



Commission for
Communications Regulation

Provision of Public Pay Telephones

Submissions to Consultation 14/27

Submissions to Consultation

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Submissions Received from Respondents

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1: Alternative Operators in the Communications Market (ALTO)

alto

alternative operators in the communications market

**Consultation: Provision of Public Pay Telephones - Universal
Service: Scope and Designation
- Ref: 14/27**

Submission By ALTO

Date: May 7th 2014

ALTO is pleased to respond to the Consultation: Provision of Public Pay Telephones – Universal Service: Scope and Designation.

ALTO welcomes this opportunity to comment on this consultation and would like to make the following general comments before addressing the questions in detail.

ALTO generally supports ComReg’s preliminary conclusions relating to measured regulation. Those conclusions appear to be concerned with and address declining customer requirements in the payphone market in Ireland generally.

In particular ALTO agrees with ComReg’s view that changing the “*reasonable demand criteria*” to customer usage is the most pragmatic approach and possibly a good indicator that the key regulatory characteristic of demonstrable demand is being achieved.

ALTO recognises that that the market has changed significantly, with substitute products such as mobile phones and Voice over IP solutions reaching maturity.

ALTO submits that ComReg should extrapolate known and assumed decline as highlighted in the Eircom graphs to establish a sunset or break/determination clause for all regulation in this area.

Criteria for any sunset or break clause could be set based on simple timing or for a lower limit of phones below which it is no longer reasonable to support that base.

ALTO submits that ComReg must, as signalled, review the intermingled consumer and carrier side of Payphone Access Levy – PAL, which subsists in the market today and facilitates significant surcharges to those accessing certain numbering ranges in Ireland, e.g., 1800 Freephone ranges, from payphones.

Response to Consultation Questions:

Q.1. Do you agree with ComReg's preliminary view that there is a requirement for a public payphones USO, which allows for the easier removal of public payphones? Please give reasons to support your view.

A. 1. ALTO generally agrees with ComReg's preliminary view that there is a requirement for a public payphones USO, which allows for the easier removal of public payphones and we would like to add the following comments.

- ComReg's consultation clearly indicates that the payphone market in Ireland is in decline that decline being subject to the widespread adoption of mobile communications. ALTO agrees that it is reasonable that payphones no longer reasonably required, as can be demonstrated by lack of use, should be removed. ALTO also agrees that any redundant supporting structure, such as the kiosks should be removed.
- ALTO notes that on two occasions in the consultation ComReg indicates that Eircom may be exceeding customers' needs. Eircom's commercial choices should simply not form part of the USO charge or any other USO regime for that matter.
- ALTO notes, as we have already, that the Freephone market has been in decline for many years. ComReg has regulations in place to ensure calls to Freephone access helplines do not appear on customer bills, etc. as a result of this consultation and the required review on Payphone Access Levies, it would helpful to potential Freephone access helpline callers if they were informed of this.

Q. 2. Do you agree with ComReg’s preliminary view that criteria for removal should be as set out as above in paragraph 104 and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

A. 2. ALTO agrees with ComReg’s preliminary view that criteria for removal should be as set out as is in paragraph 104 and specified in the Draft Decision Instrument in Section 9, however ALTO makes the following comments:

- ALTO agrees that ComReg’s preliminary view is measured, as it is clearly based on known usage and deals with situations such as continued vandalism.
- ALTO considers the time limit of a 1 minute call per day as out of alignment with the minimum charges for using a payphone which are usually stated as being €2.00. ALTO consider that a norm of using a payphone is to ensure the fee is used up and thus the user inclination to use the full €2.00 charged. ALTO therefore considers and submits that the limit should be time of a €2.00 call or the duration of a minimum priced coin call – whichever measurement is the higher.

Q. 3. Do you agree with the usage criteria which are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

A. 3. ALTO agrees with the usage criteria that are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9. See answer to Question 2 for further detail.

Q. 5. Do you agree or disagree with ComReg’s preliminary view that the next designation period should be 4 years, with an option to review the threshold values after 2 years? Please provide reasons to support your views.

A. 5. ALTO considers the payphone market as a properly declining market. ALTO remarks that it is feasible that payphone usage will be so low as to make the market unfeasible. As suggested, ALTO submits that ComReg should consider a sunset or break/determination clause for payphone USO regulation in two years time from this review, that is rather than having further on-going reviews.

Q. 6. Do you agree or disagree with ComReg’s proposal that Eircom should continue to be the universal service provider for public payphones during the next designation period? Please provide reasons to support your views

A. 6. ALTO submits that ComReg should now set a sunset or break/determination of two years in time for the discontinuance of payphone USO obligations.

ALTO notes from this consultation that little or no interest has been displayed by undertakings to take on the USO obligation and ALTO suggests that the current provider Eircom appears to no longer desire to be the designated provider. Of critical import is that the noted decline in usage that indicates that consumers also do not need nor require that this position to be maintained either. Barriers to entry of this market are high, if not entirely unrealistic/disproportionate, that is, if you do not already possess, or have an option to procure an already installed network of payphones, leased properties, etc.

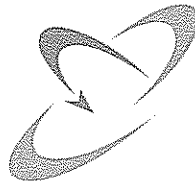
Q. 7. Do you agree with ComReg's revised draft assessment of the impact of the proposed options as set out here and in Annex: 2?

A. 7. ALTO believes that ComReg's proposals will lead to a general reduction of payphones in a measured and responsible way. ALTO considers that a time will shortly arrive when payphones will no longer be viable in terms of functionality, volume and consumer demand and that ComReg should now be preparing to discontinue this USO obligation for the reasons identified by them and supported and underpinned by this and other consultation responses.

ALTO

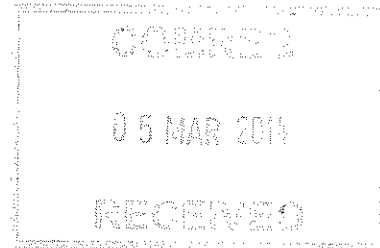
7th May 2014

2: Border, Midland & Western Regional Assembly (BMW Assembly)



3rd March, 2014

Ms Michelle O'Donnell
Commission for Communications Regulation
Irish Life Centre
Abbey Street Freepost
Dublin 1
Ireland



Re: Consultation on Provision of Public Payphones.

Dear Ms. O'Donnell,

I refer to the consultation on the provision of public payphones which is being undertaken by Comreg within the framework of the designation of a universal service provider.

This matter was discussed recently by the Border, Midland and Western Regional Assembly. The members expressed the view that public payphones should continue to be provided where there was some evidence of continued public demand and therefore the obligation should be retained in some form.

However, the members also agreed that where the demand was non-existent and in the context of almost universal mobile phone ownership and the risk of vandalism, that the removals policy should allow the current operator to remove such pay-phones.

I acknowledge that the formal deadline for responses has passed, however we were awaiting the opportunity of a scheduled Assembly meeting to raise the consultation with our elected members.

Yours sincerely,

Kieran Moylan

Assistant Director

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3: BT Communications Ireland Limited (BT)

BT Communications Ireland Limited ["BT"] Response to ComReg's Consultation:

Provision of Public Pay Telephones – Universal Service:

Scope and Designation

Issue 1 – 7th May 2014

1.0 Introduction

We generally support the preliminary conclusions of ComReg for measured regulation to address the USO requirements in this market. In particular we agree with ComReg's proposal for changing the 'reasonable demand criteria' to customer usage. For the market conditions in Ireland we consider this to be both pragmatic and a good indicator that the key regulatory characteristic of demonstrable demand is being satisfied.

However, we also recognise that that the world is changing with substitute products such as mobile phones reaching maturity and there comes a point where a product or regulatory requirement is no longer appropriate. We therefore consider ComReg should take this opportunity to establish a sunset clause for the removal of this regulation after two years.

2.0 Response to detailed Questions

Question 1: Do you agree with ComReg's preliminary view that there is a requirement for a public payphones USO, which allows for the easier removal of public payphones? Please give reasons to support your view.

Response 1 - We generally agree with ComReg's preliminary view which allows for the easier removal of public payphones and we would like to add the following comments.

- As indicated in the consultation the payphone market in Ireland is in decline with the widespread adoption of mobile communications. We agree it is reasonable that payphones no longer reasonably required (as demonstrated by lack of use) should be removed. We also agree that the supporting structure, such as the kiosk should be removed as such can be an eyesore in public places.
- We note ComReg on two occasions in the consultation indicate that Eircom may be exceeding customers' needs. Whilst laudable such would be Eircom's commercial choice and should not form part of the USO charge.
- A number of mentions are made to the use of 1800 calls from payphones however we note the Freephone market has been in decline for many years with

many help line organisations moving to other number ranges to avoid exceptionally high service provider costs.

- The European Commission has issued legislation that requires all cars manufactured from 2015 to support E-Call – i.e. a facility where the car can automatically call for help during an emergency, such as when airbags are deployed etc. Over time this should further reduce the need for public payphones.

Question 2: Do you agree with ComReg’s preliminary view that criteria for removal should be as set out as above in paragraph 104 and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

Response 2 – We agree with ComReg’s preliminary view that criteria for removal should be as set out in paragraph 104 and specified in the Draft Decision Instrument in Section 9 however we would like to add the following comment.

- We agree with ComReg’s view on removing payphones which is based on demonstrable very low usage and addresses situations such as continued vandalism.
- We consider the limit of a 1 minute call a day does not align with the minimum coin charge for using a payphone which is 2 Euro. We consider a user trait of using a payphone is to ensure the fee is used up and thus there is an inclination to use the full 2 Euro charge. We therefore consider the lower limit should be the time allocated for a 2 Euro call or the duration of a minimum priced coin call – whichever is the higher.

Question 3: Do you agree with the usage criteria which are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

Response 3 - We agree with the usage criteria for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9. Please see our response to question 2 for further detail.

We note there is no question 4.

Question 5: Do you agree or disagree with ComReg’s preliminary view that the next designation period should be 4 years, with an option to review the threshold values after 2 years? Please provide reasons to support your views.

Response 5 - We consider this is a declining market and the time is foreseeable when the low usage will make the obligation non-viable. We consider that ComReg should now set a sunset clause for this USO regulation of two years, after which the regulation should fall away.

Question 6: Do you agree or disagree with ComReg's proposal that Eircom should continue to be the universal service provider for public payphones during the next designation period? Please provide reasons to support your views.

Response 6 – We consider that ComReg should now set a sunset clause of two years for this USO obligation. We note from this consultation that no interest has been shown to take on this obligation and from the previous submissions Eircom also does not appear to want to be the designated provider. More importantly the usage suggests declining customer demand. The barriers for entering this market are high if you don't already possess an installed network of kiosks and the maintenance costs can be high given the exposure to the weather, vandalism etc. hence new market entry appears unlikely.

Question 7: Do you agree with ComReg's revised draft assessment of the impact of the proposed options as set out here and in Annex: 2?

Response 7 – We believe the proposals will lead to an increased reduction of payphones in a measured and responsible way. Given this we consider a time will soon arrive when the product is not viable in terms of volume and ComReg should now be setting a sunset for this USO obligation.

Please address enquiries to John.odwyer@bt.com

Thanks.

