevant paragraphs set out at Chapter 4 of this document clearly demonstrates that there is no evidence that the deterioration of eir’s competitive position was by virtue of its universal service obligations. It actually demonstrates the need for regulatory intervention in the market to ensure a level of competition and that this was not driven by the USO designation.

### **Application of Decisions 41 and 42**

5.52. eir states that:

“Oxera’s approach proves insufficient and ill-suited for determining whether the USO affected eir’s ability to compete on equal terms and internalise the net cost of USO through cross-subsidisation. Moreover, Oxera’s approach appears overly restrictive, as it implies considering the USO burden unfair only if it prevented eir from obtaining a fair profit, investing, or improving its financial situation.

In our view, ComReg’s assessment of how the USO affected eir’s ability to compete on equal terms should rest on an analysis of the competitive and financial position of eir relative to its rivals, based on criteria 5, 6 and 7 of

Decision 42. Particularly, the focus should be on evaluating whether eir's rivals implemented cream-skimming strategies resulting in competitive distortions and adhere to the following criteria:

- the assessment should span a sufficiently long timeframe: a static picture is unlikely to capture structural changes in eir's competitive position resulting from the USO;
- the assessment should be conducted by segment/area, to determine whether eir's rivals have implemented cream-skimming strategies and how these affected eir's profitability in the segments targeted by competition. A sole assessment at the national/aggregate level is insufficient and could lead to erroneous conclusions;
- eir's financial and competitive position should be evaluated against a meaningful counterfactual. In our view, the appropriate counterfactual is the one where the USO burden is not solely borne by eir, but is shared among eir and its competitors.”

5.53. ComReg now addresses in turn the issues eir has with ComReg's approach to Decisions 41 and 42.

5.54. Firstly, again eir attempts to reformulate the appropriate principle and does not explain the basis for this reformulation. For the avoidance of doubt, ComReg is obliged to assess whether the net cost is an unfair burden. It must follow the jurisprudence of the CJEU in relation to “unfair burden” and, it must also abide by D04/11. It is not obliged, or indeed entitled to replace what is provided for in legislation with the general test proposed by eir i.e. “whether the USO affected eir's ability to compete on equal terms and internalise the net cost of USO through subsidisation”.

5.55. eir contends that Oxera's approach is “overly restrictive” and overly focussed on financials. eir considers that a general analysis of how the USO affected eir's ability to compete should replace what is provided for in D04/11. There is no basis either in law or in D04/11 for this contention. The unfair burden principle is intrinsically linked to “net cost”. This is how the legislative regime is designed. Regulation 76(1) of the Code Regulations provides that an unfair burden finding is “on the basis of the net cost calculation”<sup>99</sup>. A similar approach is central to the CJEU judgment and the Base judgment and was echoed in D04/11. For example, in the Base judgment the CJEU stated “it is the net cost that must be the excessive burden”<sup>100</sup>. For this reason, ComReg does not consider that it would be correct to replace D04/11 with a general assessment of whether the USO is fair or not. The assessment of unfair burden of the USO must be on the basis of

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<sup>99</sup> Similarly in previous Regulation 12(1) of the Universal Service Regulations.

<sup>100</sup> Paragraph 45.

net cost.

- 5.56. eir contends that in applying its more general competition principle ComReg should in particular focus on:

“evaluating whether eir’s rivals implemented cream-skimming strategies resulting in competitive distortions”.

- 5.57. As outlined in Chapter 4, in 2014 ComReg conducted an in-depth market analysis of the FVA market<sup>101</sup> and although during that market review eir made similar assertions of cream-skimming, ComReg found no evidence of cream skimming having occurred or that eir’s profitability was affected by price skimming<sup>102</sup>. eir makes these vague allegations here without pointing to any evidence. There is no reason to infer that an evaluation of whether there was cream skimming would today come to a different conclusion to that reached in 2014. Indeed, given the passage of time, in the absence of new evidence it would be unwise to revisit a conclusion in relation to market conditions reached almost contemporaneously. The majority of eir’s competitors were purchasing a SB-WLR service from eir wholesale. The pricing of this wholesale service was set by reference to eir’s retail price and costs, ensuring that these wholesale customers made the same contribution to the recovery of the fixed network costs as eir retail. There is no evidence that the issue of particular concern to eir and the basis for its proposed general competition test has occurred.

- 5.58. For the avoidance of doubt ComReg does not agree that the criteria proposed by eir<sup>103</sup> in this context should be utilised. These arguments are addressed below.

- 5.59. ComReg considers that the timeframe for assessment used is appropriate for both dynamic and static aspects in accordance with D04/11. ComReg’s assessment is consistent with the necessity to conduct analysis within a one-year timeframe aligned with the application process, Decision 21 of D04/11 states:

‘USO funding applications shall be based on annual information which coincides with the USP’s financial year.’

- 5.60. ComReg does not agree with eir’s proposed criteria that the assessment should be conducted by segment/area. The ComReg 2014 Market Review (which commenced in 2012) and relevant paragraphs set out at Chapter 4 of this

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<sup>101</sup> D12/14.

<sup>102</sup> See Chapter 3 paragraphs 6.26- 6.37 of this document.

<sup>103</sup> The assessment should span a sufficiently long timeframe; should be conducted by segment/area; eir’s financial and competitive position should be evaluated against a meaningful counterfactual. RBB Report page 30.

document clearly demonstrate that there is no evidence that the deterioration of eir's competitive position was by virtue of its universal service obligations or that its designation adversely affected effective competition in the relevant market. It actually demonstrates the need for regulatory intervention in the market to ensure a level of competition and that this was not driven by the USO designation. In 2014 eir was found to have SMP in the FVA market as there was no evidence of effective competition.

- 5.61. ComReg does not agree that an assessment should be conducted by segment/area. As indicated above, ComReg previously reviewed the FVA market, and found that there was no evidence of cream skimming. In any event the net cost figure is calculated on a national basis and therefore it is appropriate to conduct the unfair burden on that basis.
- 5.62. Following receipt of submissions to consultation ComReg, using its statutory powers<sup>104</sup>, requested additional information from the relevant undertakings. ComReg did this in order to ensure that it had all information that could possibly be relevant.
- 5.63. While the relevant undertakings had some of the requested information, there was a lack of commonality within the available information. There was very limited additional common information available. Accordingly, ComReg and Oxera were constrained in their ability to undertake more detailed analysis at a market segment or area level.
- 5.64. ComReg set out in Chapter 4 its position in relation to eir's contention that:
- “the appropriate counterfactual is the one where the USO burden is not solely borne by eir, but is shared among eir and its competitors.”
- 5.65. ComReg disagrees with this contention. In summary, the exercise for ComReg in the context of financing of the USO is to assess whether there is a net cost of that burden (which step has been completed) and then if there is a positive net cost to assess whether that net cost is an unfair burden on the USP. In assessing whether the net cost is an unfair burden, ComReg must apply the test in the Base judgment, i.e. consider whether that cost constitutes an excessive burden for the undertaking concerned. The appropriate counterfactual is therefore eir without a universal service designation, not the universal service being shared between eir and its competitors.

### **Proposed Approach**

- 5.66. In Consultation 23/113, ComReg set out how it proposed to apply Decisions 38-42 of D04/11, in light of the CJEU judgment. No respondents to consultation

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<sup>104</sup> Section 13D of the 2002 Act. Information Requirements sent 11 March 2024.

disagreed with ComReg's interpretation. RBB's report is presented by eir as an "economic assessment" and while this report does not explicitly take issue with ComReg's interpretation, it by inference repeatedly takes issue with ComReg's legal interpretation of the appropriate approach.

- 5.67. ComReg disagrees with the type of general competitive assessment proposed by eir. eir's proposed approach is not consistent with the legislative regime. The assessment to be carried out is whether the "net cost" of the USO is an "unfair burden", this is not a general assessment of unfairness of the burden of the USO. This focus on the net cost is central to the legislative regime and this fact is reflected in D04/11 the CJEU judgment, the Base judgment, and the underpinning legislation. The term "unfair burden" has a very explicit meaning, as set out in the Base judgment. Even if ComReg considered that a general assessment of fairness of the USO were desirable (which it does not) there is no legal basis for this type of assessment in this context.
- 5.68. eir's proposed approach would not be consistent with D04/11, in which ComReg set out the principles for assessment of unfair burden. The upshot of eir's newly formulated general competitive analysis would be that Decisions 40 and 42 of D04/11 would be demoted as criteria and superseded by eir's proposed approach and Decision 41 of D04/11 would be disregarded and replaced by eir's proposed approach. In essence, eir's position is that D04/11 should be disregarded and replaced, the additional "complementary" analysis argued for by eir before the CJEU should now be the "primary criterion". D04/11 was made following a public consultation (to which eir responded), has been in place for over 12 years, and has not been challenged. ComReg does not have discretion to amend these parameters in the context of this assessment. As acknowledged by RBB in its report for eir, it falls to an NRA to establish the criteria for determining the existence of an unfair burden.

### **Sharing mechanism (administration costs)**

- 5.69. ComReg notes Three's explicit agreement with ComReg's proposed approach and in particular its view in respect of the type of assessment required as a result of the CJEU judgment.
- 5.70. ComReg notes Three's comments in relation to the sharing mechanism and in particular its view that:

"the proposed process for administration of any fund would require to be reconferred upon and that the resulting final mechanism is likely to be more complex than that used by ComReg in its estimation."

- 5.71. These views will be taken into account prior to any sharing mechanism being established.

### 5.3. Question 2 – Respondents' submissions

#### 5.72. ComReg asked in Question 2:

“Do you agree with ComReg’s approach to information and information constraints? Please give reasons for your answer. If you are of the view that ComReg should consider any additional relevant information when conducting the unfair burden assessment, please provide copies of that information (including full source references and independent verification, where appropriate).”

