Oxera unfair burden report 2010/11

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Prepared for Commission for Communications Regulation

4 December 2023

REDACTED VERSION

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1 Introduction

Decision D04/11 of the Commission for Communications Regulation (ComReg) sets out the principles and methodologies for assessing whether the universal service obligation (USO) results in a net cost that represents an unfair burden on the universal service provider (USP).[1] In accordance with European and Irish legislation,[2] in order for the USP to receive compensation for any positive net cost (hereafter referred to as 'net cost'), it is necessary to first determine that there is an unfair burden.

Eircom Limited's (eir) USO during the period under consideration included the provision of:[3]

- 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.

ComReg has asked Oxera to prepare a report assessing whether the obligation on eir to provide a universal service for the period 2010/11 represents an unfair burden. This report was to be conducted taking into account the 2022 CJEU judgment[4] and the 2023 ruling of the High Court.[5]

The CJEU judgment ruled that ComReg, in determining whether the net cost of eir's universal service provision constitutes an unfair burden, is required to take account of the situation of eir relative to that of its competitors in the relevant market:

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[1] ComReg (2011), 'Decision on the Costing of universal service obligations: Principles and Methodologies', Reference No. 11/42, Decision No. D04/11, 31 May.
[2] Regulation 75 of the European Union (Electronic Communications Code) Regulations 2022, S.I. 444 of 2022 ("S.I. 444 of 2022").
[3] ComReg (2011), op. cit., para 3.128 (including footnote 67).
[4] Eircom Limited v. Commission for Communications Regulation, Case C494/21, Judgment of the Court (Fifth Chamber) of 10 November 2022. This is referred to as the 'CJEU judgment'.
[5] The High Court (2023), 'Appeal under regulation 4 of the European Communities (Electronic communications networks and services) (framework) Regulation 2011, Between Eircom Limited and Commission for Communications Regulation', 10 July, No.167 MCA.

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

CJEU judgment, paragraph 54 [emphasis added]

In the judgment, the CJEU noted that the USP remaining profitable does not in itself allow conclusions to be drawn about the USP's ability to compete with the other operators present in the market:

[...] 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 [...]

CJEU judgment, paragraph 49

The net cost determined by ComReg in the Decision D05/19 is €7,503,531 for 2010/11.[6] ComReg has instructed Oxera to use the determined net cost in conducting its unfair burden assessment.

The existence of a positive net cost does not automatically constitute an unfair burden or automatically give rise to the need for USO funding.

The report will assist ComReg in making a determination pursuant to Regulation 75 of the European Union (Electronic Communications Code) Regulations 2022, S.I. 444 of 2022.

The report is structured as follows.

- section 2 sets out the approach to the determination of an unfair burden, taking into account the relevant legal context;

[6] ComReg (2019), 'Assessment of eir's 2010-2011 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011', Reference No. 19/36, Decision No. D05/19, 17 April.

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- section 3 presents the administrative cost assessment, consistent with Decisions 38 (iii) (a) and 39;
- section 4 presents the application of Decisions 40 to 42—a review of eir's financial and competitive position to examine specific characteristics of eir that inform the assessment of whether the net cost of the USO constituted an unfair burden in the application period. This review takes account of eir's situation relative to that of its competitors in the market;
- section 5 concludes the unfair burden assessment;
- appendix A1 sets out our understanding of the sub-products within eir's fixed-line business that could potentially be dissociable from the USO. However, the granularity of information required to explore this further is not available; and
- appendix A2 sets out the data constraints applicable to the unfair burden assessment for 2010/11, and the analysis taken in light of these constraints.

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2 Approach to the determination of an unfair burden

Decision D04/11 must now be read in light of the CJEU judgment. Having considered the CJEU judgment and its impact on D04/11, ComReg has advised Oxera of its view that, in order for Decision D04/11 to be applied in a way that is consistent with the CJEU judgment, Decisions 40 to 42 of D04/11 cannot be applied sequentially. Therefore, when applying Decision D04/11, ComReg has advised Oxera that it must disregard the first ten words of Decision 41 (i.e. the text 'If the positive net cost significantly affects a USP's profitability […]').

This means that, regardless of the impact of a positive net cost on the USP's profitability, Oxera will conduct a competitive distortions assessment, as set out in Decision 41 and 42, and assess whether the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38 (iii) (b).

In applying each of the Decisions 38 to 42 (the aspects of Decision D04/11 that relate to unfair burden assessment), Oxera will conduct an assessment of the characteristics particular to a USP in light of the competitive environment in which that provider operates, and in this way will take account of the USP's situation relative to that of its competitors in the market. By carrying out its assessment in this way, Oxera will ensure that the 'comparative component' required by the CJEU is included.

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3 Administrative cost assessment: application of Decisions 38 (iii) (a) and 39

Decision 38 (iii) (a) and Decision 39 of D04/11 require an assessment of whether the positive net cost in eir's application is material relative to the administrative costs of establishing and operating a sharing mechanism, taking into account whether these net costs are disproportionate to any net transfers to the USP. In particular:

Decision 38: For there to be an unfair burden, three cumulative conditions must be met:

i. There must be a verifiable and verified direct net cost

ii. The benefits of the USO must not outweigh the net cost (i.e. there is a positive net cost)

iii. This positive net cost is (a) material compared to administrative costs of a sharing mechanism, and (b) causes a significant competitive disadvantage for a USP.

Decision 39: If the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and taking into account whether these costs are disproportionate to any net transfers to a USP.

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As set out in section 1, the determined net cost of €7.5m (€7,503,531) for 2010/11 is the relevant amount considered in this report.

3.1 Administrative costs of establishing and operating a sharing mechanism

As advised by ComReg, if the regulator, on the basis of the net cost calculation, finds that the net cost of meeting a USO represents an unfair burden, Regulation 76 of S.I. 444 of 2022 provides that the regulator will:

unless the Min[i]ster intends to introduce a mechanism to compensate the undertaking for the determined net costs under transparent conditions from public funds, establish a sharing mechanism administered by it or by a body independent from the designated undertakings, which body shall be under the supervision of the Regulator

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ComReg has instructed us that it estimates that the current administrative cost of establishing and operating a sharing mechanism is €200,000.

3.2 The proportionality of the cost of establishing and operating a sharing mechanism relative to the transfer to a USP

As noted earlier, Decision 39 also provides that the cost of establishing and operating a sharing mechanism is to be compared with the potential net transfer to the USP, were a sharing mechanism to be established.

Using eir's revenue market share of [✂ ███ ✂] in 2010/11[7] as an approximation of its eligible turnover, it is apparent that there is a significant differential between a likely net transfer estimate to the USP, and the administrative costs estimate for establishing and operating a sharing mechanism.

3.3 Conclusion on the administrative cost assessment

In relation to Decision 38 (iii) (a), we conclude that the net cost of the USO of €7.5m for 2010/11 is material compared to the estimated administrative cost of a sharing mechanism of €200,000.

In relation to Decision 39, we conclude that the cost of establishing and operating a sharing mechanism would not be disproportionate to the net transfers to the USP. As a result, it would be justified to establish a sharing mechanism if it were found that the provision of the USO in 2010/11 represented an unfair burden on the USP.

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[7] As advised by ComReg.

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4 An assessment of eir's financial and competitive position

D04/11 provides for an assessment of whether the net cost of the USO significantly affects the USP's profitability and/or ability to earn a fair rate of return on its capital employed, and whether the net costs have a material impact on the USP's ability to compete.

This section applies the principles of D04/11—in particular, Decisions 40 to 42—to assess eir's financial and competitive position in the relevant period and market, to establish whether there is an unfair burden on the USP:

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.

Decision 41 (amended): ComReg will assess whether or 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.

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The assessment of eir's financial and competitive position is set out as follows:

- section 4.1 sets out the scope of the market in which the assessment of an unfair burden should be undertaken;
- section 4.2 applies Decision 40, to assess eir's financial position with respect to its profitability. The analysis of eir's profitability relative to its competitors is captured in section 4.4, under the application of Decision 42;
- section 4.3 applies Decision 41 (amended), to assess whether the net cost has a material impact on eir's ability to compete with competitors going forward; and
- section 4.4 applies the criteria of Decision 42 to determine whether the net cost burden is unfair.

In undertaking the analysis for 2010/11, we have considered information available up until 2011. This is consistent with Decision 21 of D04/11 which provides that 'USO funding applications shall be based on annual information which coincides with the USP's financial year'.

In the circumstances, and in particular given the long time between the year being assessed and when the assessment is taking place, we have been instructed by ComReg to check the result of Decision 41 specifically, with the result of the same analysis using the actual data available to date (up until the latest full financial year of 2021/22).

Appendix A2 sets out the analysis that we have considered for each of the Decisions. In some instances, data availability has limited the feasibility of analysis. In such instances, we have set out the type of analysis we would have considered, were the information available, and what analysis we have been able to carry out instead.

4.1 The scope of the market

In its assessment of an unfair burden, ComReg is required by the CJEU judgment to take account of the situation of the USP relative to that of its competitors in the relevant market.[8] It is, therefore, first necessary to establish the *relevant market* in which the assessment of an unfair burden should be undertaken.

We were instructed by ComReg that it was not necessary to undertake a full market definition and assessment, as is applied in the context of market reviews and competition law. In this section, therefore, we consider potential options for assessing the scope of the market relevant for the analysis, before reaching a conclusion on what we consider to be the appropriate scope of the market. This then

[8] *Eircom Limited v. Commission for Communications Regulation* (2022), op cit., para 54.

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forms the basis for our assessment of eir's profitability and competitive position relative to its competitors, with respect to the application of Decisions 40 to 42.

4.1.1 Options for the scope of the market

The CJEU judgment refers to 'an assessment of the characteristics particular to a universal service provider'.[9] As such, it is necessary to identify a relevant scope of eir's business to examine whether the net cost of the USO has a significant impact on its financial and competitive position. We have identified three potential options for the scope of the market for consideration.

- **Option 1: the core 'USO business'**. This would include the regulated wholesale components of eir's business that operate the USO network, and the related USO retail business (i.e. the Wholesale Regulated and Retail PSTN & ISDN Access business).[10] This would exclude unregulated wholesale and retail activities, and Meteor (the mobile services business) and other subsidiaries. This is a notional definition as, unlike options 2 and 3 presented below, there is no business operating the USO network as a standalone basis.
- **Option 2: the 'fixed-line business'** would include most activities within the fixed-line wholesale and retail sectors, and covers business and residential, data communications and interconnection services. Mobile services are excluded.[11]
- **Option 3: the group level**. This would include the telecoms and directly related activities undertaken by eir group, both regulated and unregulated, mobile and fixed. In principle, it would exclude any businesses that are completely unrelated to the telecoms business.

In theory, an economic assessment of whether the net cost has an impact on profitability and the ability of the USP to compete should reflect all parts of the business that are particular to the USP and not dissociable from the USO activities.

The 'dissociability test' supports an understanding of the wider economic impact of the USO and benefits. Where such wider effects are directly linked to changes to the USO (for example, in relation to using a common asset base, contributing to common costs, or being derived as joint product revenues) then they could be considered to be not dissociable from the USO.

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[9] *Eircom Limited v. Commission for Communications Regulation* (2022), op cit., para. 48.
[10] eircom Historical Cost Separated Accounts for the year ended 30 June 2011.
[11] See Appendix A1 for an assessment of activities within eir's fixed-line business that could be viewed as dissociable, and therefore could in principle be excluded from the assessment. This more narrow definition of the fixed-line business after excluding dissociable activities is not considered in our assessment given data availability issues in disaggregating the fixed-line business.

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4.1.2 Assessment of the scope of the market

Under option 1, the assessment of the USP's financial position would include only those services that are directly related to the discharge of the USO. However, the difficulty with option 1 is that while the net cost must be calculated with reference to the scope of the universal service itself, the analysis of the impact of the USO on eir should take into account the relevant parts of its business. This would need to include consideration of the extent to which the finances of the remainder of the business are affected by the same factors that are causing the net cost, and therefore how eir's profitability as the USP is best measured. This approach is consistent with the one adopted by eir's consultant, Frontier Economics, in its consideration of indirect revenues that eir gains in profitable areas due to providing services to uneconomic areas or uneconomic customers under the USO.[12] Both approaches include costs that are incurred indirectly as a result of the USO, even if, from an accounting perspective, they are not allocated to USO products, and revenues from other services that are offered over the USO network and therefore contribute to the financing of the USO. As such, option 1 would exclude parts of eir's business that are not dissociable from the USO activities, which are relevant to assess eir's financial and competitive position.

Option 3 would include activities that are not directly or indirectly linked to USO activities or affected by the same factors that are causing the net cost (e.g. mobile services) and therefore would be dissociable from the USO.

We consider that the fixed-line business (option 2) represents a good proxy for the component of eir's business that could be directly linked to the USO. This covers all of eir's fixed-line business: wholesale and retail, and business and residential, including data communications and interconnection services. Mobile services are excluded from this market scope.

Using option 2 for the assessment would account for costs that are incurred indirectly as a result of the USO, even if they are not allocated to USO products (as in option 1), and revenues from other services (regulated and unregulated) that are offered over the USO network. As mentioned above, this is consistent with the approach adopted by Frontier Economics for the USO model.[13]

Therefore, we consider option 2 to be the appropriate scope of eir's business because the fixed-line business provides the assets that are used jointly in providing the USO, as well as the revenues that would confer eir's ability to internalise the cost of the provision of the USO.