4: Dublin City Business Improvement District (Dublin City BID)

DUBLIN CITY BID SUBMISSION RE: COMREG 14/27

Dublin City BID/DublinTown is a not for profit collective of 2,500 businesses in Dublin City Centre which creates a welcoming and economically vibrant city environment. We work with our partners to enhance the appeal of the city centre as a place for shopping, recreation and socialising. We are pleased to have the opportunity to make a submission on the issue of public payphone provision. The location of phone boxes in the city centre, and the misuse of phone boxes and their appropriation for antisocial behaviour has been a significant cause of concern for the general public and the city's business community for some time now. We have endeavoured to answer each of the questions below as fully as possible.

QUESTIONS POSED AS PART OF CONSULTATION DOCUMENT

Question 1: Do you agree with ComReg's preliminary view that there is a requirement for a public payphones USO, which allows for the easier removal of public payphones? Please give reasons to support your view

Question 2: Do you agree with ComReg's preliminary view that criteria for removal should be as set out as above in paragraph 104 and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view

Question 3: Do you agree with the usage criteria which are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view

Question 5: Do you agree or disagree with ComReg's preliminary view that the next designation period should be 4 years, with an option to review the threshold values after 2 years? Please provide reasons to support your views

Question 6: Do you agree or disagree with ComReg's proposal that Eircom should continue to be the universal service provider for public payphones during the next designation period? Please provide reasons to support your views

Question 7: Do you agree with ComReg's revised draft assessment of the impact of the proposed options as set out here and in Annex: 2? Please provide reasons to support your views.
.....

QUESTION 1: DO YOU AGREE WITH COMREG’S PRELIMINARY VIEW THAT THERE IS A REQUIREMENT FOR A PUBLIC PAYPHONES USO, WHICH ALLOWS FOR THE EASIER REMOVAL OF PUBLIC PAYPHONES? PLEASE GIVE REASONS TO SUPPORT YOUR VIEW

We do not agree that there is a requirement for a public payphones USO. Economic statistics provided by the Central Bank in 2013 outlined mobile phone ownership in the Republic of Ireland at 120%, in that a significant number of the general population have more than one phone. Similarly the rate of smartphone ownership as measured by the Eircom Household Sentiment Survey had risen in 6 months of 2013 from 39% of all phones to 50% of total mobile phone ownership, this trend is set to continue. The rationale for the continuance of a USO for public payphones in this environment is doubtful. Public payphones are an obsolete technology that have been overtaken by the primacy of mobile devices.

The lack of a requirement for such a provision would appear to be clear to many, including Eircom as the current provider of the USO. It is clear from their submissions to the original consultation document that there is no desire on their part to continue with the USO. We would agree with their assertion that:

There is evidence that, with the development of usage in Ireland and the overwhelming presence of a much more efficient and effective form of communication by way of mobile phones, public payphones are in decline and that there is no justification to re-impose a USO.

If there is no will from the current USO operator to continue then we would have concerns about Eircom being compelled to provide such as service. Similarly we would not wish to see another operator taking over said USO. The experience in Dublin City Centre in relation to non-Eircom public payphones is not encouraging. At present the non-Eircom phones are damaged and defaced stumps which once housed *Smart* phone kiosks and remain an eyesore on city streets several years after that company has ceased to trade. Subsequent companies who have expressed interest in taking over these sites have done nothing to improve the negative impact these obsolete remnants are having on busy city streets.

There is considerable demand for limited pavement space within the city. For example there is an increased demand for bicycle stands, outdoor restaurant seating, information points etc. In this context it does not make sense to continue to deploy considerable space to phone kiosks which are no longer required by the general public. Indeed while there are still some horses and carriages in use in the city we have long since abandoned the need to publicly maintain horse troughs.



Fig 1. Advertising wraps on Eircom phone boxes, College Green



Fig 2. Used needle in Eircom phone box, Westmoreland Street

At present Eircom estimate that there are 1,329 public payphones, of which 92 are considered, by Eircom, to be economic. We would speculate that a number of those phones considered to be “economic” are in the city centre and within the Business Improvement District (BID) area. We are of the view that the economic value of these sites is more attributable to advertising revenue than to phone usage. However, these advertisements obscure the internal area of the phone box (Fig 1) and in effect provide cover for people using the phone boxes as public toilets or for drug consumption.

The levels of misuse taking place in these locations (eg. North Earl Street, Mary Street, Princes Street North, Bachelors Walk, Burgh Quay, Westmoreland Street to name but a few locations) have required the constant attentions of both the BID and City Council cleaning crews, this work is in addition to any cleaning of the phone boxes provided by Eircom, however even despite these efforts these phone boxes are still misused and present a danger rather than amenity to the general public. In relation to this shown above (Fig. 2) is a photo used in the Evening Herald last year after a member of the public found a used and bloodied needle in a Westmoreland Street phone booth. Removing such drug paraphernalia from City Centre phone boxes is an almost daily task for the BID cleaning crews, along with the removal of human waste. We therefore view these kiosks as a potential threat to public health.

While Eircom measure levels of usage and also log cases of vandalism for issues such as broken windows or damaged handsets, other key metrics such as misuse of phone boxes as public toilets, begging pitches and for drug consumption are not measured by Eircom. The high footfall and vehicle traffic in the city centre make these kiosks an excellent branding point and thus create significant revenue to make them economically viable. The significance of this income source has been referenced when we have sought to have phone boxes removed or relocated.



Fig 1: Drugs in public area, Prince Street North



Fig 4: Man uses an Eircom phone box as a begging pitch

In closing remarks on this

continued USO is necessary, it is not clear Eircom has been an operator and there would not appear to be anyone suitable to operate and manage such an infrastructure. The existing phone boxes in Dublin City Centre, which are among the 92 considered to be economic cause significant problems for people living, working, shopping and socialising in the city centre due to their misuse and should be removed. Having consulted with city centre businesses on the matter we are of the view that a number of both day and evening economy businesses would be prepared to host public payphones on their premises. This would provide safe and secure locations for any occasional usage that may be required.

QUESTION 2: DO YOU AGREE WITH COMREG’S PRELIMINARY VIEW THAT CRITERIA FOR REMOVAL SHOULD BE AS SET OUT AS ABOVE IN PARAGRAPH 104 AND SPECIFIED IN THE DRAFT DECISION INSTRUMENT IN SECTION 9? PLEASE GIVE REASONS TO SUPPORT YOUR VIEW.

While levels of use as outlined in paragraph 104 as the key criteria for the removal of phone boxes is relevant it is just one consideration. Phone kiosks play a part in the overall public realm of Dublin City. They are part of the streetscape, and as such have an impact on how people view, use and interact with an area. As such other considerations should come into play, such as how appropriate is it for a street to have a phone box in light of the competing demands for other, more relevant uses. Local residents and businesses should be consulted and should be able to petition Eircom directly for the removal of a phone box from the street.

QUESTION 3: DO YOU AGREE WITH THE USAGE CRITERIA WHICH ARE TO BE USED FOR DETERMINING WHICH PAYPHONES CAN BE REMOVED AS SET OUT ABOVE AND SPECIFIED IN THE DRAFT DECISION INSTRUMENT IN SECTION 9? PLEASE GIVE REASONS TO SUPPORT YOUR VIEW.

As mentioned in response to the previous question usage should not be the only criteria. The major issue in Dublin City Centre in relation to phone boxes is their use for antisocial behaviour such as aggressive begging and drug use, we believe this should be a priority issue due to the serious negative impression it gives of the city centre. Safer locations such as within business premises are available for the rare and occasional use that may be required for a public phone.

QUESTION 5: DO YOU AGREE OR DISAGREE WITH COMREG'S PRELIMINARY VIEW THAT THE NEXT DESIGNATION PERIOD SHOULD BE 4 YEARS, WITH AN OPTION TO REVIEW THE THRESHOLD VALUES AFTER 2 YEARS? PLEASE PROVIDE REASONS TO SUPPORT YOUR VIEWS.

We do not believe that there is a need for a Universal Service Provider. As Eircom point out in their submission "*usage per public payphone.... has reduced to 14% of 2006 levels*" with the continuing advancement and proliferation of mobile technology it is fair to assume that this trend will be further accelerated. If the decision is made to pursue a USP then we would recommend that it be for a maximum period of 12 months followed by a review of usage and should be reviewed annually thereafter. We believe we have passed the tipping point for public payphones and that they have now entered the realms of obsolescence.

QUESTION 6: DO YOU AGREE OR DISAGREE WITH COMREG’S PROPOSAL THAT EIRCOM SHOULD CONTINUE TO BE THE UNIVERSAL SERVICE PROVIDER FOR PUBLIC PAYPHONES DURING THE NEXT DESIGNATION PERIOD? PLEASE PROVIDE REASONS TO SUPPORT YOUR VIEWS.

As previously mentioned we do not believe there is a necessity for phone boxes or the continuation of arrangements with a USP. If ComReg decide to pursue this further and continue with a USP we believe that this responsibility should remain with Eircom. As mentioned in response to Question 1 from previous experience other telecoms companies mismanaged their on-street assets, failed to properly look after them and have left broken and damaged infrastructure to deteriorate, blotting city streets, see Fig 5.



Fig 5. Broken and abandoned phone kiosk on Wicklow Street, Dublin 2

QUESTION 7: DO YOU AGREE WITH COMREG’S REVISED DRAFT ASSESSMENT OF THE IMPACT OF THE PROPOSED OPTIONS AS SET OUT HERE AND IN ANNEX: 2? PLEASE PROVIDE REASONS TO SUPPORT YOUR VIEWS.

While we would agree with the enclosed reasons for removal of the phone kiosks, as mentioned in response to previous questions we believe that the removal of kiosks that use of kiosks for antisocial behaviour should be of primary importance. It cannot be appropriate for underused infrastructure to be appropriated for criminal and dangerous behaviour.

Gerard Farrell
Operations Manager
Dublin City Business Improvement District

5: Dublin City Council (DCC)

Dublin City Council response to consultation by Comreg;

Provision of Public Pay Telephones Universal Service: Scope and Designation. 7th May 2014

Question 1: Do you agree with ComReg's preliminary view that there is a requirement for a public payphones USO, (Universal Service Obligation), which allows for the easier removal of public payphones? Please give reasons to support your view.

Dublin City Council is not in a position to comment on the requirement, legal or otherwise for a public payphones Universal Service Obligation but welcomes the inclusion of criteria for removal of public payphones. Dublin City Council (referred to as DCC) has noted the number and frequency of public phone boxes throughout the city area, many of which are not in regular use and as such are subject to vandalism and anti-social behaviour. DCC is in support of streamlining the process for removal of phone boxes where there isn't a usage requirement, or at locations where they have become the focus of anti-social behaviour.

In the Dublin City Council Public Realm Strategy, the proliferation of street furniture including pay phones was identified as contributing to street clutter, negatively impacting the accessibility of spaces and their visual quality. Unused or infrequently used payphones contribute significantly to street clutter in Dublin City. DCC would support a policy that allows for easier removal of public payphones while also accommodating some input from the local community.

DCC also notes that a large number of the phone boxes in the city are accommodating a second revenue generating use in the form of advertising. This is acknowledged by Comreg in Paragraph 98 of the Consultation Document 2014. DCC would like to draw attention to the fact that the use of phone boxes for advertising is an unauthorised use under the Planning & Development Regulations and as such would require planning permission. This use and the requirement for planning permission was recently assessed and determined under a Section 5 Declaration, Ref. 0018/14. (Copy of the declaration attached).