#### 5.73. ALTO states that it:

“does not express a particular view on this subject, save in so far as to suggest that the ComReg approach to information and information constraints appears to be directed at eir. As such, ALTO cannot proffer any constructive position”.<sup>105</sup>

#### 5.74. BT states that:

“...the relevant market revenues should relate to telephone and broadband services and exclude lease line services - as leased line operators do not benefit from the presence or absence of a USO obligation for fixed lines.....market shares should be assessed as (sic) the retail value of relevant services divided among the retail and wholesale actors who generated that value... a new category should be added to Table A1.1 of the Oxera paper which addresses revenues not earned in Ireland or touching the electronics communications business in Ireland [X [REDACTED] X]...the selection of Option 2 (page 12 of Oxera report) to address the scope of the market excludes calls between fixed and mobile phones. We assume selection of this option is solely because of the lack of data given calls to and from mobile service are a fundamental/integral part of the Public Switched Telephone Network (PSTN)...”<sup>106</sup>

#### 5.75. eir states that:

“the assessment should rely primarily on a dynamic analysis of the competitive landscape, aimed at evaluating whether the USO resulted in competitive distortions and caused a competitive disadvantage to eir. To this extent, disaggregated information on profitability and competitive

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<sup>105</sup> ALTO, “Consultation: 2010-2011 USO funding application – Assessment of the unfair burden – Ref: 23/113. Submission By ALTO”, 7 February 2024, page 3.

<sup>106</sup> BT, “BT Response to the ComReg Consultation: eir’s 2010-2011 Universal Service Funding Application Unfair burden assessment”. 7 February 2024, page 3.

position is needed not only for eir but also for its competitors”.

5.76. eir notes that:

“ComReg should gather and analyse the following granular information for eir and its competitors:

- number of customers/lines by service;
- revenues by customer/line;
- customer-related costs (e.g. subscriber acquisition costs) and returns;
- size and quality of the network infrastructure;
- network CapEx and other investments (e.g. advertising)”

5.77. eir further notes that:

“The above information on customers, revenues, costs, and returns should be collected and examined by segment/geographic area, specifically distinguishing between higher-cost, less profitable rural areas where eir faced limited competition and lower-cost, more profitable urban areas where eir faces competition. eir understands that the detailed work carried in the Area model and Customer model submissions could serve as a valuable resource for conducting this form of analysis, particularly regarding eir’s competitive position and profitability. ComReg may not have access to similar models for eir’s competitors. If not already available, ComReg may need to gather relevant information and data on clients/lines, revenues, costs, and returns per client by geographic area from eir’s competitors.”<sup>107</sup>

5.78. Three states that:

“Three agrees with ComReg’s approach to information and information constraints. Three believes that the range of information available to be considered as part of the assessment is more than adequate to yield a valid assessment especially where the result is unambiguous”.<sup>108</sup>

5.79. Vodafone states that:

“The passage of time is stark and the information constraints arising are not a surprise... It is clear that the spectre of USO funding has now been held over industry for far too long. This draft determination reconfirms the ComReg position that there is no unfair burden for 2010-2011, and this now

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<sup>107</sup> RBB Report, page 31.

<sup>108</sup> Three, “Three’s response to the Consultation by ComReg on eir’s 2010-2011 Universal Service Funding Application, Unfair burden assessment”, 7 February 2024, page 5.



needs to come to a conclusion”.<sup>109</sup>

## 5.4. Question 2 – ComReg’s response

- 5.80. ComReg notes that while two respondents (BT and eir) responded with suggestions in relation to additional information that could be considered, no respondents provided copies of any additional relevant information that should be taken into consideration when conducting the 2010-2011 unfair burden assessment.
- 5.81. Following receipt of submissions to consultation ComReg, using its statutory powers<sup>110</sup>, requested additional information from the relevant undertakings. ComReg did this in order to ensure that it had all available information that could possibly be relevant. Comreg received some additional information.
- 5.82. ComReg asked Oxera to review its Oxera Initial Unfair Burden Report 2010/11 in light of the additional information and to address any information constraints within its report.
- 5.83. ComReg now addresses each of the categories of information proposed by BT and eir.
- 5.84. BT proposed:
- that leased line services and associated revenues should be excluded;
  - that calls between fixed and mobile services should be included;
  - that calculation of retail market shares (retail value/ retail wholesale actors); and
  - an addition of a new category to Table A1.1 (i.e. revenues not earned in Ireland or touching the electronics communications business in Ireland).
- 5.85. ComReg notes BT’s comments re the inclusion of leased lines. As set out earlier in response to question 1, ComReg’s position in respect of leased lines remains unchanged. ComReg and Oxera have always considered leased lines non-dissociable from the fixed lined business. Leased lines use the same network elements as the USO to deliver service. Therefore, ComReg considers it appropriate to include leased lines services and associated revenues in the fixed line business.
- 5.86. ComReg’s position in respect of mobile remains unchanged. In eir’s historical-

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<sup>109</sup> Vodafone, “Vodafone Response to Consultation Eir’s 2010-2011 Universal Service Funding Application. Unfair Burden Assessment”, 7 February 2024, page 3.

<sup>110</sup> Section 13D of the 2002 Act. Information Requirements sent 11 March 2024.

cost accounting (HCA) accounts,<sup>111</sup> ‘Retail Other’ category includes PSTN and ISDN traffic (including fixed-to-mobile). Accordingly, fixed-to-mobile calls are included within the ROCE analysis of eir’s fixed-line business. ComReg and Oxera have always considered mobile services as dissociable from the fixed line business.

5.87. ComReg’s position in respect of the calculation of retail market shares remains unchanged. In the Oxera Unfair Burden Report 2010/11, market share by retail revenue and number of retail subscribers is shown for eir and the largest other authorised operators (OAOs)<sup>112</sup>. eir and UPC (now Virgin Media) were the only fixed network operators in 2010-2011. eir was the only fixed network operator operating at the wholesale level. Both are included in the charts capturing both retail and wholesale operators across within the market share analysis.

5.88. Oxera has not included an additional column to Table A1.1 of the Oxera 2023 Report, as Table A1.1 is specific to eir and considers which of its sub-products are potentially dissociable from the USO. Revenues earned outside of Ireland should not be relevant to this assessment.

5.89. eir’s position is as follows:

- “RBB understands that the detailed work carried in the Area model and Customer model submissions could serve as a valuable resource for conducting this form of analysis, particularly regarding eir’s competitive position and profitability. ComReg may not have access to similar models for eir’s competitors. If not already available, ComReg may need to gather relevant information and data on clients/lines, revenues, costs, and returns per client by geographic area from eir’s competitors number of customers/lines by service;
  - revenues by customer/line;
  - customer-related costs (e.g. subscriber acquisition costs) and returns;
  - size and quality of the network infrastructure;
  - network CapEx and other investments (e.g. advertising)”.

5.90. ComReg notes eir’s comments re eir’s Area and Customer Model information and position that “If not already available, ComReg may need to gather relevant information and data on clients/lines, revenues, costs, and returns per client by geographic area from eir’s competitors number of customers/lines by service”.

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<sup>111</sup> eircom Limited (2011), ‘Historical Cost Separated Accounts: For the year ended 30 June 2011’, page 32.

<sup>112</sup> Oxera Unfair Burden Report 2010-11, pages 52-4.



- 5.96. This does not call for an analysis at a ‘segment’/area level. Accordingly, what must be assessed is whether the USP has the ability to cross subsidise the net cost based on the average level of cross-subsidy between services and changes in these over time, not at a geographic level.
- 5.97. In Chapter 4, ComReg specifically notes that in 2010-2011 all of eir’s competitors for fixed line services except one (UPC (now Virgin Media)) were purchasing and re-selling eir’s SB-WLR product. Accordingly, the size and quality of the network infrastructure, is only relevant to UPC.
- 5.98. Regulated wholesale prices (i.e. for SB-WLR) were set based on a price regulation regime whereby the nationally averaged price for this wholesale service was set by reference to eir’s retail public switched telephony network (PSTN) price (commonly referred to as ‘a retail minus basis’)<sup>114</sup>. Accordingly, the wholesale price (SB-WLR) paid by all undertakings (including eir retail) was the same standard national wholesale price regardless of where in the State they provided fixed services

## 5.5. Question 3 – Respondents’ submissions

- 5.99. ComReg asked in question 3:

“Do you agree with ComReg’s preliminary view that the positive net cost of the provision of the USO in 2010-2011 (i.e., €7,503,531) does not represent an unfair burden on eir? Please give reasons for your answer.”

- 5.100. ALTO states that:

“... [it] generally agrees with this preliminary view ... for the reasons previously expressed ... including the existence of a price cap and related recovery...”<sup>115</sup>

- 5.101. BT agrees with ComReg’s preliminary view and states that:

“Although there was limited availability of some data .... fortunately given the regulated nature of the market and the requirement for Eircom and other operators to continuously provide data to the regulator, a lot of data was still available to ComReg...”<sup>116</sup>

- 5.102. eir disagrees with ComReg’s preliminary view stating that:

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<sup>114</sup> Regulated wholesale prices have been set on a cost-oriented basis since 2016.

<sup>115</sup> ALTO, “Consultation: 2010-2011 USO funding application – Assessment of the unfair burden – Ref: 23/113. Submission By ALTO”, 7 February 2024, page 3.

<sup>116</sup> BT, “BT Response to the ComReg Consultation: eir’s 2010-2011 Universal Service Funding Application Unfair burden assessment”. 7 February 2024, page 3.