[12] Frontier Economics (2016), 'USO model documentation – 2010/11', A report prepared for eir, July.
[13] Frontier Economics (2016), op. cit.

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Accordingly, our view is that the activities included in the fixed-line business are largely consistent with the economic principle of not being dissociable from the USO (with some potential exceptions) and therefore represent a good proxy for the business that can be directly linked to the USO network. (See Appendix A1 for an assessment of the activities within the fixed-line business that could be viewed as dissociable, and could therefore in principle be excluded from the assessment. This more narrow definition of the fixed-line business—after excluding dissociable activities—is not considered in our assessment given data availability issues in disaggregating the fixed-line business. We have been advised by ComReg that this adjustment is unlikely to be material.)

Our view is also supported by the fact that eir, in its USO net cost models, included a number of products that are captured in the fixed-line business definition (and are incremental to the USO business definition)—see Table 4.1 below.

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Table 4.1 Selected products included in the fixed-line business definition [✂ Redacted ✂]

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In relation to assessing the USP's competitive position, we consider that, for the same reasons presented above, the market relevant to assess how the USO may affect eir's ability to compete with other operators that provide similar types of services, is that of the fixed-line.

An overview of the other providers operating in the market is set out in section 4.4.4, as part of the assessment of eir's position relative to its competitors.

4.1.3 Conclusion on the scope of the market relevant for the assessment of an unfair burden

For the reasons set out above, we consider that the market relevant to assess the financial and competitive position of the USP—and appropriate to apply the assessments in Decision 40 to Decision 42, and by consequence Decision 38(iii) (b)—is the fixed-line market.

4.2 Application of Decision 40

Decision 40 provides that ComReg will assess whether the net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital

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employed, in the context of assessing whether the net cost of the USO represents an unfair burden.

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.

Consistent with Decision 40, in this section we undertake an assessment of eir's financial position, with a view to establishing the effect of the net cost on eir's profitability and its ability to earn a fair rate of return on its capital employed. An assessment of eir's financial position relative to its competitors is presented in section 4.4.4.

To do this, we assess eir's level of profitability and carry out a profitability analysis based on return on capital employed (ROCE), which also reflects the requirements of Decisions 42 (1) and 42 (2):

- Decision 42 (1): Changes in profitability, including an understanding of where a USP generates most of its profits over time. Here we analyse eir's return on capital employed relative to a competitive benchmark, to establish the effect of the net cost on the USP's profitability and ability to earn a fair rate of return on its capital employed, as outlined in Decision 40.
- Decision 42 (2): Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ('EBITDA') analysis. Here we look at the level of eir's fixed-line business profitability on the basis of earnings before interest and taxes (EBIT).

Decisions 42 (1) and 42 (2) are further considered in section 4.4.1.

As set out in section 4.1, in carrying out our assessment, we use the fixed-line business as the basis for our assessment,[14] and consider the information available up to the year of this application.

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[14] As highlighted in section 4.1, there are some categories of products within the fixed-line market that could be potentially removed because they may be dissociable from the USO. However, we have not been able to assess the impact of this due to data availability issues.

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4.2.1 Changes in eir's accounting profits

In 2010/11, eir reported operating profit (EBIT) of €388m in the fixed-line business, measured as revenues less operating costs.

As noted earlier, Decision 42 (2) identifies EBITDA as a measure of profits.[15] Another standard financial indicator to measure profitability is EBIT, which is EBITDA net of depreciation and amortisation expense. Oxera's analysis of the USP's financial position focuses on EBIT, rather than EBITDA, as EBIT is a more commonly used measure of operating profit.

In terms of assessing changes in accounting profits or related financial measures, it has not been possible to carry out a like-for-like comparison of revenues and profitability in 2010/11 against those in 2009/10, due to changes in the format of the regulatory accounts. In particular, in the 2009/10 regulatory accounts eir's business was disaggregated into Businesses and Activities categories, while the historical-cost regulatory accounts for 2010/11 split eir's business into Market Groups and Markets categories.[16] Further information on data constrains is set out in Appendix A2.

However, as indicative analysis, Figure 4.1 shows eir's fixed-line EBIT for 2009/10 to 2010/11, with an increase in the absolute level of operating profit in EBIT terms, from €305m to €388m, measured as revenues less operating costs.

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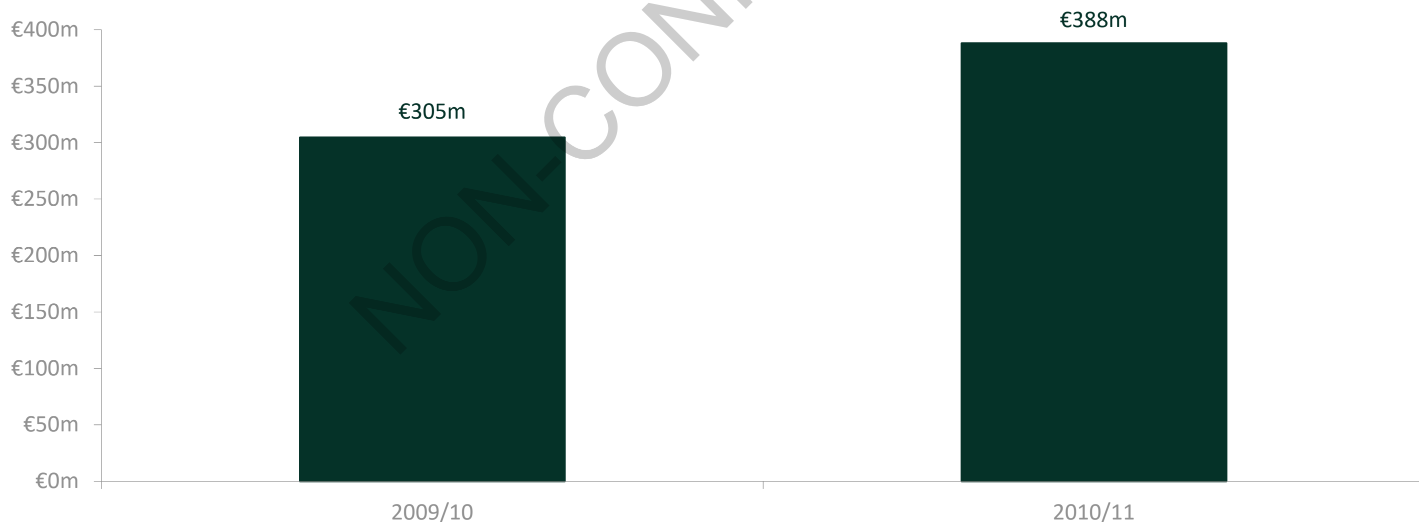
Figure 4.1 eir's fixed-line business EBIT



[15] ComReg (2011), op cit., p87.
[16] ComReg (2010), 'Response to consultation document no. 09/75 and final direction and decision: accounting separation and cost accounting review of eircom limited', Reference No. 10/67, Decision No. D08/10, 31 August.

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Source: Oxera analysis based on eir's historical-cost regulatory separated accounts for the year ending 30 June 2011.

4.2.2 Changes in profitability

In line with Decisions 40 and 42 (1), Oxera has undertaken analysis of eir's profitability in order to assess whether eir was able to earn a fair rate of return on its capital employed in 2010/11.

Specifically, we have compared the ROCE measure of eir's financial returns to a competitive benchmark level of return on capital, as described by ComReg's estimate of eir's weighted average cost of capital (WACC). We observe that eir's fixed-line business was profitable over the period of analysis (2010/11).

- What is ROCE? ROCE is an accounting-based financial returns metric, which captures the relationship between operating profits and capital employed in a business. The ROCE measure is widely used, for example, to assess profitability in market investigations and inquiries (e.g. by the European Commission and by the Competition and Markets Authority in the UK).

  Oxera's estimate of eir's ROCE is calculated as the ratio of its operating profits (measured by EBIT) and capital employed (based on historical-cost accounting, HCA, values of assets)[17] in its fixed-line business. Oxera can reliably estimate eir's ROCE since eir's level of operating profit and capital employed for its fixed-line business is detailed in its HCA regulatory accounts.

  The ROCE can then be compared to a suitable competitive benchmark (see the description below of the WACC). A ROCE-based profitability analysis is consistent with the *Base* case[18] in that it takes account of eir's own characteristics by providing a measure of the company's financial performance, which inherently takes into account eir's economic and financial situation.

- What is WACC? The WACC is commonly used by regulators and authorities in competition cases as a benchmark measure of the return that investors (i.e. equity owners and lenders) can expect from investing in a business.[19]

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[17] These are values as reported by eir in its historical-cost regulatory separated accounts. Decision 1 of Decision D04/11 requires that the HCA methodology be used to calculate the net cost of the USO. Relying on eir's HCA provides a robust and auditable basis for analysis, while ensuring consistency with Decision D04/11.

[18] Case C-389/08, Base NV and Others vs Ministerraad, Judgment of the Court of Justice (Fourth Chamber) of 6 October 2010

[19] For example, BEREC, in its response to the European Commission, stated that: 'WACC is generally recognised as the best way to evaluate the allowed return on the capital invested in network infrastructure. It is relevant for regulatory purposes as it is one of the main elements in defining cost-oriented prices, carrying out price/margin squeeze tests, including ERT and implementing the regulatory accounting obligations.' BEREC (2018), 'BEREC Position Paper Input to the Commission's WACC consultation 2018', 4 October, BoR (18) 167.

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The WACC represents an investor's opportunity cost of assuming the risk of investing in a company, or, in other words, the return that an investor would require to finance a company. It therefore provides a natural and economically robust benchmark for assessing the level of a firm's profitability.

In price control decisions, regulators (including ComReg) typically use a WACC estimate in determining the allowed profit that investors can earn. In competition cases, authorities typically use a WACC estimate as a benchmark return in examining whether excess profits have been, or are being, earned.

The use of ROCE as a profitability measure is appropriate

In the context of the specific application of D04/11, we consider it appropriate to use ROCE to measure eir's profitability. In particular, the citation in Decision 40 of D04/11 of requirement for a 'fair rate of return on capital employed' is consistent with undertaking a ROCE-based assessment of profitability.

A profitability analysis based on the internal rate of return (IRR) could, in principle, provide a conceptually correct alternative. However, for the purposes of the application of Decision 40, we consider that it is appropriate to measure profitability using ROCE- rather than IRR-based analysis, for the following reasons.

- IRR-based profitability analysis would ideally require the use of economically meaningful asset values in the analysis, with reference to the value-to-the-owner rule (whereby the assets are valued on the basis of the current cost rather than the historical cost).[20] However, eir reports the historical-cost values of its assets only in its regulatory separated accounts—information on the current cost of its assets is not available. Furthermore, even if that information were available, historical values need to be used to ensure internal consistency with the requirements of Decision D04/11.
- The IRR provides a lifetime measure of profitability (i.e. over the lifetime of the assets, or the investment horizon), which is not appropriate for annual unfair burden assessment. In the current context of assessing eir's ability to bear the net cost of the USO, within an annual funding cycle, it is appropriate to focus on the profitability analysis for the specific year of the USO funding application. Therefore, this aligns the focal point of the

[20] The value-to-the-owner rule would value the assets according to their current cost. Specifically, the rule values assets as either the modern equivalent asset (MEA) (the lowest cost of purchasing assets today that can deliver the same set of goods and services as the existing assets), the present value (the expected future cash flows discounted at the asset's cost of capital) or the net realisable value (the price the asset would fetch if it were sold today). The MEA value could be proxied by the replacement cost of the assets. See Oxera (2003), 'Assessing profitability in competition policy analysis', Office of Fair Trading, Economic Discussion Paper 6, July, para. 4.12.

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profitability analysis with the USO net cost calculation, which is assessed with reference to the USP's financial year.
- IRR-based profitability analysis requires cash flow data, which is not presented in eir's regulatory accounts and would therefore require further estimations and approximations.

The use of the WACC as the benchmark to assess profitability

Our view is that it is appropriate to use the ex-ante regulatory allowed WACC for the purpose of the profitability analysis required by Decision 40, as the WACC was estimated specifically for eir using assumptions of a notional efficient regulatory network in line with good regulatory practice. In ComReg's assessment, this was an appropriate and robust allowance of the cost of capital.

The WACC decision in 2008 provides an adequate risk-adjusted return for eir's fixed-line regulated business, including USO activities, which is relevant for the period under consideration.[21] For this period, ComReg had decided that eir's regulatory allowed WACC was 10.21%, taken from a range of 7.77–11.08%.[22,23]

As this WACC was calculated specifically for eir, its use in analysing the company's profitability is consistent with the requirements of the *Base* case, as it reflects eir's individual characteristics.

In our view, a ROCE-based profitability analysis is a key indicator of eir's ability to earn a fair rate of return on its capital employed. As long as the actual returns earned by eir (i.e. its return on capital) are in excess of the WACC (i.e. the cost of capital), this suggests that the company is earning sufficient returns that an investor would require in order to undertake the investment.