Question 2: Do you agree with ComReg's preliminary view that criteria for removal should be as set out as above in paragraph 104 and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

Dublin City Council agrees with the proposed criteria for the removal of payphones. However, in relation to deciding on removal, we would have concerns about the average usage proposal of 1 minute per day. We are of the opinion that in a city environment a phone usage of more than a minute a day would not imply a compelling case for the phones retention. The removal of such an installation would simply increase the usage of a nearby installation, usually without generating inconvenience for the users. We are not qualified to indicate what would be the appropriate level of usage to compel retention but we feel the proposed level is not suitable in the city area. You might consider separate levels for the urban and rural context.

DCC recognises that ComReg is better placed to offer an opinion based on usage.

DCC would like to ensure that repeated vandalism is included in the criteria for anti-social behaviour under the removals policy. Also where a payphone is deemed necessary at a particular location it would be preferable to provide a single box or pedestal.

Clarification is sought on which criterion takes precedence in a situation where two competing criteria are met i.e. A Local Authority requests removal but Eircom deem the payphone necessary under the usage criteria.

Question 3: Do you agree with the usage criteria which are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

As referenced in Q2 above we recognise that ComReg is best placed to determine low usage thresholds and we support the inclusion of the free phone services proposed. However, we are of the opinion that in a city environment a phone usage of more than a minute per day would not imply a compelling case for the phones retention. The removal of such an installation would simply increase the usage of a nearby installation.

Note no Question 4.

Question 5: Do you agree or disagree with ComReg's preliminary view that the next designation period should be 4 years, with an option to review the threshold values after 2 years? Please provide reasons to support your views.

Dublin City Council has no comment regarding the designation period and the option to review.

Q. 6 Do you agree or disagree with ComReg's proposal that, for the proposed next designation period, the required universal services should be designated for the entire State and that prices should be geographically averaged? Please provide reasons to support your view.

It is not within the remit of Dublin City Council, which is a Local Authority in an urban area to comment on the geographic pricing of the public telephone service.

Q 7 Do you agree or disagree with ComReg's proposal that Eircom should continue to be the universal service provider for public payphones during the next designation period, unless there are expressions of interest from other providers? Please provide reasons to support your view.

Dublin City Council has no comment on the appointment of Eircom as the universal service provider.

Question 7: Do you agree with ComReg's revised draft assessment of the impact of the proposed options as set out here and in Annex: 2? Please provide reasons to support your views.

Dublin City Council supports the proposed revisions to the Regulatory Impact Assessment, most notably the proposed revisions to the removals policy as it represents a more streamlined approach to rationalising the current provision of public phone boxes for the following reasons;

- A large number of phone boxes are not used for their primary function but as advertising structures. Those carrying advertising represent an unauthorised secondary use and are an unsightly visual intrusion on the streetscape and the city environment generally
- Phone boxes throughout the city have become the focus of anti-social behaviour, vandalism and street clutter
- Phone boxes located within Architectural Conservation Areas or within the environs of Protected Structures require planning permission. Installations in these areas can detract from the historic setting and represent a degradation of the physical features of the areas
- Removal of phone boxes or amendments to the existing installations require consent from the relevant local authority and footway openings must be reinstated to the requirements of the relevant local authority, as per all utility works on public roads and footways.

DCC would be in support of a regulatory approach whereby the removal of problematic phone boxes would be made easier while also allowing for input from the local community. It should be noted also, that in the city context where phone boxes are in groupings of two or four generally, it would be preferable to provide a single box or pedestal at locations where a payphone is deemed necessary.

Mr. Dick Gleeson
Dublin City Planning Officer

RE: Section 5 Declaration Application

Ref: **0018/14**
Address: Junction Bolton Street / Capel Street, Dublin 1
Applicant: Ciaran Cuffe
Submitted by: Ciaran Cuffe
Date received: 27th January 2014

This application is for a Declaration under Section 5 of the Planning and Development Acts 2000 - 2010 as to whether specific works constitute development and are/ or are not exempted development.

Proposal

Clarification is sought as to whether the following works are exempted development:

The erection of an advertising panel measuring approximately 2000mm high by 800mm wide on a telephone box in a public street at the junction of Bolton Street and Capel Street, Dublin 1

The applicant has submitted a location map and photographs of the phone kiosks.

There are 2 adjoining kiosks located on the pavement at the eastern side of Bolton Street south of the entrance to the college staff car park. The pavement in this location has a substantial build-out and accommodates a Dublin Bikes station. Each kiosk is fully glazed, and panels are divided horizontally by a transom c. 800mm above ground level. The submitted photographs show the applied advertising which is affixed onto the glazed door panels of the northern kiosk on its northern elevation, and on the southern kiosk on its southern elevation.

Allowing for the intermediate transom the advertising panels have an area of c.1.4sq.m.

One of the submitted photos shows an advertisement for an AIB smartphone app, and the second photograph shows an advertisement for a McDonald's burger.

At the date of site inspection on 18th February 2014 the advertisements were for Supervalu (northern kiosk) and Simon Fun Run (southern kiosk)

APPRAISAL

It is noted that Class 31 (c) of the Planning and Development Regulations 2001 – 2013 exempts the provision of telephone kiosks or other telephone facilities in a public place not being on, over or along a public road by a statutory undertaker authorised to provide a telecommunications service. This Section 5 application is not in respect of the telephone kiosk, but solely in respect of the erection of an advertising panel on the kiosk.

In assessing Section 5 applications regard is given to Section 3 (1) of the Planning and Development Acts 2000 - 2010

Section 3 (1) In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Section 2 (1) Interpretation states that “works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

It is considered that the ‘erection of an advertising panel on a telephone kiosk’ constitutes ‘works’ as defined in Section 2 (1) of the Planning and Development Acts 2000 – 2010 and therefore constitutes ‘development’ as defined in Section 3 (1)

Article 6(2) of the Planning and Development Regulations 2001 – 2011 states that:

- (a) Subject to Article 9, development consisting of the use of a structure or other land for the exhibition of advertisements of a class specified in column 1 of Part 2 of Schedule 2 shall be exempted development for the purposes of the Act, provided that -
- (i) Such development complies with the conditions and limitations specified in column 2 of the said Part 2 opposite the mention of that class in the said column 1

The Planning and Development Regulations 2001 – 2013 Schedule 2, Part 2 exempts Advertisements under Classes 1 to 18.

Having reviewed Classes 1 to 18, I am of the opinion that Classes 3 to 18 would not be relevant to the subject application. Classes 1 and 2 exempt advertisements exhibited on business premises.

Planning and Development Regulations 2001 – 2011 Part 2 Exempted Development, Section 5(1) Interpretation:

“business premises” means

- (a) Any structure or other land (not being an excluded premises) which is normally used for the carrying on of any professional, commercial or industrial undertaking or any structure (not being an excluded premises) which is normally used for the provision therein of services to persons”

The question of whether the telephone kiosk is a ‘business premises’ is relevant, since the exemptions under Part 2 classes 1 to 5 apply to such premises.

The telephone kiosk is a structure located in a public place for the purpose of the provision of a telecommunications service by a statutory undertaker. There is no exemption for the fixing of an advertisement to such a structure unless it is a ‘business premises’

If a case is made that the kiosk is a business premises (i.e. a structure normally used for the provision therein of services to persons) then an advertising exemption under Class 1 or 2 could be available.

Exempted Development - Advertisements

Description of Development	Conditions and Limitations
<p>Class 1 Advertisements (other than those specified in classes 2, 3, or 5 of this Part of this Schedule) exhibited on business premises wholly with reference to the business or other activity carried on, or the goods or services provided on the premises.</p>	<p>9. No such advertisement shall cover any part of any window or door of any building on which the advertisement is exhibited or to which it is attached or affixed.</p>

Description of Development	Conditions and Limitations
<p>Class 2 Illuminated advertisements exhibited as part of any shop or other window display on business premises and other advertisements affixed to the inside of the glass surface of a window of a business premises or otherwise exhibited through a window of such premises.</p>	<p>1. The total area of any advertisements so exhibited shall not exceed one quarter of the area of the window through which the advertisements are exhibited.</p>

I am satisfied that the advertising panels subject of this Section 5 application are not exempt under Class 1 of Schedule 2 Part 2 since the advertisement is not wholly with reference to the business or activity carried on or the services provided and furthermore the advertisement covers the entire area of the door or window of the structure to which it is affixed

I am satisfied that the advertising panels subject of this Section 5 application are not exempt under Class 2 of Schedule 2 Part 2 since the total area of the advertisement exceeds one quarter of the area of window through which the advertisement is exhibited

I am satisfied that there are no other exempted development provisions in the Planning and Development Act 2000 as amended, or the Planning and Development Regulations 2001, as amended, under which the subject development could have the benefit of an exemption

Recommendation

It is recommended that the following decision issues in respect of the submitted Section 5.

The 'erection of an advertising panel on a telephone kiosk' constitutes 'development' as defined in Section 3 (1) of the Planning and Development Acts 2000 – 2010. The advertisement is not wholly with reference to the business or activity carried on or the services provided, and therefore does not comply with Class 1 of Schedule 2, Part 2 (Exempted Development Advertisements) of the Planning and Development Regulations 2001 – 2013. The advertisement covers the entire area of the door or window of the structure to which it is affixed and the total area of the advertisement exceeds one quarter of the area of window through which the advertisement is exhibited, and therefore does not comply with the Conditions and Limitations of Class 2 of Schedule 2, Part 2 (Exempted Development Advertisements) of the Planning and Development Regulations 2001 – 2013. The advertising panel is therefore NOT EXEMPT DEVELOPMENT. The applicant to be informed.

Margaret Coyle
A/Senior Executive Planner

6: Dublin Lord Mayor's Office

From: lordmayor@dublincity.ie [<mailto:lordmayor@dublincity.ie>]
Sent: 22 May 2014 17:08
To: retailconsult
Subject: FW: Dublin City Council response to Consultation

Dear Fionnuala

I, as Lord Mayor of Dublin chair the Dublin City Local Business Policing Forum which brings together senior representatives from the City Council, An Garda Síochána, business and tourism groups. The Forum meets monthly and discusses issues which affect the city from a policing, business and tourism point of view.

At the meeting held on Monday 28th April the issue of phone boxes on the streets of Dublin city centre and associated incidents of antisocial behaviour was raised. In particular An Garda Síochána outlined problems with antisocial behaviour in the Eircom phone boxes on Westmoreland Street. It was agreed at the meeting that I would follow up on this issue. Following the meeting, I was advised that Dublin City Council and Dublin City BID had made submissions to Comreg in relation to their consultation on public phones.

I would like to advise that I support the comments made by Dublin City Council and Dublin City BID in relation to phone boxes in the City. Phone boxes have become the focus of antisocial behaviour, vandalism and street clutter. Dublin City Council's submission asked that repeated vandalism is included in the criteria for antisocial behaviour under the removals policy. Dublin City BID's submission outlines the necessity for constant attention of both the City Council and BID cleaning crews and the requirement for the removal of drug paraphernalia on a daily basis. Phone boxes within Architectural Conservation Areas, or within the environs of a protected structure require planning permission. In addition, a large number of phone boxes are not used for their primary function but as advertising structures. The use of phone boxes for advertising is an unauthorised use under Planning & Development Regulations and as such would require planning permission. The use and the requirement for planning permission was recently assessed and determined under a Section 5 Declaration (Copy Attached).