- “The available evidence fails to support ComReg’s conclusions that the net cost did not significantly affect eir’s ability to earn a supra-competitive return in 2010/11”;
- “The competitive landscape of the Irish fixed-line market in 2010/11 reflects significant structural changes compared to the initial years of liberalization...”;
- “Consequently that eir’s ability to internalise the USO cost, without suffering a competitive disadvantage, was notably diminished in 2010/11 compared to preceding years”;
- “an examination of eir’s market share at a national level fails to fully capture the extent of the competitive pressure exerted by its rivals.... cream-skimming strategies are likely to have generated significant competitive distortions due to eir’s inability to implement a similar strategy because of the USO mandate....”;
- “these distortions had a substantial impact on eir’s profitability in more profitable areas, thereby limiting its ability to cross-subsidise the USO net cost.”; and
- “eir’s competitors were not in a substantially worse financial and competitive position compared to eir to bear part of the USO cost.”<sup>117</sup>

5.103. Three states that it:

“agrees with ComReg’s approach to information and information constraints” and “believes that the range of information available to be considered as part of the assessment is more than adequate to yield a valid assessment especially where the result is unambiguous.”<sup>118</sup>

5.104. Vodafone agrees with ComReg and indicates that it is satisfied with the:

“findings that there is no USO unfair burden.”

5.105. Vodafone comments that:

“It is important to note that all operators will have unprofitable customers who are more expensive to service. It is not possible to limit the broad targeting of services based on profitability of the customer. It remains a central theme of the ongoing challenges that absent USO obligations Eir would have limited its service to profitable customers. This is clearly not the

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<sup>117</sup> RBB Report, pp. 41-2.

<sup>118</sup> Three, “Three’s response to the Consultation by ComReg on eir’s 2010-2011 Universal Service Funding Application, Unfair burden assessment”, 7 February 2024, page 5.

case.”<sup>119</sup>

## 5.6. Question 3 – ComReg’s response

5.106. ComReg notes that ALTO, BT, Three and Vodafone agree with ComReg’s preliminary view.

5.107. ComReg disagrees with eir’s statement that:

“The available evidence fails to support ComReg’s conclusions that the net cost did not significantly affect eir’s ability to earn a supra-competitive return in 2010/11”.<sup>120</sup>

5.108. ComReg is of the view that its conclusions as summarised in Chapter 4 are fully supported and evidenced.

5.109. ComReg has set out its position on competition and pricing at Chapter 4 of this document. The FVA Market Analysis (which commenced in 2012 and ended in 2014), relevant paragraphs of which are set out at Chapter 4 of this document, clearly demonstrates that there is no evidence of cream-skimming or that eir’s profitability was affected by price-skimming. It clearly demonstrates the need for regulatory intervention in the market to ensure a level of competition and that this was not driven by the USO designation.

5.110. As set out previously, ComReg notes that the principle set out in D04/11 and re-enforced by the CJEU is whether the net cost of universal service obligations represents an unfair burden on the USP, taking account of its situation relative to that of its competitors in the relevant market. It is not whether or not rivals were in a worse position than eir to bear the USO net cost.

5.111. eir’s contention that ComReg should assess if eir’s competitors are in a worse position compared to eir to bear part of USO cost has no basis in the legislative regime, D04/11 or the CJEU judgment. Regulation 76 of the Code Regulations that the NRA should assess whether:

“the net cost of meeting an obligation under Regulations 70 to 73 represents an unfair burden on an undertaking”.

5.112. As indicated in order to take account of the CJEU judgment, ComReg when establishing if the burden is unfair will assess whether it:

“...is excessive in view of the undertaking’s ability to bear it, account being

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<sup>119</sup> Vodafone, “Vodafone Response to Consultation Eir’s 2010-2011 Universal Service Funding Application. Unfair Burden Assessment”, 7 February 2024, page3.

<sup>120</sup> RBB Report, page 41.

taken of all the undertaking's own characteristics" (BASE) and when examining those characteristics "particular to that operator" "tak[e] account of its situation relative to that of its competitors in the relevant market".

## 5.7. Other issues raised

### 5.7.1. Approach to valuation

5.113. The value of a company's fixed assets (i.e. capital assets or property, plant, and equipment) may be based on their book value (using historical cost accounting ("HCA")) or their replacement cost (modern equivalent asset ("MEA") / 'value-to-the-owner').

5.114. The book value is the value of an asset according to its balance sheet account balance. For assets, the value is based on the original cost of the asset less any depreciation, amortisation or impairment costs made against the asset.

5.115. eir states that the replacement cost may be calculated by reference to a modern equivalent asset (MEA) / 'value-to-the-owner'<sup>121</sup> basis. The 'value-to-the-owner' refers to the current market value of an asset.

5.116. The positive net cost for unfair burden assessment is calculated based on HCA methodology for asset valuation. The positive net cost reflects the difference in actual costs that the USP, as a commercial operator, would have incurred had the USO not been in place for the year of an application for funding.

5.117. Decision 1 of D04/11 states that:

"The HCA methodology, properly adjusted for efficiencies and taking account of the costs that could have been avoided by the USP without having the USO, is the cost methodology that must be used to calculate the net cost of the USO."<sup>122</sup>

5.118. It is ComReg's view that although a replacement valuation concept (such as current cost accounting<sup>123</sup> ("CCA") and/or modern equivalent asset ("MEA")) may

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<sup>121</sup> eir states: "fair value is typically determined using valuation methods, such as market approach, income approach, and cost approach. The market approach involves comparing the asset to similar assets that have recently sold in the market. The income approach estimates the present value of future cash flows generated by the asset. The cost approach determines the value of the asset based on the cost to replace it or reproduce it."

<sup>122</sup> ComReg considered in D04/11 that the use of the HCA accounting approach to avoidable costs and benefits is appropriate, and that this would then be consistent with return on capital estimates using the Net Book Value of assets as reported in eir's regulatory HCA accounts for the relevant financial period (i.e. Decision 12).

<sup>123</sup> ComReg acknowledges that, as a matter of economic principle, valuing the assets of a firm according to their current equivalent cost or CCA values provides a more economically meaningful measure of asset values than their historical cost, particularly when determining future prices.

properly be used for other regulatory purposes depending on the specific regulatory objectives, HCA valuation is the better approach for the purposes of verifying the net cost and undertaking the unfair burden assessment. The reasons for ComReg’s position are outlined below.

- eir’s separated accounts for the relevant financial period are prepared on a HCA basis; the use of HCA helps facilitate the verification of eir’s costs by ComReg to ensure that any funding sought in relation to the USO does not exceed what is necessary or appropriate.
- The use of HCA values and mean capital employed (“MCE”) is identifiable.<sup>124</sup> The HCA is also the transaction cost. It is what eir paid at the time of the asset purchase (less annual depreciation over time).
- The use of HCA values for the period is a transparent and practical approach as it relies on actual data that exists and is verifiable from eir’s HCA accounts which are audited.
- eir no longer prepares CCA accounts. The only CCA accounts prepared by eir were for its core network. In addition, a complete and recent asset register based on CCA valuation is not available from eir. In this light, it would not be possible to currently derive a robust and transparent CCA valuation of eir’s assets, in particular those associated with its access network<sup>125</sup>.
- In the absence of a transparent and detailed analysis which is robust and auditable<sup>126</sup> asset re-valuations are largely notional or hypothetical and do not reflect actual historically incurred costs by eir.
- Any changes in the value of assets used to provide price regulated services or the USO possibly also require a significant modification to the way in which depreciation is addressed and the extent assess costs have already been recovered. However, Decision 1 of D04/11 specifies the particular treatment of depreciation in the context of calculating USO net costs.

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<sup>124</sup> Based on asset values reported in eir’s HCA regulatory accounts for the financial period.

<sup>125</sup> As regards the valuation of civil engineering assets such as duct and poles, see European Commission Recommendation “On consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment”, 2013, pp7-8, paragraphs (33) to (38), <https://op.europa.eu/en/publication-detail/-/publication/900fe901-2295-11e3-8d1c-01aa75ed71a1/language-en>.

<sup>126</sup> Regulation 11 (7) of the Regulations provides that irrespective of the costing methodology applied: “[t]he accuracy of the accounts or other information or both, serving as the basis for the calculation of the net cost of an obligation shall be audited or verified, as appropriate, by the Regulator or by a body independent of the undertaking concerned and approved of by the Regulator”.



- HCA accounting is prescribed for use in calculating the USO net cost (Decision 1 of D04/11)<sup>127</sup>.
- HCA is used as the valuation basis for access network assets in the context of price controls for fixed line voice services imposed on eir by ComReg. As such, the 'value-to-the-owner' for these assets is the same as the HCA valuation that is used in assessing the appropriate level of the regulated prices. Therefore it is internally consistent to use HCA values of capital employed and to derive the relevant values from eir's HCA regulatory accounts for the period in question in assessing the profitability of eir's fixed-line business.
- eir is designated with SMP in the FVA market, as a result of which wholesale and retail price control and cost accounting obligations are imposed on eir by ComReg. eir's cost accounting and accounting separation obligations are based on an HCA accounting standard, and this also underpins price control obligations imposed on eir (e.g. SB-WLR). Therefore, the use of an HCA approach for the unfair burden assessment adopts the same basis as those obligations and the calculation of the USO net cost. HCA accounting is not only used in calculating the USO net cost. It is internally consistent to use HCA values of capital employed and to derive the relevant values from eir's HCA regulatory accounts for the period in question in assessing the profitability of eir's fixed-line business.
- In general, when using CCA accounting measures for asset valuation, biases can occur due to assumptions about a range of factors.<sup>128</sup> ComReg notes there is no compelling reason for the potential use of a relevant 'fair value' estimate of capital employed, or rationale as to why such an approach might be more appropriate compared to HCA accounting valuation in the context of the unfair burden assessment, while ensuring methodological consistency with D04/11.