Profitability analysis

Figure 4.2 compares eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). It shows that the ROCE of eir's fixed-line business in 2010/11 was 26.1%, exceeding the regulatory allowed WACC of 10.21% by 15.9 percentage points. To further contextualise eir's financial position, note that:

- the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg, by 15.1 percentage points;

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[21] ComReg (2008), 'Response to Consultation and Decision Notice, Eircom's Cost of Capital", Reference No. 08/35, Decision No. D01/08, 22 May.
[22] The 2008 WACC decision was not appealed by eir, and it incorporated evidence from extensive stakeholder engagement and submissions.
[23] The use of a range in calculating a WACC is common practice.

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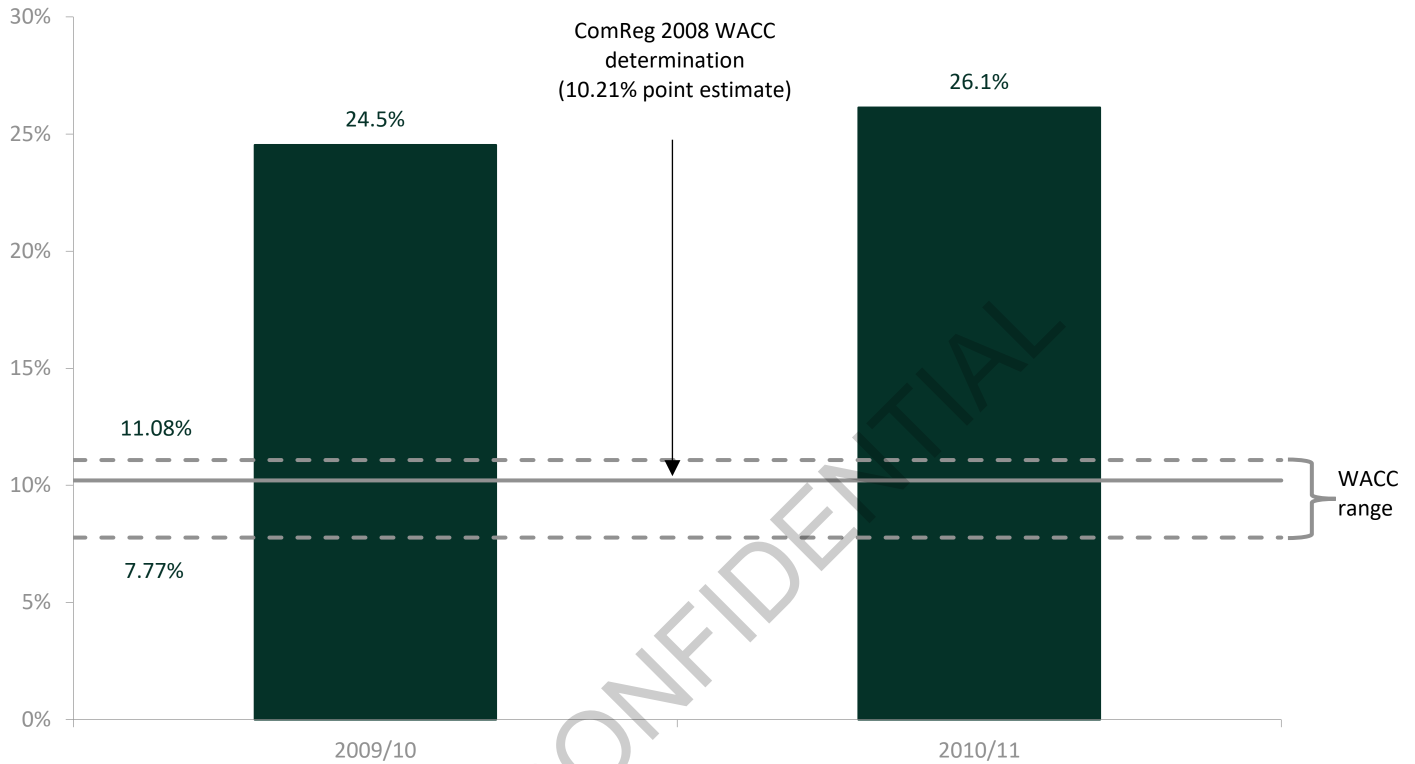
- for there to be no returns above the WACC, the net cost of the USO would have to have been around 31 times higher; or, alternatively;
- the absolute level of operating profit (EBIT) for the fixed-line business would have to have been around 61% lower for the application period, 2010/11.

Figure 4.2 eir's fixed-line business ROCE benchmarked against the WACC



Note: The data shown here is not directly comparable to 2009/10 due to changes in the format of the regulatory accounts.
Source: Oxera analysis based on ComReg's 2008 WACC determinations (Comreg (2008), op. cit.) and eir's historical-cost regulatory separated accounts.

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Figure 4.3 compares the effect of the net cost with respect to its impact on profitability (measured as the ROCE of the fixed-line business). The figure illustrates the impact of the net cost of the USO on the profitability of the fixed-line business. Specifically, it shows a counterfactual scenario, whereby if eir had not incurred the net cost of providing the USO, its ROCE would have been approximately 0.5% higher in 2010/11. (Note: equivalently, this 0.5% estimate can be interpreted as the net cost as a proportion of mean capital employed.) This shows that eir's profitability of the fixed-line business is not materially undermined by the net cost of the USO. We note that, conceptually, the capital employed in the counterfactual could change, although there is no evidence available to adjust this. Given the large proportion of assets that are not dissociable, we consider our analysis to be a good proxy of the impact.

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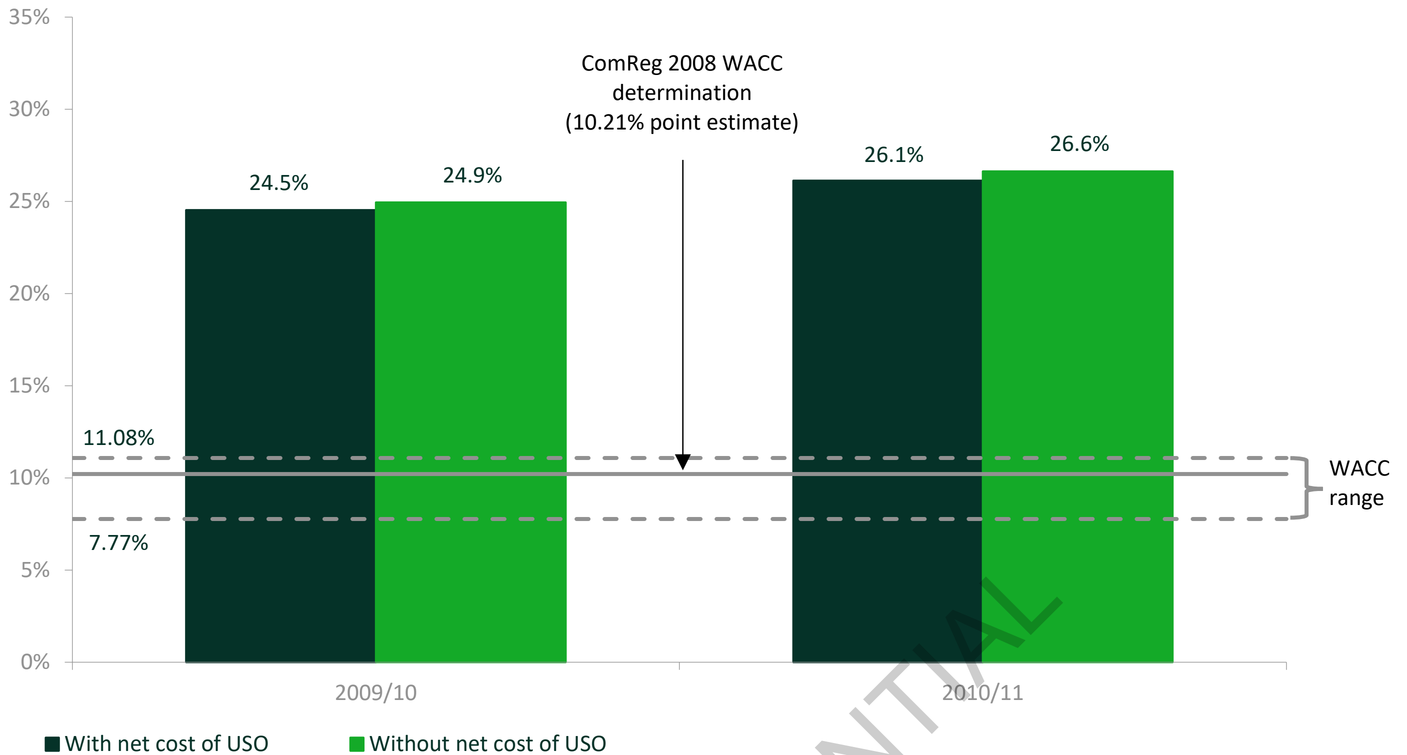
Figure 4.3 eir's fixed-line business ROCE including and excluding the net cost of the USO



Source: Oxera analysis based on ComReg's 2008 WACC determinations (Comreg (2008), op. cit.) and eir's historical-cost regulatory separated accounts.

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The ROCE is a measure of accounting profitability for a given period of time, typically annual. As noted earlier, the data shows that for there to be no returns above the WACC in 2010/11, the net cost of the USO would have to have been around 31 times higher; or, alternatively, the absolute level of operating profit (measured as EBIT) for the fixed-line business would have to have been 61% lower.

4.2.3 Summary of the assessment of Decision 40

Overall we find that, for the year 2010/11 under consideration, the net cost has not significantly affected eir's profitability and/or ability to earn a fair rate of return on its capital employed. Indeed, eir's returns were in excess of the competitive benchmark of a 'fair rate of return' as measured by the regulatory allowed WACC, including the upper end of the WACC range estimated by ComReg for the relevant period.

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4.3 Application of Decision 41

Decision 41 requires an assessment of eir's ability to compete going forward:

Decision 41 (amended): 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.

To assess this, we present operational metrics for 2009/10 and 2010/11, to provide an indication of eir's operational health, as a proxy to assess eir's ability to compete going forward. This is set out in section 4.3.1.

In the circumstances, and in particular given the length of time that has elapsed between the focal year that is being assessed, and when the assessment is taking place, we have been instructed by ComReg to check the results of the analysis of Decision 41, set out in section 4.3.1, with the results of the same analysis using the actual data available to date (up until the latest full financial year of 2021/22). This is set out in section 4.3.2.

A comparison of eir's performance relative to that of its competitors is set out in section 4.4.4, as part of the assessment of Decision 42.

4.3.1 An assessment of eir's operational performance, 2009/10–2010/11

To evaluate eir's ability to compete going forward, we have carried out an assessment of whether there are any indications that the USO affected eir's economic and financial situation during 2009/10–2010/11.

We do this by presenting financial metrics in relation to eir's operational health in 2009/10 and 2010/11, as a proxy to assess its ability to compete going forward. This is set out in Table 4.2.

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Table 4.2 eir's operational performance in 2009/10 and 2010/11

Indicator	2009/10 level	2010/11 level
Gearing	41%	170%
Dividend	€155m	€0m
CAPEX	€153m	€109m
Credit rating	N/A	N/A
Cash ratio (liquidity)	0.35	0.13
Quick ratio (liquidity)	0.75	0.21
Current ratio (liquidity)	0.78	0.21

Note: Metrics are presented at the group level, with the exception of CAPEX which is presented at the fixed-line level. Gearing is calculated as net debt / (net debt + total equity), where net debt is total liabilities minus cash and cash equivalents. For example, in 2010/11, eir's net debt was €3,332m and its equity was -€1371m, hence the calculation €3,332m / (€3,332m – €1,371m) shows that net debt was 170% of the value of the firm's total asset base. The cash ratio is a liquidity measure that shows a company's ability to cover its short-term obligations using only cash and cash equivalents. The quick liquidity ratio determines a debtor's capacity to pay off current debt obligations without needing to raise external capital. The current ratio is a liquidity ratio that measures a company's ability to pay short-term obligations or those due within one year. For the current ratio, a ratio below 1 indicates that the total current assets are insufficient to cover short-term liabilities.
Source: eircom Limited (2011), 'Financial Statements'.

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Based on the information available in 2010/11, the table shows that eir:

- was highly indebted, demonstrated by a high gearing of 170% in 2010/11. This shows that eir's debt liabilities were greater than its total value of equity;
- was unable to pay dividends in 2010/11;
- was able to undertake some CAPEX investment, albeit a reduction to the level observed in 2009/10; and
- had poor liquidity coverage ratios. Cash, quick and current ratios are used to assess a firm's ability to repay its short-term debts. A value of less than one for the current ratio indicates that the total current assets are insufficient to cover short-term liabilities.

Due to data availability, we are not able to comment on eir's credit rating in 2011, as this information is only available from 2012 onwards (see discussion on data constrains in Appendix A2).

While it is apparent that eir has faced financial challenges in 2010/11, we observe that based on our analysis above, this evidence does not show a causal link between the financial distress and challenges experienced by eir and its provision of the USO.

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4.3.2 An assessment of eir's operational performance in 2009/10–2021/22

As mentioned earlier, we have been instructed by ComReg to check whether Decision 41 is met, with reference to a longer period of analysis (as undertaken is section 4.3.1), i.e. using the financial data on operational performance available to date (up until the latest full financial year of 2021/22). This is presented in Table 4.3 below.

