eir's 2010-2011 Universal Service Funding Application

Unfair burden assessment

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Submissions to Consultation

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alto

alternative operators in the communications market

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Consultation: 2010-2011 USO funding application – Assessment of the unfair burden - Ref: 23/113

Submission By ALTO

Date: February 7th 2024

ALTO is pleased to respond to the Consultation 23/113 2010-2011 USO funding application – Assessment of the unfair burden:

Preliminary Remarks

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.

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Responses to Consultation Questions:

Q. 1. Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.

A. 1. 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 in to the latest USO assessment and that inclusion in our submission appears to be an error. ALTO notes ComReg has not assessed unfair burden, and that the end result appears favourable.

Q. 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).

A. 2. ALTO 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.

Q. 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?

A. 3. ALTO generally agrees with this 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 for the reasons previously expressed to ComReg including the existence of a price cap and related recovery. ComReg must take and pay due attention and heed to such matters. ALTO separately believes that it is unsatisfactory that a USO burden calculation from 2010 – 2011 remains extant and a live issue in 2024.

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ALTO
7 February 2024

BT Response to the ComReg Consultation:

eir's 2010-2011 Universal Service Funding Application

Unfair burden assessment

Issue 1: 7th February 2024

Confidential Version – Confidential Text in Annex A

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1.0 Introduction

We welcome the opportunity to comment to the ComReg assessment and we will provide our response to the questions below.

Before addressing the detail of the assessment, we would say 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.

1.1 The future USO

Separately we note the recent position of ComReg[1] concerning the designation for USO in view of the existing parties planning to withdraw their single line PSTN services. We also note the Oxera document summarises the requirements of the USO are as below:

• access at a fixed location;

• a printed telephone directory and the maintenance of the National Directory Database (NDD);

• public pay phones;

• services to consumers with disabilities; and

• measures to assist consumers to control their expenditure.

We would observe:

- A printed telephone directory and the maintenance of the National Directory Database (NDD); - Printed directories are only supplied on demand with most private customers now X-Directory (unlisted) so the directories contain a lot less numbers and are of limited use, business customers can be found on the internet. Hence is there still a need for printed directories at the considerable cost reported by eir. We note the National Directory Database is now run by the company PXS hence for the past years the industry already bears this cost.

[1] ComReg 23/115 - Universal Service Establishing that fixed voice communications services cannot be ensured commercially in the State.

- Public pay phones; Uneconomic payphones have largely disappeared from Irish streets and have been superseded by the mobile Smart Phone. Whilst we agree with the existing ComReg test for checking for uneconomic payphones and allowing their removal, a review should be carried out whether the remaining uneconomic payphones are still needed and is there a better way to service this need given the widespread availability of mobile technology and the increased convenience and safety to users of not having to travel to a payphone.
- Services to consumers with disabilities; – Regulation for these requirements now largely applies directly to all operators so it should not be in future eir claims.
- Fixed Access Lines - With regards to access at a fixed location the Government's National Broadband Plan (NBP) investment (operated by National Broadband Ireland) is now rapidly rolling out modern high speed access networks to most uneconomic areas, hence are the fixed line requirements still appropriate via the USO (which incorporates an uneconomic area assessment as part of the process)[2] when the Govt has already contracted and provided significant investment for NBP?

In our view the world has moved on and today it's obvious that for many the voice single line in the home is quickly being overtaken by mobile/broadband and Over the Top communications (OTT) such as WhatsApp.

Whilst we acknowledge the stark ComReg position to notify the lack of providers of single line telephony to the Minister was procedural we find it disappointing that ComReg offered no thoughts to the future or to review future options. For example, is the USO still required in Ireland in its current form given the above.

An example of how things can change for the better. Several years ago, there used to be a complex system of the Dept. of Social Welfare directly subsidising operators providing end user phone lines. This caused huge complexity within the industry and ultimately customer complaints until it was replaced by a simple scheme to pay the recipient of the support directly and let them choose whether to simply top up their mobile or pay for a phone line. Overnight the complexity and complaints disappeared. Hence in this modern environment ComReg need to analyse whether the USO in Ireland is appropriate in its current form. The above would suggest not and it's time to start analysing whether the USO in its current form is appropriate. Hopefully such would close the endless debacle of assessments and financial risk within the industry.

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2.0 BT Response to the Questions

Q. 1 Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.

BT Response

We note the ComReg process is fixed by long established regulatory Decisions that were not challenged (appealed) at their issue other than the recent limited changes required by the European and Irish courts, hence we accept the approach is in line with the established rules.

[2] ComReg Doc 19/36 - Assessment of eir's 2010-2011 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2010-2011 NON-CONFIDENTIAL – See Decision 25 on page 38 of the Doc.

Q. 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).

BT Response

Our view is the 2010-2011 assessment should have been concluded in a timely manner and that it took far too long before the initial ComReg Decision on the Assessment was issued in 2019. We consider this delay led to the constraints that ComReg is now facing.

Given the situation we would like to offer the following comments:

1. We welcome that ComReg has sought the assistance of a well-respected expert consultancy company Oxera. We note Oxera has a wide experience of regulation in various countries and consider this helpful.
2. We consider that the relevant market revenues should relate to telephone and broadband services and exclude leased line services – as leased line operators do not benefit from the presence or absence of a USO obligation for fixed lines.
3. We consider that market shares should be assessed as the retail value of relevant services divided among the retail and wholesale actors who generated that value.
4. We consider a new category should be added to Table A1.1 of the Oxera paper which addresses revenue not earned in Ireland or touching the electronic communications business in Ireland. ✂ See Confidential Annex.
5. We note that the selection of Option 2 (page 12 of the 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). I.e. revenue is earned by both the uneconomic lines and mobile industry through these calls. Fixed to Mobile call values should include the value of the associated MTR.

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Q. 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.

BT Response

Although there was limited availability of some data due to the passing of some 13 years since the period in question, fortunately given the regulated nature of the market and the requirements for Eircom and other operators to continuously provide data to the regulator, a lot of data was still available to ComReg and based on this, plus the Oxera look at the impact on Eircom and competitors in the market, we agree with ComReg that the USO had a marginal impact on Eircom which was still well able to earn a return well above the WACC, maintained a steady ARPU and maintained the position as the main player in the market.

For 2010–2011 23 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.

Annex A – Confidential Information

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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

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1 Scope and structure of the report

This report has been prepared by RBB Economics ("RBB") for Eircom Limited ("eir").

On 6 December 2023, the Commission for Communications Regulation ("ComReg") published the Consultation Document 23/113 ("the Consultation document"), which sets out and consults upon ComReg's revised approach and preliminary views on whether the cost of the Universal Service Obligation ("USO") in 2010-11 represented an unfair burden for eir. ComReg's preliminary views rely largely on the evidence and conclusions presented in a report commissioned to Oxera ("the Oxera report").

The questions posed by ComReg in the Consultation document are as follows:

Q1. Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.

Q2. 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).

Q3. 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.

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This report presents the conclusions of our economic assessment of ComReg's approach and preliminary views, and provide an answer to the specific questions raised by ComReg.

This report is structured as follows:

- Section 2 provides an overview of the relevant legal framework for determining whether the cost of the USO represents an unfair burden for the Universal Service Provider ("USP") in Ireland;
- Section 3 provides a summary of ComReg's revised approach and preliminary views on the unfair burden assessment for 2010, as set out in the Consultation document;
- Section 4 presents our economic analysis of the approach used by ComReg to conduct its unfair burden assessment. In doing so, we provide an answer to Q1 of ComReg's Consultation document;
- Section 5 provides an overview of the relevant information and data which, in our view, ComReg should employ to conduct its unfair burden assessment. In doing so, we answer to Q2 of ComReg's Consultation document;

- Section 6 presents our view as to whether the cost of the USO represented an unfair burden on eir in 2010/11, based on the evidence available. In doing so, we provide an answer to Q3 of ComReg’s Consultation document.

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2 Legal framework

EU legislation, as set out in Directive 2002/22/EC, establishes that, if the USO provision represents an unfair burden on a USP, Member States shall implement a compensation mechanism or, alternatively, distribute the USO net cost among providers of electronic communications networks and services. However, the Directive does not provide any precise criteria for the assessment of whether the USO net cost constitutes an unfair burden.

Although the concept of "unfair burden" is not defined in the Directive, the Court of Justice of the European Union ("CJEU") in Case C-389/08 Base and Others ("Base case") provides a broad definition of it. Specifically, the CJEU notes that "unfair burden" is a burden that "*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*".

The CJEU Base case judgment also establishes that it falls to the NRA to establish the criteria for determining the existence of an unfair burden.

In this context, on 31 May 2011 ComReg adopted Decision 04/11 ("D04/11"), which comprises a set of numbered decisions. Decision 38 of D04/11 established that, in order for an unfair burden to exist, the USO net cost must result in a significant competitive disadvantage for the USP (Decision 38 of D04/11). Furthermore, Decisions 40 to 42 of D04/11 set out principles and methodology to guide ComReg in assessing whether the USO net cost constitutes an unfair burden on the USP. These established that ComReg's assessment of an unfair burden will follow a sequential approach, evaluating:

- whether the USO net cost significantly affects the USP's profitability and/or ability to earn a fair rate of return on its capital employed (Decision 40); and
- if the USO net cost significantly affects the USP's profitability as required by Decision 40, whether such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward (Decision 41).

Against this background, Decision 42 sets out the static and dynamic criteria and market indicators based on which ComReg will assess the USP's financial and competitive position and determine whether the USO net cost burden is unfair.

Against this background, on 18 April 2019 ComReg adopted five decisions determining that the USO net cost borne by eir from 2010/11 to 2014/15 did not represent an unfair burden. ComReg took the view that eir's ability to earn a fair rate of return on capital employed demonstrated that the USO net cost had not resulted in a significant competitive disadvantage for the company. Consequently, ComReg concluded that there was no necessity to conduct a competitive distortion assessment as set out in Decision 41. The decisions focused solely on the characteristics of eir. ComReg did not conduct an analysis of the financial and competitive position of eir's competitors in the market.

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eir appealed ComReg's decisions before the Irish High Court, which sought clarification from the CJEU. The High Court asked whether, when assessing if the USO net cost poses an unfair burden on the USP, NRAs are required to consider solely the characteristics and situation of the USP or, conversely, they should also have regard to these aspects in comparison to its competitors in the relevant market.

On 10 November 2022, the CJEU issued its decision in case C-494/21 ("CJEU judgment"). The CJEU held that an unfair burden assessment should consider not only the USP's own characteristics and position, but also those of its competitors. According to the CJEU:

> *"…the answer to the question referred is that Articles 12 and 13 of the Universal Service Directive must be interpreted as requiring the competent NRA, 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]

Moreover, the CJEU specifies that the sole assessment of the financial position of the USP is insufficient to determine the existence of an unfair burden, as the evaluation of the competitive situation in the relevant market is an integral part of the overall assessment.

> *"The mere finding that such a provider remains profitable despite the burden on it by virtue of the net cost of its universal service obligations does not allow conclusions to be drawn as to the repercussions of that net cost for that provider's ability to compete with the other operators present in an evolving market. It cannot be ruled out that the burden which the net cost of universal service obligations represents for such a provider prevents, or makes more difficult or more complicated, the financing of investments in new technologies or related markets, investments which its competitors might possibly be in a position to make and which are therefore likely to procure significant competitive advantages for those competitors."*[2]

Following the CJEU judgement, the High Court of Ireland annulled the abovementioned ComReg decisions which determined that the USO net cost borne by eir from 2010/11 to 2014/15 did not represent an unfair burden.

ComReg has now subject to public consultation the preliminary findings of its unfair burden assessment in the light of the CJEU judgement for the year 2010/11. A more detailed description of ComReg's revised approach and preliminary views is provided in section 3.

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[1] CJEU judgment, paragraph 33.
[2] CJEU judgment, paragraph 49.

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3 ComReg's revised approach and preliminary views

ComReg's Consultation document reviews D04/11 in light of the CJEU judgment. ComReg considers that, for D04/11 to align with the CJEU judgment, the criteria used in conducting the unfair burden assessment should be reviewed as follows:

- Decisions 40 to 42 of D04/11 should no longer be applied sequentially. This means that, irrespective of the impact of the net cost on the USP's profitability (Decision 40), a competitive distortions assessment should be conducted (Decision 41 and Decision 42);
- the specific characteristics of the USP should be considered within the broader context of the competitive environment in which it operates, rather than in isolation.

Table 1 provides an overview of Decisions 40 to 42 as revised by ComReg in the Consultation document. The text indicating the specific parts of the decisions that ComReg deems necessary to disregard are marked with a strikethrough.

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Table 1: Decisions 40 to 42 as revised by ComReg

Decision	Revised text
Decision 40	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
Decision 41	~~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.
Decision 42	ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair: 1. Changes in profitability, including an understanding of where a USP generates most of its profits over time. 2. Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ("EBITDA") analysis. 3. Changes in direct USO net cost, if any, over time. 4. Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time. 5. Changes in prices over time. 6. Changes in market share and/or changes in related markets. 7. Market entry barriers.