5.119. Therefore, while ComReg acknowledges that CCA may in certain circumstances

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<sup>127</sup> During the consultation process which led to D04/11, ComReg set out clearly why it considered it appropriate in the context of the USO net cost verification to start with accounting cost (profit) on a HCA basis and take capital employed values directly from eir's HCA separated accounts in assessing the USP's costs and revenues (profitability) as part of the net cost calculation. For further discussion see "Costing of universal service obligations: principles and methodologies", ComReg Document No. 10/94, 30 November 2010 (paragraphs 4.7-4.29), <https://www.comreg.ie/publication/costing-of-universal-service-obligations-principles-and-methodologies/>, and "Response to Consultation and Draft Decision - Costing of universal service obligations: Principles and Methodologies", ComReg Document No.11/15, 7 March 2011 ("Consultation 11/15"), (section 3, paragraphs 3.3 to 3.15), <https://www.comreg.ie/publication/response-to-consultation-and-draft-decision-costing-of-universal-service-obligations-principles-and-methodologies/>.

<sup>128</sup> For example, amongst other things, economic and accounting asset values, scope of the assets, opening and closing values, NBV etc.

be a more appropriate measure than historical cost values of the economic value of an asset, as the USO assessment is considering the profitability of the firm with and without the USO, it is more appropriate to use HCA valuation in undertaking the unfair burden assessment.

## 5.7.2. The weighting of Oxera's assessment

5.120. Decision 40 states:

“ComReg will assess whether or not this net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital employed;” (emphasis added).

5.121. ComReg does not agree with eir's views in relation to the application of Decision 40, and specifically that “ComReg's unfair burden assessment should rely primarily on a dynamic analysis of the competitive landscape in the markets for the provision of the services falling under the USO.... and the analysis of eir's profitability would be guided by the following criteria: (i) the profitability assessment should be conducted at a segment/granular level (ii) the assessment of eir's profitability should be complemented with a wider dynamic analysis of the impact of the USO on eir's competitive position ... and ComReg should reduce the weight in the overall evaluation of the static and aggregate analysis of eir's ability to earn a fair return.... Should only be regarded as complementary to the assessment of eir's competitive position, rather than the primary consideration... and (iii) the unfair burden assessment should attach a higher weight to the competitive analysis...”.

5.122. Chapter 4 above clearly and comprehensively outlines why ComReg disagrees with eir's contention that: “... the profitability assessment should be conducted at a granular segment/area level...”.

5.123. eir (in points (ii) and (iii) above) is essentially proposing that Decision 40 should be demoted to “supplementary evidence” and the unfair burden assessment should attach a higher weight to the competitive analysis. This proposal has no basis in D04/11 or in the CJEU judgment and eir gives no basis for this proposal. There is nothing in D04/11 or CJEU judgment regarding demoting or weighting of criteria of assessment. Indeed, the CJEU does not take issue with and cites ComReg's application of Decision 40 (see paragraph 21).

## 5.7.3. The methodology of Oxera's assessment

5.124. eir states that Oxera's assessment is flawed and suffers from significant shortcomings that could affect its conclusions for the following reasons: (i) ROCE is not a good proxy of economic profits and is calculated incorrectly; (ii) regulated WACC is not an appropriate competitive benchmark and does not reflect the

actual cost of capital incurred by eir in the application year; (iii) Oxera understates the impact of the USO on eir's profitability, as it does not consider that, absent the USO, eir's capital employed would have been lower; and (iv) eir's profitability is reviewed under an overly restrictive framework. ComReg does not agree with eir's position and sets out its reasoning below.

### 5.7.3.1. The use of ROCE as an indicator

- 5.125. ROCE is calculated by dividing net operating profit, or earnings before interest and taxes (EBIT), by employed capital. It shows how much profit a company generates for each euro of capital employed. The higher the number (which is expressed as a percentage), the more profit the company is generating per euro of capital.
- 5.126. The ROCE is an accounting-based financial returns metric which captures the relationship between operating profits and capital employed in a business. ROCE is widely used to assess profitability in market investigations and inquiries by the Competition and Markets Authority (CMA) in the UK, as well as by the European Commission. ComReg also used ROCE in its RTE excessive pricing investigation<sup>129</sup>
- 5.127. ComReg considers it appropriate to conduct a profitability analysis which is based on ROCE, namely using a comparison of the ROCE to WACC in the context of D04/11.
- 5.128. eir disputes the suitability of the use of ROCE as an indicator of economic profit. eir considers ComReg's approach to assess eir's profitability is methodologically flawed, particularly the use of annual (unaveraged) estimates of ROCE and asset values based on HCA and could therefore lead to wrong conclusions.
- 5.129. eir cites an article entitled "Excessive Pricing in Competition Law: Never say Never?" by Motta and de Streel to support eir's proposition that:

"accounting indicators have important shortcomings and should be interpreted with caution, since they are not in general a good proxy for economic profits".

Extracts from this article should be viewed in the proper context, as set out below.

- 5.130. The article was written in the context of competition law and excessive pricing. It discusses the standard of proof for excessive pricing and looks at different

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<sup>129</sup> "Investigation into an alleged abuse of an alleged dominant position by RTÉ/RTÉNL, contrary to Section 5 of the Competition Act 2002, and/or Article 102 of the Treaty on the Functioning of the European Union", ComReg Document No. 14/62, 20 June 2014, paragraphs 110-2 and 131, <https://www.comreg.ie/publication/information-notice-closure-of-investigation-into-an-alleged-abuse-of-an-alleged-dominant-position-by-rtartanl>

possible tests to prove an excessive price. It considers four methods to determine whether a price is excessive. The fourth method consists of concentrating:

“on the profits of the dominant firm and comparing such profit either with (i) a normal competitive profit or (ii) the profits of other firms”.

5.131. The article concludes by stating that:

“... with regard to the standard of proof, the competition authority should rely on a convergence of indicators to show excessive prices, complemented by a deep investigation of the market structure and the reasons why prices may be above their competitive level”.

5.132. The article provides caveats for all the possible tests to prove excessive pricing, and not just when a firm's ROCE is greater than its WACC.

5.133. An unfair burden assessment is undertaken in respect of a specific year. Accordingly, alternative lifetime measures such as internal rate of return (IRR) are not appropriate. This is supported by Decision 40 of D04/11 which specifies an assessment based on “ability to earn a fair rate of return on its capital employed”.

5.134. This article also notes that a ROCE analysis is acceptable to the CJEU stating that “the Court has indicated that several methodologies may be used” in the context of proving an excessive price<sup>130</sup>.

5.135. eir cites an Oxera report prepared for the UK Office of Fair Trading (“OFT”) titled “Assessing profitability in competition policy analysis - economic discussion paper 6 (“Oxera report prepared for the OFT”)” in its critique of Oxera's profitability analysis in the context of Oxera's Initial 2010-2011 Unfair Burden Report.

5.136. The report states (at paragraph 1.5) that:

“Caution should be exercised when undertaking profitability assessments and drawing conclusions from them. However, this holds equally for most of the other indicators and techniques commonly used in competition policy. Conceptual, measurement and interpretation issues also arise, for example, when defining relevant markets based on price-elasticity evidence, or when determining market power based on market shares. Therefore, profitability analysis should be seen as one among a number of complementary economic indicators and techniques that can be used together in a competition policy analysis.”

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<sup>130</sup> Motta, M. and de Streel, A. (2007) pages 32-37.

5.137. This report qualifies its applicability (at paragraph 1.30) stating that:

“As discussed in this paper, a large number of past competition investigations in the UK have relied on the ROCE, among other indicators, to infer the extent of monopoly profits of a firm or industry. The ROCE is usually a measure of a company’s earnings before interest and taxes (EBIT) in a given period (usually a year), divided by the capital employed in that period. In addition, there is considerable reliance on the ROCE in regulated utilities, such as water, electricity, gas, airports, and rail, where the regulators periodically set price caps to allow the companies to make a normal return (usually the market-based weighted average cost of capital, or WACC) on their estimated ‘regulatory’ asset base. The application of profitability analysis to the utility industries is outside the scope of this paper, so the discussion below focuses on the use of ROCE in competition investigations in other sectors”.(their emphasis added).

5.138. The Oxera Unfair Burden Report 2010/11 sets out that the ROCE measure is widely used, for example to assess profitability in market investigations and enquiries (e.g. European Commission, and by the Competition and Markets Authority (“CMA”) in the UK). The CMA market investigations guidelines refer to ROCE as a typical approach to profitability analysis, stating that “ordinarily, where data permits, we use ROCE, as this can be computed annually”<sup>131</sup>.

5.139. ComReg notes that in the context of an unfair burden assessment ROCE is not used as an isolated indicator. both the profitability assessment (i.e. ROCE; EBIT; Irish group level profitability) and the competitive assessment (i.e. APRU, market shares by revenue and number of subscribers in the fixed line market) inform an unfair burden assessment.

5.140. Decision 40 of D04/11 requires an assessment of a “fair rate of return on capital employed”. Accordingly, a ROCE based assessment of profitability is appropriate as part of the series of indicators in an unfair burden assessment.

5.141. eir states that ComReg’s approach to assessing eir’s profitability is methodologically flawed, particularly the use of annual (unaveraged) estimates of ROCE and asset values based on HCA and could therefore lead to ‘wrong conclusions’.

5.142. ComReg disagrees with eir’s stated position. The estimate of eir’s ROCE is calculated as the ratio of its operating profits (measured by EBIT) and capital employed (based on HCA values of assets) in its fixed line business. eir’s ROCE can be reliably estimated as its actual operating profit and capital employed for

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<sup>131</sup> “Market investigations guidelines: CC3 Guidelines for market investigations: their role, procedures, assessment and remedies”, published 1 April 2013, Appendix Q: Profitability Methodology, <https://www.gov.uk/government/publications/market-investigations-guidelines>.

its fixed line business are set out in its HCA regulatory accounts.