Dublin City Centre is the main business and tourism area in the City and it is vitally important that all efforts are made to keep it clean and safe for Dubliners and visitors alike.

I appreciate if you would take into account my support as outlined above on my own behalf and on behalf of the Dublin City Local Business Policing Forum.

Regards
Oisín

Oisín Quinn

Ardmhéara Bhaile Átha Cliath

| Oifig an Ardmhéara | Teach an Ardmhéara | Sráid Dásain | Baile Átha Cliath 2 | Éire.

Lord Mayor of Dublin

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7: Eircom Group (Eircom)

eircom Group

Response to ComReg Consultation Paper:

**Provision of Public Pay Telephones
Universal service: Scope and Designation –
Further Consultation and Draft Decision**

ComReg Document 14/27



7 May 2014

DOCUMENT CONTROL

Document name	eircom Group response to ComReg Consultation Paper 13/119
Document Owner	eircom Group
Status	Non-Confidential

The comments submitted to this consultation are those of Meteor Mobile Communications Ltd. (MMC) and eircom Ltd (eircom) collectively referred to as eircom Group.

Executive Summary

eircom is disappointed by the complete failure on ComReg's part to address the material issues raised in its response to the initial consultation¹. Key among ComReg's oversights are a failure to demonstrate reasonable need for payphones, while overlooking the significant market developments that have resulted in mobile phones replacing payphones as a means of serving the needs of end users. This has been compounded by a significant under estimation of the costs associated with the draft decision while any claimed benefits are vague and entirely unsubstantiated.

eircom reiterates the concern raised in response to the initial consultation, that ComReg has not reached any properly analysed position and that there are material flaws in the manner in which ComReg has reached its draft decision. ComReg's draft decision is fundamentally flawed with respect to:

- the substance of the issue regarding a further proposed re-designation of eircom as having a Universal Service Obligation (USO) in relation to public payphones in Ireland;
- the legality of ComReg's approach; and
- the process by which ComReg has reached its conclusions.

In no part of ComReg's assessment has any evidence been provided, to the required standard, that a USO is necessary in relation to public payphones in Ireland. The onus is on ComReg to provide such evidence and it has failed to do so.

Importantly, ComReg appears to base its main justification for the USO designation of eircom in relation to payphones on what it claims is current usage information. This basis is primarily used as its justification for complying with the requirement of national regulatory authorities (such as ComReg) under EU law to identify the "reasonable needs of end-users". Yet, ComReg:

- makes no effort to determine what such reasonable needs of end-users in Ireland constitute;
- has engaged no third party analysis to back up its arguments;
- is inconsistent in the description of the quantum of users of payphones between "some" and "many";
- concedes that payphone usage is declining ;
- doesn't use its own separate data which shows the importance and level of mobile penetration and usage in Ireland; and
- has provided no or a wholly inadequate basis for its views on USO in the RIA.

eircom maintains that there is simply no justification, either on the facts or by reference to the legal requirements under EU and Irish law to justify the continuation of this onerous USO in relation to public payphones.

As part of this consultation process there has been a notable absence of input from stakeholders including groups representing the interests of end users. This supports eircom's assertion that public payphones are increasingly anachronistic and irrelevant to society. Meanwhile eircom continues to receive requests from local authorities, other authorities and business representative groups for the removal of public payphones, many of which are considered to be a focus point for anti-social behaviour.

¹Provision of Public Pay Telephones Universal service: Scope and Designation. ComReg Document 13/119.

In its response to the initial consultation eircom demonstrated the continuing, rapid decline in payphone usage which reflects the fact that needs that were once served by payphones are now being served by mobile phones which offer greater convenience, privacy and coverage throughout the state at a far lower cost to end-users. In support of this fact, our quarterly returns to ComReg show that eircom's payphone minutes dropped by 20% in the last quarter (Jan-March 2014), compared to the previous quarter, and by almost 40% in the last 6 months. In light of this rapidly accelerating decline, it is incomprehensible that ComReg would seek to justify the maintenance of a payphones USO.

ComReg has failed to address this development while dismissing other factors, including the distortions to payphone usage patterns from unsustainably low wholesale freephone call origination from payphones and unduly high charges for freephone call origination from mobile operators. ComReg also fails to establish the degree to which emergency calls from payphones may be legitimate or essential in light of the indicators of emergency call abuse from payphones and the ubiquity of mobile phone access.

The draft decision is based on the false premise that there would be no additional cost burden on eircom. In reaching this conclusion, ComReg has failed to take a forward looking approach to the USO designation, while assuming that the existing cost burden on eircom is a given and one that would not be avoided if the obligation were removed. This leads to a flawed regulatory impact assessment (RIA) as the bar against which any benefits are measured (with those that have been put forward having been unsubstantiated), is set far below the actual annual costs of over €1m that would continue to arise from the imposition of the USO. This also suggests a predetermined outcome rather than an evidence-based decision being made.

ComReg attempts to justify the re-imposition of the USO by combining this with what ComReg claims to be more dynamic removals policy. ComReg also remarks that eircom has not attempted to remove many phones in recent years while overlooking the fact that the rate of removals is ultimately driven by the requirement to provide payphones throughout the state. While this requirement remains, piecemeal removals carry disproportionate costs, and is not cost justifiable for eircom (with significant capital outlay far outweighing any negligible or non-existent potential savings), while doing little to address the on-going operational cost of state-wide provision. The lack of any robust justification for the USO remains the key concern.

Without prejudice to the above concerns, and even if, in theory, ComReg were able to justify the continuation of the USO eircom has significant concerns about ComReg's proposed removals policy. In particular eircom has concerns regarding the proposed arbitrary usage threshold which is set at one tenth of the level of usage that would be expected from a single household, while also placing undue emphasis on freephone usage as a determinant for the retention of payphones.

ComReg's draft Regulatory Impact Assessment (RIA) lacks the necessary detailed analysis that is warranted, given the significance of the imposition for eircom and the related implications for its customers and ultimately competition. The RIA merely lists options along with speculative effects that have no grounding other than their arising from ComReg's views. ComReg has only admitted incremental costs in its analysis while omitting the take account of the fact that significant reductions in cost of in excess of €1m per annum that could be achieved by calling an end to the significant losses that arise from public payphones under the USO. Similarly, ComReg neglects to consider the cost of piecemeal removals as opposed to the reduction in costs that might be achieved if ComReg decides not to re-designate the USO. With respect to claimed benefits, ComReg's estimation of claimed benefits from Public Payphones remain entirely un-quantified and without any supporting evidence, while even the general claims in respect of the number of end-users with an apparent need are littered with inconsistencies.

eircom's Submission

In addition to addressing the specific questions raised by ComReg in the current consultation, this submission will begin by identifying eircom's concerns regarding the proposed ComReg draft decision in relation to the USO regarding public payphones as follows:

- Fundamental errors of law by ComReg;
- Process deficiencies;
- Failure by ComReg to establish reasonable needs of end-users;
- ComReg's erroneous view of and approach to reasonable needs of end-users;
- Reference by ComReg to unfair and inappropriate comparators;
- Inconsistency by ComReg in the quantum of people apparently using public payphones;
- Arbitrary threshold for determining need;
- Freephone calls;
- Emergency calls;
- Cost burden;
- Designation period and removals policy;
- Insufficient account of eircom's response to ComReg 13/119 (of 7 February 2014); and
- Concluding comments

Fundamental errors of law by ComReg

The relevant EU Directive is EU Directive 2000/22/EC (as amended by Directive 2009/136/EC) (hereafter the Directive). Article 6(1) of EU Directive 2002/22/EC (as amended), obliges Member States to ensure that national regulatory authorities (such as ComReg) can (as opposed to must) impose obligations on undertakings in order to ensure that public payphones are provided to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones, the accessibility of such telephones to disabled users and the quality of services.

Under Article 6(2) of the Directive, Member States are obliged to ensure that national regulatory authorities can decide not to impose such obligations under Article 6(1) in all or part of its territory, if it is satisfied that the facilities of comparable services are widely available, on the basis of a consultation of interested parties as referred to in Article 33 of the Directive.

SI No. 337 of 2011 ("the 2011 Regulations") purports to give effect to Ireland's obligations, as a Member State, implement the relevant EU Directives, in particular relative to the potential designation of undertakings for the purposes of public payphone provision.

The obligations in relation to the public payphone provision therefore date back to 2002, and 12 years later the factual context against which the issue requires to be assessed has changed immeasurably. Even since the last designation of eircom in June 2012, the need for such an on-going provision has to be assessed against a factual situation which has changed dramatically. In particular, any objective assessment demonstrates the following:-

- Mobile networks are fully capable of meeting the requirements and the market satisfactorily provides for the needs of end-users in Ireland. With the expansion and growth of electronic communications service provision in Ireland in recent years, there is a very widespread, competitive supply of such services in Ireland;
- The cost of mobile services in Ireland has fallen very significantly over the last number of years, such that issues as to affordability and access no longer arise;

Public payphones are not currently provided in the few geographic locations in which mobile phone coverage may not exist, and there is no evidence that public payphones are required for the purposes of preventing social exclusion or managing the needs of disabled users. By contrast, the cost of provision of such public payphones is entirely disproportionate by reference to the perceived benefits.

No reliable and objective, expert analysis of the circumstances relevant to this USO consultation has been carried out by ComReg so as to demonstrate that there remains any objective need to continue to impose the onerous public payphone USO obligation on eircom.

By contrast, eircom has supplied evidence to ComReg which demonstrates that there is no longer a need for a public payphone USO in Ireland, particularly where the market ensures alternative and widespread, available, accessible and affordable services through significant competition from fixed and mobile service providers as set out in pages 14 to 17 and pages 21 and 22 of eircom's response to the initial consultation. This is squarely within the anticipated circumstances referred to in Article 6.2 of the Directive, when a national regulatory authority does not need to impose a public payphone USO.

In addition, ComReg has failed to analyse the actual financial and competitive effects and burdens placed on eircom by continuing to subject eircom to such an unnecessary USO. The USO adversely affects eircom to a significant extent and distorts competition by imposing an unfair burden on it in the form of a net cost in excess of €1m per annum. It is the disproportionate nature of the burden on eircom, by comparison with the perceived (and in eircom's view, non-existent) on-going benefit of the USO for the provision of public payphones that renders ComReg's proposed decision as being unreasonable, disproportionate, discriminatory and ultimately unlawful.

ComReg could and should have procured and consulted on an objective external economic analysis to determine whether the conditions for designating eircom as USO, in relation to public payphones, are still warranted. ComReg could and should also have carried out a detailed survey of persons who had used public payphones in the last number of years. The failure by ComReg to procure and consult on such an objective and expert analysis renders its decision not only unlawful and unreasonable, but also tainted by predetermination and objective bias as is detailed more fully later in this submission.

National regulatory authorities such as ComReg are obliged to assess the need to impose USOs in an efficient, objective, transparent and non-discriminatory manner. The evidence that is available, and particularly the evidence supplied by eircom, demonstrates that to continue to impose this unnecessary obligation on eircom must be seen as inefficient and discriminatory.

The continued imposition of the public payphones USO on eircom is adverse to eircom's commercial interests, and presents an obstacle to eircom in its competition with other undertakings in the Irish market. The onus is on ComReg to demonstrate that there is a continued need for the imposition of this onerous USO, either on eircom or at all, and that responsibility has not been discharged by ComReg.