Table 4.3 eir's operational performance, 2009/10–2021/22

Indicator	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
Gearing	41%	170%	122%	132%	126%	130%	133%	140%	134%	138%	125%	133%	121%
Dividend	€155m	€0	€0	€0	€0m	€1m	€1m	€1m	€1m	€400m	€80m	€450m	€800m
CAPEX	€153m	€109m	€176m	€247m	€261m	€235m	€246m	€249m	€280m	€239m	€230m	€339m	€238m
Cash ratio	0.35	0.13	0.56	0.63	0.36	0.37	0.30	0.27	0.37	0.41	0.44	0.48	0.83
Quick ratio	0.75	0.21	0.94	1.08	0.75	0.82	0.75	0.65	0.75	0.77	0.73	0.79	1.16
Current ratio	0.78	0.21	1.01	1.14	0.80	0.86	0.79	0.72	0.78	0.88	0.95	0.90	1.35

Note: Metrics are presented at the group level, with the exception of CAPEX which is presented at the fixed-line level. Gearing is calculated as net debt / (net debt + total equity), where net debt is total liabilities minus cash and cash equivalents. For example, in 2010/11 eir's net debt was €3,332m and its equity was -€1,371m, hence the calculation €3,332m / (€3,332m – €1,371m) shows that net debt was 170% of the value of the firm's total asset base. The cash ratio is a liquidity measure that shows a company's ability to cover its short-term obligations using only cash and cash equivalents. The quick liquidity ratio determines a debtor's capacity to pay off current debt obligations without needing to raise external capital. The current ratio is a liquidity ratio that measures a company's ability to pay short-term obligations or those due within one year. For the current ratio, a ratio below 1 indicates that the total current assets are insufficient to cover short-term liabilities.
Source: eircom Limited (2011), 'Financial Statements'; Eircom Holdings (Ireland) Limited, annual reports for bondholders (years ending 2013 to 2022).

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Our review has been informed by an assessment of primary sources including eir's annual reports, statutory and regulatory accounts, and bond prospectuses, as well as independent secondary sources such as reports by credit rating agencies (Moody's, S&P and Fitch), equity analysts and news outlets.

There are some data availability constraints during this period; specifically, we note that credit rating agencies and equity analysts cover eir from 2012 onwards, after Moceir Holding (Ireland) Ltd. (Eircom) was created following the debt restructuring of ERC Ireland Preferred Equity Limited and related companies in June 2012. Appendix A2 sets out data constraints.

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While looking over this time horizon, we observe that eir increased its investments (such as in fibre), and improved its financial health with a gradual improvement of its creditworthiness.[24] Therefore, the following key findings are supported.

1 The USO has not prevented eir from undertaking necessary investments.
2 There is no available evidence of a causal link between the financial challenges experienced by eir, that have been observed over time, and its provision of the USO.
3 The USO has not impeded eir from making improvements to its financial health over time.

The USO has not prevented eir from undertaking necessary investments

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

> […] 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.
>
> CJEU judgment, para 49 [emphasis added]

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We observe that eir launched a number of investment programmes over the extended period under consideration. Figure 4.4 shows eir's level of capital expenditure (CAPEX) in the fixed-line business for the period FY2009/10–2021/22.

It is evident that eir increased its CAPEX from €153m in FY2009/10 to between €230m and €339m during the period of FY2012/13–2021/22. The total CAPEX in the fixed-line business during the entire period FY2009/10–2021/22 sums to €3bn.[25]

[24] For example, S&P Global Ratings (2017), 'Irish Telecoms Group Eir Upgraded To 'B+' On Continued Improvement In Credit Quality; Outlook Stable', pp. 3–4.
[25] eircom Limited (2011), 'Financial Statements', p 41; Eircom Holdings (Ireland) Limited (2013), 'Annual Report for Bondholders Year Ended June 30, 2013', p156; Eircom Holdings (Ireland) Limited (2015), 'Annual Report for Bondholders Year Ended June 30, 2015', p. 164; Eircom Holdings (Ireland) Limited (2017), 'Annual Report for Bondholders Year Ended June 30, 2017', p. 167; Eircom Holdings (Ireland) Limited (2019), 'Annual Report for Bondholders Year Ended June 30, 2019', p. 107; Eircom Holdings (Ireland) Limited (2022), 'Annual Report for Bondholders for the Financial Period ended 31 December 2021', p. 110. Eircom Holdings (Ireland) Limited (2023), 'Annual Report for Bondholders for the Financial Period ended 31 December 2022', p. 60.

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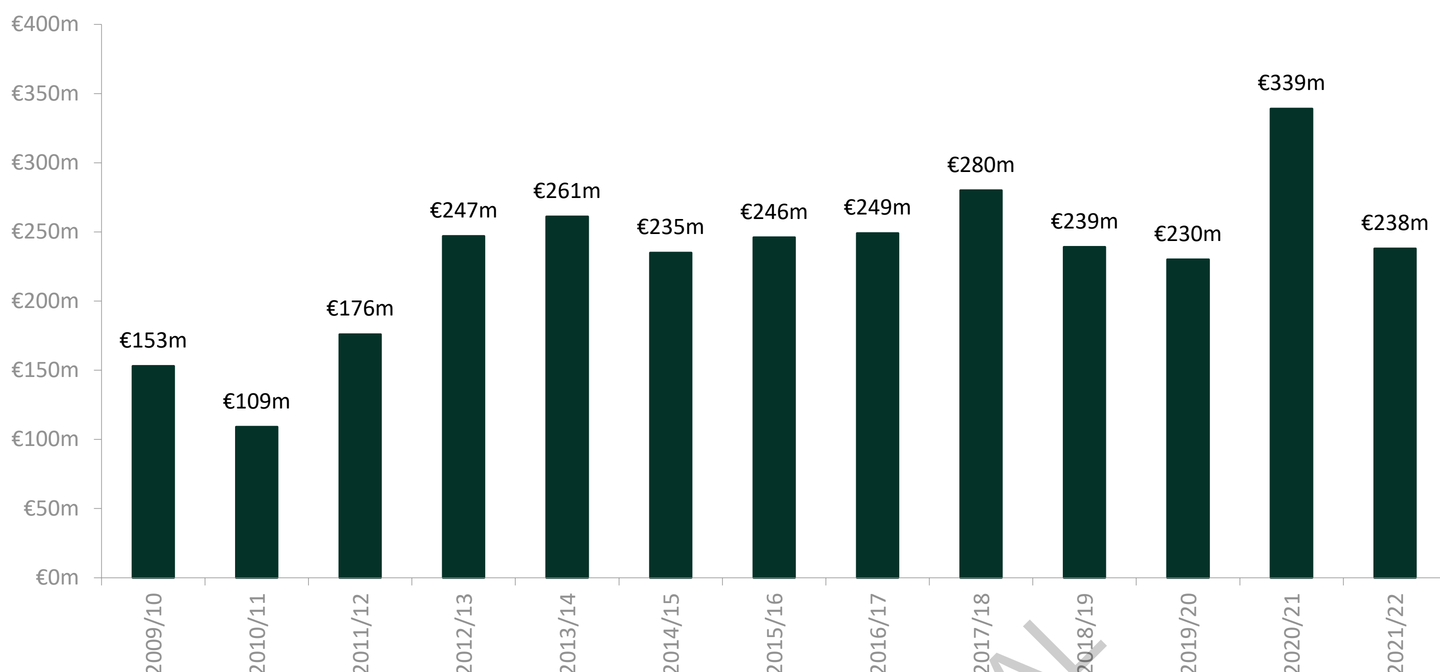
Figure 4.4 eir's CAPEX in the fixed-line business



Note: eir's total CAPEX of the fixed-line business is the sum of CAPEX incurred for intangible assets and property, plant and equipment.
Source: eircom Limited (2011), 'Financial Statements', p. 41; Eircom Holdings (Ireland) Limited, annual reports for bondholders (years ending 2013 to 2022).

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This evidence indicates that, despite the requirement to provide the USO, eir has been able to increase investment specifically in the fixed-line business and overall in areas such as software, bandwidth, licences and infrastructure. eir itself stated that it financed its CAPEX from cash on hand and cash flow from operations.[26] Its ability to use internal financing to fund large capital investments over the period of assessment has also been evidenced by its expectations both of funding, and of being in a position to fund, CAPEX programmes rolling out, including the Next Generation Access Network (NGA network) and enhancing current services, IT capabilities and TV through 'cash on hand and cash flow from operations'.[27]

Our review of secondary sources suggests that eir has successfully carried out necessary investment since 2012, which has been well regarded by rating agencies.[28]

[26] Eircom Holdings (Ireland) Limited (2013), 'Annual Report for Bondholders Year Ended June 30, 2013', p. 14.
[27] Ibid.
[28] For example, Moody's (2012) noted the potential for eir to strengthen its competitive position over time and improve its long-term sustainability through its accelerated investment plan. Equity analysis reported that eir responded to its declining market shares by launching a €400m CAPEX programme over five years to upgrade its fibre network. S&P Global Ratings (2017) noted that 'eir's investments in its fibre network support its position in the fixed broadband market, and should assist further growth, offsetting the declining legacy voice revenues. Moody's (2012), 'Rating Action: Moody's assigns Caa1 rating to Eircom's new holding company; stable outlook', p. 1; S&P Global Ratings (2017), 'Irish Telecoms Group Eir Upgraded To 'B+' On Continued Improvement In Credit Quality; Outlook Stable', pp. 3–4.

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Overall, the significant investment programme since 2012, and its resulting positive consequences, are evident in the commentary of several independent sources. Besides Fitch's 2012 statement that unconstrained competitors can invest in the most profitable parts of the market,[29] the secondary sources do not make reference to the USO as a factor affecting eir's investment plans to compete in the market and its financial position.

In summary, the assessment undertaken in this section, reviewing independent industry commentary, showed that the USO did not impede eir's ability to carry out significant investments which would enable it to (continue to) compete in the market going forward.

There is no available evidence of a causal link between the financial distress and challenges observed over time and the provision of the USO

While it is apparent that eir faced financial challenges over time, consistent with the results presented in section 4.3.1, and evidenced by it entering into an examinership in March 2012,[30] we observe that there is no available evidence of a causal link between the financial challenges experienced by eir and its provision of the USO and, as a result, the net cost of the USO has not had a material impact on the USP's ability to compete on equal terms with competitors going forward, at the time of the relevant funding application.

Indeed, while credit rating agencies list a number of reasons for eir's financial performance, constraints arising from the USO are mentioned only once over 2012–22 (as cited previously): 'not being subject to the regulatory imposed constraints of universal service, UPC has been able to focus investment and commercial activity in the most obviously profitable parts of the market.'[31]

Instead, credit rating agencies give several other reasons for eir's financial challenges. The key drivers repeatedly highlighted include:

- eir's level of indebtedness (a highly leveraged capital structure with a slow pace of deleveraging);[32]

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[29] Fitch (2012), 'Fitch Assigns Eircom 'B-' IDR; Outlook Negative'.
[30] Eir was granted an examinership by the High Court on 30 March 2012. An examinership is a mechanism provided for the rescue and return to health of an ailing, but potentially viable company. The High Court (2012), 'In the matter of Eircom Limited and in the matter of Meteor Mobile Communications Limited and Irish Telecommunications Investments Limited as related companies within the meaning of section 4(5) of the companies (amendment) act 1990 (as emended) and in the matter of the companies (amendment) act 1990, as amended', 30 March, No.175 COS.
[31] Fitch (2012), 'Fitch Assigns Eircom 'B-' IDR; Outlook Negative', p. 2.
[32] Moody's (2013), 'Rating Action: Moody's upgrades Eircom's rating to B3; stable outlook', p. 2.

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- high CAPEX and restructuring costs having constrained free cash-flow generation;[33,34]
- negative revenue and operating profit trends in the years up to FY2014 (albeit we note that the effect of the net cost of the USO would have been incorporated within the headline level of operational profits);[35]
- a challenging operating environment in light of an increasingly competitive market and eir losing retail fixed-line market shares.[36]

In line with the first bullet above, there is evidence to suggest that management decisions taken by eir have affected its financial situation and resulted in challenges for the company. One such challenge is its high level of indebtedness. This is highlighted in the High Court's judgment on eir's examinership in 2012, where eir's high debt was flagged as a significant issue of concern resulting in its insolvency. As part of its assessment, the High Court attributed eir's indebtedness to the multiple changes in ownership since eir's privatisation.[37]

eir acknowledged its level of indebtedness as a concern, citing in each annual report for bondholders between 2013 and 2022 that its 'substantial leverage and debt service obligations' could adversely affect the business, constituting a key risk related to its financial profile.[38]

eir's liquidity position has been cited as 'adequate' by Moody's in 2013,[39] averaging €284m in 'cash and cash equivalents' over FY2009/10–FY2021/22.[40] Despite this, high use of short-term liabilities in the form of 'trade payables', 'accruals' and 'deferred income' contributed to weak liquidity ratios for the firm of 0.42, 0.78, and 0.86, for average cash, quick and current ratios, respectively, over the stated period (i.e. FY2009/10 to FY2021/22; see Table 4.3).[41] Each of these is a metric used to assess a firm's ability to repay its short-term debts, represented by the value of current liabilities. For the current ratio, a value of 1.0 indicates that the current assets are sufficient to cover short-term liabilities. Hence, over the assessed period the analysis suggests that eir has not had a healthy level of liquidity.