5.143. Decision 1 of D04/11 sets out that HCA methodology is to be used to calculate the net cost of the USO. Accordingly, the use of HCA is consistent with Decision 1.

5.144. eir suggests that a profitability analysis based on an internal rate of return (“IRR”) could in principle provide a conceptually correct alternative.

5.145. ComReg does not agree for the following reasons:

- IRR is a lifetime measure of profitability (over the lifetime of the assets, or the investment horizon). It is not appropriate for an unfair burden assessment and the ability to bear in a specific financial year;
- IRR would ideally require asset valuations based on current (“value-to-owner”) rather than historical cost. eir’s asset base valuation is based on HCA and there is no CCA evaluation; and
- IRR-based profitability assessments require cashflow data, which is not contained within eir’s regulatory accounts.

5.146. An unfair burden assessment is undertaken in the context of a specific funding application year. Accordingly, an annualised profitability assessment (based on annual ROCE estimates) as opposed to IRR aligns with D04/11.

5.147. ComReg disagrees with eir’s claim that ROCE has been calculated incorrectly. ComReg notes that Oxera’s estimate of eir’s ROCE is calculated as the ratio of its operating profits (measured by EBIT) and capital employed (based on HCA values of assets) in its fixed-line business. Oxera can reliably estimate eir’s ROCE since its actual operating profit and capital employed for its fixed-line business are detailed in its HCA. Indeed, these are values as reported by eir in its HCA.

5.148. The approach taken is appropriate in the specific application of D04/11 since Decision 1 explicitly requires that the HCA methodology be used to calculate the net cost of the USO. As such, The Oxera Unfair Burden 2010/11 Report’s use of eir’s HCA provides a robust and auditable basis for analysis, while ensuring consistency with D04/11.

### **5.7.3.2. The use of Regulated WACC as a competitive benchmark**

5.149. eir states that the regulated WACC is not an appropriate competitive benchmark and does not reflect eir’s actual cost of capital. eir states that this results in a flawed methodology that could lead to wrong conclusions.

5.150. ComReg now sets out its position on WACC and why ComReg is of the view that regulatory WACC is the appropriate benchmark to use.

5.151. A WACC represents an investor's opportunity cost of assuming the risk of investing in a company or, in other words, the return that an investor would require as a benchmark for investing. A WACC is commonly used by regulators and competition authorities as a benchmark measure of the return that investors can expect from investing in a business. In price control decisions, regulators (including ComReg) typically use a WACC estimate to determine the allowed profit that investors can earn.

5.152. Following consultation with stakeholders a regulatory WACC for fixed line telecommunications was set by ComReg in 2008<sup>132</sup> and subsequently in 2014<sup>133</sup>. In the 2008 WACC Decision, ComReg set the WACC at 10.21% ("the 2008 WACC"). The 2008 WACC was calculated specifically for eir and was stated to apply:

"as a basis for allowing Eircom an adequate rate of return for regulatory purposes, including the setting of relevant regulated wholesale prices and it will be used in Eircom's separated accounts".

5.153. The potential impact of financial turmoil and volatility in financial markets was taken into account in the 2008 WACC Decision<sup>134</sup>. The 2008 WACC Decision relied on the substantial body of empirical estimation and analysis carried out by Oxera on behalf of ComReg. As part of this analysis, Oxera assessed the potential impact of the then ongoing financial turmoil on the individual cost of capital parameter estimates to investigate whether an adjustment to the original estimates consulted on would be appropriate.<sup>135</sup>

5.154. In the 2014 WACC Decision ComReg set the WACC at 8.18% for fixed line telecommunications. The 2014 reduction in the WACC demonstrates that the 2008 WACC took into account the financial situation at the time<sup>136</sup>. Europe

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<sup>132</sup> "Response to Consultation and Decision Notice, Eircom's Cost of Capital", ComReg Document No. 08/35, Decision No. 01/08, 22 May 2008 (the "2008 WACC Decision") <https://www.comreg.ie/publication/response-to-consultation-and-decision-notice-d0108-eircoms-cost-of-capital>.

<sup>133</sup> "Cost of Capital, Mobile Telecommunications, Fixed Line telecommunications, Broadcasting (Market A and Market B), Response to Consultation and Decision" ComReg Document 14/136, Decision No. 15/14, 18 December 2014 (the "2014 WACC Decision"), [https://www.comreg.ie/?d1m\\_download=cost-of-capital](https://www.comreg.ie/?d1m_download=cost-of-capital).

<sup>134</sup> Paragraph 4.3 page 28 of the 2008 WACC Decision.

<sup>135</sup> "Oxera Report – eircom's cost of capital – Prepared for Commission for Communications Regulation", ComReg Document No. 07/88a, 1 November 2007, [https://www.comreg.ie/?d1m\\_download=oxeras-report-on-eircoms-cost-of-capital-appendix-c](https://www.comreg.ie/?d1m_download=oxeras-report-on-eircoms-cost-of-capital-appendix-c).

<sup>136</sup> Europe Economics were commissioned by ComReg to assess more recent data to inform the respective parameter values in calculating the WACC. The report prepared by Europe Economics titled "Cost of capital for Mobile Termination Rates, Fixed-Line and Broadcasting Price Controls", April 2014, was included as an Annex to the 2014 WACC Decision (D15/14).

Economics were commissioned by ComReg to assess more recent data to inform the respective parameter values in calculating the 2014 WACC.

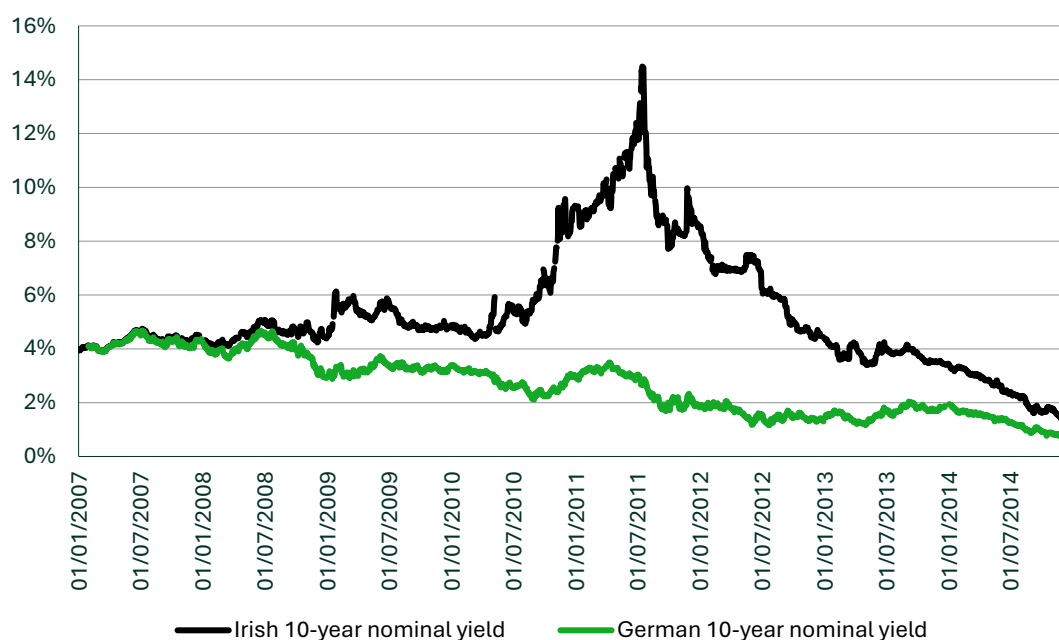
- 5.155. In the 2014 WACC Decision ComReg remained of the view that the previously used WACC methodology, as well as all associated assumptions, formed the most appropriate basis for separately estimating the nominal pre-tax cost of capital to be used in price controls for the (i) wholesale mobile call termination, (ii) fixed line telecommunications and (iii) broadcasting sectors<sup>137</sup>.
- 5.156. Neither the 2008 nor the 2014 WACC Decisions were appealed.
- 5.157. ComReg is of the view that it is appropriate to use the regulated WACC which was used to calculate the positive net cost when undertaking the profitability assessment and the competitive assessment. This ensures an appropriate 'like-for-like' comparison.
- 5.158. One of the key parameters in the WACC calculation is the risk-free rate, which filters into both the cost of debt and the cost of equity. The range set in 2008 of 4.5-5% was informed by both Irish and German government bond yields, with the lower bound of 4.5% being the spot yield on a 10-year nominal Irish government bond on 2 July 2007. In this context, even if the risk-free rate were to be adjusted to fully reflect the movement in bond yields, as eir suggests, the upward pressure on the WACC (holding all other parameters constant) would not have been sufficient to eliminate the gap between eir's fixed-line ROCE and the WACC. The risk-free rate based on the average Irish 10-year nominal government bond yield over eir's 2010-2011 financial year (1 July 2010- 30 June 2011) increased to 8.4%. The WACC subsequently faced downward pressure as the post-crisis yield spike in Ireland reversed (see below), and German yields remained low over the entire period.

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<sup>137</sup> ComReg "aimed-up" certain components of the WACC (meaning that the regulatory costs of capital were set above the central estimate of the market cost of capital). This was in order to reflect the asymmetry of consequences between setting the cost of capital too low and setting it too high and that the negative consequences of the former materially exceed those of the latter



### Irish and German 10-year nominal government bond yields, 2007–2014



Source: Eikon.

5.159. For the avoidance of doubt, ComReg and Oxera are not of the view that a ROCE/WACC ratio is in and of itself determinative.

5.160. In conclusion, it is ComReg's view that a ROCE/WACC based assessment of profitability is appropriate as part of the series of indicators in an unfair burden assessment.