Source: ComReg.

Against this background, ComReg has instructed Oxera to conduct a new unfair burden assessment for the year 2010/11, based on ComReg's revised approach.

Oxera's main findings can be summarised as follows:

- Application of Decision 40: Oxera finds that the USO net cost did not significantly affect eir's profitability in 2010/11. This finding is based on the observation that eir's Return On Capital Employed ("ROCE") in 2010/11 exceeded the competitive benchmark of a "fair

rate of return" as measured by ComReg's regulatory allowed Weighted Average Cost of Capital ("WACC") for 2008.

- Application of Decision 41: Oxera finds that the USO net cost did not impact eir's ability to compete on equal terms during the whole USO application period (2010/11). This finding rests on two key points. According to Oxera:
  - there would be no available evidence of a causal link between the provision of the USO and the financial distress experienced by eir during the USO application period;
  - the USO would not have prevented eir from undertaking necessary investments nor improving its financial health, as evidenced by improvements in its credit rating.
- Application of Decision 42: Oxera finds that eir was profitable and well-positioned to cross-subsidise the USO net cost in 2010/11 by using profits earned in its fixed-line business. This finding is based on the following:
  - eir was able to maintain a steady ARPU in 2010/11;
  - despite a reduction in its market share, eir remained the main player in the market, both by revenues and subscribers' number;
  - eir's EBIT at the group level exceeded that of its competitors, whilst eir group's ROCE was broadly in line with those of its competitors.

These findings lead Oxera to conclude that, whilst none of the indicators employed would be determinative *per se*, the USO net cost did not represent an unfair burden in 2010/11.

The remainder of this report presents the results of our assessment of ComReg's revised approach and Oxera's findings and conclusions, and provides a response to the questions posed by ComReg in the Consultation document.

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4 Assessment of ComReg’s revised approach to the unfair burden assessment

This section presents the conclusions from our analysis of ComReg’s revised approach to assess whether the USO cost represents an unfair burden for eir.

As detailed below, our analysis shows that ComReg’s revised approach, as applied by Oxera, suffers from certain flaws and limitations that are likely to affect its conclusions. With this in mind, we propose a revised approach that addresses these flaws and limitations.

This section is structured as follows. Section 4.1 discusses Oxera’s approach to market definition. Sections 4.2 to 4.4 review Oxera’s application of Decision 40, 41 and 42, respectively. Section 4.5 summarises our findings and outlines our proposed approach for the unfair burden assessment, addressing the flaws identified in Oxera’s analysis. In doing so, we provide a response to Q1 of ComReg’s Consultation document.

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4.1 Assessment of Oxera’s approach to market definition

According to ComReg, in order to conduct the unfair burden assessment, it is necessary to first identify and describe the relevant market. In this regard, ComReg specifies that the term “relevant” should be interpreted as “appropriate” and it is not intended to refer to the term “relevant market” as used in the context of competition law.[3]

In this regard, the Oxera report commissioned by ComReg argues that the relevant scope of the market for assessing eir’s financial and competitive position should be the fixed-line business considered as a whole. Such definition not only includes the services that fall under the USO (“USO services”). It also includes all other fixed-line services that are unrelated to the USO (“non-USO services”). These include: (i) wholesale fixed-line services, that provide alternative operators with access to eir’s fixed network at a regulated price; (ii) data communications and other retail services, provided to both residential and business customers.

Oxera argues that the scope of the market they define would be appropriate, because the majority of non-USO services are not dissociable from USO services. According to Oxera, non-dissociability would stem from the fact that some costs incurred and revenues obtained by eir across its fixed-line business are shared between USO and non-USO services. As such, according to Oxera, eir’s financial and competitive position in non-USO services cannot be isolated from those that the company holds in USO services.

Oxera’s approach is in our view flawed. From our perspective, a more appropriate scope should consider only the services falling under the USO. Furthermore, the assessment should not be conducted solely at an aggregate/national level. eir’s financial and competitive position relative to its rivals should be at a more granular level, by segment/geographic area, with the

[3] See Oxera unfair burden report 2010/11 (2023), page 11.

aim of determining whether eir is able to cross-subsidise the USO net cost on a sustained basis.

In the remainder of this section, we provide a detailed assessment of ComReg's and Oxera's approach to market definition.

As set out in Decision 38 of D04/11, the USO burden should be considered unfair when it imposes a substantial competitive disadvantage on the USP. In this regard, it must be noted that the USO generates positive externalities that benefit not only the USP, but also all other communication providers in the market. In particular, by ensuring affordable access to fixed-line telephony in rural and sparsely populated areas, the USO increases the total number of customers connected to the network, leading to higher average service value for customers and potentially higher revenues for *all* providers.[4] Hence, from a fairness perspective, it can be argued that if the entire cost of the USO is borne by a single USP, and it is not shared proportionally amongst all providers, it represents an unfair burden on the USP unless the USP is in a significantly better position than others to bear such burden. Otherwise, the USP will be placed in a situation of competitive disadvantage vis a vis rivals.

The situation of competitive disadvantage as a result of the USO can arise considering that:

- the USP faces the obligation to set uniform prices and serve unprofitable customers at the same conditions of profitable customers;
- the USP's rivals can adopt so-called "cream skimming" strategies and focus their competitive efforts in the most profitable segments/areas of the business(es) covered by the USO.

This competitive disadvantage will be more likely the higher the degree of competition in the market. If competition is absent or limited, the USP can theoretically bear the USO net cost without suffering a competitive disadvantage; in other terms, it is able to internalise the USO net cost. This is because the USP can cross-subsidise losses from unprofitable customers with the profits it obtains from profitable customers.

On the contrary, if the USP faces effective competition, its ability to internalise the USO net cost is reduced. This is because rivals can selectively target the most profitable market segments/areas. As rivals focus on profitable segments/areas, prices are driven down in these segments/areas. Should the USP attempt to respond, it would be compelled to reduce the prices it charges to profitable customers. However, this would disproportionately impact the USP's profits, as the uniform price mandate requires an identical reduction in the price the USP charges to unprofitable customers. Consequently, the USP suffers a competitive disadvantage that would not arise if the USO burden was shared amongst providers.

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[4] This is because customers' average valuation of a communication service increases as the network expands (network externalities or effects). Additionally, some customers may engage in communication with others who would not be connected to the network without the USO, generating additional traffic and revenues for service providers. These network externalities are widely acknowledged and documented in the economic literature.

D04/11 acknowledges that price uniformity, coupled with effective competition in the most profitable market segments/areas, may undermine the capacity of the USP to internalise the USO burden. According to D04/11:

> *"Price uniformity: across Ireland could, in theory, lead to "cherry picking" by rivals in a scenario where unit costs rise and the universal service cannot continue to be borne by a USP alone. If a USP is facing competition in the most profitable segments of the market, its ability to cross-subsidise USO customers may be undermined, in principle, and this could eventually lead to a USP being unable to bear any positive net cost. For example, if competition is sufficiently widespread to suggest cherry picking".[5] [Emphasis added]*

The above carries several important implications for the definition of the scope of the relevant market for the purpose of the unfair burden assessment, which are set out below.

First, the market scope should encompass the USO services and exclude non-USO services. Indeed, it is in the provision of the USO services where one must evaluate whether any competitive disadvantage for eir arises as a consequence of the interaction between increasing competition and the USO requirements.

Second, and as a result of the above, determining whether eir is able to internalise the USO net cost requires necessarily an assessment of eir's financial and competitive position by segment/geographic area. Only a more granular analysis will provide insights into whether and to what extent the competitors of the USP may be employing cream-skimming strategies, by strategically focusing their competitive efforts on lower-cost, more densely populated areas. A mere assessment at a national/aggregate level, as the one presented by Oxera, would be insufficient and could lead to wrong conclusions.

Third, in contrast with the approach proposed by the Oxera report, the scope of the relevant market should exclude fixed regulated services.

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. It follows that eir cannot internalise the USO burden by earning supra-competitive profits from fixed regulated services since, by definition, eir lacks the ability to unilaterally increase the price and, as a result, obtain supra-competitive profits in the provision of regulated services. Oxera's decision to evaluate eir's position in both regulated and unregulated segments appears therefore unjustified.

For the reasons set out above, in our view, the definition of a narrower market scope restricted to non-regulated USO services, aimed at assessing specifically whether eir faces effective competition in more profitable segments or areas that limits its ability to cross-subsidise the USO cost, aligns better with economic principles. In addition, it also aligns better with:

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[5] ComReg D04/11, paragraph 5.30.

- criteria 1 and 4 of Decision 42, which call for a detailed analysis of eir's profitability by business/activity to understand the USP's ability to internalise the USO net cost;
- the wording of paragraph 43 of the CJEU judgement, which states that any conclusions regarding the existence of an unfair burden may depend on the competitive conditions existing in "*the different sectors of the relevant market*".

Furthermore, our proposed approach also seems to be consistent with the guidance provided by Oxera in its first unfair burden assessment for 2009/10, commissioned by ComReg in 2013. In that context, Oxera identified the need to assess the USP's profitability and consider the nature of competition in different segments of the market to determine whether any market distortion caused by competition may result from the USO. In this regard, Oxera proposed analysing the USP's profitability and competitive position by segmenting areas where the USP retains greater market power from those where there is more competition. According to Oxera:

> *"In determining whether any market distortion caused by competition results from the requirements of the USO and is therefore consistent with finding an unfair burden, ComReg would need to consider the nature of competition during the different segments of the market with different market conditions. This form of analysis could be undertaken by segmenting areas where the USP retains greatest market power from those where there is most competition."*[6]

As we will discuss in more detail in section 6, an assessment under a more appropriate market scope, such as the one we propose, could have led to different conclusions compared to those obtained by Oxera.

Finally, it should be noted that the dissociability test applied by ComReg and Oxera appears, to a significant extent, arbitrary. Dissociability issues apply in general to any firm offering multiple products or services, in particular when these are sold in bundles or share common costs. In the case of telecommunications providers, these issues affect not only to the possibility of breaking down revenues and costs within the fixed-line business between USO and non-USO activities, but also more in general (e.g. between fixed and non-fixed services). However, 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 with profits obtained from non-USO services. This framework is flawed as it may fail to capture any potential competitive disadvantage that the USP may suffer due to the USO mandate.

4.2 Assessment of Oxera's application of Decision 40

According to ComReg's revised approach as outlined in the Consultation document, eir's ability to earn a fair of return on capital is no longer a sufficient condition to determine the fairness of the USO burden, as it was in previous assessments.

6 See Oxera, "Does the universal service obligation represent an unfair burden for eir?" (2013), page 23.

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However, the comparison between eir's ROCE and the regulatory WACC, used by Oxera as a benchmark to assess eir's ability to earn a fair return, remains central in Oxera's overall assessment. Indeed, despite acknowledging the increased competitive pressure faced by eir, Oxera downplays its significance, arguing that eir's capacity to maintain a fixed-line ROCE above WACC in 2010/11 would indicate that its ability to internalise the USO net cost was not hindered by increased competition. Specifically, Oxera argues that "*these market factors are reflected in the profitability analysis […], as eir's profitability (measured by its ROCE) is a composite measure of both demand- and supply-side factors. Hence, it reflects the strength of the underlying business as well as the market environment and competitive pressures faced by eir during the application period.*"[7]

In the remainder of this section, we assess Oxera's methodology and conclusions with regard to the analysis of eir's profitability. Our findings are as follows.

First, we appreciate that, under ComReg's revised approach, a profitability assessment is now necessary, but not sufficient, to determine the fairness of the USO burden. However, we observe that Oxera implements this approach in a manner that still gives excessive weight to an aggregate and static analysis of eir's profitability in comparison to competitive analysis. This could lead to wrong conclusions because:

- a profitability analysis can provide insights into eir's ability to cross-subsidise the USO net cost only to the extent it is conducted (i) at a granular segment/area level and (ii) over a sufficiently long timeframe;
- accounting profitability indicators, especially when reviewed under a static and aggregate framework, must be interpreted with caution, as they are subject to several theoretical and practical shortcomings.

As such, a high-level analysis of eir's ability to earn a fair return should serve only as a complementary element to the assessment of its competitive position, and should not have the weight given by Oxera in its approach (see section 4.2.1).

Secondly, Oxera's analysis of eir's financial position suffers from several flaws that are likely to affect its conclusions. Specifically, Oxera's comparison of eir's ROCE with the regulatory WACC, used by Oxera to support its conclusion that eir was profitable and well-positioned to cross-subsidise the USO net cost, is methodologically flawed. This results in an overly restrictive framework, which makes it highly unlikely that any net cost could be considered an unfair burden (see section 4.2.2.4).

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4.2.1 Oxera's assessment gives an excessive weight to an aggregate and static analysis of eir's ability to earn a fair return

As detailed in section 4.1, the primary criterion to assessing a USP's ability to internalise the USO net cost lies in the degree of competition it faces in the provision of the USO services. Specifically, the focus is on whether the USP faces effective and selective competition in

[7] See Oxera unfair burden report 2010/11 (2023), page 23.

lower-cost, more profitable segments/areas, as competition could potentially undermine its ability to cross-subsidise the USO net cost.