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[33] Free cash-flow generation is a measure of the cash that a company generates after accounting for cash outflows to support operations and maintain its capital assets.
[34] Moody's (2017), 'Rating Action: Moody's upgrades Eir to B1; stable outlook', p. 1; Fitch (2019), 'Fitch Affirms Eir's IDR at 'B+'/Stable, Downgrades New Senior Secured Debt to 'BB-(EXP)'', pp. 2–3.
[35] Oxera analysis based on eir's annual reports.
[36] Moody's (2012), 'Rating Action: Moody's assigns definitive B3 ratings to Eircom's amended Term Loan; stable outlook', p. 1; Fitch (2013), 'Fitch Affirms Eircom at 'B-'; Outlook Negative', p. 1.
[37] The High Court (2012), op. cit., para 4 and 13.
[38] Eircom Holdings (Ireland) Limited, annual reports for bondholders (years ending 2013 to 2022), op. cit.
[39] Moody's (2013), 'Moody's assigns (P)Caa1 rating to Eircom's senior secured notes; stable outlook'.
[40] Oxera analysis based on eir's annual reports for FY2009/10 to FY2021/22
[41] Oxera analysis based on eir's annual reports for FY2009/10 to FY2021/22 Cash ratio is calculated as cash and cash equivalents / current liabilities; current ratio is calculated as current assets / current liabilities; and quick ratio is calculated as (cash and cash equivalents + marketable securities + receivables) / current liabilities.

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Dividend payout is another indicator of financial health, as a company uses its profits to make dividend payments to its equity shareholders. Figure 4.5 below depicts the annual dividends paid to equity shareholders by eir from FY2009/10–2021/22. From 2010/11–2013/14 eir paid no dividends, and then from 2014/15–2017/18 just €1m was paid out each year, which suggests it was experiencing difficulties during these years. However, there is no available evidence of a causal link between the financial challenges experienced by eir, and its provision of the USO.

We note that following the acquisition of a majority stake in eir being purchased by NJJ Telecom Europe in April 2018, the dividend payout increased.[42] Dividends for the following four financial years ranged from €80m to €800m in 2021/22. Notwithstanding, eir's position as the USP during these more recent years, the company has been able to pay substantial amounts to its shareholders.

Figure 4.5 eir's dividends paid to equity shareholders, 2009/10–2021/22

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Note: 2021/22 represents an extended period (July 2021 until December 2022) as eir changed its financial year reporting from end of June to end of December.
Source: eir's financial statements for 2011–22.

Based on this analysis, our view is that eir has indeed faced financial challenges, such as high indebtedness, over the assessed time period, including the period of the application. However, the evidence reviewed indicates that these have not been driven by the net cost of the USO.

[42] eir (2018), 'NJJ-led telecoms consortium completes transaction to acquire majority stake in eir', https://www.eir.ie/pressroom/eir-MAR-announcement-eircom-Finance-DAC-closing-of-acquisition-and-new-Board-of-Directors-09.04.2018/, accessed 31 October 2023.

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The USO has not impeded eir from making improvements to its financial health

The available evidence shows that aspects of eir's financial health have been steadily improving over time, irrespective of its USO status. Such evidence has been found in credit rating agency reports, bond issuances and eir's own annual reports. Indeed, the granting of eir's examinership itself in 2012 required an expectation by the High Court for there to be a reasonable prospect of the company's recovery.[43]

For example, the credit rating agencies indicate improved financial strength, as reflected in credit rating upgrades for eir during 2012–22 (Moody's three notches, Fitch two notches, S&P one notch).[44] This is supported by a lower spread-to-benchmark for eir's bond issuances in 2019 (2.45–3.80%) than that of the bond issued in 2013 (8.54%).[45] However, it is important to note that all three agencies have continued to consider eir below investment grade over the period of analysis, meaning that its bonds have presented a greater degree of risk than the safest corporate debt investments.[46]

4.3.3 Summary of assessment of the application of Decision 41

The evidence we have reviewed, based on information available in 2010/11, indicates that there is no available evidence of a causal link between the financial challenges faced by eir and the provision of the USO.

As a result, it emerges that the net cost of the USO for the year 2010/11 under application has not materially impacted eir's ability to compete on equal terms with competitors going forward.

We also find this conclusion to hold when eir's operational metrics are assessed up until 2021/22. As part of our analysis, we find that there is no available evidence of a causal link between the financial challenges faced by eir (as well as the improvements over time) and the provision of the USO. Similarly, the evidence indicates that the requirement to provide the USO over the period has not impeded eir's ability to invest. The strengthening of its performance in some of the assessed areas (i.e. carrying out necessary investment, reducing leverage with debt refinancing on cheaper terms, and improvements to its credit rating) with relatively limited reference to the USO across the reviewed sources suggests that the USO did

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[43] The High Court (2012), op. cit., para 14.
[44] Fitch (2012), 'Fitch Assigns Eircom 'B-' IDR; Outlook Negative'; Fitch (2019), 'Fitch Affirms Eir's IDR at 'B+/Stable', Rates New Senior Secured Debt 'BB(EXP)''; Moody's (2012), 'Moody's assigns Caa1 rating to Eircom's new holding company; stable outlook'; Moody's (2019), 'Moody's assigns B1 ratings to Eir's new senior secured debt; stable outlook'; S&P Global Ratings (2012), 'Irish Telecommunications Company Moceir Holding (Ireland) (Eircom) Assigned 'B' Rating; Outlook Stable'; S&P Global Ratings (2019), 'Irish Telecom Group Eircom Rating Affirmed At 'B+' On Proposed Dividend Recapitalization; Outlook Stable'.
[45] Oxera analysis based on data accessed via Dealogic.
[46] S&P Global Ratings (2022), 'Guide to Credit Rating Essentials', p. 9.

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not have a material impact on eir's overall economic, operational and financial performance.

4.4 Application of Decision 42

This section presents a static and dynamic assessment of eir's financial, economic and competitive position, to assess whether the net cost burden is unfair.

Aligned with Decision 42 of Decision D04/11, it does this by assessing the following.

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 account profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ('EBITDA') analysis
3. changes in direct USO net costs, if any, over time
4. estimates of average level of cross-subsidies 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

4.4.1 Changes in profitability, accounting profits and related financial measures

Criteria 1 and 2 of Decision 42 require the consideration of the following aspect to determine whether the net cost of the USO is unfair:

- changes in profitability (including an understanding of where a USP generates most of its profits over time) (criteria 1); and
- changes in accounting profits and related financial measures (criteria 2).

To do this we analyse: i) eir's ROCE relative to a competitive benchmark, to establish the effect of the net cost on the USP's profitability; and ii) the absolute level of eir's fixed-line business profitability on an EBIT basis.

Our analysis of this is set out in sections 4.2.2 and 4.2.1 respectively, where we find that:

- eir's fixed-line business was profitable over the period of analysis (2010/11). Its fixed-line business ROCE significantly exceeded the regulatory allowed WACC range estimated by ComReg during the period 2009–11.

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- eir reported EBIT of €388m in the fixed-line business, measured as revenues less operating costs. We have not been able to assess changes in accounting profits or related financial measures as it has not been possible to carry out a like-for-like comparison of revenues and profitability in 2010/11 against those in 2009/10, due to changes in the format of the regulatory accounts.

In section 4.4.4. we explore how eir's profitability compares to those of its competitors.

Sections 4.4.2 and 4.4.3 that follow cover, respectively, changes in direct USO net cost over time (Decision 42 (3)) and the level of cross-subsidies between services and changes over time (Decision 42 (4)).

4.4.2 Changes in direct USO net cost over time

Decision 42 (3) requires an assessment of changes in direct USO net cost over time. Figure 4.6 shows that from 2009/10 to 2010/11 the USO net cost increased by €2.4m from €5.1m to €7.5m.

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Figure 4.6 USO net cost

Source: ComReg (2014), 'Universal Service Fund Application 2009-2010—Appeal', Reference No. 14/119, 7 November; ComReg (2019), 'Assessment of eir's 2010-2011 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011', Reference no. 19/36, Decision no.D05/19, p. 69.

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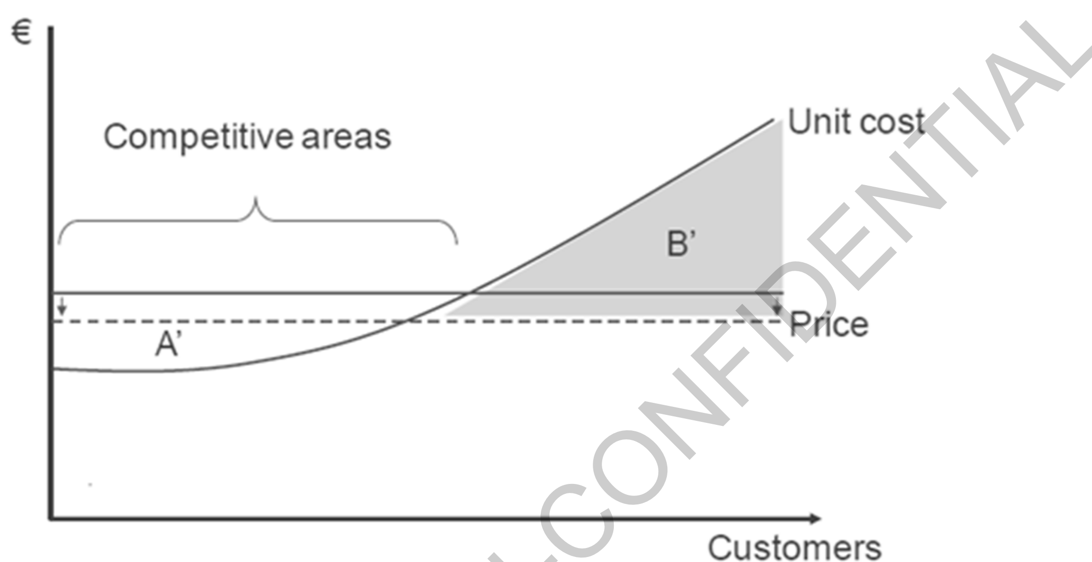
We understand that the changes in the direct net cost are primarily due to changes in the net cost of uneconomic customers (particularly during the 2009/10 to 2010/11 period).[47]

4.4.3 The level of cross-subsidies between services and changes over time

Decision 42 (4) requires considering estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time. In line with this, ComReg's approach to the assessment of whether the net cost of the USO represents an unfair burden also considers whether eir, as the USP, is able to earn sufficient profits to finance its costs in uneconomic areas/customers from profits in economic areas/customers. This is referred to as a 'cross-subsidy' and is illustrated in D04/11 as shown in Figure 4.7.

Figure 4.7 Cross-subsidisation (internalisation) of the net cost of the USO



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Source: ComReg (2011), 'Decision on the costing of universal service obligations: Principles and Methodologies', Reference No. 11/42, Decision No. D04/11, 31 May, p. 67, Figure 3.

As highlighted previously, we consider that the fixed-line business definition serves as a good proxy for the business that is directly linked to the USO (i.e. the fixed-line business includes services that rely on the use of the USO assets). From the perspective of the USP's financial position, if the USP earns sufficient profits within the fixed-line business to enable it to cross-subsidise the costs of providing the USO, this indicates that it would be able to bear the burden of the net cost of the USO.

[47] Tera (2017), 'Assessment of Eir's USO funding application – Direct net cost 2010-2-11 – Redacted version', Reference No. 17/73a, August, pp. 61–62.

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To undertake this assessment we would ideally compare the profitability of the different segments of the fixed-line business between 2009/10 and 2010/11. However, for the 2010/11 application, it has not been possible to undertake this analysis due to changes in the format of the regulatory accounts. In particular, in the 2009/10 regulatory accounts eir's business was disaggregated into Businesses and Activities categories, while the HCA regulatory accounts for 2010/11 split eir's business into Market Groups and Markets categories. As a result, we look at the overall profitability of the fixed-line business.[48] We note, however, that the required level of information will be available for future application periods. Information on data constraints for the 2010/11 assessment is set out in Appendix A2.

For the 2010/11 application period, we find that eir appears to have been well positioned to internalise the net cost, or in other words, to cross-subsidise the provision of the USO by using profits that were earned in segments of the fixed-line business. This is evident by the strong profitability of eir's fixed-line business during 2010/11, as set out in section 4.2.1 and 4.2.2.

While there are certain parts of eir's fixed-line business that are subject to price regulation, and controls that may effectively limit its ability to cross-subsidise the USO net cost, we consider that the effects of price regulation are already captured in the profitability analysis. Indeed, the profitability analysis establishes whether the total revenues generated by the assets used in the provision of the USO provide a sufficient rate of return. Therefore, to the extent that price regulation constrains eir's revenues, this effect would manifest itself in lower actual returns generated by eir and, therefore, a reduced ability to cross-subsidise the USO from these regulated activities. Furthermore, to the extent that the regulated business activities within the fixed-line business have a common asset base with the USO network, it can be expected that these revenues and profits can be used to internalise the cost of providing the USO.

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4.4.4 Assessment of eir's position relative to its competitors in the market

The 2010/11 period saw continued developments in the competitive landscape of Irish telecoms. This was a continued trend following the liberalisation of the market and the introduction of regulation in 1997.

Indeed, 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

[48] ComReg (2010), 'Response to consultation document no. 09/75 and final direction and decision: accounting separation and cost accounting review of eircom limited', Reference no. 10/67, Decision no. D08/10, 31 August.

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competition, with players such as UPC, BT and Magnet becoming more reliant on self-provided infrastructure.[49]

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.

