



Commission for  
**Communications Regulation**

## Decision Notice

### The Provision of the Universal Service:

#### Request for Funding by Eircom

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## 1 Executive Summary

In consultation document 07/07 entitled “The Provision of the Universal Service: request for funding by Eircom”, (“the consultation”) the Commission for Communications Regulation (“ComReg”) invited all interested parties to submit their views in relation to the preliminary matters for decision relating to Eircom’s request for universal service funding dated 11 May, 2006.

The consultation was the first in a planned series of consultation documents and decisions addressing Eircom’s request for funding. The consultation also sought the views of interested parties in relation to appropriate procedures to adopt for any future requests for funding.

Responses to the consultation were received from the following interested parties:

- Eircom;
- BT Ireland (“BT”);
- Association of Licensed Telecoms Operators (“ALTO”);
- O2 Communications (Ireland Ltd) (“O2”); and
- Vodafone Ireland Limited (“Vodafone”).

ComReg wishes to thank all interested parties for their responses. Their views have been carefully considered and have informed ComReg’s final decisions in relation to the issues under consideration.

This decision notice summarises the views expressed by interested parties to the consultation document and sets out the final decisions of ComReg in relation to the issues that were consulted upon.

### **ComReg’s conclusions may be summarised as follows:**

1. The relevant period for assessing Eircom’s request for funding dated 11 May, 2006 shall be the financial period commencing 1 April, 2006.
2. A full justification for Eircom’s request for funding shall be submitted in writing to ComReg, within one month of the publication of relevant audited separated accounts, but no later than six months following the end of Eircom’s financial period.
3. If Eircom wishes to make a request to ComReg for funding in respect of its provision of the universal service for financial periods subsequent to Eircom’s current financial period, any such request shall be submitted to ComReg on an annual basis.

At an appropriate time after the effective date of this decision, ComReg will begin and complete the process of obtaining the necessary information from Eircom, which will enable ComReg to assess Eircom's request dated 11 May, 2006 for universal service funding.

This preliminary assessment will involve a thorough review and examination of Eircom's financial position; examining both tangible and intangible costs and benefits, to determine whether or not there is any net cost arising as a result of the provision by Eircom of the universal service, and whether or not any such net cost might represent an unfair burden to Eircom.

Based on this assessment, ComReg will then decide whether or not it should accept Eircom's request for funding, in respect of the period commencing 1 April, 2006. The outcome of this preliminary assessment will be published in a consultation document. Interested parties will then have an opportunity to make representations which will be fully taken in to account before ComReg makes a final decision on whether or not Eircom is entitled to funding in respect of its provision of the universal service.

## **2 Introduction**

As previously outlined in the consultation, the universal service in Ireland consists of the provision of a defined minimum set of services to all end-users at an affordable price.

Eircom, the universal service provider in the State, made a written request to ComReg for universal service funding on 11 May, 2006. ComReg, as the national regulatory authority in Ireland, is obliged under EU and domestic law to assess Eircom's request.

Therefore, ComReg first consulted on the preliminary issues identified in section 3 of the consultation. The preliminary issues that were identified for consultation, together with a summary of the responses received by interested parties and the formal decisions by ComReg are set out in following sections of this document.

### **3 Decision Notice Issues**

#### **3.1 Introduction**

As noted in the consultation, the decisions to be made by ComReg were restricted to two preliminary issues:

1. The appropriate period in respect of which Eircom should be entitled to seek funding for its provision of the universal service; and
2. Procedures for future requests for funding by Eircom.

The following section summarises the views of interested parties and sets out ComReg's final decision in relation to these issues.

#### **3.2 Relevant funding period**

##### **Views of respondents**

Vodafone agreed with ComReg's proposed decision on the relevant period for funding.

O2 noted that ComReg should use the financial period commencing 1 April, 2006 to carry out an initial assessment and if it were determined that a funding mechanism should be established, the relevant funding period should only commence after ComReg had established the framework for such funding.

ALTO and BT did not agree that the relevant funding period should be the financial period commencing 1 April, 2006 on the basis that the proposed period for assessment was a current period, in respect of which no appropriate accruals for such payment could reasonably have been made by operators.

Eircom did not agree with the proposed decision regarding the relevant period, suggesting that as it had made a valid request for funding in 1999, that entitlement had not been affected by the statutory basis giving rise to the entitlement changing.

All respondents, except Eircom, agreed with ComReg's preliminary view that there was no basis for retrospective application of the funding provisions of the Universal Service Regulations<sup>1</sup> prior to the date the Universal Service Regulations came in to force (on 25 July, 2003).

O2, BT and ALTO suggested that the relevant period could only commence after ComReg had established the framework for such funding. In particular, one respondent referred to Regulation 11(2) of the Universal Service Regulations which specifies some of the requirements for a funding request. O2 suggested that since no

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<sup>1</sup> The European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

supporting information had been provided by Eircom in relation to its request for funding, that no determination could be made on whether or not there should be funding, until such information was provided.