The consideration as to the entitlement or otherwise of eircom to seek and receive compensation cannot be used as a basis for deciding to continue the designation. The designation should only be continued where there is objective, reliable, expert evidence on which it can be demonstrated that the need for the USO remains. In any event, the compensation mechanism is extremely unsatisfactory as ComReg will be aware, and is demonstrated by the on-going litigation².

In 2010 the EU Commission stated that:

²2014/Record No.61 MCA

"Since the last review, growing take-up and declining prices of mobile services can be observed. This confirms the analysis in early reviews that the competitive provision of mobile communications has resulted in consumers having widespread affordable access to these services so that there is no risk of social exclusion"³..

The OECD, in a report issued in 2011, in the context of national broadband plans, made important comments on universal services and stated that

"Furthermore, mobile connectivity is eroding the justification for fixed-line subsidisation through universal service obligations by reducing the costs and expanding the functionalities of public payphones".

Under Article 8 of the Directive, Member States may designate one or more undertakings to guarantee the provision of universal services. In any such designation process, and as provided for in Section 7(3) of the 2011 Regulations, ComReg must adopt "efficient, objective, transparent and non-discriminatory designation mechanisms whereby no undertaking is in principle excluded from being designated".

eircom believes no such proper designation mechanism has been adopted in this case. ComReg has failed to adequately consider, the designation of other undertakings for this obligation. This is a significant failure in light of the competitiveness and growth of the Irish market and is discriminatory towards eircom. It is entirely insufficient for ComReg to have merely invited expressions of interest in providing the Public Pay Telephone USO for the next designation period as an aside within the initial consultation.

On the contrary, ComReg discouraged any such applications by openly expressing the view in Consultation 13/119 that eircom "should continue to be the universal service provider due to its ubiquity, experience and capability, during the designation period, unless ComReg receives suitable expressions of interest from other providers". This is further evidence of predetermination and objective bias.

It is not surprising that no such expressions of interest were received given the serious competitive disadvantage this obligation imposes on a provider – a competitive disadvantage which has been visited by ComReg on eircom in a discriminatory fashion without any proper consideration of the extent of that competitive disadvantage, or the alternative possible designated providers, and in circumstances where the public payphone USO is an onerous, unnecessary, burden. Furthermore it would not be unreasonable to assume that no expressions of interest were received due to the fact that any potential candidates may have concluded based on the evidence at hand, that there is no reasonable need to be served.

Process Deficiencies

With regard to the process in paragraph 13 of the initial consultation on public payphones⁴, ComReg committed to "review and fully take into account all responses it receives" and to "issue a further consultation before coming to a final decision". This gave rise to a reasonable expectation that this subsequent consultation would address the points raised in response the initial consultation and build from these. Indeed, in accordance with Regulation 5 of the User Rights

³ [Communication from the Commission - Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC /* COM/2011/0795 final */](#)

⁴ Provision of Public Pay Telephones Universal service: Scope and Designation. ComReg Document 13/119.

Regulations⁵, ComReg is obliged to have regard to views expressed to it under a public consultation carried out in accordance with Regulation 26.

More generally ComReg is obliged to act in a manner which is fair and objective, as well as being reasonable and legally sound, both under Irish and EU law.

eircom is concerned that the way in which ComReg has managed the consultation process to date is unfair and is indicative of ComReg having predetermined the outcome. Denham J. in *O'Callaghan v. Mahon* commented (at page 550) as follows:

"The appearance of what has been done is critical. It is essential that justice be seen to be done. Therefore, the test refers to a reasonable apprehension by a reasonable person, who has knowledge of all the facts, who sees what is being done. It is this reasonable person's objective view which is the test. This is the criterion which is required to be applied. It is not the apprehension of a party".

In the earlier case of *Spin Communications Limited v. IRTC*, Murphy J. (approved by McKechnie J. in *Nurendale Limited v. Dublin City Council & Ors* and by Finlay Geoghegan J. in *North Wall Quay Property Holdings Limited v. DDDA*) outlined the circumstances in which objective bias could be found:

"[T]o condemn as biased the decision of a judge or other decision maker involves two conclusions. First, that the adjudicator is affected by some factor external to the subject matter of his decision and, secondly, that in relation to the particular decision the external factor operated so as to tilt the judgment in favour of the successful part."

Barron J. in *Orange Communications Limited v. Director of Telecoms (No. 2)*, commented as follows:

"The essence of bias then is the perception – the strength of that perception not being relevant for the purposes of this definition – once all the facts are known that the particular decision maker could never give or have given a decision in relation to the particular issue uninfluenced by the particular relationship, interest or attitude."

eircom's difficulty with ComReg's draft decision is that it appears to have been ComReg's starting point both that the USO should continue, and that eircom should be the (only) designated undertaking.

eircom's concern in this regard is illustrated by the complete failure on ComReg's part to address the material issues raised by eircom in its previous responses, to rely entirely on the usage information provided by eircom as a sole basis for its claim without any analysis of the actual public payphone usage; without itself carrying out an objective analysis of the extent to which it can be demonstrated that there remains a need for the provision of public payphones so as to meet the obligations of the applicable EU Directives, by the setting of arbitrary usage thresholds, and through taking no account of the lack of input from stakeholders including groups representing the interests of end-users.

There is a lack of objective reliable evidence on which to base ComReg's decision to continue the USO, and to continue to designate eircom as the only designated undertaking. Not only does this give rise to concerns as to predetermination and objective bias (as referred to above), but it also calls into question the reasonableness of the proposed decision.

⁵S.I. No. 337 of 2011

Under EU law, USO in electronic communications was designed to prevent social exclusion, by ensuring the availability of a basic level of service in case the market did not provide this.

In this regard ComReg has failed to assess the specifics of the Irish market or to adequately factor in the rapid evolution of the Irish market while relying almost entirely on an invalid presumption throughout the consultative process that eircom should be designated because of a perceived need for public payphones. In doing so it has ignored the guidance of the European Commission, BEREC and the OCED while proposing to act contrary to the growing number of informed decisions among regulatory authorities across Europe that are resulting in the removal of the Payphones USO.

A number of Member States, including Belgium, Denmark, the Netherlands, Luxembourg and Germany, either had none or no longer have a designated universal service provider for public payphones. eircom has supplied details of the methodology and assessment used in Belgium as a fair and appropriate comparator to Ireland.

ComReg has ignored the many different types of approach taken by other Member States in relation to this USO as more fully explained in the 2010 BEREC Report and has not provided a sufficient level of regulatory justification for the continued USO designation.

The relevant EU Directives make clear the circumstances in which national regulatory authorities are to have the obligation to impose USO obligations in the context of public payphones, and the circumstances in which national regulatory authorities are entitled to decide not to impose such obligations. In order to be seen to act reasonably, ComReg must be able to demonstrate that there is objective data to justify the imposition, on an on-going basis, of the onerous USO public payphone obligation on eircom, by reference to the criteria set out in the Directives. Specifically, the data must be sufficient to demonstrate that the provision of public payphones is necessary to meet the reasonable needs of end users in terms of the geographical coverage, the number of telephones, the accessibility of such telephones to disabled users and the quality of services.

In eircom's view, ComReg has not produced objective data to so demonstrate. In fact, and conversely, eircom has supplied data which demonstrates that these needs would be met without imposing this USO obligation because of the manner in which the market has so considerably changed since the obligation, was first introduced.

ComReg's consultation process, far from eliciting evidence from which it can be demonstrated that the criteria referred to in the EU Directives is not being met, has produced such a lack of response that can only be indicative of there no longer being a need for the public payphone USO. The onus is on ComReg to demonstrate that there is data sufficient to continue the USO obligation, and in the absence of such data (and indeed in the face of data to the contrary as evidenced in the EU Commission Report 2010 and the 2011 OECD Report referred to previously), ComReg cannot be said to be acting fairly or reasonably if it makes a decision, as is proposed.

Failure by ComReg to Establish Reasonable Needs of End-Users

With a view to establishing a need for public payphones in the initial consultation, ComReg applied broad generalisations suggesting that *"payphones which are located in more extreme rural areas may be more relied upon by vulnerable consumers"*. eircom demonstrated in its response that there are no payphones in extreme rural areas, while the absolute dearth of input from stakeholders such as groups representing the interests of end users, calls into question the validity of ComReg's claims that payphones are relied upon by society in any part of the country to any reasonable extent.

eircom highlighted ComReg's lack of any proper analysis and in particular the failure to use expert evidence or any sufficient or contemporary empirical evidence to demonstrate "reasonable needs of end users" for public payphones in accordance with Section 5 of the European Communities (Electronic Communications) Networks and Services) (Universal Service and Users Rights) Regulations 2011⁶. It is concerning, in paragraph 52 of the current consultation, that ComReg states *"that the use of surveys and statistical information on population are not relevant at this time as information on actual usage is a more appropriate and accurate representation of consumer need and detriment at this time"*. Low level use of payphones does not equate to a need for payphones and the apparent "ad-hoc" usage as described by ComReg, suggests that consumers occasionally choose but do not necessarily need to use payphones on these occasions.

Furthermore, eircom highlighted in its response that there is mobile coverage at all public payphone sites, and that a end-users could have a fully working (and far more convenient, private and accessible) alternative to the public payphone for as little as €15 which would include twenty minutes (€5 worth) of usage. Twenty minutes of usage alone from a payphone would cost €10, demonstrating that the on-going running cost of a mobile phone would be half that of a payphone. This relative value of mobile phones is set to increase as payphone charges will undoubtedly increase as usage declines. ComReg should be taking a forward looking view and therefore considering this when determining whether or not the USO should continue. It is not acceptable for ComReg to base its decision on a static view of the market by suggesting that the proposed "dynamic" removals criteria would address declining public payphone use.

In paragraph 192 of the current consultation, ComReg claims in the absence of any supporting evidence, that that need and usage are inextricably linked. ComReg has not demonstrated that those using payphones are doing so in the absence of alternatives that may be available to them. In circumstances where end users are exercising a choice by using a public payphone, the payphone is not satisfying an un-served need. eircom has demonstrated based on the development of the market and market offerings for mobile phone services in particular, that there is insufficient need for public payphones to justify the continuation of this USO.

ComReg refers to current provision of public payphones "throughout the state" and has not addressed eircom's observation that vast swaths of country are already un-served without an apparent material detriment to the public in those areas. ComReg refers to the possibility that a population/geographic based approach could have been taken which could lead to the relocation or introduction of payphones and additional costs for eircom. ComReg rejects this approach in favour of the usage based approach for those payphones that remain. This all the while lends to eircom's argument regarding the irrelevance of the payphones USO obligation as there is no demonstrable difference between those areas that are no longer served and those that continue to be served. ComReg has conceded that the possibility for end-users to use public payphones has already been forgone in those large areas from which all public payphones have been removed. ComReg has not demonstrated that any consumer detriment has arisen in these areas in the absence of payphones. The absence of any representations on behalf of consumers or local communities strongly confirms the absence of payphones does not give rise to societal harm. This also calls into question the validity of a usage based threshold for those public payphones that remain and the validity of ComReg RIA.