As a result, in our view, 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. This analysis should aim at evaluating whether and to what extent the imposition of the USO had a detrimental impact on eir's competitive position compared to a scenario without the USO. In other terms, it should seek to determine whether the USO led to competitive distortions (as outlined in Decision 41) that resulted in a substantial competitive disadvantage for eir (as outlined in Decision 38).

In this context, the analysis of eir's profitability should be guided by the criteria outlined below.

Firstly, as also discussed in section 4.1, the profitability assessment should be conducted at a granular segment/area level, adhering to criteria 1 and 4 of Decision 42. In contrast to an aggregate analysis, ComReg should focus on a more detailed examination of whether and to what extent competition from alternative operators may have impacted eir's ability to cross-subsidise the USO net cost with profits obtained from lower-cost and more profitable segments/areas. To this extent, ComReg would have to assess eir's profitability by geographic area, specifically distinguishing between urban, more densely populated areas, where costs tend to be lower and profits and competition tend to be higher, and rural, less populated areas. For this purpose, ComReg could use the detailed cost models that eir prepares as part of its assessment of the USO funding application and/or preparation of its regulatory accounts. These models are already relied on by ComReg for the purpose of formulating its measures and decisions.

Secondly, 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. In this regard, it should be noted that structural changes resulting from competitive distortions are unlikely to be captured by a static analysis of eir's financial position.

This looks consistent with D04/11, which at paragraph 5.28 states that:

> *"Profitability can indicate a USP's ability to bear a USO in the short term. However, a static view of a USP's revenues and profitability may only provide a weak indicator of a USP's ability to continue paying cross-subsidy revenues into the future. ComReg's approach is to complement a profitability assessment with a competitive distortions assessment, as appropriate". [Emphasis added.]*

In our view, the above arguments imply that ComReg should reduce the weight in the overall evaluation of the static and aggregate analysis of eir's ability to earn a fair return. Such an analysis should only be regarded as complementary to the assessment of eir's competitive position, rather than the primary consideration, as implied by ComReg and Oxera approach.

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Moreover, any evaluation of the ability to earn "fair" or supra-competitive returns is subject to significant theoretical and practical limitations, particularly when relying on accounting indicators, as extensively noted in the economic literature. Consequently, it may result in erroneous conclusions. We will discuss in detail these limitations in section 4.2.2.

In summary, in our view the unfair burden assessment should attach higher weight to the competitive analysis, as opposed to an aggregate and static analysis of eir's ability to earn a fair return, as implicit in ComReg and Oxera approach. This view seems to align with a literal interpretation of paragraph 49 of the CJEU judgement, which states that "*the mere finding that [a USP] remains profitable despite the burden on it by virtue of the net cost of its universal service obligations does not allow conclusions to be drawn as to the repercussions of that net cost for that [USP]'s ability to compete with the other operators present in an evolving market*."

4.2.2 Oxera's assessment of eir's profitability is methodologically flawed

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As discussed in the previous section, in our view Oxera's assessment gives disproportionate emphasis to an aggregate and static analysis of eir's profitability as compared to an analysis of the interplay between the USO burden and the competitive landscape. In this section, we analyse the methodological framework under which Oxera evaluates eir's profitability.

Oxera carries out an analysis of eir's profitability comparing eir's Return On Capital Employed (ROCE) in 2010/11 relative to eir's regulatory allowed WACC as defined by ComReg in 2008. According to Oxera, this would provide a valid benchmark to examine whether eir's returns in 2010/11 were in excess of the competitive benchmark of a "fair rate of return".

Oxera finds that in 2010/11 eir's ROCE was in excess of the WACC estimated by ComReg. Based on this evidence, Oxera concludes that, in 2010/11: (i) the USO net cost did not significantly affect eir's ability to earn a fair rate of return; (ii) eir was well positioned to cross-subsidise the USO provision by using profits earned in its fixed-line business

In our view, Oxera's assessment is flawed and suffers from significant shortcomings that could affect its conclusions. This is for the following reasons. Firstly, ROCE is not a good proxy of economic profits and is calculated wrongly (section 4.2.2.1). Secondly, regulated WACC is not an appropriate competitive benchmark and does not reflect the actual cost of capital incurred by eir in the application year (section 4.2.2.2). Thirdly, 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 (4.2.2.3).

This results in an overly restrictive framework, which makes it highly unlikely that any net cost would ever be considered an unfair burden (see section 4.2.2.4).

4.2.2.1 ROCE is not a good indicator of economic profits and is calculated incorrectly

As anticipated in section 4.2.1, determining if profits are above or below a competitive benchmark of a fair return is subject to significant practical limitations. There is a significant body of economic literature on the use of accounting indicators to assess economic profitability. The main conclusion that can be drawn from this literature is that accounting

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

As an illustration, former Chief Economist of the European Commission's DG Competition Professor Massimo Motta, in a paper with Professor Alexandre de Streel, notes the following on the use of accounting profitability indicators: [8]

> *"A 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.*
>
> *The variant (i) considers a product's price excessive when the firm's return on capital for that product is greater that its weighted average cost of capital (WACC). However, this approach, which has been used by some national competition authorities, <u>is fraught with conceptual difficulties (accounting profit reflect economic profit only in very specific, and often unrealistic, assumptions) and practical difficulties (vulnerability to accounting complications)</u>.*
>
> *The variant (ii) compares the profit rates of the dominant firm to the profits obtained by similar companies in other geographic markets. The practical application of such approach is also very difficult as it is almost impossible to find a relevant comparator". [Emphasis added]*

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Similarly, a study commissioned by the Office of Fair Trading ("OFT") to Oxera in 2013 sets out the challenges associated with using profitability in competition analysis.

The study highlights that using profitability in competition analysis entails significant theoretical problems. This is because there are a number of reasons why firms might earn high or low economic profits that do not depend on the degree of market competition, including for example superior efficiency or specific cost structures.[9]

The 2003 Oxera study also emphasises the difficulty of identifying an appropriate competitive benchmark against which to compare measured profits.[10]

Additionally, the study underscores that the use of profitability analysis raises measurement and interpretation issues:[11]

> *"…profitability analysis raises various measurement and interpretation issues. For example, <u>accounting data, which is normally the primary source of information, is rarely presented in such a way that it can be easily and readily</u>*

8 Motta, M. and A. de Streel (2007), "Excessive Pricing in Competition Law: Never say Never?", in Swedish Competition Authority, The Pros and Cons of High Prices, 2007, p. 37.
9 Oxera, "Assessing profitability in competition policy analysis" (2003), prepared for the OFT, paragraph 1.48.
10 Oxera, "Assessing profitability in competition policy analysis" (2003), prepared for the OFT, paragraph 1.3.
11 Oxera, "Assessing profitability in competition policy analysis" (2003), prepared for the OFT, paragraph 1.3.

used for economic analysis for competition policy purposes. […] Even if profits can be measured, profitability figures can be difficult to interpret. For example, when are profits too high or too low, and what is the relevant time period to consider? If high profits are found, are they due to market power or to superior efficiency?" [Emphasis added.]

These limitations also apply to the ROCE metric employed in the Oxera report. The 2003 Oxera study for the OFT notes that the ROCE is only a good proxy of economic profits (ideally measured by the Internal Rate of Return or IRR) under very particular circumstances, including:

- when it is calculated as a weighted average for a sufficiently long time period;
- when the asset base is calculated according to the value-to-the owner rule.

According to Oxera, the use of annual (unaveraged) ROCE estimates can be problematic, given the sensitiveness of both the numerator (EBIT) and the denominator (capital employed) to accounting practices on accruals and depreciation schedules.

The quotes below summarize Oxera's views on the use of ROCE to measure economic profits:

"…it is valid to use other profitability measures – in particular the ROS, gross margins and market valuations – as proxy measures for the IRR, either in addition to or instead of the IRR itself. This applies in particular where reliable data on cash flows and asset values are not available, making it difficult, and sometimes impossible, to measure the IRR.

However, […], these measures are useful to competition policy only insofar as they do not significantly and systematically diverge from the IRR, and if they provide additional information when the IRR is difficult to estimate. In this regard, it was noted above that annual estimates of the ROCE and ROE do not in general meet these criteria. While, in theory, an appropriately weighted average ROCE or ROE can be used to obtain the IRR (if accounts are fully articulated and assets are valued according to value-to-the-owner rule — see Box 4.3), ROCE and ROE estimates have not been applied in this way in practice. These measures therefore have to be interpreted with caution". [12]

"Under certain conditions, a weighted average ROCE gives the same result as the truncated IRR, in particular if: (i) the correct asset valuation is used — i.e. based on the value-to-the-owner principle; (ii) the accounts are fully articulated such that all changes in the book value of assets flow through the profit and loss account, and (iii) the weighted average ROCE is calculated using Kay's formula

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[12] Oxera, "Assessing profitability in competition policy analysis" (2003), prepared for the OFT, paragraph 8.6.

> *Under these conditions, there is a direct correspondence between the weighted average ROCE and the IRR using the value-to-the-owner rule over truncated periods. This weighted average ROCE is in fact the IRR.*
>
> *While the weighted average ROCE equals the truncated IRR, <u>the use of annual (unaveraged) ROCE estimates, however, can be problematic</u> for the following reasons.*
>
> *In principle, competition authorities can estimate the ROCE. This estimation should nevertheless take into account that <u>both the numerator and the denominator in the calculation of annual ROCE are sensitive to variations in accounting practices (over time and across companies)</u>. The EBIT figure in the numerator is particularly affected by accruals — which can cause a significant wedge between the actual cash inflows and outflows in a period and the revenues and costs, and hence profits, assigned to that period — and by the choice of depreciation schedules. Depreciation also has a significant impact on the value of the capital employed in the denominator of the ROCE. These factors could affect the annual ROCE estimates even if the underlying performance of the activity is unchanged. In contrast, the truncated IRR calculation uses actual cash flows in each year rather than earnings. Cash flows are a relatively 'hard' statistic, and are not affected by accruals or depreciation schedules.*
>
> *In addition, the denominator in the annual ROCE estimate is also subject to uncertainties in asset values. This can affect the usefulness of year-to-year (or company-to-company) comparisons of annual ROCE over a particular period of time".* [13] *[Emphasis added]*

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In view of the above, we consider that Oxera's approach to assess eir's profitability is methodologically flawed and could therefore lead to wrong conclusions.

This is especially relevant given that the ROCE metric employed by Oxera in its assessment is susceptible to the shortcomings identified in the economic literature. In particular:

- Oxera uses annual (unaveraged) estimates of ROCE and the evolution of ROCE is calculated over a very short timeframe. In this regard, the economic logic suggests that the potential effects on eir's profitability stemming from the potential competitive distortions caused by the USO are likely to manifest gradually over time;

[13] Oxera, "Assessing profitability in competition policy analysis" (2003), prepared for the OFT, paragraph 1.32.

- asset values are based on historic cost accounting (HCA) [14] and not estimated according to the value-to-the-owner rule.[15]

4.2.2.2 Regulated WACC is not an appropriate competitive benchmark and does not reflect eir's actual cost of capital

Oxera's approach argues that the WACC is the appropriate benchmark to assess whether eir earned a fair return on capital. Specifically, according to Oxera, the WACC would be a suitable "competitive benchmark"; that is, a good benchmark of the level of profitability that would exist in a competitive market.

This means that, under Oxera's own approach, any return in excess of the WACC will be in principle considered fair or supra-competitive, and that the USO net cost will only affect eir's ability to obtain a fair return investment if returns fall below the WACC.

In this regard, we observe that the WACC is a proxy of the cost of the capital that a company needs to finance its investments and activities. In practice, the returns of a company can significantly exceed the WACC, even if it operates in a very competitive market. Indeed, returns can be higher than the WACC due to a number of procompetitive reasons, including higher efficiency, successful innovation and cyclical factors.

When a company has returns just in line with or below the WACC, this means that it struggles or fails to obtain the returns required by shareholders and debtholders to provide the company with funding. As a result, the company will likely have problems to find the capital to finance its operations, and will thus be in a difficult financial situation.

In light of the above, we consider that Oxera's approach, which relies on the WACC as a benchmark of a fair return on capital, is methodologically flawed and could lead to wrong conclusions.

Our view is consistent with the views expressed by regulators in other EU countries. For instance, the British telecommunications regulator's statement on USO conditions for broadband services clearly supports the conclusion that the mere fact that accounting profits have been consistently above WACC is not sufficient to rule out that the USO cost represents an unfair burden. According to Ofcom:

> *"In response to Vodafone, we have previously set out our general approach to returns in regulated telecoms markets. Our approach to wholesale regulation is*

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[14] Under HCA rules, the value of assets is calculated as the historic acquisition cost minus the amortization. The amortization is in turn determined according to accounting criteria. As such, it does not reflect in general the actual economic depreciation of the assets. For instance, one of the most widely used accounting amortization criteria consists in assuming that the asset value depreciates linearly (i.e. by the same amount each year) over a certain period of time (the asset's accounting useful life). As a result of these accounting criteria, assets values, and therefore the capital employed used for ROCE calculations, ceteris paribus tend to decrease over time. This means that the ROCE of a company calculated with HCA asset values can increase just because of the application of accounting amortization rules that have nothing to do with the actual economic value of the assets involved or the company's profitability.