With a market share of [✂ ✂], eir was the main player in the fixed-line market in 2011, other operators include Vodafone ([✂ ✂]), UPC ([✂ ✂]), BT ([✂ ✂]) and Imagine ([✂ ✂]), who each accounted for a smaller overall share.[50] A number of other operators, such as a Magnet, were also present in the market at the time. However, given their small market share (less than 2% each), for the analysis, they have been grouped together as other authorised operators (OAOs).

Consistent with the CJEU judgment, the analysis in this section presents an assessment of eir's ability to compete relative to its competitors, as a result of the broader competitive dynamics in the fixed-line market. This is done with reference to:

- the profitability of eir relative to its competitors;
- changes in prices over time (Decision 42 (5));
- changes in market share (Decision 42 (6));
- changes in market entry barriers (Decision 42 (7)).

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Comparison of profitability

Comparing eir's profitability with that of its competitors can provide an indication of eir's relative performance. Due to data constraints, it has not been possible to carry out a direct comparison between eir's fixed-line EBIT with that of its competitors at the fixed-line level. This is because segmental accounts at the fixed-line level for eir's competitors are not available. As a proxy, and being mindful of the limitations of the analysis, the group-level EBIT for the Irish market has been calculated for the four largest competitors to eir for 2009/10–2010/11, shown in Figure 4.8 below.

[49] ComReg (2013), 'Annual report 2010/11', 11 January.
[50] The figures reflect the average retail market share between Q1 2010 and Q4 2011 for each of the companies.

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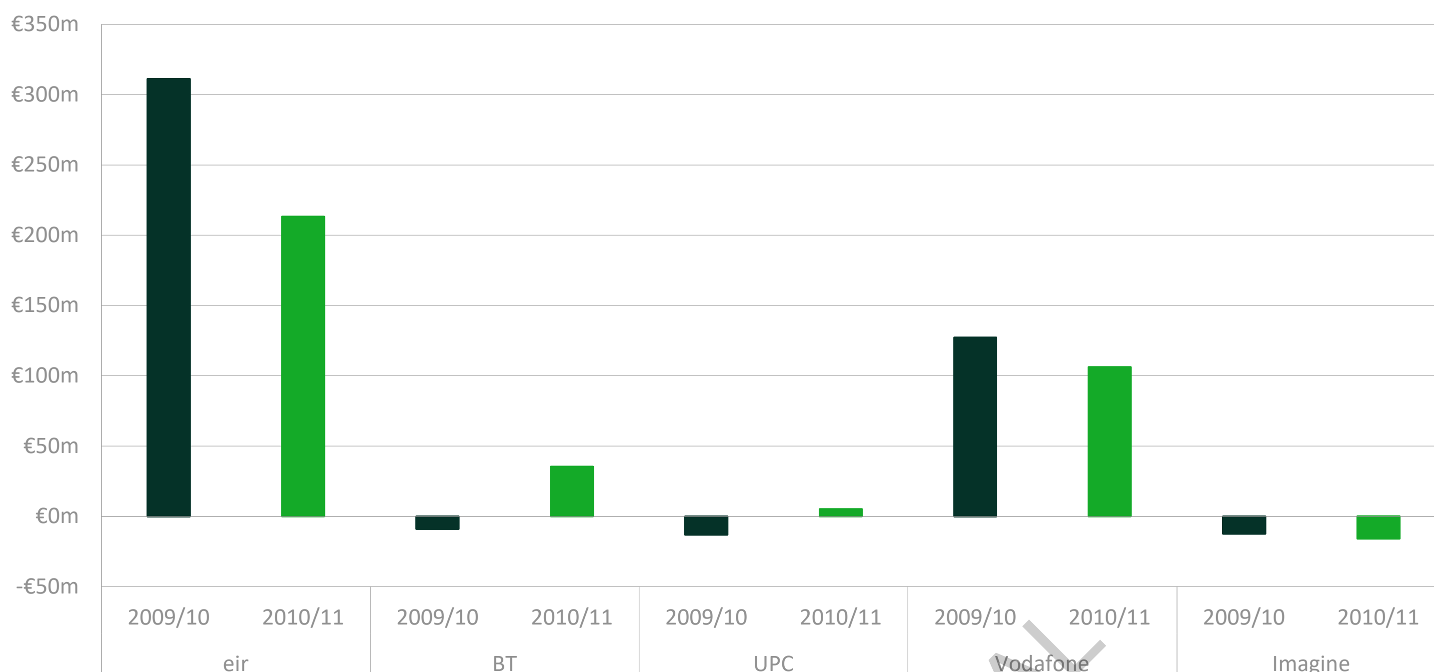
Figure 4.8 Group-level EBIT, 2009/10–2010/11



Note: eir's group-level EBIT is calculated by Oxera based on historical-cost accounts. Competitors' EBIT is based on financial statements.
Source: eir historical-cost accounts and 2010/11 financial statements of BT Communications Ireland Limited, UPC Communications Ireland Limited, Vodafone Ireland Limited, and Imagine Communications Group Limited.

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The indicative analysis shows that eir's EBIT at the group level exceeded that of its competitors, with a number of operators making losses during the period.

Figure 4.9 below shows the group level ROCE for eir and its competitors for 2009/10–2010/11, indicating that eir's profitability was broadly in line with its competitors.

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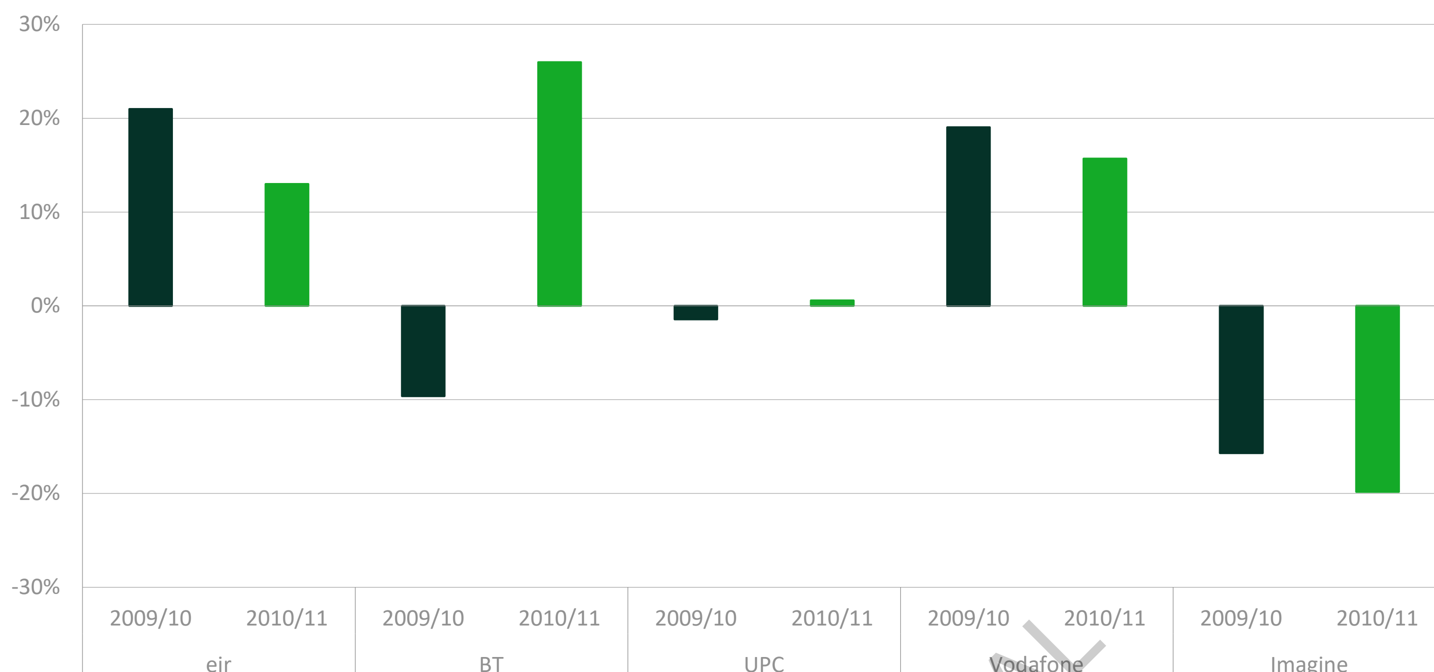
Figure 4.9 Group-level ROCE, 2009/10–2010/11



Note: eir's group-level ROCE is calculated by Oxera based on historical-cost accounts. Competitors' ROCE is calculated based on financial statements.
Source: eir historical-cost accounts and 2010/11 financial statements of BT Communications Ireland Limited, UPC Communications Ireland Limited, Vodafone Ireland Limited and Imagine Communications Group Limited.

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Changes in prices over time

This section addresses Decision 42 (5) of Decision D04/11 by assessing how eir's prices have changed over time relative to those of its competitors. This is done by computing average revenue per user (ARPU) as a proxy for average price.

Figure 4.10 below presents the average prices achieved, approximated by the ARPU, in the retail fixed-line business for eir and three of its largest competitors, with BT excluded due to incomplete subscriber data. The trend shown is of stable prices in the retail segment for eir from Q4 2010 to Q4 2011, which is the period considered due to data restrictions. UPC and Imagine experienced an increased ARPU over this period, whilst Vodafone's slightly declined.

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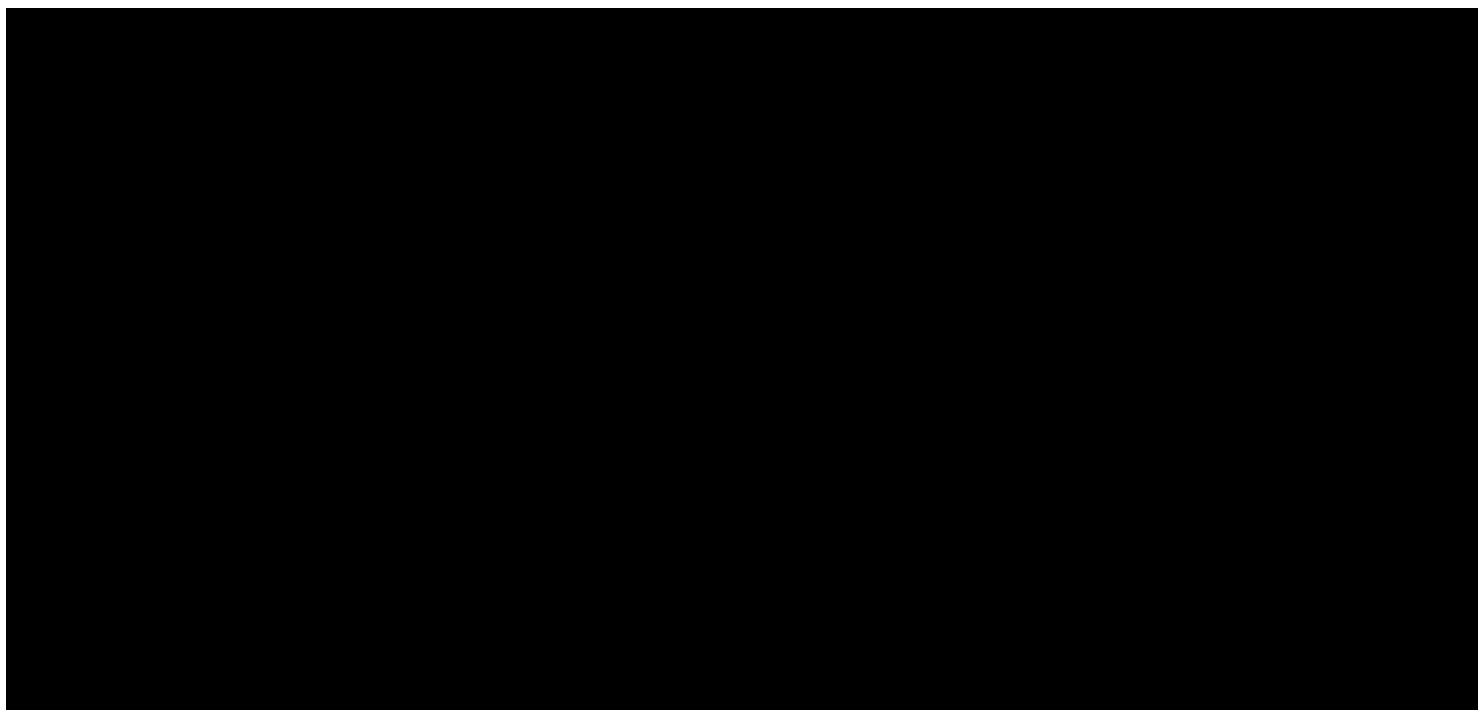
Figure 4.10 Average prices achieved over time in retail fixed-line business [✂ Redacted ✂]



Note: Data presented for Q4 2010–Q4 2011 due to limited availability of subscriber breakdown data. BT has been excluded due to incomplete data. ARPU is calculated as total revenue/number of subscribers.
Source: As advised by ComReg.

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Changes in market share

This section addresses Decision 42 (6) of Decision D04/11 by assessing how eir's market share has changed over time, relative to those of its competitors. This is consistent with the CJEU judgment:

> The mere finding of facts relating to market share of that provider, considered in isolation, does not allow any useful conclusions to be drawn in the absence of a comparison with the market shares held by its competitors
>
> Court of Justice (2022), op. cit. Excerpt from paragraph 43 [emphasis added]

Figure 4.11 presents the market shares of eir and its competitors based on retail fixed-line revenue. It shows that eir had a relatively high share of the market in the period, with a gradual decline from [✂ ✂] in Q1 2010 to [✂ ✂] by Q4 2011.