#### 5.7.3.3. Oxera's estimate of the impact of the net cost on eir's profitability

5.161. ComReg does not agree with eir's position that Oxera underestimates the impact of the net cost on eir's profitability. The Oxera Unfair Burden Report 2010/11 acknowledges that "conceptually, the capital employed in the counterfactual could change, although there is no evidence available to adjust this"<sup>138</sup>. Additionally, as noted in this report, given the low proportion of activities within eir's fixed-line business that are dissociable from the USO, eir's assets related to its fixed-line business are unlikely to be significantly different in the counterfactual scenario. Therefore, ComReg considers this to be a robust proxy given the available information.

5.162. Finally, ComReg notes that, with the USO, eir achieves profitability (as proxied by ROCE) in excess of the regulated WACC and that the likelihood that this differential would be even greater in the absence of the USO is not evidence that

<sup>138</sup> Oxera Unfair Burden Report 2010/11, page 27.

the USO net cost presents an unfair burden on eir.

#### 5.7.3.4. The framework for reviewing eir's profitability

- 5.163. ComReg disagrees with eir's view that the approach taken in the Oxera 2010/11 Unfair Burden Report to reviewing profitability is overly restrictive. The comparison of the ROCE profitability analysis to the regulated WACC benchmark is appropriate. The ROCE calculation provides a reasonable indication of eir's ability to earn a fair rate of return on its capital employed. eir's calculation, which finds that the USO net cost required to obtain a ROCE below the WACC is €244m, is additional evidence supportive of Oxera's overall conclusion that the net cost does not significantly affect the USP's profitability.<sup>139</sup> The €244m figure is large due to eir's significant fixed-line EBIT in 2010/11, which is why eir was able to earn a ROCE greater than the regulated WACC. Oxera's analysis shows that the USO net cost is indeed small relative to eir's earnings.<sup>140</sup>
- 5.164. eir also suggests that the approach is not appropriate based on calculations of the USO net cost per capita relative to those of other EU Member States with compensation mechanisms in place<sup>141</sup>. From an economic and regulatory principles perspective, this type of comparison is not of any real value or appropriate because market conditions, and the approaches undertaken by each national regulatory authority (NRA), are unique to each country, firm, national regulatory regime, and period of time.

#### 5.7.4. Oxera's analysis of Capex

- 5.165. ComReg does not agree with eir's position that the analysis of Capex is ill-suited to support the conclusions in Oxera's Unfair Burden Report 2010/11. The analysis in the Oxera Initial Unfair Burden Report 2010/11, is conducted using eir's annual CAPEX for its fixed-line business, which is the sum of investment in property, plant, and equipment (PPE) and intangible assets. These figures show substantial annual investments by eir.<sup>142</sup> Oxera selected this analysis to demonstrate eir's ability to invest and have updated it in the Oxera Unfair Burden Report 2010/11 to capture CAPEX ratios for eir and its largest competitors at the Irish group-level as a proxy for quality of equipment.<sup>143</sup> ComReg notes that it appears that RBB has used Virgin's (formerly UPC) Irish group-level data from its financial statements to calculate the CAPEX/depreciation and CAPEX/revenues ratios, as Virgin's financial reporting does not break down

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<sup>139</sup> Oxera Unfair Burden Report 2010/11, page 27.

<sup>140</sup> Oxera Unfair Burden Report 2010/11, pages 28, 43.

<sup>141</sup> RBB Report, page 23.

<sup>142</sup> Oxera Unfair Burden Report 2010/11, page 38.

<sup>143</sup> Oxera Unfair Burden Report 2010/11, pages 33-6.

information at the fixed-line level. Hence, the comparison between eir's fixed-line and Virgin's Irish group-level CAPEX ratios for the period 2009/10 to 2014/15 is not on a "like for like" basis.<sup>144</sup>

### 5.7.5. eir's profits

5.166. ComReg wishes to address eir's contentions that the "evidence is not suggestive of eir earning supra-competitive profits". As outlined earlier in this chapter, the calculation of the 2008 WACC incorporated an assessment of each parameter of the WACC calculation. One of the key parameters is the risk-free rate, which filters into both the cost of debt and the cost of equity. The range set in 2008 of 4.5–5.0% was informed by both Irish and German government bond yields, with the lower bound of 4.5% being the spot yield on a 10-year nominal Irish government bond on 2 July 2007. Within this context, even if the risk-free rate were to be adjusted to fully reflect the movements in bond yields, as eir suggests, the upward pressure on the WACC (holding all other parameters constant) would not have been sufficient to eliminate the gap between eir's fixed-line ROCE and the WACC. The risk-free rate based on the average Irish 10-year nominal government bond yield over eir's 2010/11 financial year (1 July 2010–30 June 2011) increased to 8.4%. However, the WACC subsequently faced downward pressure as the post-crisis yield spike in Ireland reversed (see Figure in Section 5.7.5) and German yields remained low over the entire period.

5.167. For the avoidance of doubt, Oxera did not state in its Unfair Burden Report 2010/11 "that the available financial evidence suggests that the USO did not impede eir from obtaining supra-competitive profits" as claimed by eir.<sup>145</sup>

5.168. Decision 38 (iii) (b) refers to whether the positive net cost causes a "significant competitive disadvantage" for a USP and not whether the USP impeded eir from "obtaining supra-competitive profits".

5.169. ComReg has set out its position in respect of scope of the market in its response to submissions to question 1.

### 5.7.6. Competition in the market

5.170. ComReg disagrees with eir's position that the market situation is indicative of effective and increasing competition.

5.171. A number of the trends highlighted by eir as evidence of the increased competition faced by eir are based on information that does not fall within the

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<sup>144</sup> RBB Report, page 26.

<sup>145</sup> RBB Report, page 32.

relevant period of analysis (2010/11).

5.172. ComReg in Chapter 4 has considered the following: (i) the level of competition (ii) differences in competitive conditions: urban/rural and retail pricing (national/regional); and (iii) voice-only or bundled voice, based on extracts from the FVA Market Analysis in forming its decision.

5.173. In summary, in the FVA Market Analysis conducted between 2012-2014, ComReg found that:

- the level of competition was evolving, but high and non-transitory barriers to entry into the LLVA market remained, with the majority of operators reliant on eir for wholesale;
- there were no significant differences in competitive conditions between urban and rural areas. Despite the presence of multiple suppliers of bundled products in urban areas, ComReg identified no change in the pricing or marketing of standalone FVA products relative to rural areas;
- FVA retail pricing was uniform on a national basis, with no evidence of sub-national pricing or marketing; and
- competitive conditions were not significantly affected by whether voice services were offered standalone or bundled. ComReg considered the market to be national in scope for standalone FVA.

5.174. These findings from ComReg's near-contemporaneous Consultations and Decisions therefore did not find evidence that eir faced competitive pressure from OAOs targeted towards the segmental and geographic markets mentioned.

### 5.7.7. Competition in the market situation

5.175. ComReg disagrees with eir's statement that the "Market situation is indicative of effective and increasing competition". In this regard, ComReg disagrees with eir's statement that "the evidence is indicative of eir's rivals engaging in 'cream skimming' that undermines eir's ability to internalise the USO net cost". ComReg has set out its position in respect of cream skimming in its response to submissions to question 1.

5.176. ComReg in Chapter 4 considered the following: (i) the level of competition (ii) differences in competitive conditions: urban/rural and retail pricing (national/regional); and (iii) voice-only or bundled voice, based on extracts from the FVA Market Analysis in forming its decision.

5.177. eir, in response to the 2012 FVA Consultation, took issue with this point of view, as is outlined in D12/14 in a section titled "Significant differences in competitive

conditions between urban and rural areas”. As set out in Chapter 4:

“ComReg notes that due to the limited availability of reliable data, the precise market shares in the FVA market(s) in urban and rural areas are not known. Figure 3 which is based on household survey evidence categorised at county level, gives some high-level indication of the growing residential presence of UPC ‘s cable service in particular urban areas, particularly in the Dublin region. However, it is important to note that Figure 3 does not represent actual market shares for Dublin and other regions where UPC is present – it is based on survey evidence only and hence can be interpreted only as indicative evidence. In addition, it should be recalled that ComReg identified a relevant FVA product market that incorporates both residential and non-residential services. UPC ‘s share of the non-residential customer segment is likely to be significantly lower than that of Eircom across all regions, with the 2013 Business ICT Survey indicating only a 3% national share of business FVA customers for UPC.”<sup>146</sup> (emphasis added)

5.178. For the reasons summarised above, ComReg disagrees with eir’s position that “the evidence is indicative of eir’s rivals engaging in “cream skimming” that undermines eir’s ability to internalise the USO net cost”.

### 5.7.8. eir's position vis-a-vis rivals

5.179. eir states that “eir is not significantly better positioned than rivals to bear the USO net cost”. As set out in Chapter 4, in making this statement, eir is attempting to reformulate the appropriate principle and does not explain the basis for this reformulation.

5.180. For the avoidance of doubt, ComReg is obliged to assess whether the net cost is an unfair burden, it must follow the jurisprudence of the CJEU in relation to “unfair burden” and, it must also abide by D04/11. It is not obliged, or indeed entitled to replace what is provided for in legislation with the general test proposed by eir i.e. “whether the USO affected eir’s ability to compete on equal terms and internalise the net cost of USO through subsidisation”.

5.181. ComReg disagrees with eir’s stated views in this regard.

### 5.7.9. Approach of other NRAs

5.182. eir states that:

“...an international review indicates that several NRAs used in their assessments a market share threshold significantly higher than eir’s share

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<sup>146</sup> D12/14 paragraphs 3.36 to 3.39.

in Ireland in 2010/11 and subsequent years to determine if the USO net cost qualifies as an unfair burden. Using the fact that eir remained the first player in the market as a benchmark for the unfair burden assessment appears overly restrictive in this context”<sup>147</sup>.