[15] The term "value-to-the-owner" (or fair value) refers to the current market value of an asset. 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.

designed to maintain a balance between, on the one-hand, incentivising BT to invest in new technology (and become more cost efficient through time) and, on the other hand, ensuring fair prices for retail competitors and their customers. We recognise that BT's accounting returns in the wholesale broadband market referred to by Vodafone (i.e. the regulated "Market A" – which typically comprises rural exchange areas) have historically been above the cost of capital. However, as we explained in the 2018 WBA statement, we do not consider that these accounting returns represent an accurate picture of the economic returns in this market. Even where past returns have been above the cost of capital, we do not consider it conducive to regulatory predictability and future investment incentives to claw-back such returns through an adjustment to separate regulation – such as any USO net cost claim (if such net cost were found unfair)".[16]

It also seems to align with the view expressed by Oxera itself, which in the study commissioned by the OFT to Oxera, already mentioned in section 4.2.1, highlights the following:[17]

"Over relatively shorter time periods, however, profits could diverge from the cost of capital for a variety of reasons, not all of which are necessarily related to market power or anti-competitive practices (e.g. economic cycles, windfall gains that are not related to a company's main operations, or temporarily high profits in dynamic, innovative markets). Therefore, in addition to the cost of capital, information on returns made by appropriate comparator firms or industries should also be considered as benchmarks for the profitability assessment."

In our view, ComReg should complement the use of WACC by incorporating alternative benchmarks. Meaningful alternatives could involve considering (i) the returns achieved by companies operating in the same markets as eir (i.e., eir's rivals), or (ii) the returns achieved by companies similar to eir but operating in different geographic markets. As it will be shown in section 6.1, considering other benchmarks would likely lead to different conclusions. Unless the available evidence unequivocally indicates that eir earned consistently excessive or supra-competitive profits, irrespective of the benchmark employed, ComReg should base its decision on the assessment of eir's competitive position.

Additionally, in our view, using the 2008 ComReg's regulatory WACC as a benchmark is inappropriate for quantifying eir's actual cost of capital in the year 2010/11. Specifically, the 2008 regulatory WACC, which is based on 2007 data, is likely to underestimate eir's actual cost of capital in 2010/11 due to the differing financial market conditions resulting from the global financial crisis in 2008. Since the assessment of the existence of the unfair burden is carried out as a retrospective analysis, we consider that Oxera should have used existing historical information from the relevant periods (in this specific case, 2010/11) as a basis for

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[16] Ofcom (06/06/2019), paragraph 10.48 c.iv).
[17] Oxera, "Assessing profitability in competition policy analysis" (2003), prepared for the OFT, paragraph 1.18.

its analysis. As we will show in section 6, the consideration of a WACC more aligned with the financial market conditions in Ireland during 2010/11 could have led to different conclusions.

4.2.2.3 Oxera understates the impact of the USO net cost on eir's profitability

Oxera assumes that, in a counterfactual scenario in which USO is absent, only eir's EBIT would be affected. In particular, Oxera assumes that eir's EBIT would be increased by the amount of the USO net cost. Based on this, Oxera concludes that eir's profitability would have not been materially undermined by the net cost of the USO.

This assumption by Oxera is a significant error, because eir had to dedicate part of its capital to fund the provision of unprofitable USO activities. However, in the counterfactual scenario, i.e. should the USO have not been imposed on eir, eir would have not undertaken such activities and, therefore:

- it would not have raised the capital required to finance them. This would mean that, in the counterfactual scenario, the total capital employed by eir would be lower and the ROCE would be higher than under Oxera's erroneous assumption; and/or
- it would have invested the capital required to finance them in profitable activities. In this case, eir's EBIT and thus ROCE in the counterfactual scenario would be higher than under Oxera's flawed assumption.

Oxera's erroneous assumption leads to underestimating the ROCE that eir would have obtained absent the USO and, as a consequence, understating the actual impact of the USO on eir's profitability. Depending on the amount of capital required to finance USO unprofitable activities, Oxera's conclusions could have been different.

4.2.2.4 eir's profitability is reviewed under an overly restrictive framework

According to Oxera, any net cost that did not hinder eir from recovering its cost of capital would be considered fair under ComReg's framework. Oxera's approach looks overly restrictive, as it makes it highly unlikely that any net cost would ever be considered an unfair burden.

With the aim of illustrating this point, Table 2 provides an estimate of the USO net cost that would be required to obtain a ROCE below the WACC, under Oxera's approach. The figures are based on the data obtained from the Oxera report. To obtain our estimate, we proceeded as follows. First, we obtained eir's EBIT and ROCE without the USO net cost (calculated, respectively, by adding the USO net cost to eir's EBIT, and the impact of the USO net cost on eir's ROCE estimated by Oxera). Then, we calculate the reduction in EBIT that would be required to obtain a ROCE equal to the WACC (as presented by Oxera) as the percentage difference between the WACC and the ROCE times eir's EBIT. The result is the USO net cost that would lead to a ROCE equal to the WACC.

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Table 2: USO net cost required to obtain a ROCE below the WACC

	2010/11
EBIT without USO net cost, € million (A)	396
ROCE without USO net cost (B)	26.6%
WACC point estimate (C)	10.21%
USO net cost required, € million (A×[1-(C/B)])	244

Source: Own analysis based on data obtained from the Oxera report.

The results show that the USO burden should have to be unreasonably high in order to find an unfair burden. Specifically, the data shows that, in 2010/11, the USO net cost should have reached 244 € million in order to meet the threshold implicit in Oxera's approach. This implies a USO net cost per capita of 53.3 €.

The threshold implicit in Oxera's approach is strikingly larger than in other EU Member States with compensation mechanisms in place. This is illustrated in Figure 1. The figure shows the values of the USO net cost per capita deemed as unfair by NRAs in like Spain[18], France[19], Italy[20] and Portugal[21] (grey bars). These values are compared against the USO net cost per capita above the USO burden would be considered unfair, as implicit in Oxera's approach (green bar). For reference, it also shows the actual USO net cost per capita defined by ComReg for 2010/11 (blue bar).

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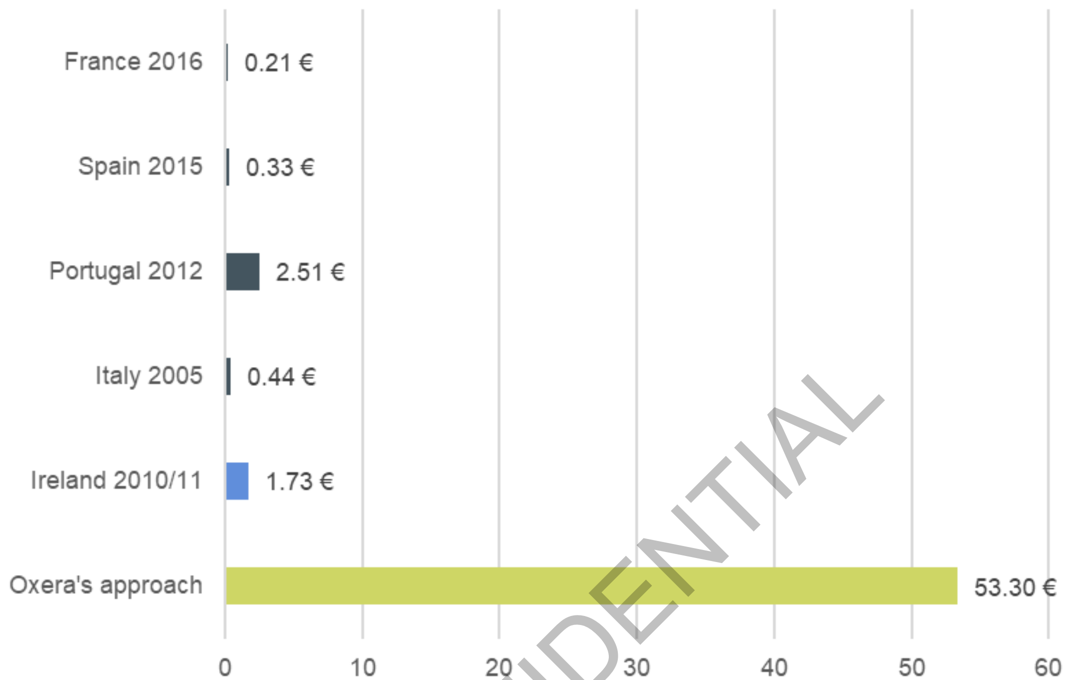
[18] Comisión Nacional de los Mercados y la Competencia (CNMC), Resolución por la que se determinan los operadores obligados a contribuir al fondo nacional del servicio universal de comunicaciones electrónicas por el ejercicio 2015 SU/DTSA/001/18/FNSU 2015, 12 December 2018.

[19] ART, Décision no 2018-0401 du 24 avril 2018 fixant l'évaluation définitive du coût net du service universel et les contributions des opérateurs pour l'année 2016, 24 April 2018.

[20] Agcom, Delibera N. 139/12/CIR servizio universale: applicabilità del meccanismo di ripartizione e valutazione del costo netto per l'anno 2005, 13 December 2012.

[21] Anacom, Decision on the identification of bodies required to contribute to the compensation fund of the electronic communications universal service and on the establishment of the amount of contributions concerning CLSU to be compensated for 2012-2013 (CLSU approved in 2015) and for 2015 (subsequently to the USP tender designation), 26 January 2017.

Figure 1: Comparison of USO net cost per capita for Ireland and other EU Member States with compensation mechanisms in place versus Oxera's approach



Source: Own calculations based on data on the USO net cost obtained from the decisions of national regulators and population data from Eurostat. See Annex A.1for the details.

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The data shows that, in Italy, in 2005, the NRA compensated the Telecom Italia for the unfair burden represented by the USO net cost per capita of only 0.44 €. Similarly, in Portugal, in 2012 the NRA compensated CLSU for the unfair burden represented by the USO net cost per capita of 2.51 €. Even lower values per capita were deemed unfair in Spain in 2015 (0.33 €) and France in 2016 (0.21 €). These values are strikingly larger than the "fairness threshold" that is implicit in Oxera's approach, which amounts to 53.3 €.

The evidence provided above strongly suggests that Oxera's approach is overly restrictive, making it highly unlikely for any net cost to be deemed an unfair burden.

4.3 Assessment of Oxera's application of Decision 41

Oxera concludes that the USO net cost did not materially impact eir's ability to compete on equal terms with competitors, as set out in Decision 41, solely relying on an analysis of the financial position of eir. According to Oxera, financial data would indicate that, despite the USO, eir could improve its financial situation and increase its capital expenditure over the USO application period.

Oxera acknowledges that eir faced financial challenges in 2010/11 and, more generally, during the USO designation period. Particularly, Oxera highlights eir's high indebtedness and reduced ability to invest, service debts, or distribute dividends.

However, in Oxera's view, this would not prove that the USO net cost materially impacted eir's ability to compete on equal terms with competitors, because: (i) there is not a causal link between such financial challenges and the USO; (ii) eir was able to improve its operational performance over time in spite of the USO

Based on the above, Oxera concludes that the conditions set out in Decision 41 of D04/11, which requires to establish if the USO net cost materially impacts eir's ability to compete on equal terms with competitors going forward, would not be met.

In our view, the approach followed by Oxera is unsuitable for addressing Decision 41. We base our view on the following reasons.

Firstly, Oxera bases its view solely on an analysis of the financial position of eir. As discussed in section 4.2.1, we consider that the overreliance on accounting financial indicators is subject to substantial shortcomings and could lead to erroneous conclusions. Additionally, Oxera's analytical framework seems unsuitable to determine whether the USO affected the ability of eir to compete effectively and on equal terms.

In our view, <u>a more suitable approach would be to assess whether the competitive position of eir was substantially impacted by the USO; i.e., if the USO resulted in competitive distortions</u> that could have limited the ability of eir to compete effectively. As discussed in section 4.1, competitive distortions are likely to arise when the USP's competitors engage in cream-skimming strategies. Indeed, the USO requirements, combined with the uniform price mandate, can limit the ability of the USP to constrain the competitive pressure it faces from rivals if they target selectively certain (lower-cost and more profitable) market segments.

Such an approach can be implemented by comparing the competitive pressure faced by eir in lower-cost and more profitable market segments, on the one side, and in higher-cost and less profitable segments, on the other side. This can be done, for example, based on a dynamic analysis by segment/area of simple and straightforward indicators such as those set out in criteria 5, 6 and 7 of Decision 42.