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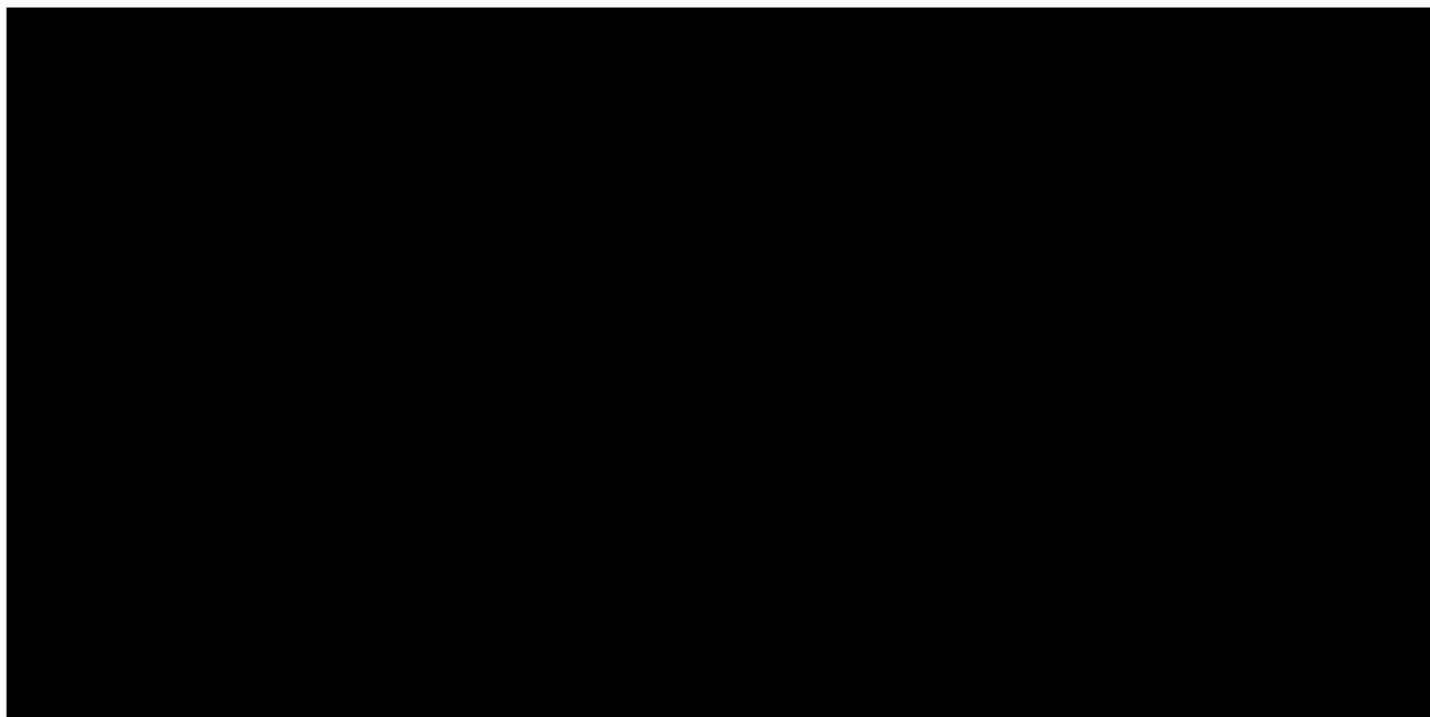
Figure 4.11 Changes in retail fixed-line market share, by revenue [✂ Redacted ✂]



Note: OAOs, other authorised operators.
Source: As advised by ComReg.

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Despite this declining market share, eir remained the market participant with the largest market share during the period under assessment with other operators' share modest and increasing. UPC experienced growth from [✂ ✂] share in Q1 2010 to [✂ ✂] in Q4 2011, while Vodafone held an average of [✂ ✂] retail market share in the period, with its growth partially attributable to its acquisition of BT's retail and low-end small and medium enterprise (SME) customers.[51] Imagine held [✂ ✂] market share across the two-year period, with the remaining [✂ ✂] of market revenues in Q4 2011 being held collectively by OAOs.

Another metric through which relative market shares can be assessed is the number of subscribers each operator has, and how this changed during the relevant period. Figure 4.12 presents the fixed-line retail market shares based on subscriber numbers held by eir and its competitors over the period Q4 2010 to Q4 2011. It shows that eir's share of total subscribers decreased slightly, from [✂ ✂] to [✂ ✂] over the five quarters, a reflection of growing competition in the market. Despite this, as shown in Figure 4.10, eir was able to derive a stable ARPU from its retail

[51] The Competition Authority (2009), 'Determination of merger notification M/09/015 – Vodafone Ireland / BT Ireland'.

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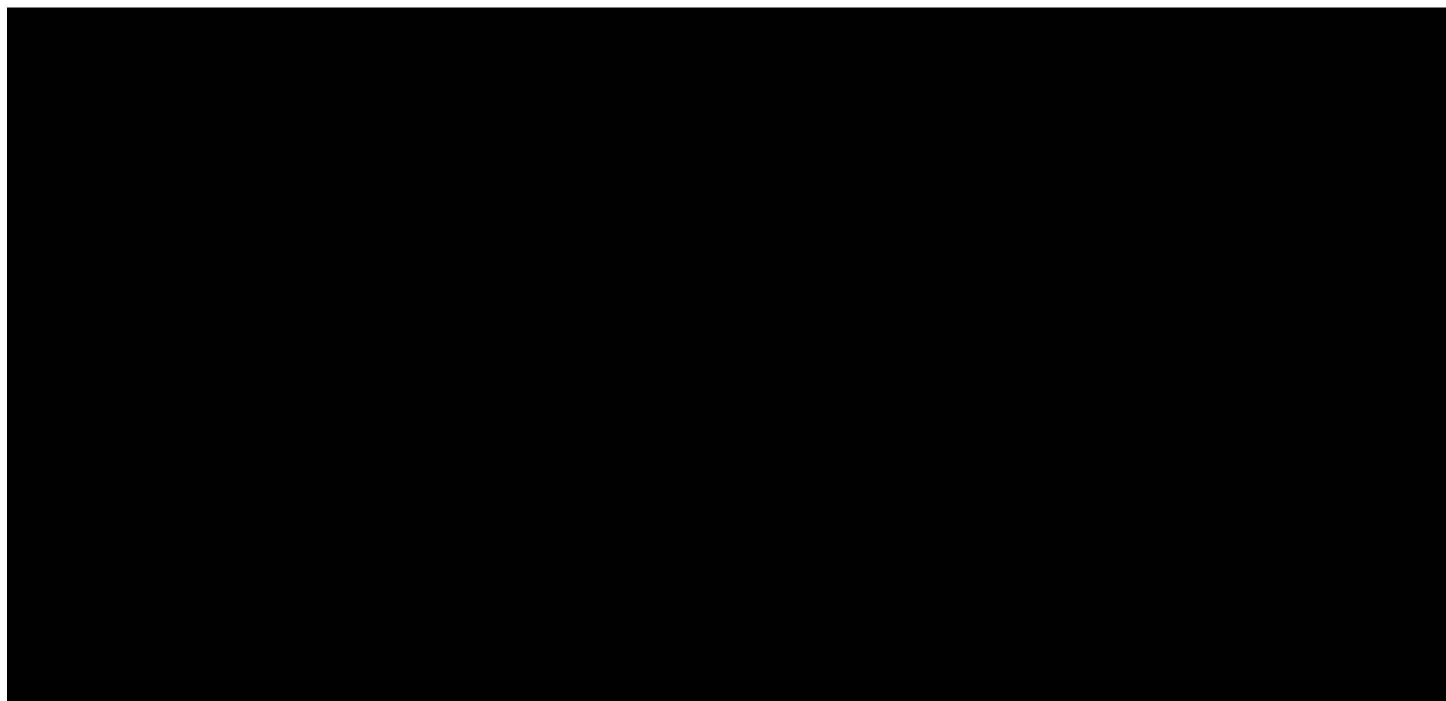
subscribers during this time, while Vodafone's fell by [✂ █ ✂] percentage points in the same time span.

Figure 4.12 Changes in retail fixed-line market share, by number of subscribers [✂ Redacted ✂]



Note: Data presented for Q4 2010–Q4 2011 due to limited availability of subscriber breakdown data. BT has been excluded due to incomplete data.
Source: As advised by ComReg.

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Unrelated to the provision of the USO, general market trends are likely to have also led to declining revenues for eir and more competition in the market over the relevant period. Examples of this include the growth of voice over internet protocol (VOIP) whereby customers make calls over the internet using services such as Skype and FaceTime, rather than traditional phone calls. Another trend has been the increased uptake of bundles, with the share of fixed market retail subscriptions being either double- or triple-play at 34.8% in Q4 2010, which increased from Q3 2010 where the same figure was 33.5%.[52]

[52] ComReg (2010), 'Irish Communications Market: Quarterly Key Data Report, Data as of Q3 2010' and ComReg (2010), 'Irish Communications Market: Quarterly Key Data Report, Data as of Q3 2010'.
Double-play subscriptions refer to a bundling of two services (e.g. fixed telephony and internet); triple-play subscriptions refer to a bundling of three services (e.g. fixed telephony, internet and TV).

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Market entry barriers

This section addresses Decision 42 (7) of Decision D04/11 by reviewing evidence as to the level of market entry barriers.

ComReg's regulatory framework in place in 2010/11 assumed that competition would develop over time and that prices were set at levels such that eir was able to earn a fair return on capital after taking into account the impact of any changes in its competitive position.[53] Hence, changes in the sample composition and market shares of competitors should be considered, albeit an observed fall in eir's market share does not, in and of itself, lead to the conclusion that there has been a significant causal decline in profitability that renders eir unable to meet the net cost of the USO.

We cannot directly and unequivocally observe the strength of market entry barriers over time as these are complex and multi-faceted; they include regulatory and licensing requirements, legal requirements, technical requirements, asset intensity levels and capital requirements that are faced by new entrants at any point in time. However, we can observe whether new entrants emerge and whether they can successfully compete for higher market shares over time. In the case of the Irish retail fixed-line market, we observe that Figure 4.11 and Figure 4.12 show the market shares of competitors by revenue and subscribers respectively. These indicate that the market barriers did not prevent the relatively new entrants (i.e. eir's competitors) from achieving growth. At the same time, the majority market share position of eir is consistent with ComReg's findings that there were high levels of sunk cost persisting in the market and high non-transitory barriers to entry in the Irish retail fixed voice access market.[54]

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Overall, Figure 4.11 shows eir's strong position in terms of retail fixed-line revenue, holding [✂█✂] in Q1 2010, and despite a fall, it still held moderate decline, eir remained the main operator with [✂█✂] market share in Q4 2011. The growth of Vodafone following its acquisition of BT Ireland's retail customers (as discussed in the section addressing changes in market share) demonstrates that market entry barriers in Ireland have not been insurmountable by a large multinational corporation.

Furthermore, we observe that the industry (i.e. eir's competitors) largely depended on eir's regulated wholesale fixed voice services to offer their own retail voice solutions to customers, with competition for the provision of infrastructure emerging in some densely populated areas. This is not atypical; it is indeed a common feature

[53] Specifically, the existing framework for the regulation of access, the USO regulations and the price controls imposed on eir.
[54] ComReg (2014), 'Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers', Response to Consultation and Decision, Reference No. 14/89, Decision No. D12/14, 28 August, para. 6.54.

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of network industries that the network operator is required to provide access on a fair and reasonable, non-discriminatory basis. In 2010/11, such high fixed sunk network costs in the industry represented a persistent barrier to competing with eir along the full value chain, and this could in turn facilitate eir's maintenance of a resilient market position.[55]

eir faced specific challenges such as the strength of UPC's cable network in the most populous urban areas of Ireland, specifically its largest cities such as Dublin.[56] Additional market trends, such as the increasing consumer preference for bundling of services (e.g. telephony, broadband and TV), also presented advantages to competitors with an existing strong presence in these areas, such as Vodafone. However, these market factors are reflected in the profitability analysis in section 4.2.2, 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.

4.4.5 Summary of assessment of the application of Decision 42

Decision 42 requires profitability to be considered alongside an assessment of the impact that the USP faced from broader market dynamics.

For the 2010/11 application we find that:

- eir's fixed-line business was profitable over the period of analysis, with its ROCE exceeding the regulatory allowed WACC range;
- eir reported EBIT of €388m in the fixed-line business, measured as revenues less operating costs;
- eir was well positioned to cross-subsidise the provision of the USO by using profits earned in its fixed-line business;
- indicative analysis shows that eir's EBIT at the group level exceeds that of its competitors, while eir group's ROCE was broadly in line with those of its competitors;
- eir was able to maintain a steady ARPU for the period;
- eir's market shares, by revenue, in the period declined from [✂ ✂] in Q1 2010 to [✂ ✂] by Q4 2011. However, it remained the main player in the market, with the next largest player at the time, UPC, accounting for only [✂ ✂] of the market in Q4 2011;
- eir's share of total subscribers in the fixed-line market remained relatively stable during the period;

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55 Ibid, para. 6.43.
56 ComReg (2013), 'Annual report 2010/11', 11 January.