5.183. eir later states that:

“... that a review of the international experience review shows that regulators in other EU Member States found that the USO net cost represented an unfair burden and implemented a compensation mechanism, even when the USP’s market share in their respective countries was significantly higher than eir’s market share in Ireland. This was notably the case of Spain, Italy, and Portugal, where the USP’s shares in the fixed telephony market were, respectively, 82.5%, 68% and 73%”<sup>148</sup>.

5.184. eir submits that ComReg’s approach is different to that of other NRAs when undertaking an unfair burden assessment. eir states that the market share thresholds adopted by Spain, Italy, and Portugal, where unfair burdens were determined, are lower than eir’s market share. eir submits that if ComReg used a similar market share threshold an unfair burden would be found.

5.185. National regulatory authorities have significant discretion in relation to how they determine where there is an unfair burden. The CJEU in the Base judgment<sup>149</sup> confirmed at paragraph 43 that:

“it falls to the national regulatory authority to lay down general and objective criteria which make it possible to determine the thresholds beyond which ..... a burden may be regarded as unfair”.

5.186. ComReg observes that there is no uniform approach as regards the unfair burden assessment among regulators who have assessed USO costs and whether there is an unfair burden. The national regulatory approaches take into account the country specific regulatory frameworks and the country specific market conditions.

5.187. While dominance thresholds from competition law may be employed, this type of analysis in isolation does not take account of causality e.g. market shares may have fallen as a result of factors unrelated to the USO, such as general competition or the emergence of new technologies e.g. NGA.

5.188. The unfair burden assessment must determine whether eir, as the USP, is able to bear the net cost of the USO having regard to its own characteristics taking

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<sup>147</sup> RBB Report, page 28.

<sup>148</sup> RBB Report, page 35.

<sup>149</sup> CaseC-389/08 Base & Others v Ministerraad, paragraph 43, [curia.europa.eu](http://curia.europa.eu).

account of its situation relative to that of its competitors in the relevant market.

5.189. Despite an observed fall in eir's 2010-2011 market share, market share is not, in and of itself, determinative. While it is acknowledged that eir's 2010-2011 had decreased, this does not necessarily mean that eir was unable to bear the net cost of the USO.

5.190. Accordingly, market share, in and of itself, is not exclusively determinative of the existence of an unfair burden.

### 5.7.10. Passage of time

5.191. ALTO states that:

" ALTO has previously submitted its views to ComReg on USO for the period under consideration. At the time of submission more than thirteen years in ordinary time has elapsed on the issues raised within this Consultation. Ordinarily, and as a matter of law, such matters would be and should be statute barred due to the passage of time. Such a delay creates unnecessary risk and uncertainty for ALTO members. ALTO reminds ComReg of its previous submissions concerning the issue of the price cap and recovery available to eir at that time and during the currency of this belated and second assessment".<sup>150</sup>

5.192. BT states that:

"...this whole process has taken far too long, and it is not reasonable that BT and industry in 2023/2024 should be reviewing an assessment of Eir's USO funding application for 2010 to 2011. In our view ComReg should never have allowed this situation to occur with the first consultations for the 2010 – 2011 USO assessment delayed until 2019. This situation is not acceptable. In our view the situation has far exceeded a reasonable delay and raises concerns as to whether there is an infringement of the statute of limitation period in Ireland."<sup>151</sup>

5.193. Three states that:

"Notwithstanding the legal processes which have contributed to the timescale leading this point, it is a fact that this consultation deals with issues which are over 12 years old. It is the first in a series of assessments

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<sup>150</sup> ALTO, "Consultation: 2010-2011 USO funding application – Assessment of the unfair burden – Ref: 23/113. Submission By ALTO", 7 February 2024, page 2.

<sup>151</sup> BT, "BT Response to the ComReg Consultation: eir's 2010-2011 Universal Service Funding Application Unfair burden assessment". 7 February 2024, page 1.

required to bring clarity and finality on the issue of USO funding up to date. This protracted process represents a significant regulatory overhang on the sector and Three would urge ComReg to prioritise the completion of the outstanding assessments.”<sup>152</sup>

5.194. Vodafone states that:

“The issues under consultation have been held over the sector for far too long bearing in mind publication of ComReg Decision D04/11 was almost 13 years ago. The fact remains that Eir continues to be hugely profitable with an EBITDA margin at 47% which is funded to a large extent by wholesale charges”.<sup>153</sup>

5.195. ComReg notes the concerns expressed by respondents in relation to the length of time which it has taken to review eir’s USO finding application for 2010-2011. ComReg acknowledges that undertaking an unfair burden assessment in respect of 2010-2011 at this remove is not ideal. Chapter 2 of this document outlines the background to this unfair burden assessment, and it is clear from the facts outlined that any delay is predominantly attributable to matters outside of ComReg’s control. ComReg is proceeding with the unfair burden assessment now and will prioritise the completion of this and the other outstanding unfair burden assessments. ComReg is obliged to carry out its work in accordance with relevant legislation, which it is doing. There is no limitation period provided for in this legislation. This current unfair burden assessment is being conducted in order to comply with a court order made in 2023.

### **5.7.11. Retail Price Cap**

5.196. ComReg notes ALTO’s comments in respect of retail price cap and recovery available to eir which it has raised previously in submissions to consultations.

5.197. ComReg addressed these matters in ComReg Document 19/41<sup>154</sup>.

## **5.8. Other issues raised - outside of the scope of the 2010-2011 UFB assessment**

5.198. BT set out a number of observations in respect of any future USO with reference

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<sup>152</sup> Three, “Three’s response to the Consultation by ComReg on eir’s 2010-2011 Universal Service Funding Application, Unfair burden assessment”, 7 February 2024, page 3.

<sup>153</sup> Vodafone, “Vodafone Response to Consultation Eir’s 2010-2011 Universal Service Funding Application. Unfair Burden Assessment”, 7 February 2024, page2.

<sup>154</sup> “Assessment of eir’s 2010-2015 Universal Service Fund Applications: Response to Consultations 17/73; 17/81; 17/95; 17/109 and 18/36”, ComReg Document No. 19/41, 18th April 2019, <https://www.comreg.ie/publication/assessment-of-eirs-2010-2015-universal-service-fund-applications-response-to-consultations-17-73-17-81-17-95-17-109-and-18-36>, pp67-68, paragraphs 285-6.



to ComReg Decision D10/23 “Universal Service Establishing that fixed voice communications services cannot be ensured commercially in the State”<sup>155</sup>.

- 5.199. For the avoidance of doubt Consultation 23/113 (and the Oxera Initial Unfair Burden Report 2010/11) related to the 2010-2011 unfair burden assessment. The USO services which are summarised therein are the designated USO services during the period 2010-2011.
- 5.200. The matters raised by BT matters pertain to any potential future USO and therefore it would not be appropriate for ComReg to engage further on these matters in the context of this consultation, which is exclusively focused on the 2010-2011 USO unfair burden assessment.

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<sup>155</sup> ComReg Decision 10/23, “Universal Service Establishing that fixed voice communications services cannot be ensured commercially in the State”, Document 23/115, 13 December 2023 (“D10/23”), <https://www.comreg.ie/publication/universal-service-establishing-that-fixed-voice-communications-services-cannot-be-ensured-commercially-in-the-state-d10-23-document-no-23-115>.

## 6. Regulatory Impact Assessment (RIA)

- 6.1. A RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders. ComReg's approach to RIA is set out in the Guidelines published in August 2007.<sup>156</sup> In conducting the RIA, ComReg take account of the RIA Guidelines<sup>157</sup> issued by the Department of An Taoiseach in June 2009 and adopted under the government's Better Regulation programme.
- 6.2. Section 13(1) of the Communications Regulation Act 2002, as amended, requires ComReg to comply with certain Ministerial Policy Directions. Policy Direction 6 of February 2003 requires that before deciding to impose regulatory obligations on undertakings we must conduct a RIA in accordance with European and International best practice, and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme. In conducting the RIA, ComReg also has regard to the fact that regulation by way of issuing decisions, for example imposing obligations or specifying requirements, can be quite different to regulation that arises by the enactment of primary or secondary legislation.
- 6.3. ComReg's published RIA Guidelines, in accordance with a policy direction to ComReg, state that ComReg will conduct a RIA in any process that may result in the imposition of a regulatory obligation, or the amendment of an existing obligation to a significant degree, or which may otherwise significantly impact on any relevant market or any stakeholders or consumers. However, the Guidelines also note that in certain instances it may not be appropriate to conduct a RIA and, in particular, that a RIA is only considered mandatory or necessary in advance of a decision that could result in the imposition of an actual regulatory measure or obligation, and that where ComReg is merely charged with implementing a statutory obligation then it will assess each case individually and will determine whether a RIA is necessary and justified.
- 6.4. ComReg considers that in this response to consultation and determination document, it is not exercising its discretion by imposing a discretionary regulatory obligation that would require a regulatory impact assessment (RIA) but is acting under a statutory obligation imposed on it by Regulation 75 of the Code Regulations, which requires that upon receipt of a request for funding/compensation from the USP, ComReg shall calculate the net cost of

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<sup>156</sup>“ComReg's Approach to Regulatory Impact Assessment. Response to Consultation and Guidelines,” Document 07/56, 10 August 2007, [https://www.comreg.ie/media/dlm\\_uploads/2015/12/ComReg\\_0756.pdf](https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg_0756.pdf); and “Guidelines on ComReg's Approach to Regulatory Impact Assessment”, Document 07/56a, 10 August 2007, [https://www.comreg.ie/media/dlm\\_uploads/2015/12/ComReg0756a.pdf](https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg0756a.pdf).

<sup>157</sup> RIA Guidelines - Department of Taoiseach.

provision and assess whether the universal service obligation represents an unfair burden for the USP. As such, if a request for funding/compensation has been received, ComReg has no discretion as to whether or not such an assessment is undertaken. Therefore, a RIA is not being undertaken for this response to consultation and determination.