Secondly, Oxera asserts that eir's financial distress, particularly its substantial indebtedness, should not be considered in the assessment of an unfair burden, arguing that these challenges were unrelated to the USO. Whilst we acknowledge that eir's indebtedness may not be directly linked to the USO net cost, we note that <u>it is very likely that the most immediate consequence of eir's high indebtedness, i.e., the financial burden of having to repay debt through interest payments, did impact eir's overall capacity to manage additional financial burdens</u>. In a context where financial analysis plays such an important role, as is the case in Oxera's assessment, it remains unclear why one would not consider how the substantial financing costs that eir was incurring during the USO application period (especially starting from 2012) may have affected its ability to bear the USO net cost vis-à-vis its competitors.

This holds especially true considering that financing costs, including interest payments, are not directly considered in Oxera's analysis of eir's profitability. This omission stems from the fact that: (i) the EBIT, the earnings metric employed by Oxera for the calculation of ROCE (put

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differently, the numerator of ROCE), deduct operating costs but not financing costs. Therefore, it does not consider the impact on profitability of the interest expenses required for debt repayment; (ii) as discussed in sectionc4.2.2.2, the regulated WACC used by Oxera does not consider the actual cost of debt for eir, relying instead on a theoretical market measure.

In our view, assessing the influence of eir's indebtedness on its financial capacity to handle the USO burden would better align with a literal interpretation of the CJEU judgment, which at paragraph 42 holds that a burden is excessive *'in view of the undertaking's ability to bear it, account being taken of all the undertakings' own characteristics, in particular the quality of its equipment, <u>its economic and financial situation</u>, and its market share.*" [Emphasis added.]

Thirdly, Oxera's approach deems any USO net cost to be fair if this does not prevent from finding financial resources to repay its debt and broadly maintain its capital expenditure (CapEx) over time. This appears unreasonable, for two reasons: first, as discussed in section 4.2.2.4, in this way the fairness threshold is set at an overly high and unreasonable level; second, it is methodologically incorrect to evaluate these factors in isolation, and not against an appropriate counterfactual. In our view, the appropriate counterfactual is the one where the USO burden is not solely borne by eir, but shared among eir and its competitors.

In section 4.3.1 below, we discuss in more detail the flaws and limitations of Oxera's analysis of the evolution of eir's CapEx.

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4.3.1 Oxera's analysis of CapEx is ill-suited to support its conclusions

According to Oxera, eir's increasing CapEx between 2009/10 and 2021/22 would show that the USO net cost did not prevent eir from undertaking the necessary investments and, thus, compete on equal terms with competitors.

In our view, this analysis is fundamentally ill-suited for assessing whether eir had the ability to compete on equal terms with competitors. This is for the following reasons.

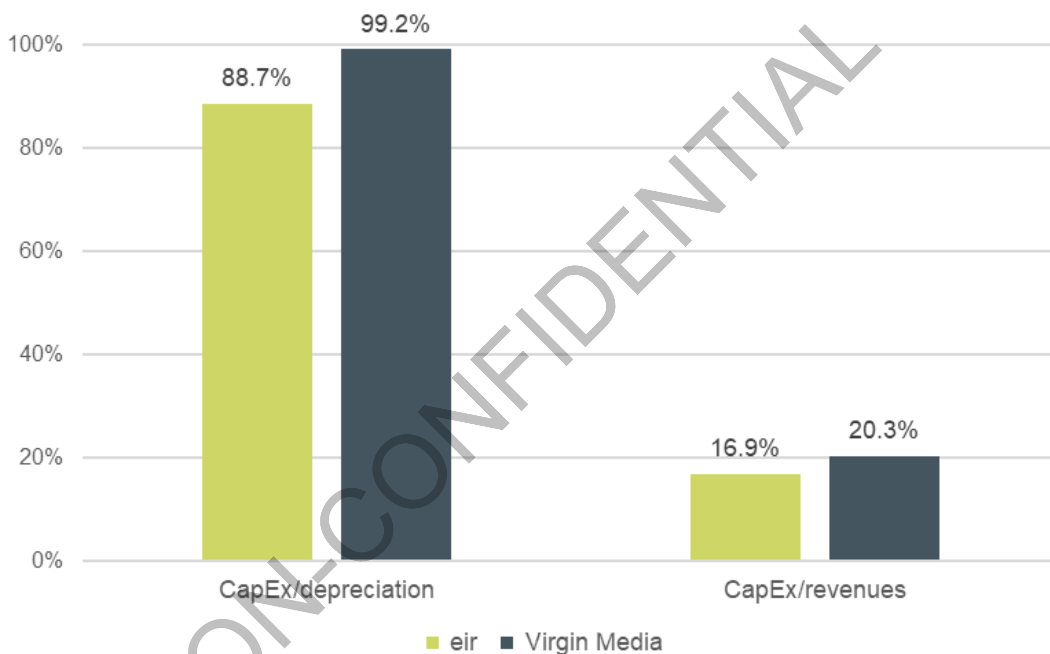
First, the mere fact that eir invested in CapEx during the USO designation period does not conclusively prove, as suggested by Oxera, that the USO did not diminish eir's ability to compete on equal terms. Beyond the practical challenges of interpreting in isolation a financial indicator open to multiple interpretations, an assessment of eir's investment policy in the given context would necessitate a prior evaluation of what eir's investment level would have been in the counterfactual scenario.

In light of the challenges which involves the quantification of eir's theoretical investment level in the counterfactual scenario, determining whether the USO limited eir's ability to attract the capital needed to enhance its network infrastructure and compete effectively should rely on the competitive assessment. Specifically, such assessment should evaluate whether cream-skimming strategies from eir's rivals introduced significant competitive distortions, thereby limiting eir's ability and incentive to invest.

Second, Oxera's analysis does not provide conclusive evidence supporting the assertion that the CapEx levels of eir were not diminished by the impact of the USO. This is because the

evolution of CapEx is evaluated by Oxera in isolation; that is, it is not compared against any internal or external benchmark. In this regard, Figure 2 below illustrates eir's fixed-line CapEx in relation to depreciation and revenues from 2009/10 to 2014/15. The depicted ratios are then compared to those of Virgin Media, eir's primary competitor. The data shows that eir's CapEx-to-Depreciation ratio was 88.7% over the period considered: that is, 11.3% p.p. lower than 100%, suggesting that eir the company did not invest enough to cover the depreciation of its existing assets. This might indicate that eir was underinvesting in maintaining or replacing its current assets. Notably, the data also shows that eir's CapEx was lower than that of Virgin Media, both in relation to depreciation and as a proportion of revenues.

Figure 2: Comparison between eir's and Virgin Media's fixed-line CapEx between 2009/10 and 2014/15



Source: RBB analysis based on eir's and Virgin Media's financial statements.

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The evidence presented, particularly the comparative analysis of eir's CapEx in relation to depreciation and revenues against Virgin Media, significantly undermines Oxera's assertion that the USO did not adversely affect eir's investment capabilities. The data not only suggests that eir was potentially underinvesting in maintaining or replacing its assets, as indicated by the CapEx-to-Depreciation ratio, but also shows that eir's investment levels were consistently lower than those of its primary competitor. This stark contrast raises serious questions about the validity of Oxera's conclusion and indicates that the USO likely imposed considerable constraints on eir's ability to invest, thereby impacting its competitive position in the market.

4.4 Assessment of Oxera's application of Decision 42

Oxera acknowledges that eir was facing an increasing competitive pressure in 2010/11, which resulted in a decrease of eir's market share.

Specifically, Oxera notes that "*the 2010/11 period saw the continued emergence of cable player UPC as a competitive presence across a number of urban areas, while the activity of local-loop unbundling (LLU) operators, notably BT, raised LLU volumes. Relatively densely populated areas also saw the emergence of more infrastructure-intensive competition, with players such as UPC, BT and Magnet becoming more reliant on self-provided infrastructure.*" It also notes that the "*fixed-line market experienced continued convergence of services, with a number of operators focusing on bundled offers, such as fixed voice and broadband services as well as television, voice and broadband.*"

However, Oxera claims that this did not affect eir's ability to cross-subsidise the cost of the USO by using profits earned in its fixed-line business, since: (i) eir was well-positioned to cross-subsidise the USO provision by using profits earned in its fixed-line; (ii) eir was able to maintain a steady ARPU between 2010 and 2011; (iii) eir remained the operator with the largest market share in 2010/11, both in terms of revenue and number of subscribers.

In our perspective, Oxera's assessment is incomplete and ill-suited to support the conclusion that eir was well-positioned to internalise the net cost of USO through cross-subsidisation. This is for the following reasons.

As a general point, we note that Oxera's assessment is limited to a reduced number of indicators, over a very limited timeframe. As discussed earlier in the context of our assessment of eir's financial position, a proper assessment of the fairness of the USO burden requires a dynamic analysis over a longer timeframe. This is crucial because, in a scenario where the USO generates competitive distortions, the full impact of these distortions is likely to unfold gradually over time. Structural changes in competitive conditions are unlikely to be properly captured on the basis of a static picture of one or two years.

Additionally, whilst generically recognising that eir was facing increased competition in densely populated areas, Oxera fails to analyse properly the degree and nature of competition in the different segments of the market, and how this may have interacted with the USO mandate. As explained in section 4.1, this is the relevant framework to determine whether the USO resulted in competitive distortions that may have undermined eir's ability to internalise the universal service cost. As we will discuss in more detail in section 6, an assessment under such a framework could have led to different conclusions.

Notwithstanding the above drawbacks, in the remainder of this section we analyse whether the arguments presented by Oxera are suitable for sustaining Oxera's conclusions that the increasing competition did not affect eir's ability to internalise the USO net cost:

Firstly, with regard to Oxera's argument that eir was well-positioned to subsidise the USO net cost because it remained profitable in the fixed-line business, we refer to the arguments presented in section 4.2.1. As noted above, crucially, eir's ability to cross-subsidise the USO net cost can only be assessed within a framework that involves a dynamic analysis of eir's competitive and financial position on a segment/area basis. Additionally, accounting returns indicators are subject to various theoretical and practical shortcomings, and must be evaluated with caution.

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Secondly, the broad stability of eir's fixed-line ARPU in 2010/11 does not necessarily exclude the possibility that increased competition was limiting eir's ability to cross-subsidise the USO net cost. On the contrary, it could be indicative of a scenario in which rivals engage in cream-skimming strategies, and eir, unable to match price reductions from rivals for more profitable areas, refrains from doing so not to adversely affect profitability in less profitable areas. In this context, it becomes evident that the interpretation of ARPU is meaningful only within the broader framework of an evaluation of eir's total revenues and profitability.

Specifically, in determining whether the reduction in eir's market share undermined eir's ability to internalise the universal service cost, ComReg should have assessed, on a separate basis, how eir's revenues and profitability evolved over the same period in those (higher-cost and less profitable) parts of the business where eir retains faces limited competition, on the one side, and those (lower-cost and more profitable) parts where eir's share eroded due to competition, on the other side. This is also the approach suggested in the Oxera 2013 report for ComReg cited in section 4.1, which states that:

> *"…it would be important to consider the effect of competition on the USP's financial position and, in turn, its ability to internalise the net cost through cross-subsidisation. This could be done by estimating the USP's loss of customers, through the type of market share analysis set out above [that is, in the most profitable segments of the market], multiplied by the average profit per customer. This would help to isolate the profit loss due to increased competition."*

Thirdly, the mere fact that eir retained the largest market share in the fixed-line market does not provide informative or conclusive insights into its ability to internalise the USO net cost. A static assessment of eir's market share proves an unreliable measure of its market power. To this extent, it would be essential to examine the evolution of eir's share over time and consider potential threats of entry and expansion from competitors. In this regard, a retrospective analysis of the Irish telecom market since 2007 indicates that eir's competitive position exhibited a significant and continuous decline, in contrast with the rapid growth of competitors' market shares. Furthermore, evaluating market shares solely at a broad national level may underestimate the true intensity of competition faced by eir, especially in the most profitable market segments. A comprehensive competitive assessment, therefore, necessitates a review of market shares by segment, with a specific emphasis on the most profitable parts of the business.

Lastly, as discussed in section 6.2, an international review indicates that several NRAs used in their assessments a market share threshold significantly higher than eir's share 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.

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4.5 Conclusion and response to Q1: RBB's views on ComReg's approach

This section provides a response to ComReg's Q1 as set out in the Consultation document. It summarises our previous findings as concerns the revised approach to the unfair burden assessment proposed by ComReg and applied by Oxera. It also outlines our proposed refined approach, which addresses the flaws identified in Oxera's analysis. The approach we propose, in our view, is better suited to determine whether eir suffered a competitive disadvantage as a result of the USO, as set out in Decision 38.

In general terms, 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.

In our view, 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.

With this in mind, below we elaborate further on our views regarding the application of the unfair burden assessment by ComReg in accordance with D04/11.

Market scope. In our 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.

Application of Decision 40. 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 ROCE achieved by eir's rivals in the same relevant

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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.