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- while we cannot directly and unequivocally observe the strength of market entry barriers over time as these are complex and multi-faceted, we do observe that eir's competitors marginally increased from 2009/10 to 2010/11, showing that the market barriers did not prevent the relatively new entrants (i.e. eir's competitors) from achieving growth.

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5 Conclusion

Decision 38 requires that for there to be an unfair burden on a USP, three cumulative conditions must be met.

Decision 38: For there to be an unfair burden on a USP, 3 cumulative conditions must be met:

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

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Decision 38 (i) and 38 (ii) have been established as part of ComReg's assessment of eir's funding application, finding that there is a direct net cost and that the benefits of the USO do not outweigh the net cost.[57]

Findings of Decision 38 (iii) (a): Section 3 of this report finds that the net cost of €7.5m is indeed material compared to the administrative cost of a sharing mechanism (estimated at €200,000) fulfilling the criterion of Decision 38 (iii) (a).

In the application of Decisions 40 to 42, which are relevant for Decision 38 (iii) (b), set out in section 4.2 to 4.4, we conclude that:

- Findings of Decision 40: In 2010/11, the net cost has not significantly affected eir's profitability and/or ability to earn a fair rate of return on its capital employed. Indeed, eir's returns were in excess of the competitive benchmark of a 'fair rate of return' as measured by the regulatory allowed WACC.
- Findings of Decision 41: The net cost of the USO for the year 2010/11 under application has not materially impacted eir's ability to compete on equal terms with competitors going forward as there is no available evidence of a causal link between the financial distress and challenges observed and the provision of the USO. In addition, the results of the wider period of financial analysis that we have undertaken (2009/10–2021/22) show that the USO

[57] ComReg (2019), 'Assessment of eir's 2010-2011 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011', Reference No, 19/36, Decision No. D05/19, 17 April, para 217 (ii) and para 205.

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did not prevent eir from undertaking necessary investment nor has it impeded eir from making improvements to its financial health, as evidenced by improvements in its credit rating.

- Findings of Decision 42: eir was profitable and was well positioned to cross-subsidise the provision of the USO by using profits earned in its fixed-line business. Indeed, when compared to its competitors, eir was able to maintain a steady ARPU for the period and, despite a reduction in market shares, remained the main player in the market (by revenue and subscriber numbers). Indeed, indicative analysis shows that eir's EBIT at the group level exceeded that of its competitors, while eir group's ROCE was broadly in line with those of its competitors.

Based on the analysis undertaken, we find that the conditions for Decision 40 to 42, and by consequence, the conditions for Decision 38 (iii) (b), have not been met. While no one indicator is determinative, if the universal service obligation was an unfair burden on eir in 2010/11, indications of this would be apparent from the analysis undertaken. No such indications have emerged from our analysis.

The indicators demonstrate that the universal service obligation did not directly cause, and therefore represent, an unfair burden on eir in 2010/11.

As a result, having applied Decisions 38–42 and considered all of the evidence outlined, we are of the view that the cumulative conditions of Decision 38 are not met, and that the universal service obligation did not represent an unfair burden on eir in 2010/2011.

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A1 Activities within eir's fixed-line business that could be viewed as dissociable

Following discussions with ComReg, we understand that there are sub-products within eir's fixed-line business that could potentially be dissociable from the USO business. This specifically relates to sub-products within the Wholesale Residual (Unregulated) and Retail Other business segments. These are highlighted in the table below.

Table A1.1 Sub-products highlighted as potentially dissociable from the USO business

Segment	Sub-segment	Product	Sub-product	Dissociable
Wholesale Residual (Unregulated)	Wholesale Residual (Unregulated)	Wholesale Residual (Unregulated)	Foreign Call Traffic Inpayments Bands 1–10	No
			Interconnect International Access	Potentially
			International LL Connections/ Rental	No
			Wholesale Network Management Services	No
			CPE Fees	No
			Mast Access	Potentially
			Repayable Works Orders	No
			SCCP revenues	No
			Wholesale Duct Rental	No
			Internal Trade with Tetra	No
Retail Other	Retail voice calls	Retail voice calls	Retail voice calls	No
	Retail DSL/broadband	Retail DSL/broadband	Retail DSL/broadband	No
	Retail Residual	Leased Lines	National LL Connections	No
			National LL Rentals	No
			Retail Ethernet & SANs Connections & Rentals	No
			International LL Connections & Rental	No
		Data Services	Business IP Connections & Rental	No
			ATM Connections/ Rental	No
			Frame Relay Rental	No
			Eirpac Rental & Traffic	No
			Other Switched Data Services	No
		Apparatus Supply	Apparatus Supply	No
		Legacy Operator Services	Legacy Operator Services	No
		Value added voice	Freefone Connections	No
			Freefone Rental	No

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Segment	Sub-segment	Product	Sub-product	Dissociable
			Freefone National & Mobile Traffic	No
			Freefone International Traffic	No
			VPN/IVPN Access	No
			VPN/IVPN Traffic	No
			VOIP Non Traffic	No
			SIP Ancillary Services	No
			VOIP Local/National	No
			VOIP ROI Mobile	No
			VOIP UK	No
			VOIP International	No
			SIP Non Traffic Revenues	No
			SIP On-Net	No
			SIP Local/National	No
			SIP ROI Mobile	No
			SIP UK	No
			SIP International	No
			PRS Access Rental	No
			PRS Traffic	No
			Call Management Services Connections	No
			Call Management Services Rental	No
			Call Management Services Traffic	No
		Value Added Non-Voice	Value Added Non-Voice	No
		Directory Enquiry	National Directory Enquiries 1811	No
			International DQ 11818	No
			eircom Access to OAO DQ	No
			Teleconference Calls 11811	No
		Public Payphones	Public Payphones	No
		Other Remaining Activities	TV Service Connections/Rental	Potentially
			eBS CPE Rentals	No
			Global Conferencing Services	Potentially
			Network Management Services	No
			Property & Accommodation Rental	No
			Staff on Loan Agency	Potentially
			Tetra Business	Potentially
			Meteor Mobile re emobile	Potentially
			eMobile Handsets	Potentially
		Other Internet Services	Internet Access 1890/1891/1892/1893	No
			eircom net Internet Rental	No
			eircom net Internet Set-up fees	No

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Source: As advised by ComReg.

The removal of these elements would reflect a subset of eir’s fixed line business that could be identified as dissociable. The granularity of data required to disaggregate the profitability analysis to assess the impact of excluding these sub-products is not available.

Our understanding, based on discussion with ComReg, is that, given the nature of the sub-products identified, their removal would not significantly alter the results of the profitability analysis presented throughout the report.

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A2 Data constraints for the 2010/11 application

In this section we set out the data constraints faced in carrying out the analysis presented in the report for 2010/11. In doing so, we highlight, for each of the decisions, the 'preferred analysis', i.e. what we would do if data constraints were not an issue, followed by the 'analysis presented', which sets out the approach followed.

Table A2.1 Data constraints

Decision	Preferred analysis	Analysis presented (and reason, if different to preferred analysis)	Data used
40: 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.	Our preferred analysis would be to carry out a ROCE analysis and compare it to the regulatory benchmark (WACC). This can be complemented by other forms of profitability assessment, such as EBIT margins and analysing the impact of the USO on the ROCE. This should be carried out at the level that would exclude potential activities within the fixed-line business that are dissociable from the USO business (see discussion in Appendix A1).	We carried out the profitability analysis based on the preferred metrics at the fixed-line business level. This does not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for this is not available.	The profitability analysis of eir is based on information from its historical-cost regulatory separated accounts. The WACC used is based on ComReg's WACC determination. The USO net cost figures are from ComReg documents relating to eir's Universal Service Fund applications (ComReg 19/36).
41: 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.	A number of metrics can be used to provide an indication of eir's operational health as a means to assess its ability to compete going forward, based on information available in 2010/11. This includes metrics on gearing, dividend payments, CAPEX, credit rating and liquidity.	We carried out an assessment of whether there are any indications that the USO affected eir's economic and financial situation in 2009/10–2010/11 based on an assessment of eir's level of gearing, dividend payments, CAPEX and liquidity. Information on credit rating was not available for 2009/10 and 2010/11. In the circumstances, and in particular given the length of time that has elapsed between the focal year that is being assessed and when the assessment is taking place, we have been instructed by ComReg to check the implications obtained from the information available in 2010/11 with the results of the same analysis using the actual data available to date (up until the latest full financial year of 2021/22). We note that credit rating agencies and equity analyst reports only cover eir from 2012 onwards.	The analysis is informed by a review of eir's annual reports, statutory and regulatory accounts, bond prospectuses, credit ratings agency reports, equity analyst reports and news outlet publications.

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42 (1): Changes in profitability, including an understanding of where a USP generates most of its profits over time.	Profitability analysis of eir at the fixed-line level, excluding any activities that could be viewed as dissociable, and a cross-check on eir's ROCE with reference to modern equivalent asset (MEA) values for the level of capital employed.	We carried out an assessment of eir's fixed-line ROCE compared to a competitive benchmark, with and without the USO net cost. This does not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for this is not available. Direct fixed-line comparison is not possible due to the lack of fixed-line data for competitors and the lack of data on MEA values of the capital employed. For completeness, we also note that while MEA valuation is more economically meaningful than book values, the guidance of Decision D04/11 is that the analysis be based on historical-cost accounts, consistent with the approach that Oxera has taken.	The ROCE calculation is based on information from eir's historical-cost regulatory separated accounts. The WACC benchmark is based on ComReg's WACC determination. USO net cost figures for 2009/10 and 2010/11 are from ComReg documents relating to eir's Universal Service Fund applications (ComReg 19/36).
42 (2): Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ('EBITDA') analysis.	Profitability analysis of eir at the fixed-line level and a cross-check on eir's ROCE with reference to MEA values for the level of capital employed.	We carried out an assessment of eir's fixed-line ROCE compared to a competitive benchmark, with and without the USO net cost. This does not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for this is not available. Direct fixed-line comparison is not possible due to the lack of fixed-line data for competitors and the lack of data on MEA values of the capital employed. For completeness, we also note that while MEA valuation is more economically meaningful than book values, the guidance of Decision D04/11 is that the analysis be based on historical-cost accounts, consistent with the approach that Oxera has taken.	The ROCE calculation is based on information from eir's historical-cost regulatory separated accounts. The WACC benchmark is based on ComReg's WACC determination. USO net cost figures for 2009/10 and 2010/11 are from ComReg documents relating to eir's Universal Service Fund applications (ComReg 19/36).
42 (3): Changes in direct USO net cost, if any, over time.	Comparison of the net cost of the USO between 2009/10 and 2010/11.	A comparison was undertaken of the net cost of the USO between 2009/10 and 2010/11.	Our analysis is based on USO net cost figures for 2009/10 and 2010/11 from ComReg documents relating to eir's Universal Service Fund applications (ComReg 19/36).
42 (4): Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.	Disaggregation of profitability drivers between 2009/10–2010/11 to identify sources of cross-subsidy that would have been available in 2010/11, alongside an assessment of eir's profitability at the fixed-line level, excluding any activities that could be viewed as dissociable.	We assessed eir's profitability at the fixed-line level. This does not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for this is not available. We were unable to undertake analysis of disaggregated profitability due to differences in the format of the accounts between the years.	Fixed-line EBIT margins for eir are based on information from eir's historical-cost regulatory separated accounts.

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42 (5): Changes in prices over time.	ARPU trends for eir and its competitors in the fixed-line business over the relevant period.	Due to data availability issues, we look at developments in ARPU for a subset of competitors and time periods. Specifically, BT's retail fixed-line subscriber data is incomplete and subscriber data for all market players is available for Q4 2010–Q4 2011 only. We undertook the assessment at the retail fixed-line level to prevent potential double-counting at the wholesale level.	ARPU calculations are carried out using quarterly retail fixed-line revenue and subscriber data provided by ComReg for eir and its competitors.
42 (6): Changes in market share and/or changes in related markets.	Market shares, by revenue and subscriber, for the retail fixed-line business for eir and its competitors, accompanied by an analysis of the profitability of eir and its competitors at the fixed-line business level (EBIT and ROCE).	We reviewed changes in market shares for the main operators in the fixed-line business. We were unable to carry out profitability analysis for eir and its competitors at the fixed-line level due to segmental accounts for eir's competitors not being available at the retail level. We instead used information at the group level.	Market shares are calculated using quarterly retail fixed-line revenue and subscriber data provided by ComReg for eir and its competitors. Group-level profitability is calculated using eir's historical-cost accounts and the 2010/11 financial statements of BT Communications Ireland Ltd, UPC Communications Ireland Ltd, Vodafone Ireland Ltd and Imagine Communications Group Ltd.
42 (7): Market entry barriers	We cannot directly and unequivocally observe the strength of market entry barriers as these are complex and multi-faceted. Preferred data would include an assessment of regulatory and licensing requirements, legal requirements, technical requirements, asset intensity levels and capital requirements that are faced by new entrants.	We can conclude on whether new entrants emerge and whether they can successfully compete for higher market shares over time. As a result, we looked at market trends including market shares for the retail fixed-line business in the 2009/10–2010/11 period.	Annual market shares are calculated using quarterly retail fixed-line revenue data provided by ComReg for eir and its competitors.

Source: Oxera.

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