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## 7. Determination

1. This Determination is hereby issued by the Commission for Communications Regulation (“ComReg”):
  - i. Pursuant to Regulation 75(4) of European Union (Electronic Communications Code) Regulation 2022 (“the Code Regulations”);
  - ii. Having applied the principles and methodologies set out in ComReg Document D04/11 “Report on Consultation and Decision on the Costing of Universal Service Obligations Principles and Methodologies” dated 31 May 2011;
  - iii. Having regard to the judgment of the European Court of Justice in the case of Eircom Limited v. Commission for Communications Regulation, Case C-494/21, delivered 10 November 2022 and the order of the High Court dated 10 July 2023 in the case Eircom Limited v. The Commission for Communications Regulation, High Court Commercial, Record No. 2019/167 MCA;
  - iv. Having regard to the contents of (including the analysis and reasoning set out in): ComReg Document No. 23/113, Submissions to Consultation (24/43s), the Oxera Unfair Burden Report 2010/11 (24/43A), responses received to ComReg’s section 13D information requirements dated 24 March 2023, and ComReg Document No. 24/43;
  - v. Having regard to ComReg’s functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act 2002, as amended and ComReg’s objectives under Regulation 4 of the Code Regulations;
  - vi. Having, where relevant, complied with policy directions issued to ComReg by the then Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004;
  - vii. Having, in ComReg Decision D05/19, following the assessment of the funding application received from Eircom Limited (“eir”) on 15 July 2016 in relation to the net cost of meeting its universal service obligations in the financial year 2010-2011, determined that there was a positive net cost in 2010-2011 of €7,503,531 comprised of the following figures (“the net cost”):

USO Net Cost 2010-2011		2010-2011 ComReg €
<b>Direct net cost (a)</b>	Uneconomic Areas	€183,793
	Uneconomic Customers	€8,643,518
	Directories	-
	Public Payphones	€185,310
	Services for disabled end users	€58,935
	Consultancy fees	-
	<b>Direct net cost</b>	<b>€9,071,556</b>
<b>Intangible benefits (b)</b>	Enhanced brand recognition	€1,298,367
	Life-cycle	€259,711
	Ubiquity	€3,596
	Marketing	€6,351
	<b>Total intangible benefits</b>	<b>€1,568,025</b>
<b>Net cost (after intangible benefits)/Positive net cost</b>		<b>€7,503,531</b>

- viii. Having, in ComReg D05/19 determined that the estimate of benefits to eir as a result of the provision of the universal service do not outweigh the net cost, that the positive net cost is material compared to the administrative costs of a sharing mechanism and that USO financing would be justified if it were found that the provision of the USO in 2010-2011 represented an unfair burden on the USP.
- ComReg has determined that for the financial year 2010-2011, the determined net cost of the provision of the universal service obligation does not represent an unfair burden on eir and therefore that the universal service obligation in 2010-2011 does not represent an unfair burden on eir.
  - If any section, clause or provision or portion thereof contained in this Determination is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Determination and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Determination, and shall not in any way affect the validity or enforcement of this Determination.

**SIGNED FOR AND ON BEHALF OF THE COMMISSION FOR COMMUNICATIONS  
REGULATION ON THE 4 DAY OF JUNE 2024**

**Robert Mourik**

**Chairperson**

**COMMISSIONER OF THE COMMISSION FOR COMMUNICATIONS REGULATION**

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## Annex 1: D04/11 – Decisions 38-42

### Decisions 38 to 42 of D04/11

Determining if there is an unfair burden	
Decision 38	<p>For there to be an unfair burden on a USP, three cumulative conditions must be met:</p> <ul style="list-style-type: none"> <li>i. There must be a verifiable and verified direct net cost</li> <li>ii. The benefits of the USO must not outweigh the net cost (i.e. there is a positive net cost)</li> <li>iii. This positive net cost is (a) material compared to administrative costs of a sharing mechanism, and (b) causes a significant competitive disadvantage for a USP</li> </ul>
Decision 39	<p>If the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and taking into account whether these costs are disproportionate to any net transfers to a USP.</p>
Decision 40	<p>ComReg will assess whether or not this net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital employed; and</p>
Decision 41	<p>If the positive net cost significantly affects a USP's profitability, ComReg will assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward.</p>
Decision 42	<p>ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair:</p> <ul style="list-style-type: none"> <li>i. Changes in profitability, including an understanding of where a USP generates most of its profits over time.</li> <li>ii. Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ("EBITDA") analysis.</li> <li>iii. Changes in direct USO net cost, if any, over time.</li> <li>iv. Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.</li> <li>v. Changes in prices over time.</li> <li>vi. Changes in market share and/or changes in related markets.</li> <li>vii. Market entry barriers.</li> </ul>

## Decisions 38 to 42 of D04/11 post CJEU judgment (strikethrough)

Determining if there is an unfair burden	
Decision 38	<p>For there to be an unfair burden on a USP, three cumulative conditions must be met:</p> <ul style="list-style-type: none"> <li>iv. There must be a verifiable and verified direct net cost</li> <li>v. The benefits of the USO must not outweigh the net cost (i.e. there is a positive net cost)</li> <li>vi. This positive net cost is (a) material compared to administrative costs of a sharing mechanism, and (b) causes a significant competitive disadvantage for a USP</li> </ul>
Decision 39	<p>If the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and taking into account whether these costs are disproportionate to any net transfers to a USP.</p>
Decision 40	<p>If the positive net cost is not relatively small, ComReg will assess whether or not this net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital employed; and</p>
Decision 41	<p><del>If the positive net cost significantly affects a USP's profitability,</del> ComReg will assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward.</p>
Decision 42	<p>ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair:</p> <ul style="list-style-type: none"> <li>i. Changes in profitability, including an understanding of where a USP generates most of its profits over time.</li> <li>ii. Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ("EBITDA") analysis.</li> <li>iii. Changes in direct USO net cost, if any, over time.</li> <li>iv. Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.</li> <li>v. Changes in prices over time.</li> <li>vi. Changes in market share and/or changes in related markets.</li> <li>vii. Market entry barriers.</li> </ul>



## Annex 2: Information shared with Oxera

### eir's historical cost separated accounts for 2010-2011

ComReg in D08/10<sup>158</sup> prescribed changes to the historical separated accounts to increase transparency, by improving the availability of adequate information on the costs and performance of the various parts of eir's regulated business and to better align with the market-based regulation that was being adopted as part of the European regulatory framework.

There had been various changes which ComReg considered necessitated the review of eir's regulatory reporting requirements. These included, inter alia:

- The length of time since the last review and recent changes in other jurisdictions;
- The experiences of ComReg and eir in the intervening period of assessing and understanding financial information used in the regulatory process;
- The completion of a number of market analyses; and
- The need to reflect the market-based structures in accordance with the European regulatory framework.

The 2010-2011 eir regulated accounts are comprised of the following documents, which eir is required to produce:

- Separated Accounts to the market level;
- Additional Financial Statements ("AFS") for material services and products;
- Additional Financial Information ("AFI") for other financial data; and
- Accounting Documentation describing, in detail, eir's regulatory accounting systems.

This reporting structure means that eir does not necessarily have to disclose unregulated information that was previously published.

ComReg personnel engaged with Oxera to assist Oxera in understanding eir's 2010-2011 historical cost separated accounts (HCA).

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<sup>158</sup> "Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited", ComReg Document No. 10/67, Decision No. 08/10, 31 August 2010 ("ComReg D08/10"), <https://www.comreg.ie/publication/response-to-consultation-document-no-0975-and-final-direction-and-decision-accounting-separation-and-cost-accounting-review-of-eircom-limited>.

eir’s historical cost separated accounts set out eir’s Definition of the markets and businesses” as follows:

### *Definitions of the Markets and Businesses*

#### **eircom business structure**

eircom is a unitary business having one network with support functions. It consists of a customer facing division (**eircom Retail**) and a division responsible for providing customers with telephony services, maintaining the core switching and transmission networks, and providing and maintaining customer connections to this network (**eircom Wholesale**). A number of additional services are supplied by **subsidiary companies** which maintain separate accounting records.

## **eir’s 2010-2011 USO funding application**

eir’s 2010-2011 USO funding application consists of the following documents:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

ComReg considered and shared with Oxera:

- [REDACTED]
- [REDACTED]

## **2010-2011 statutory accounts**

The Companies Registration Office is the central repository of public statutory information on Irish companies and business names. The Companies Acts requires companies operating in Ireland to file annual returns with the CRO.

ComReg has procured the relevant 2010-2011 accounts for those service providers operating in the Irish fixed line market for the relevant periods, where

available<sup>159</sup>. In some cases, service providers' reporting is amalgamated into regional or global group accounts<sup>160</sup>.

The information procured by ComReg from the Companies Registration Office was considered by ComReg and provided to Oxera.

## ComReg quarterly key data reports

Statistical information on the Irish electronic communications market and benchmark data from other countries is collected and analysed by ComReg's wholesale division.

Through its Quarterly Key Data Reports ("QKDR") and the Data Portal ComReg informs stakeholders of the key trends and developments in the Irish Electronic Communications market.

ComReg considered the relevant QDKR reports and associated information for the period 2010-2011. ComReg provided Oxera with copies of these documents.

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<sup>159</sup> BT Ireland; Digiweb; eircom Limited; Hutchinson 3G Ireland Limited; Imagine Communications Group Limited; Lycamobile Limited; Tesco Mobile Ireland; Magnet Networks Limited; Telefonica; UPC Communications Ireland Limited.

<sup>160</sup> Sky Ireland financial reporting is consolidated into its UK British Sky Broadcasting Group plc.

# Annex 3: Oxera unfair burden report 2010-2011

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