Application of Decision 41 and 42. 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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5 RBB assessment of the relevant information and data for ComReg's unfair burden assessment

This section responds to Q2 of ComReg's Consultation document. We outline below the relevant data information that ComReg should gather and employ to conduct the unfair burden assessment in accordance with the framework proposed by RBB in the previous section.

As outlined in the previous section, 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 position is needed not only for eir but also for its competitors. Specifically, in our view, 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).

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. 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.

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6 Available evidence suggests USO is likely to have represented an unfair burden on eir in 2010/11

This section presents the results of our analysis based on the evidence available, evaluating the application of the approach we proposed in section 4 to assess eir's financial and competitive position relative to its competitors.

Specifically, section 6.1 examines eir's overall accounting profitability to assess Oxera's claim that the USO did not impact eir's capacity to achieve a fair return. Section 6.2 provides an overview of the competitive landscape of the Irish fixed-line telecom market in 2010/11. Section 6.3 analyses if the market evidence is indicative of eir's rivals engaging in "cream skimming" strategies, undermining eir's ability to internalise the USO net cost. Section 6.4 evaluates whether eir's competitors are in a significantly worse financial or competitive position than eir to bear the USO cost. Finally, section concludes and provides a response to Q3 of ComReg's Consultation document.

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6.1 Evidence is not suggestive of eir earning supra-competitive profits

As outlined in section 4.2.1, using accounting indicators is subject to theoretical and practical limitations and warrants cautious application. Hence, eir's accounting profitability should be evaluated only within the broader context of an assessment of its competitive position.

Despite this, we have examined whether it can actually be concluded, as stated in Oxera's report, that the available financial evidence suggests that the USO did not impede eir from obtaining supra-competitive profits.

Our analysis reveals, firstly, that the assessment of eir's profitability yields significantly different results depending on the market scope considered. Table 3 below illustrates eir's ROCE calculations across different scopes: the USO business, fixed-line business and group level. This is compared against a WACC range. Reiterating our view that WACC is not a suitable benchmark for the profit level in a competitive market, we have adjusted the regulated WACC used by Oxera in its assessment for the purposes of the analysis below. This adjustment aims to better reflect the financial conditions in Ireland during each designation year. Specifically, we have updated Oxera's calculation of the cost of debt by using an estimate of the risk-free rate specific to each application year, in contrast to Oxera's use of 2007 as a benchmark. We approximate the risk-free rate using the average yield of the 10-year Irish sovereign debt.

Table 3: Comparison of eir's ROCE against WACC under different market scopes

	2010/11	2011/12	2012/13	2013/14	2014/15
USO business ROCE	[conf.]	[conf.]	[conf.]	[conf.]	[conf.]
Fixed-line ROCE	[conf.]	[conf.]	[conf.]	[conf.]	[conf.]
Group ROCE	[conf.]	[conf.]	[conf.]	[conf.]	[conf.]

	2010/11	2011/12	2012/13	2013/14	2014/15
WACC range	[conf.]	[conf.]	[conf.]	[conf.]	[conf.]

Source: *ROCE figures are sourced from on eir's historical cost regulatory separated accounts. WACC figures are derived by updating the 2008 regulated WACC, considering an estimate of the risk-free rate specific to each application year.*
Note: *(I) Based on the methodology followed by Oxera in previous assessments, we assume that the USO business would include wholesale plus the PSTN retail business. (II) For calculating the mid-point WACC, we consider the average of the monthly yields of the 10-year Irish sovereign debt. As an illustration, for the 2010/11 period, we utilized a risk-free rate of 8.27%, calculated as the simple average from July 2010 to June 2011. The risk-free rate for determining the low- and high-point WACC is estimated by adding/subtracting 5 bps to the risk-free rate defined above, respectively.*

The data reveals that eir's ROCE within the USO business is significantly lower than the same metric calculated within the whole fixed-line business, which is the scope employed by Oxera for its assessment. Notably, during the period considered, the ROCE within the USO business falls within the WACC range in two instances, and very close to its upper limit in the other instances. As discussed in section 4.1, there are compelling economic reasons to argue that the USO business is the appropriate market scope for the unfair burden assessment, as opposed to the fixed-line business employed by Oxera. Consequently, Oxera's conclusions that eir earned supra-competitive profits over the USO designation period are undermined.

The evidence provided in Table 3 also highlights that, <u>within the fixed-line business scope employed by Oxera, eir's ROCE has experienced a significant decline over time</u>. Specifically, eir's fixed-line ROCE decreased from [conf.] in 2010/11 to [conf.] in 2014/15, marking a substantial [conf.] reduction on aggregate. This observed decline raises significant doubts about Oxera's claim that the USO net cost did not impact eir's ability to achieve a rate of return above its cost of capital. Conversely, even according to Oxera's methodology, it aligns more closely with a scenario in which the USO did cause a competitive disadvantage to eir and/or substantially diminished eir's capacity to bear the USO net cost over time.

As discussed in section 4.2.2.2, WACC is not an appropriate competitive benchmark of a fair return. As such, ComReg should not guide its decision on the comparison between ROCE and WACC and, in any event, when evaluating eir's ability to earn a fair rate of return, it should consider alternative benchmarks in addition to WACC. A meaningful alternative involves considering the returns achieved by eir's rivals. To this extent, Table 4 below shows the ROCEs calculated for some of eir's main competitors, as compared to Oxera's ROCE group level estimates for eir. Whilst a more meaningful comparison should compare the ROCEs referred to the fixed-line services falling under the USO, the data shows that the ROCE obtained Virgin and Vodafone, eir's two main rivals, have significantly exceeded eir's ROCE In several years over the period considered.[22] This casts doubt on ComReg's and Oxera's conclusion that the USO did not affect eir's ability to obtain a fair return on its capital employed.

Table 4: Comparison of eir's and rivals' ROCE.

	2010/11	2011/12	2012/13	2013/14	2014/15
Vodafone	24%	22%	19%	16%	11%
BT	n/a	n/a	n/a	12%	14%

[22] The simple average of the yearly ROCEs calculated for Virgin and Vodafone over the period 2010/11-2014/15 is, respectively, 19% and 18%, as compared to a simple average for the same period of around 14% calculated from the yearly ROCE estimates provided by Oxera for the eir Group.

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	2010/11	2011/12	2012/13	2013/14	2014/15
Virgin	11%	15%	23%	25%	21%
Pure Telecom	n/a	n/a	n/a	24%	18%
Three	n/a	n/a	n/a	n/a	3%
Eir (group-level)	13.0%	19.1%	14.2%	12.1%	12.3%

Source: *The ROCE figures for eir's rivals are derived from their financial statements. eir's group-level ROCE is based on eir's historical cost regulatory separated accounts.*

Note: *The financial statements of Three, Virgin and Pure Telecom provide profits and loss account and balance sheet for year ending 31 December, while Vodafone's and BT's provide financial information for year ending 31 March. See Annex A.2 for details on calculations.*

In conclusion, the evidence presented in this section fails to support Oxera's claim that eir earned supra-competitive profits during the USO designation period. Conversely, depending on the scope considered, it suggests that it cannot be asserted that eir achieved a return consistently above its cost of capital. Furthermore, the data highlights a reduction in eir's operating profit during the USO designation period. Finally, the ROCE earned by eir is in many instances below that earned by its main competitors. In summary, when adopting a more dynamic perspective on eir's financial position, even according to Oxera's own methodology, the possibility that the USO net cost impacted eir's profitability cannot be disregarded.

In the next sections, we analyse eir's competitive position, aiming at assessing whether and to what extent this may have been affected only within the broader context of an assessment of its competitive position.

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6.2 Market situation is indicative of effective and increasing competition

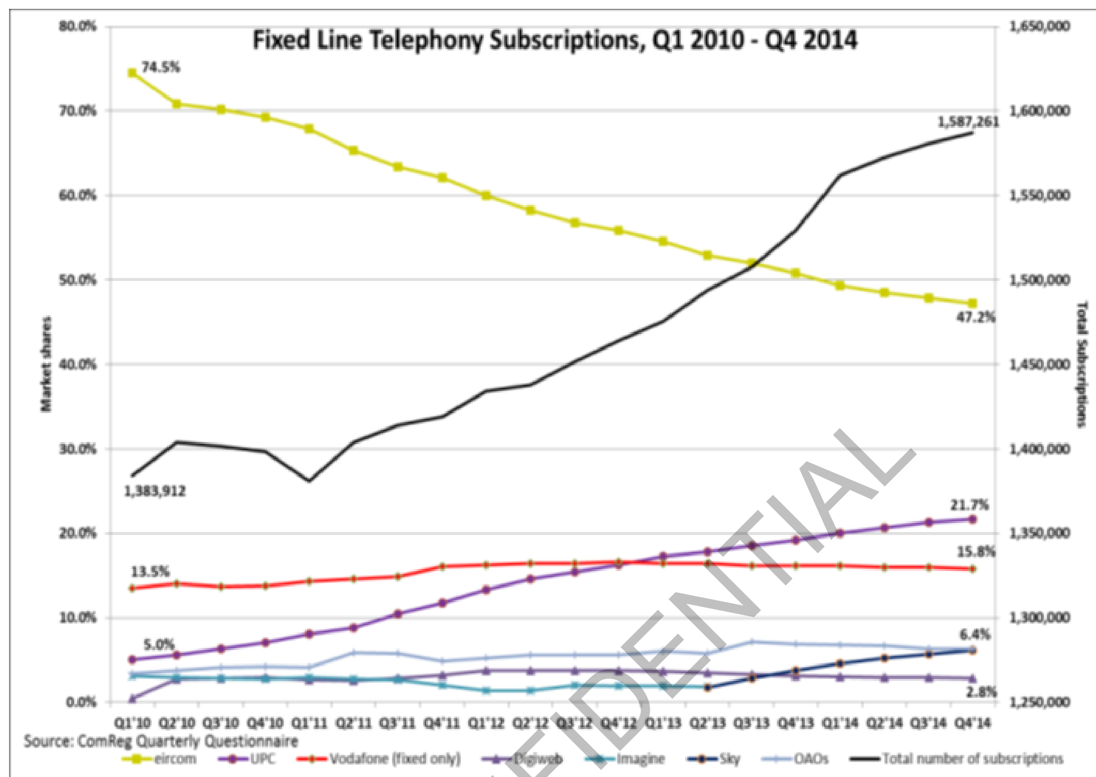
The competitive landscape in 2010/11 had changed significantly compared to the early years of liberalisation, when eir held a position of quasi-monopoly and, arguably, was in a better position than rivals to bear the USO burden.

As also noted by Oxera in its 2013 report, between 2007 and 2011 eir's fixed-line market share significantly dropped (14 percentage points). The drop was especially pronounced over the year 2010/11, when eir's share reduced by 10.6% percentage points. This was the result of the entry of players like Virgin (formerly UPC), who was not in the market by the end of 2008 and achieved a market share of 7% in 2011, as well as the growth of other operators, such as Vodafone. In this last regard, Oxera also notes that the number of rivals with a market share in excess of 2% increases from 3 to 6 in that same period. [23]

Furthermore, when adopting a broader vision, the evidence reveals that eir's market share loss not only continued, but accelerated from 2010/11 onwards. Figure 3 below, which has been extracted from ComReg's 2015 Market Review, shows the evolution of the market shares of the main Irish operators, calculated over the total number of fixed telephony subscriptions, between the first quarter of 2010 and the fourth quarter of 2014.

[23] See Oxera, "Does the universal service obligation represent an unfair burden for eir?" (2013), page 21.

Figure 3: Fixed line telephony subscriptions, Q1 2010 to Q4 2014



Source: ComReg D05/15, Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, 24 July 2015, p. 223.

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The market share data reveals a substantial decline in eir's market share by nearly 30 percentage points the period 2010-2014, from 74.5% to 47.2%. In parallel, Virgin (formerly UPC) experienced a significant surge, elevating its share by over 15 percentage points from 5.0% to 21.7%. Other competitors, including Vodafone (15.8% share by the end of 2014) and Sky (6.4%), also succeeded in augmenting their market shares. This data strongly indicates that eir faced increased and effective competition in 2010/11.