In addition, ComReg seems to base its draft decision on a claim in paragraph 5 of the current consultation that:

⁶<http://www.irishstatutebook.ie/pdf/2011/en.si.2011.0337.pdf>. In this regard, see Article 6 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (**2002 Directive**) and as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC (**2009 Directive**)

"most payphone usage is likely to be from users who have their own landline or mobile but use a payphone when they have no alternative means of making a call or for privacy reasons of the latter type, given the landline and mobile penetration in Ireland"

This is a reasonable concession that landline and mobile penetration is very high which is re-confirmed by ComReg in paragraph 30 of the current consultation and also in ComReg 13/119. There is then no logical step from that clear admission by ComReg to a claim that there is a sufficient need for public payphones merely on the basis of "no alternative means of making a call or for privacy reasons". Indeed the suggestion that public payphones offer privacy is highly questionable. eircom's response to the initial consultation noted the fact that at best public payphones offer a glass fronted kiosk. By definition it would be difficult to find a more public place to make a phone call whilst in the case of mobile phones privacy in respect of call records is addressed through the regulatory requirement to suppress freephone numbers from call records and recently dialled numbers can easily be deleted from mobile phone call logs.

It is worth noting that ComReg itself noted at page 52 of ComReg 14/197 that: "Total retail mobile voice traffic totalled 2.86 billion minutes in Q4 2013, an increase of 6.3% on Q4 2012."

Furthermore, ComReg noted at page 47 of ComReg 14/19 that: "mobile penetration since Q4 2012 and shows that at the end of December 2013, mobile penetration, based on a population of 4,603,900 (using CSO Q3 2013 estimate), was 122.2% including mobile broadband and M2M and 103.3% excluding mobile broadband and M2M. Mobile penetration is recognised as the standard metric internationally to measure the adoption of mobile services, and is calculated based on the number of active SIM cards per 100 of the population."

ComReg's own most recent data demonstrate the extent to which mobile phone usage is growing and that the very considerable level of mobile penetration in Ireland (in this regard, eircom notes ComReg's qualification at page 47 of ComReg 14/19 that: "Given that some mobile users may have used more than one active SIM card during the period, there is likely to be some over-estimation of actual individual mobile penetration using this metric.") However, this in no way changes the essential fact of the level of penetration and usage of mobiles in Ireland.

The evidence presented to ComReg during this consultation process demonstrates that in the case of needs arising from financial or mobility issues and for obvious reasons, in the case of a need for privacy, commercially available mobile phone services prove far superior to payphones in serving end users.

EU Directive 2000/22/EC (as amended) requires regard to be had to "reasonable needs of end-users". Eircom believes that the basis for ComReg assessment demonstrates no such "reasonable needs" and its approach is disproportionate to the objectives of a USO under EU law.

ComReg's erroneous view of and approach to "reasonable needs of end-users"

At paragraph 49 of the current consultation, ComReg erroneously dismisses eircom's valid earlier criticism of ComReg's failure to analyse "reasonable needs of end-users".

eircom has demonstrated both in its 7 February 2014 submission in response to ComReg 13/119, and in this submission, that fundamental flaws lie at the heart not only of ComReg's flawed process but also its substantive reasoning.

So-called "actual current usage" is grossly simplistic and in no way represents an actual reflection of "reasonable needs" as relied upon by ComReg at paragraph 50 of the current consultation. Any

[7 http://www.comreg.ie/fileupload/publications/ComReg1419.pdf](http://www.comreg.ie/fileupload/publications/ComReg1419.pdf)

imposition of USO on any undertaking must assess the actual current and future circumstances of why public phones are or are likely to be used in the context of a fast-changing and rapidly evolving market.

Reliance on the data ComReg cites fails to take a fully rounded and in-depth assessment of what "reasonable needs of end-users" actually constitute. In this context, the rejection by ComReg at paragraph 50 of the current consultation of "use of surveys and statistical information " on population which would provide actual applicable data to determine the way the market operates in practice and therefore enable ComReg to better understand what any "reasonable needs" might be, further demonstrates the fundamental flaw in ComReg's approach.

ComReg selectively relies on an otherwise inapplicable reference from the BEREC paper at paragraph 54 of the current consultation. It cannot reasonably be said that Austria and Denmark, having withdrawn the USO in relation to public payphones, constitute anything other than fair and appropriate comparators (quite apart from including the Netherlands, Luxembourg and Germany).

ComReg massively understates the role of mobile phone in serving any needs previously addressed by public payphones and misunderstands the functions of mobile phones which continue to serve these needs even when out of credit when it states at paragraph 56 of ComReg 57 that:

"ComReg acknowledges that for some consumers, in certain areas and certain circumstances there are alternatives to public payphones available to consumers such as mobile offerings which allow prepaid users to make calls when they are out of credit, motorway SOS phones, and non-USO payphones."

Furthermore, ComReg should not rely on the possibility of mobile phones being out of credit as some basis for relying on public payphones which may or may not be available at the relevant geographic location of the consumer. ComReg's suggestion also overlooks the fact that mobile operators provide end users with the ability to top-up at any-time and anywhere within a mobile network by simply sending a free text message containing a debit or credit card reference. Furthermore, for those without a debit or credit card, SMS can similarly be used by those that have sufficient foresight to have purchased a voucher costing as little as €5. ComReg cannot justify the imposition of this USO on the strength of such a tenuous need. Moreover, ComReg assumes that the same end users would have the foresight to have with them at all times the appropriate coins for making a payphone call.

In this regard, ComReg states at paragraph 102 of the current consultation that: "The following graph outlines the usage levels for the 6 month period January to June 2013 and for the period July 2013 to February 2014. This shows that **the vast majority of public payphones are used for less than 7 minutes per day** (*emphasis added*)."

A conclusion to draw is that ComReg itself acknowledges the minimal usage of the "vast majority" of public payphones in Ireland. The reasons are rooted in the development of mobile phones which are equally substitutable for all phone users in Ireland.

In this regard, ComReg states at paragraph 132 of the current consultation that: "As noted in Section 3 above, ComReg is of the view that the use of surveys and statistical information on

population are not relevant at this time as information on actual usage is a more appropriate and accurate representation of consumer need in a declining market"

eircom agrees with ComReg in relation to the decline in the market and this points very clearly in the direction of using that fact as a key feature of the market dynamics. Reliance on so-called "actual usage" therefore is an inappropriate basis for determining that consumer need requires eircom being re-designated with the USO.

Therefore requiring eircom to continue to be designated cannot possibly be justified on the basis of any appropriately measureable "reasonable needs of end-users".

ComReg itself appears to believe that there are other "appropriate" indicators of need for consumers (other than usage) as set-out in paragraph 192 of the current consultation but gives no suggestion as to what those other indicators are or how (if at all) they were assessed as part of the consultation process.

Reference by ComReg to unfair and inappropriate comparators such as France, Italy, Spain and UK

ComReg refers to France, Italy, Spain and UK as jurisdictions where the USO remains in place at paragraph 28 of the current consultation. These are clearly unfair and inappropriate comparators to refer to in the context of the position in Ireland. By looking only at those jurisdictions in which a decision has not yet been taken to remove the USO, while the trend for the removal of the USO has become established in a number of other member states, manifestly fails to be forward looking.

While any designation should be based primarily on national circumstances, no analysis of the basis of the USO is provided by ComReg in relation to these jurisdictions despite a vague recognition that they are "implemented in various ways".

By contrast, eircom has provided details of and an assessment of both methodology and approach in relation to a jurisdiction which is much closer to Ireland (i.e. Belgium).

However, ComReg chose to disregard this far more valid comparator jurisdiction entirely in the current consultation without any sufficient explanation. At paragraph 49 of ComReg 14/27, ComReg attempts to rely on unnamed and unspecified "practice with regard to USO payphones in other EU jurisdictions"

Practice in jurisdictions of roughly equal size to Ireland (e.g. Belgium in relation to which eircom has provided specific evidence) and Denmark where the USO was withdrawn clearly point to a different conclusion and are consistent with the market developments in Ireland and the future of the market (i.e. a justifiable and appropriate forward-looking analysis).

Inconsistency by ComReg in the quantum of people apparently using public payphones

A basic weakness of ComReg's position and the disproportionate response to re-designating eircom with a public payphone USO is also evident by reference to the clearly limited number of people who use public payphones and the rare occasions on which they are used for example as stated in paragraph 33 of the current consultation:

"ComReg considers that payphones are used by some consumers when their mobile is not available to them. They **may** (*emphasis added*) also be used by those without a land-line or a mobile phone, or because they choose to use a payphone rather than to have a landline."

Furthermore, in addition to conceding that public payphone usage is declining, ComReg relies on "ad hoc" use by consumers. The cost, burden and drain on eircom of being re-designated cannot be justified by ad hoc use in the context of usage that is declining and the ease with which mobile phones can provide all the seeming advantages of public payphones.

"Payphone usage is declining, and the average number of calls from some public payphones is extremely low. But payphones are still required by consumers, albeit on an **ad-hoc** (*emphasis added*) basis." This cannot be a sound basis on which to re-designate eircom with a USO.

Without any justification, ComReg then asserts at paragraph 12 that: "public payphones, which **continue** (*emphasis added*) to provide a basic service to **many** (*emphasis added*) people throughout the State."

There is no evidence provided by ComReg in the consultation process that public payphones continue to provide a basic service to many people in Ireland. Indeed, the previous claim that public payphone usage is declining in paragraph 3 of 14/27 contradicts the suggestion that there is a continuing need (if any need remains). If usage were proven to be even an indicator of need, usage trends would suggest a declining need. Indeed, this is in contrast to the reference in paragraph 14 of 14/27 where ComReg refers to the "the needs of **some** (*emphasis added*) consumers" in the absence of a USO. This inconsistency is also evident in paragraph 32 of the current consultation where it states that:

"As above, ComReg notes that the number of public payphones has declined in recent years, yet despite this decline, it is apparent that public payphones continue to provide a basic service to **some** (*emphasis added*) people throughout the State."

The inconsistencies of ComReg's approach in the consultation process as a whole and in relation to 14/27 undermine the objective justification of ComReg's view that eircom should be designated with a USO in relation to public payphones and as suggestive of a predetermined approach and a draft decision tainted by objective bias.

Arbitrary Threshold for Determining Need

Basing a decision on a usage threshold is a wholly unreliable and unjustifiable means by ComReg of measuring need and is no substitute for quantitative and qualitative measures targeted at identifying actual needs that are not already being fully served by the market.

In the draft decision instrument, ComReg proposes to establish a threshold of 1 minute of usage - provided that this is not made up of more than 30 seconds of Emergency and/or Freephone calls. ComReg provides no empirical basis for settling on these specific usage levels. ComReg does not establish or explain how 1 minute of payphone usage per day represents the reasonable needs of end-users.

Putting the proposed 1 minute per day usage threshold into context, eircom has analysed the level of usage on one of its most common voice oriented fixed line price plans⁷. Average daily usage on this plan exceeds \approx minutes per month (excluding freephone, premium and Directory Enquiry

⁷ eircom Talk Anytime

numbers)⁸. Therefore the typical home phone has \times times the volume of usage proposed by ComReg as the minimum threshold below which it considers the retention of an individual payphone not to be justified. It would be expected that a payphone should serve a significantly higher number of users than a single household. Therefore instead of 30 minutes of use per month, ComReg should be seeking to set a threshold of a multiple of \times minutes such as 1,000 minutes per month.

Just 6 of the 1,328 remaining public payphones exceed a \times minutes per month threshold. i.e. 99.5% of payphones have usage less than the reasonable need of a single household despite the fact that a payphone is supposed to be meeting the reasonable need of a community. None reach an average of 1,000 minutes per month⁹.