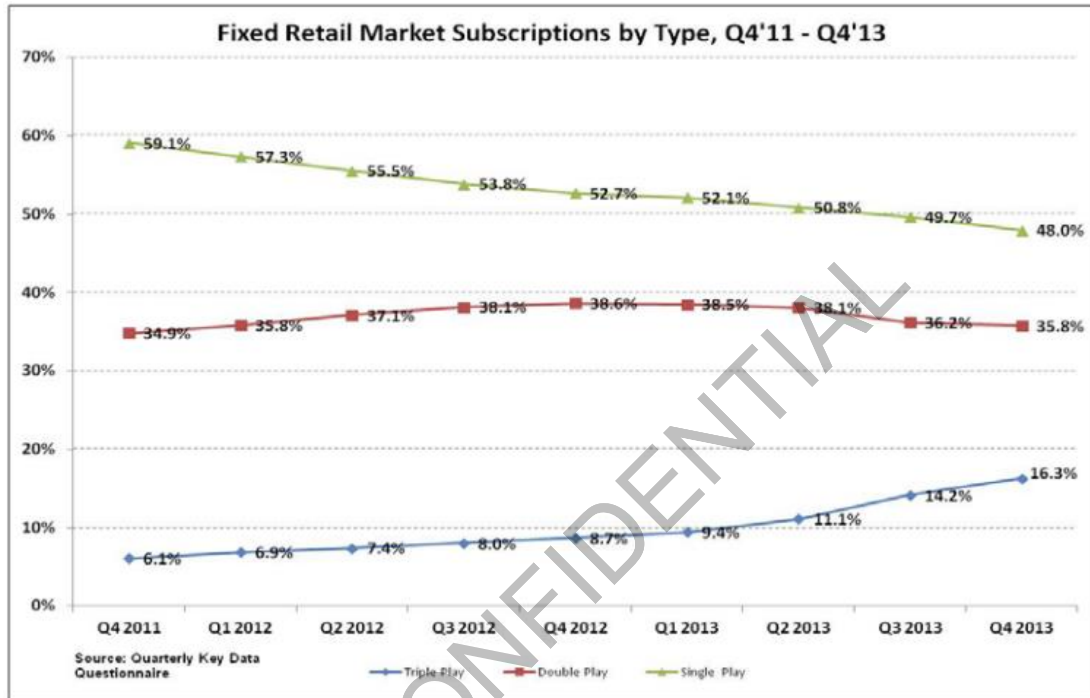
In this regard, it should be noted that a review of the international experience review shows that regulators in other EU Member States found that the USO net cost represented an unfair burden and implemented a compensation mechanism, even when the USP's market share in their respective countries was 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%.[24]

The Irish market also experienced a surge in the adoption of bundled offers, combining fixed services (telephony and broadband) and mobile/pay-TV services. The development of these bundled offers contributed to the intensification of competition. Notably, any competitive advantages that eir might have had in providing the fixed part of the bundle were potentially counteracted by the advantages that competitors like Vodafone or Sky enjoyed in providing the mobile and pay-TV part of the bundle, respectively.

[24] Portugal Telecom's market share in 2008. ANACOM, Decision on the Definition of Unfair Burden.

Figure 4 below, extracted from ComReg's 2014 Market Review, illustrates the evolution of the proportion of fixed retail market subscriptions by type between the fourth quarter of 2011 and the same period of 2013. The chart specifically distinguishes unbundled single-play (1P) offers from bundled double-play (2P) and triple play (3P) offers.

Figure 4: Fixed retail market subscription by type, Q1 2011 to Q4 2013



Source: ComReg's Decision D12/14, Op. Cit., p. 254.

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The figure indicates that, at the end of 2011, 2P and 3P offers already represented a significant portion of the market, 40.9%. Notably, it also highlights a further decrease of over 10 p.p. in unbundled 1P offers during the subsequent two years, dropping from 59.1% to 48.0%. At the same time, the proportion of bundled 3P offers witnessed a notable increase, rising by more than 10 p.p., from 6.1% to 16.3%. Although bundled 2P offers grew in 2012, they declines in 2013, resulting in overall stability.

In conclusion, the evidence presented in this section shows that the competitive dynamics within the Irish fixed-line telecommunications market in 2010/11 underwent structural changes compared to the initial years of liberalization. As evidenced by the sharp reduction in its market share, eir was facing increasing competitive pressure. This was driven by the entry and expansion of new market players, alongside the growing prevalence of bundled offerings. Consequently, eir's ability to internalise the USO cost without suffering a competitive disadvantage, was notably diminished in 2010/11 compared to preceding years.

In the following section, we analyse how these structural changes in competitive landscape interacted with the USO mandate. Specifically, we evaluate whether the USO is likely to have caused a competitive disadvantage to eir, thereby diminishing its ability to respond effectively to the growing competitive pressures posed by rivals.

6.3 Evidence is indicative of eir's rivals engaging in "cream skimming" that undermines eir's ability to internalise the USO net cost

As discussed in section 4.1, assessing competition solely at the national level is insufficient for determining whether the USO caused a substantial competitive disadvantage for eir. Indeed, it is crucial to conduct a more detailed competitive assessment that differentiates between lower-cost, more profitable areas and higher-cost, less profitable areas. The objective of this granular evaluation is twofold: (i) determine whether eir's rivals implemented "cream-skimming" strategies that resulted in competitive distortions; (ii) determine whether cream-skimming significantly undermined eir's capacity to cross-subsidise the USO cost.

The findings of our assessment are presented below.

The evidence available shows, first, that entry and expansion of eir's rivals took place mainly in urban areas. Figure 5 below shows eir's and its rivals' market shares for fixed telephony in Dublin, and urban (including Dublin) and rural areas in 2013 and 2015. Data for previous years is not available. The data is sourced from the ICT Survey for the respective years. Whilst these figures may not precisely reflect the operators' actual shares, as they are based on survey evidence, they nonetheless provide a reliable indication of the different degree of competition existing in urban (lower cost, more profitable) versus rural (higher cost, less profitable) areas.

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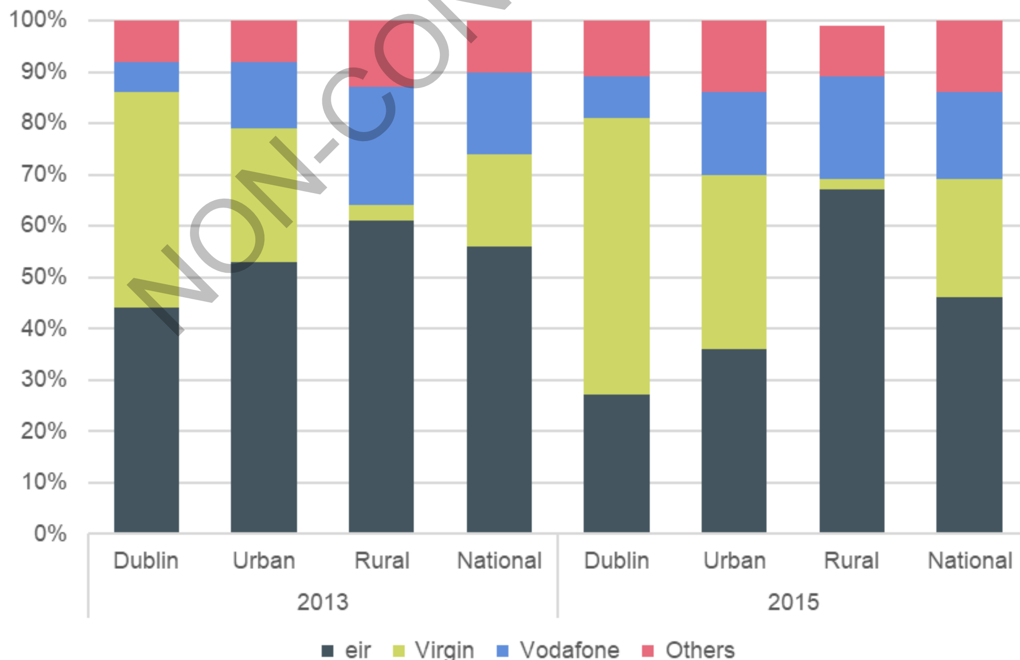
Figure 5: Fixed Voice Access (FVA) market shares by location



Source: ComReg D12/14 (2013) and 73 ComReg 15/123a (2015).

The data shows that the market shares of eir's rivals at a national level significantly understate the competitive constraint they pose to eir in urban, lower cost and more profitable areas. In particular, according to ComReg, Virgin's share of fixed voice access (FVA) subscriptions was

substantial in urban areas, reaching 26% in 2013 and increasing to 34% in 2015. This stands in stark contrast to Virgin's almost negligible market share in rural areas: 3% in 2013 and 2% in 2015. Furthermore, in Dublin, the largest city in Ireland, Virgin's share was as high as 42% in 2013, just two percentage points below eir's share, 44%. In 2015, Virgin's share in Dublin increased to 54%, whilst eir's share significantly drop to 27%.

As a result, eir's competitive position was considerably and more significantly affected in urban areas targeted by Virgin. Table 5 below shows the aggregate fall in eir's fixed-line revenues and total lines over the period between 2010/11 and 2014/15. The analysis differentiates between 3 areas: (i) urban areas served by Virgin;[25] (ii) other urban areas where Virgin is not present; (iii) rural areas. The areas served by Virgin account for the majority of the market in terms of lines, and represent the most profitable for eir, as its return per line during the period considered was between 28.4% and 32.4% higher in these areas than in the rest of the country. The figures presented refer to retail services only, and have been obtained from the Area Models submitted to ComReg as part of eir's USO funding application for the corresponding years.

Table 5: Aggregate loss in total lines and revenues between 2010/11 and 2014/15, fixed-line

	Total lines	Total revenues
Urban areas served by Virgin	-31.5%	-42.7%
Other urban areas	-22.8%	-35.2%
Rural areas	-25.8%	-40.9%

Source: RBB analysis based on Area Models for 2010/11, 2011/12, 2011/13, 2013/14 and 2014/15. Relevant data for the analysis are obtained from the following sheets: "C_Net_Costs" and "O_Analysis".

The data shows that eir's revenues and number of lines decreased to a larger extent in urban areas where eir faced competition from Virgin than in other areas. Specifically, in urban areas where Virgin is active, eir's number of lines fell by 31.5%, whilst in other urban and rural areas fell, respectively, by 22.8% and 25.8%. Similarly, eir's revenues fell by 42.7% in urban areas where Virgin is active, whilst in other urban and rural areas fell by, respectively, 35.2% and 40.9%.

As discussed extensively in section 4, cream-skimming by eir's rivals may result in significant competitive distortions if the USO cost burden is borne by a single USP. Based on the available evidence, it appears likely that such distortions occurred to a significant extent during the USO designation period. Indeed, firstly, market share data shown in Figure 5 suggests that the selective entry and expansion of eir's rivals in urban areas was successful. This is particularly evident from the rapid increase of Virgin Media's share within a relatively short period. Additionally, data provided by eir to ComReg in the Area Models indicates that, to withstand increased competition, eir was compelled to reduce its unit margins by lowering prices.[26] This profit erosion increased the number and significance of unprofitable USO

[25] These include the cities of Dublin, Cork, Galway and Limerick.

[26] The data from Area Models indicates a substantial decrease in eir's fixed-line unit revenues per line from 2010/11 to 2014/15, amounting to an average 17.7% decline over the whole Irish territory. Part of this reduction can be attributed to the increased competitive intensity, as evidenced by the fact that, during the same period, eir's unit return per line decreased to a faster pace: 29.9%.

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customers, and resulted in a substantial increase in the USO burden, as illustrated by the significant rise (approximately 70%) in the USO net cost borne by eir between 2010/11 and 2014/15.

We have examined to what extent increased competition in urban areas served by Virgin resulted in a profit loss for eir in these areas. Firstly, we have calculated eir's cumulated line loss in the period from 2011/12 to 2014/15 as the difference between the eir's fixed-lines in each year and eir's fixed-lines in 2010/11. Second, we have multiplied cumulated line losses in each year by the average return per line that eir obtained in each year in the same areas. The implicit assumption is that eir would have obtained the same unit returns from lost customers as it did from retained customers over the period under analysis. This assumption is not necessarily precise, but the objective of this analysis is not to obtain a precise estimate but rather an indication of the order of magnitude of the loss. The results of this analysis are reported in Table 6 below.

Table 6: Profit loss due to increased competition in urban areas served by Virgin and impact on ability to cross-subsidise the USO net cost

	2011/12	2012/13	2013/14	2014/15
Cumulated fixed-line loss, number (A)	[conf.]	[conf.]	[conf.]	[conf.]
Average return per line, € (B)	[conf.]	[conf.]	[conf.]	[conf.]
Profit loss due to competition, € (C = A x B)	[conf.]	[conf.]	[conf.]	[conf.]

Source: RBB analysis based on Area Models for 2010/11, 2011/12, 2011/13, 2013/14 and 2014/15. Relevant data for the analysis are obtained from the following sheets: "C_Net_Costs" and "O_Analysis".

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The data shows that eir's profit loss due to increased competition in urban areas served by Virgin was significant. This is likely to be indicative of a reduced capacity to internalise the USO net cost. Indeed, arguably, it is from lower-cost, more profitable urban areas where eir should be able to derive the financial resources to cross-subsidise the USO cost.

Moreover, given that a substantial portion of this profit loss is likely to have been passed on to eir's competitors, it also suggests that eir's rivals increased their relative ability compared to eir in bearing a portion of the USO cost. This is important because, as noted above, a situation in which the burden of the USO is exclusively assumed by the USP when it generates positive externalities for all operators and the USP is not significantly better positioned than its rivals to bear it, could not be considered fair (from a pure fairness perspective).

The next section provides a more detailed evaluation of the ability and suitability of eir's competitors to share part of the USO net cost, account being taken of the criteria set by the CJEU in the Base case and in the CJEU judgement, and in particular eir's competitive position relative to that of its competitors.

6.4 eir is not significantly better positioned than rivals to bear the USO cost

As shown in section 6.1, from a financial perspective. the evidence available suggests that eir's competitors are not in a worse position compared to eir to bear part of the USO net cost. Indeed, their returns during the period analysed were comparable or even exceeded those obtained by eir (see Table 4).

This section analyses in more detail the characteristics of eir's competitors, and how these affect their competitive position vis a vis eir. Virgin is considered separately from other providers, as it was the sole operator, alongside eir, possessing its own fixed communications network during the period in question.

- **Virgin Media** (formerly UPC) enjoys important competitive advantages that can offset or even overcome eir's own advantages. These include:
  - Own network: Virgin provides video, broadband and fixed-line telephony services through its own fixed communications network. Therefore, it does not depend on the wholesale access services provided by eir. Virgin's network covers the most densely populated areas in Ireland, including the cities of Dublin, Cork, Galway and Limerick, and provides services to both residential and business customers;
  - Cream-skimming: Given the footprint of its network, Virgin is well-positioned to implement cream-skimming strategies, by selectively targeting densely populated and more profitable urban areas. eir cannot replicate such strategy because of the USO and uniform price mandates;
  - Fast broadband: Virgin's network can provide download speeds of 360-500 Mbps, which are significantly higher than those available over eir's traditional DSL network.
- **Other communication providers**: unlike Virgin, the rest of eir's competitors do not have their own fixed communications network. They are, thus, dependent on eir's wholesale access services. However, the potential advantages eir could derive from this are likely compensated or overcome by factors such as:
  - Regulation: the regulatory measures implemented by ComReg are aimed at facilitating access by rivals to eir's network, and thus guaranteeing that competitors are not excluded from the market;
  - The uptake of bundled offers including non-fixed services, where competitors like Sky and Vodafone enjoyed significant advantages over eir in the provision of pay-TV and mobile services, respectively;
  - Cream-skimming strategies targeting densely populated and profitable urban areas, a strategy unattainable by eir because of the USO and uniform price mandate.

Overall, the evidence provided above shows that eir's rivals have competitive advantages that can offset or overcome eir's own advantages. Therefore, they do not appear in a significantly worse competitive position than eir to bear a proportional part of the USO net cost.

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This adds to the argument discussed earlier in section 4.1, according to which the rationale for sharing the USO cost among eir and its competitors appears to be grounded in principles of pure fairness.

6.5 Conclusion and response to Q3: RBB's views on ComReg preliminary view on the existence of an unfair burden

This section provides a response to ComReg's Q3 as set out in the Consultation document. It summarises the findings of our analysis of eir's financial and competitive position based on the approach proposed in section 4. Our conclusions are as follows:

- 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. When adopting a more dynamic perspective, even according to Oxera's own (and, in our view, flawed) methodology, the situation observed seems consistent with a scenario in which the USO net cost affected eir's profitability. Indeed, depending on the scope considered, it cannot be asserted that eir obtained a ROCE consistently above the WACC. Furthermore, the data indicates a substantial reduction in eir's ROCE in the years immediately following 2010/11, which is consistent with a scenario in which the USO net cost adversely affected eir's financial and competitive position. Finally, eir's ROCE seems to be in line or below the ROCE earned by its main competitors. This supports the perspective that eir's returns cannot be considered as supra-competitive.

- The competitive landscape of the Irish fixed-line market in 2010/11 reflects significant structural changes compared to the initial years of liberalization. As evidenced by the sharp reduction in its market share (10.6 p.p. only between 2010 and 2011), eir was facing increasing competitive pressure, driven by the entry and expansion of new market players, alongside the growing prevalence of bundled offerings. Consequently, eir's ability to internalise the USO cost, without suffering a competitive disadvantage, was notably diminished in 2010/11 compared to preceding years.

- Additionally, 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. An analysis of eir's competitive position by geographical area reveals a much more pronounced decline in urban areas, especially those served by Virgin Media. This decline stems from the cream-skimming strategies employed by its competitors, particularly Virgin Media, who concentrated their competitive efforts in lower-cost, more profitable urban areas. These 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. Our analysis indicates that these distortions had a substantial impact on eir's profitability in more profitable urban areas, thereby limiting its ability to cross-subsidise the USO net cost. This may be indicative of the existence of an unfair burden.

- Virgin Media, Vodafone and Sky enjoyed competitive advantages that compensate or even overcome eir's own advantages. This means that eir's competitors were not in a substantially worse financial and competitive position compared to eir to bear part of the USO cost. In this context, the introduction of a compensation mechanism or sharing the

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net cost of the USO among eir and its competitors would seem reasonable from a pure fairness perspective. In particular, considering that the USO provision generates positive externalities benefiting not only the USP, but also all other providers of communication services.

The findings outlined above support the existence of an unfair burden on eir, in contrast to ComReg's and Oxera' preliminary view.

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A Annexes

A.1 USO net cost and population in other EU Member States

Table 7: Comparison of USO net cost per capita for Ireland and other EU Member States with compensation mechanisms in place

Country/year	USO net cost	Population	USO net cost / population
Portugal 2012	26.423.507	10.542.398	2,51
Ireland 2010/11	7.900.000	4.570.881	1,73
Italy 2005	25.585.000	57.874.753	0,44
Spain 2015	15.101.086	46.449.565	0,33
France 2016	13.769.987	66.638.391	0,21

Source: Own calculations based on data on the USO net cost obtained from the decisions of national regulators and population data from Eurostat.

A.2 Details of ROCE calculations for eir's rivals

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Table 8: Virgin (formerly UPC)

euros	2010/11	2011/12	2012/13	2013/14	2014/15
Operating profit (1)	5.100.025	10.458.133	33.172.845	39.374.845	58.641.000
Goodwill depreciation (2)	34.427.510	34.427.510	34.427.513	34.427.512	-
Adjusted EBIT (A=1+2)	39.527.535	44.885.643	67.600.358	73.802.357	58.641.000
Total assets (3)	973.033.160	923.562.481	881.992.967	849.399.110	877.219.000
Goodwill (4)	545.103.487	510.675.974	476.248.462	441.820.950	476.249.000
Adjusted total assets (B=3-4)	427.929.673	412.886.507	405.744.505	407.578.160	400.970.000
Current liabilities (5)	80.209.521	105.619.750	106.491.515	114.558.781	117.439.000
Capital employed (C=B-5)	347.720.152	307.266.757	299.252.990	293.019.379	283.531.000
ROCE (A/C)	11%	15%	23%	25%	21%

Source: Virgin's financial statements.
NOTE: Calculations based on UPC's financial statements from 2010/11 to 2012/14 and on Virgin's financial statements in 2014/15.

Table 9: Vodafone

'000 euros	2010/11	2011/12	2012/13	2013/14	2014/15
Operating profit (1)	106.130	118.531	114.285	102.746	61.093

'000 euros	2010/11	2011/12	2012/13	2013/14	2014/15
Goodwill depreciation (2)	46.737	13.535	8.443	7.797	6.396
Adjusted EBIT (A=1+2)	152.867	132.066	122.728	110.543	67.489
Total assets (3)	1.040.205	1.042.008	1.197.063	1.145.227	1.157.756
Goodwill (4)	41.427	38.849	37.330	29.533	23.401
Adjusted total assets (B=3-4)	998.778	1.003.159	1.159.733	1.115.694	1.134.355
Current liabilities (5)	363.597	413.844	499.160	431.250	493.565
Capital employed (C=B-5)	635.181	589.315	660.573	684.444	640.790
ROCE (A/C)	24%	22%	19%	16%	11%

Source: Vodafone's financial statements.
NOTE: Vodafone's financial statements for years 2010/11-2013/14 include consolidated and company-level balance sheets. Calculations are based on figures from consolidated balance sheet.

Table 10: BT

'000 euros	2013/14	2014/15
Operating profit (1)	28.627	42.166
Goodwill depreciation (2)	-	-
Adjusted EBIT (A=1+2)	28.627	42.166
Total assets (3)	594.166	617.324
Goodwill (4)	-	-
Adjusted total assets (B=3-4)	594.166	617.324
Current liabilities (5)	346.236	319.169
Capital employed (C=B-5)	247.930	298.155
ROCE (A/C)	12%	14%

Source: BT's financial statements.

Table 11: Pure Telecom

'000 euros	2013/14	2014/15
Operating profit (1)	1.437	1.089
Goodwill depreciation (2)	-	-
Adjusted EBIT (A=1+2)	1.437	1.089
Total assets (3)	5.891	6.204
Goodwill (4)	-	-

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‘000 euros	2013/14	2014/15
Adjusted total assets (B=3-4)	5.891	6.204
Current liabilities (5)	-	-
Capital employed (C=B-5)	5.891	6.204
ROCE (A/C)	24%	18%

Source: Pure Telecom’s financial statements.

Table 12: Three

‘000 euros	2014/15
Operating profit (1)	28.004
Goodwill depreciation (2)	-
Adjusted EBIT (A=1+2)	28.004
Total assets (3)	1.822.354
Goodwill (4)	567.932
Adjusted total assets (B=3-4)	1.254.422
Current liabilities (5)	265.696
Capital employed (C=B-5)	988.726
ROCE (A/C)	3%

Source: Three’s financial statements.

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Three's response to the Consultation by ComReg on eir's 2010-2011 Universal Service Funding Application Unfair burden assessment

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7th February 2024

Three.ie

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1 Introduction

Three welcomes the opportunity to comment on ComReg's unfair burden assessment in respect of eir's USO funding application for the period 2010-2011.

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 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.

In broad terms Three supports ComReg's finding that the determined net cost of USO for the period 2010-2011 did not represent an unfair burden on eir.

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2 Responses to Consultation Questions

Consultation Question 1

Q. 1 Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.

Three Response:

Three notes that part of ComReg's assessment involves estimation of the cost of administering any fund that might be established. Three further notes that ComReg's estimation is based on a process which has been consulted on but not "determined" by way of a formal Decision. 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 which 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. In this regard Three believes that ComReg's estimate of the cost of administering a fund is likely to be understated.

It is possible that a revised sharing mechanism would link contributions to market activity by contributors in the period to which the contribution related. If so then 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. In this scenario the cost of administering the fund would be further inflated.

Three is of the view that the primary focus of 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 judgement 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.

Based on this Three supports ComReg's proposed approach to the assessment of eir's situation relative to that of its competitors in the relevant market.

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Consultation Question 2

Q. 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).

Three Response:

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.

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Consultation Question 3

Q. 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

Three Response:

Three agrees 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.

In particular Three agrees with ComReg's assessment of the Oxera report as summarised in Paragraph 5.15 of the consultation document.

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Vodafone Response to Consultation

<u>Eir's 2010-2011 Universal Service Funding Application</u>

Unfair Burden Assessment

Consultation

Reference: ComReg Doc 23/113

Version: Non-Confidential

Date: 7/2/24

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Response to Consultation

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg's) further consultation on Eir's 2010 to 2011 Universal Service Funding Application and the draft determination on the unfair burden assessment.

Vodafone's position in relation to USO funding applications have been expressed as part of many consultations and in court proceedings to which Vodafone are notice parties. We do not propose to go into much further detail other than to say our position in response to this draft determination is consistent with that previously expressed.

SUMMARY OF POSITION

In summary our views

- Vodafone is satisfied with the draft determination that there is no USO unfair burden.
- 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%[1] which is funded to a large extent by wholesale charges.

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We have provided answers to the consultation questions below.

[1] https://www.eir.ie/opencms/export/sites/default/.content/pdf/IR/presentations/2022_2023/eir_Q3-23_results_presentation.pdf

CONSULTATION QUESTIONS

Question 1
Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.

Vodafone is satisfied with the findings that there is no USO unfair burden.

Q. 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).

The passage of time is stark and the information constraints arising are not a surprise given the matters under consideration relate to services provided in 2010 to 2011.

Vodafone has been a participant in this process in the period leading up to ComReg decision D4/11 in May 2011. In the 13 years since publication Vodafone have invested in mobile infrastructure rollout and the delivery of fixed line services to Irish customers.

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 needs to come to a conclusion.

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Q.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.

Vodafone is satisfied with the findings that there is no USO unfair burden. It is very evident that not affected Eir profitability with EBITDA margin at 47%.

Eir remains extremely reliant on wholesale to maintain high profits and, against this backdrop, it seems clear that there is no unfair burden on Eir and that industry should not be required to contribute in the form of any universal service payment.

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 case.

This could be evidenced when homes initially targeted for State Intervention under National Broadband Plan were subsequently removed from the subvention area and Eir made it clear it could rollout FTTH services on a commercial basis to these areas. It is highly probable that customers within that 340K footprint may be

uneconomic however overall Eir has made a commercial call to service these areas. The removal of these homes from the NBP ensure that Eir remains the monopoly access provider in the 340K footprint.

ENDS

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