Freephone Calls

With regard to Freephone usage from Payphones, ComReg has completely ignored the salient points made by eircom with respect to the likely economic drivers of Freephone usage, in the form of excessive wholesale Freephone call origination charges from mobiles and below cost Freephone call origination charges from payphones, both of which should be reviewed and which undoubtedly artificially inflate the volume of Freephone minutes from public payphones. A forward looking approach must take account of the effect of removing such distortions. It is astounding that ComReg would overlook this issue when relying to a large degree on Freephone usage as a justification of the USO while it simultaneously makes Freephone usage an integral element in the proposed new removals criteria.

ComReg has stated its strong disagreement with eircom's contention that the volume of calls to specific Dublin City Council freephone numbers is being used by ComReg to justify a national designation. The fact remains that ComReg's focus on freephone use appears to stem from its observation that "a substantial amount of Freephone calls from payphones were to helpline numbers", which suggests a general need for access to various helpline numbers. However ComReg should be aware that 85% of freephone calls were to the two Dublin City Council freephone numbers. ComReg should have observed that just 4% of freephone calls related to helpline numbers other than the Dublin City Council helpline number.

As regards the proposed removals criteria, ComReg assumes that the relative effort on eircom to identify usage to particularly sensitive helpline numbers is not warranted. This is despite the fact that eircom has demonstrated to ComReg its ability to carry out such analysis with relative ease. This analysis showed that 74% of Freephone calls have been identified with non-sensitive reverse charge and international calling card numbers¹⁰ the inclusion of which would artificially perpetuate the unjustified retention of individual payphones.

Emergency Calls

ComReg should be looking solely to the current and estimate future level of legitimate emergency calls as justification for the USO with the level of false emergency calls operating against any remaining justifications for the retention of the USO.

⁸Based on analysis of usage for the month of December 2013 for calls to Local, National, Mobile and International.

⁹Based on analysis of public payphone usage for the period July 2013 to February 2014. Due to time limitations it was not possible to include emergency call volumes for this period. An estimate of emergency call minutes has therefore been made for each payphone based on a pro-rata application of actual emergency call minutes for each payphone for the period January to June 2013.

¹⁰Based on analysis of Payphone usage for August and September 2013

eircom called on ComReg to analyse the proportion of emergency calls that were “normal” calls (i.e. not miss-use of the emergency numbers) based on eircom’s estimate that 40% of other landline calls could be considered “normal”, in stark contrast to just 23% of payphone emergency calls.

ComReg has not addressed this in this further consultation. Instead it has sought to discount the significance of the high level abuse of payphones through false emergency calls, arguing that the total number of emergency calls should be its only concern. ComReg goes on to entirely miss the point in paragraph 138 by stating that “eircom has not established that emergency calls from public payphones are primarily nuisance in nature” by suggesting that the “volume of calls to ECAS from public payphones is small proportionate to the volume of nuisance calls”. ComReg has the obligation and the information to demonstrate this fact and has simply not done so.

Putting aside for a moment the fact that it is ComReg and not eircom that should be establishing the legitimacy of current payphone use, eircom has sought to highlight the likelihood of a significantly higher degree of abuse of payphones based on the low proportion of normal calls reported by the ECAS, which points to the need to justify the USO solely on the basis of normal emergency calls. Historically through eircom’s roles as the previous ECAS provider, eircom had first-hand experience of the degree to which school children appeared drive false emergency call volumes, which spiked during the mid-afternoon of school days. eircom has made reference to such activity at the ECAS forum meetings.

If ComReg intends to justify the perpetuation of the Payphones Universal Service Obligation (USO) on the basis of their use for emergency calling, it should be looking solely to the level of legitimate emergency calls as justification for the USO. Conversely the level of false emergency calls should operate against any remaining justifications for the retention of the USO and indeed the retention of individual payphones under any removals policy that might emerge should ComReg be able to justify the USO in the first instance.

eircom also highlighted the fact that in the majority of emergency situations a mobile phone is far more likely to be used than a payphone, particularly given the limited number of locations served by public payphones. ComReg is both obliged and in a position to seek evidence from ECAS of the proportion of emergency incidents that were reported solely through the use of a public payphone. This would provide important evidence as to whether or not a need exists for public payphones for the purpose of making emergency calls. ComReg has not provided any such analysis.

Cost Burden

In its executive summary and cost benefit analysis, ComReg states that the proposed obligation will not result in any additional costs to eircom and in paragraph 191, “*that additional costs incurred by Eircom, if it is re-designated are minimal*”. ComReg suggests that “eircom has the ability under the Removals Policy to remove public payphones in certain circumstances” and that “*eircom has not attempted to remove any public payphones in recent years*”. This ignores that fact that eircom is constrained by the very existence of the current USO designation such that in the absence of the freedom to make commercial decisions with respect to which payphones are removed, the random removal of payphones merely introduces more inefficiencies. .

ComReg is aware that eircom has established fixed term contract as the most efficient means of managing this declining service, which highlights the fact that there are limits to the extent that efficiency gains can be achieved while the USO remains in place. This is ultimately driven by the requirement to provide payphones throughout the state. The random removal of payphones within particular regions does little to reduce operational costs while payphones remain to be served in each region.

The removal of payphones itself involves a significant cost while the removal of individual payphones merely results in any contribution that they may be making being foregone while the costs of serving the area in which they are located remains. Ultimately such a piecemeal approach to the removal of payphones that are no longer needed would be far less efficient than a more large scale co-ordinated approach. The cost of removing payphones one by one is not objectively justifiable or otherwise economically justifiable from eircom's perspective.

ComReg is taking a backward looking approach to designation by taking the substantial cost associated with the provision of public payphones as a given and looking only to the impact a re-designation might have in increasing that cost. A forward looking approach should look at the USO designation as though it were being applied for the first time. When eircom was first designated as the USO provider for public payphones in 1999, there were in excess of 3 times as many public payphones in operation with approximately 20 times the volume of usage. As outlined in eircom's response to the initial consultation, between 2006 and 2013, average minutes per month for public payphones has fallen from by 96% from 447 minutes to just 21 minutes. While bearing in mind that the payphone base and usage would have declined further if eircom were not constrained by the existing USO obligation, it would be difficult to even contemplate the fresh imposition of a public payphone USO in the current context. ComReg cannot rely on the fact that there is currently a USO in place as justification for its continuance and must take account of the full cost as against a robust valuation of any claimed benefits.

Designation Period and Removals Policy

eircom maintains that there is simply no justification, either on the facts or by reference to the legal requirements under EU and Irish law for a USO but without prejudice to the above concerns, if ComReg were able to justify the continuation of the USO, eircom has significant concerns about ComReg's proposed designation period.

With regard to the designation period eircom has already highlighted that the USO significantly distorts the operation of payphones relative to the operation that would exist under normal commercial conditions. Therefore the designation period cannot be influenced by the nature of the removals policy that is applied and must be based on a thorough forward looking analysis of the need for public payphones. Based on the limited analysis that ComReg has relied on to date, the declining use of payphone alone would suggest that the re-designation should be limited to 1 year. For the avoidance of doubt, eircom does not accept that the analysis of usage, in the absence of qualitative analysis of usage drivers provides ComReg with sufficient justification to re-designate eircom in any case, even if the designation period were set to 1 year.

ComReg has sought to justify a 4 year designation period on the basis that it has introduced a "dynamic" removals procedure. However the proposed removals policy and procedure is far more demanding as the criteria was previously "low" usage, absent a specific threshold. Notably eircom is seeing a greater number of calls from local authorities for the removal of public payphones rather than objections to their removal while public objection to the removal of public payphones is almost non-existent.

Furthermore the new reporting and notification requirements would mean that certain phones could not be removed for up to 9 months and on average 6 months after usage falls below the threshold (i.e. 6 month bi-annual reporting period plus 1 month to submit a report to ComReg plus 2 Month prior notification of removal to ComReg).

The single site rule is written such that multiple phones in a single site would be viewed in respect of their combined usage which means that none might be removed until long after all had passed

below the threshold. The rule should allow for all but one to be removed. Also the draft decision fails to refer to the combined treatment leaving mutli-sites in limbo.

ComReg did not take sufficient account of eircom's comments of 7 February 2014

eircom does not believe that ComReg took sufficient account of the range of views and analysis provided by eircom in its submission of 7 February 2014. eircom rejects ComReg's assertion that it "fully considered" eircom's views as stated in paragraph 24 of the current consultation. Most of the references to eircom's comments are selective and do not capture the detail provided or sufficiently analyse the points made by eircom.

Merely providing "views" on eircom's submissions as stated in paragraph 9 is insufficient given the cost burden and obligation which ComReg has unjustifiably proposed to continue to impose on eircom, in relation to the USO regarding public payphones.

Concluding Comments

In conclusion, the Directive requires Member States to entitle national regulatory authorities to impose USOs in certain circumstances. That same Directive also envisages a situation where it would no longer be necessary to impose such USO obligations, and required Member States to ensure that national regulatory authorities were entitled to decide not to impose a particular obligation.

ComReg has not only an entitlement, but also a duty not to impose a continuing USO obligation, unless there is a clear and objectively justified need to do so, due to the onerous nature of such designation on eircom. That objectively justified need must be established by reference to objective, expert, up-to-date data which has been satisfactorily procured, and consulted upon, by ComReg. This is demonstrably not the case in the current consultation.

The factual scenario that pertained previously has fundamentally changed. This is demonstrated by the reports from both the Commission and the OECD referred to above, as well as ComReg's own analysis of mobile data. In a number of other Members States (such as Belgium where the national regulatory authority commissioned economics and legal experts to justify their eventual decision), their national regulatory authorities have already determined that it is no longer necessary to continue a USO for public payphone provision.

In Ireland, the situation prevailing is similar to those countries where the USO has been dropped, and it is very different to the situation prevailing at the time the USO was first imposed. The need for a continuing public payphone USO in Ireland has not existed for some time and certainly no longer exists.

The impact of a continuing USO public payphone obligation on eircom is severe, anti-competitive, and unlawful. ComReg's proposed decision is unlawful because it has been arrived at without the analysis necessary to ensure that the continuation of the USO is justified. It has failed to take account of relevant considerations, and has instead used irrelevant considerations as purported justifications.

ComReg's reasoning is unclear, incomplete and not based on clear or objective supporting data. It has not carried out adequate consultation, it has failed to take proper account of eircom's earlier submissions, it has failed to carry out an adequate Regulatory Impact Assessment and has fundamentally failed to adhere to the requirements of the relevant EU Directives and EU law generally. ComReg's proposed decision is indicative of the issue having been predetermined by ComReg and the decision being flawed by reference to issues of objective bias.

There is insufficient evidence to support the continuation of the public payphone USO. Even were there to be such evidence (which there is not), the designation of eircom by ComReg without considering any possible alternative undertakings is disproportionate, discriminatory and is unlawful. The onus of proof is on ComReg to demonstrate that there remains a need for the onerous public payphone USO to continue. ComReg has singularly failed to discharge that onus.

eircom requests that ComReg addresses the concerns raised in this and eircom's earlier submissions.

Question 1: Do you agree with ComReg's preliminary view that there is a requirement for a public payphones USO, which allows for the easier removal of public payphones? Please give reasons to support your view.

For the reasons set out above eircom strongly disagrees with ComReg's preliminary view that there is a requirement for a public payphones USO. The key concern here is that ComReg's preliminary view is not evidence based. It has been established in the absence of reliable, objective, expert analysis of the current Irish context while also failing to recognise or quantify the onerous nature of the public payphone USO obligation on eircom. Moreover the view has been reached with little regard for the evidence supplied by eircom which demonstrates that there is no longer a need for a public payphone USO. Therefore there can be no question that ComReg has not had an opportunity to consider the adverse impact of a USO designation on eircom.

Please refer to previous paragraphs, and to our response to Q.5 below, to ascertain eircom's views in relation to ComReg's revised removals policy.

Question 2: Do you agree with ComReg's preliminary view that criteria for removal should be as set out as above in paragraph 104 and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

Without prejudice to eircom's objection to the re-imposition of the USO and in the unlikely event that ComReg could justify this under current market conditions, eircom does not agree that the removals policy should operate as set out in the consultation. The proposed removals criteria of 1 minute of usage - provided that this is not made up of more than 30 seconds of Emergency and/or Freephone calls has been set in the absence of any empirical analysis. As previously highlighted in this response ComReg has not demonstrated any actual need nor does it establish or explain how 1 minute of payphone usage per day represents reasonable needs of end users.

Question 3: Do you agree with the usage criteria which are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

If we put to one side for a moment, the fact that ComReg has not demonstrated any actual need, as explained above, that average daily usage on eircom's popular Talk Anytime plan of \approx minutes per month (excluding freephone, premium and Directory Enquiry numbers) is 10 times that proposed by ComReg as the minimum threshold below which it considers the retention of an individual payphone not to be justified. It would be expected that a payphone should serve a significantly higher number of users than a single household. Therefore instead of 30 minutes of use per month, ComReg should be seeking to set a threshold of a multiple of \approx minutes such as 1,000 minutes per month. Based on usage over the last year, 99.5% of payphones have usage less than the reasonable need of a single household despite the fact that a payphone is supposed to be meeting the reasonable need of a community. None reach an average of 1,000 minutes per month. This highlights the fact that ComReg should be able to reach the reasonable conclusion through analysis of aggregate usage alone, that there is insufficient need (if any) to justify the imposition of the USO in the first instance.

Q. 4 Do you agree or disagree with ComReg's preliminary view that the next designation period should be 3 or 4 years? Please provide reasons to support your view.

For the avoidance of doubt, eircom does not accept that the analysis of usage, in the absence of qualitative analysis of usage drivers provides ComReg with sufficient justification to re-designate eircom in any case, even if the designation period were set to 1 year.

The designation period cannot be influenced by the choice of removals policy and must be based on a thorough forward looking analysis of the need for public payphones. eircom maintains that there is simply no justification, either on the facts or by reference to the legal requirements under EU and Irish law for a USO. Without prejudice to this view and even if, in theory, ComReg were able to justify the continuation of the USO, based on the limited analysis that ComReg has relied on to date, the declining use of payphone alone would suggest that the re-designation should be limited to 1 year.

Question 5: Do you agree or disagree with ComReg's preliminary view that the next designation period should be 4 years, with an option to review the threshold values after 2 years? Please provide reasons to support your views.

ComReg has sought to justify a 4 year designation period on the basis that it has introduced a "dynamic" removals procedure. However the proposed removals policy and /procedure while doing away with the requirement to notify local authorities or take on board public views, is far more demanding as the criteria was previously "low" usage, absent a specific threshold.

Furthermore the new reporting and notification requirements would mean that certain phones could not be removed for up to 9 months and on average 6 months after usage falls below the threshold (i.e. 6 month bi-annual reporting period plus 1 month to submit a report to ComReg plus 2 Month prior notification of removal to ComReg).

The single site rule is written such that multiple phones in a single site would be viewed in respect of their combined usage which means that none might be removed until long after all had passed below the threshold. The rule should allow for all but one to be removed. Also the draft decision fails to refer to the combined treatment leaving multiple-sites in limbo.

Question 6: Do you agree or disagree with ComReg's proposal that Eircom should continue to be the universal service provider for public payphones during the next designation period? Please provide reasons to support your views.

Under Article 8 of Directive 2002/22/EC (as amended), Member States may designate one or more undertakings to guarantee the provision of universal services. In any such designation process, and as provided for in Section 7(3) of the 2011 Regulations, ComReg must adopt "efficient, objective, transparent and non-discriminatory designation mechanisms whereby no undertaking is in principle excluded from being designated".

eircom believes no such proper designation mechanism has been adopted in this case. ComReg has failed to consider, or adequately consider, the designation of other undertakings for this obligation. This is a significant failure in light of the competitiveness and growth of the Irish market and is discriminatory of eircom. It is entirely insufficient for ComReg to have merely invited expressions of interest in providing the Public Pay Telephone USO for the next designation period.

On the contrary, ComReg discouraged any such applications by openly expressing the view in Consultation 13/119 that eircom "should continue to be the universal service provider due to its ubiquity, experience and capability, during the designation period, unless ComReg receives suitable expressions of interest from other providers". This is evidence of predetermination and objective bias.

It is not surprising that no such expressions of interest were received given the serious competitive disadvantage this obligation imposes on a provider – a competitive disadvantage which has been visited by ComReg on eircom in a discriminatory fashion without any proper consideration of the extent of that competitive disadvantage, or the alternative possible designated providers, and in circumstances where the public payphone USO is an onerous, unnecessary, burden. Furthermore it could be concluded that no expressions of interest were received due to the fact that any potential candidates may have concluded based on the evidence at hand, that there is no need to be served.

Question 7: Do you agree with ComReg's revised draft assessment of the impact of the proposed options as set out here and in Annex: 2? Please provide reasons to support your views.

ComReg purports to rely on a draft Regulatory Impact Assessment (RIA) at Annex 3 which is wholly insubstantial and lacking the depth and analysis that a proper assessment should undertake. The RIA is merely a list of options and possible effects of one option over another without any assessment or analysis. As noted earlier, with respect to claimed costs, ComReg has only admitted incremental costs in its analysis while omitting the take account of the fact that significant reductions in cost of in excess of €1m per annum that could be achieved by calling an end to the public payphones USO. Similarly, ComReg neglects to consider the cost of piecemeal removals as opposed to the reduction in costs that might be achieved if ComReg decides not to re-designate the USO.

With respect to claimed benefits, and as noted earlier in this submission, eircom has identified significant inconsistency in ComReg's estimation of the quantum of people apparently affected by public payphones. Without any supporting evidence, ComReg asserts at paragraph 12 that public payphones "**continue** (emphasis added) to provide a basic service to **many** (emphasis added) people throughout the State."

There is no evidence provided by ComReg in the consultation process that public payphones continue to provide a basic service to many people in Ireland. Indeed, the suggested continuity of the claimed need would appear to contradict the previous claim that public payphone usage is declining in paragraph 3 of 14/27. In the absence of more detailed analysis it is impossible for ComReg to conclude that the number of users is not declining. Furthermore, this is in contrast to the reference in paragraph 14 of 14/27 where ComReg refers to the "needs of **some** (emphasis added) consumers". This inconsistency is also evident in paragraph 32 of the current consultation where it states that:

"As above, ComReg notes that the number of public payphones has declined in recent years, yet despite this decline, it is apparent that public payphones continue to provide a basic service to **some** (emphasis added) people throughout the State."

The inconsistencies of ComReg's approach in the consultation process as a whole and in relation to 14/27 undermine the objective justification of ComReg's view that eircom should be designated with a USO in relation to public payphones.

8: UPC Communications Ireland Limited (UPC)



**UPC Ireland Response to: ComReg 14/27;
Consultation and Draft Decision on Provision
of Public Pay Telephones, Universal Service:
Scope and Designation**



Introduction

UPC Communications Ireland Limited (“UPC”) welcomes the opportunity to provide its response to ComReg on its Consultation (“the consultation”) on the Provision of Public Pay Telephones (ComReg 14/27).

In common with other aspects of Universal Service, UPC Ireland believes that where services are justifiably designated for provision by a Universal Service Provider (USP) it is imperative that such services are provided efficiently.

UPC Ireland notes ComReg’s statement that “*ComReg considers that most payphone usage is likely to be from users who have their own landline or mobile but use a payphone when they have no alternative means of making a call or for privacy reasons of the latter type, given the landline and mobile penetration in Ireland¹*”.

UPC Ireland is of the view that given the overwhelming and increasing presence of much more efficient and effective forms of communication by way of mobile phones, home landlines and over-the-top phone applications it is questionable whether circumstances in Ireland require a USO designation for the provision of payphones.

This aside, UPC Ireland is of the view that where ComReg intends to maintain the obligation it is essential that it does not result in mandating the provision of a large number of uneconomic payphones.

Responses to ComReg Questions

Question 1: Do you agree with ComReg’s preliminary view that there is a requirement for a public payphones USO, which allows for the easier removal of public payphones? Please give reasons to support your view.

Where ComReg is of the view that there is a requirement for a public payphone Universal Service Obligation (USO) and where ComReg intends to maintain the obligation, UPC Ireland agrees that ComReg should also allow for the easier removal of public payphones where there is not “*a demonstrated reasonable need*”.

¹ Paragraph 5, page 5 ComReg 14/27



Question 2: Do you agree with ComReg’s preliminary view that criteria for removal should be as set out as above in paragraph 104 and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

UPC Ireland agrees that the removals criteria should be based on demonstrable and objective criteria and that public payphone usage is a reasonable basis. However, UPC Ireland does not agree with the level of the usage thresholds proposed by ComReg. ComReg states *that removal of payphones from a location should be permitted where*

- *average usage (including local, national, mobile, international, emergency, Freephone and reverse charge minutes) is less than 1 minute per day, unless*
- *the average number of minutes to Freephone numbers and Emergency Services combined is not more than 30 seconds per day².*

UPC Ireland views these thresholds as far too low (and would make the same comment about 2 minutes or 3 minutes per day as presented in paragraph 106) and not at all representative of “*a reasonable need*”. The threshold levels as proposed by ComReg amount to severely restricting the removal of uneconomic payphones.

Question 3: Do you agree with the usage criteria which are to be used for determining which payphones can be removed as set out above and specified in the Draft Decision Instrument in Section 9? Please give reasons to support your view.

See response to Q.2 above.

Question 4 Do you agree or disagree with ComReg’s preliminary view that the next designation period should be 3 or 4 years? Please provide reasons to support your view.

² Paragraph 104, page 23, ComReg 14/27



Where ComReg is of the view that there is a requirement for a public payphone Universal Service Obligation (USO) and where ComReg intends to maintain the obligation, UPC Ireland agrees that the designation period should be 3 or 4 years.

Question 5: Do you agree or disagree with ComReg's preliminary view that the next designation period should be 4 years, with an option to review the threshold values after 2 years? Please provide reasons to support your views.

UPC Ireland agrees that it is sensible to review the threshold levels after 2 years given the rapidly changing and decreasing usage levels of payphones.

UPC Ireland is of the view that given the overwhelming and increasing presence of much more efficient and effective forms of communication by way of mobile phones, home landlines and over-the-top phone applications it is sensible to review the threshold values after 2 years.

Question 6: Do you agree or disagree with ComReg's proposal that Eircom should continue to be the universal service provider for public payphones during the next designation period? Please provide reasons to support your views.

No comment.

Question 7: Do you agree with ComReg's revised draft assessment of the impact of the proposed options as set out here and in Annex: 2? Please provide reasons to support your views.

No comment.