### **ComReg's decision and reasons therefor**

ComReg has carefully considered the views of respondents summarised above. ComReg has decided that the relevant period for the request for funding dated 11 May, 2006 is the financial period commencing 1 April, 2006. This decision is based on the following:

1. In respect of the period 1999-2003, ComReg remains of the view that Eircom is not entitled to seek retrospective compensation from July, 1999, as the Universal Service Regulations do not purport to have any retrospective effect prior to 25 July, 2003. ComReg notes that it had received a prior request for funding from Eircom in respect of this period. Indeed, this was also pointed out to ComReg by Eircom in its response to the consultation. Eircom also suggested in its response to the consultation that ComReg did not respond to Eircom's 1999 request. ComReg wishes to emphasise that it did in fact respond to Eircom's request and sought further detailed information from Eircom in relation to an important issue relating to that request. However, the further information that was sought was not provided. Ultimately, the request for funding was not pursued to its conclusion by Eircom and as such, it effectively lapsed, prior to the new legal framework (the Universal Service Regulations) governing universal service funding coming in to effect on 25 July, 2003.
2. ComReg has also considered the position with respect to the period 25 July up to the date of Eircom's current request. ComReg notes that it received no request for funding from Eircom from the date the Universal Service Regulations came in to effect on 25 July, 2003 up to the date of Eircom's current request dated 11 May, 2006. ComReg remains of the view that in those circumstances, an assessment going back to 25 July, 2003 would be unfair to other operators since they would have made commercial decisions on the reasonable assumption that no fund was to be in operation. In this regard, ComReg has also taken account of specific representations made by some of the interested parties. Vodafone for example, stated that allowing retrospection would be certain to have an adverse impact on the market if a funding mechanism were later to be established. It also suggested that such a decision could create uncertainty and dampen investment incentives. O2 expressed the view that no operator would have made provision for universal service funding in its near-term financial planning. ALTO and BT expressed very similar views. These views reflect those expressed by ComReg in the consultation. ComReg notes from Eircom's response to consultation that it recognises that its not having pursued a request for funding post-2003 would have caused uncertainty for other operators. It should be pointed out that Eircom also expressed the view that operators should have made commercial decisions in light of that regulatory uncertainty. ComReg does not accept that this should reasonably have been expected of operators. In addition, much of

the uncertainty could in the first place, have been removed by Eircom itself, had it made a fully supported request for funding within a reasonable period following the coming in to force of the Universal Service Regulations on 25 July, 2003.

Finally, ComReg notes the comments by Eircom to the effect that industry would have been aware of Eircom's request for funding in 1999 and that this contradicts ComReg's views that industry would have had a reasonable assumption that no fund was to be in place. However, it is clear that while industry might have been aware of Eircom's request in 1999, that request did not span the period post-25 July, 2003. No request was made by Eircom post-25 July, 2003 up to 11 May, 2006 and therefore, it does appear correct to say that industry would have had a reasonable assumption about there being no universal fund in respect of that period. In addition, as already noted, the request made in 1999 had lapsed prior to 2003.

3. 1 April, 2006 is the commencement of the period of assessment and this roughly coincides with the date of Eircom's request of 11 May, 2006.

The formal decision reflecting the above conclusions is set out in section 4 of this decision notice.

### **3.3 Procedures for future requests for funding**

#### **View of respondents**

ALTO and BT agreed that greater clarity and predictability would be introduced by ComReg's proposals, but noted that requests for funding should have a notice period of at least one financial year in advance.

The view that there should be a requirement for a one (financial) year period of advance notification was shared by O2.

Vodafone expressed general approval for ComReg's proposals, but argued that the quantitative data used in assessing requests should be based solely on data for that period and not on data from a previous financial period.

Eircom noted that the proposed approach was sensible in general, but that the time limits proposed in respect of a funding request were not reasonable and that the time limit should be increased to 12 months following the end of Eircom's financial period.

#### **ComReg's decision and reasons therefor**

ComReg remains of the view that it is reasonable to require that in future, Eircom would submit requests for funding on an annual basis.

The Universal Service Regulations do not specify when a universal service provider must submit requests for funding; therefore ComReg considers that it is appropriate



and reasonable, in the interests of commercial and legal certainty and in the interests of orderly administrative procedure, that greater clarity and predictability be introduced in this regard.

ComReg has considered the views of respondents as summarised above. ComReg has decided that it would be unreasonable to expect Eircom to submit its request for funding one year in advance, as the outcome of the year would be uncertain.

In relation to using the data from the previous financial year, ComReg noted in the consultation that the previous financial period data would only provide a starting point for the assessment of the request, except where there is *prima facie* case to the effect that circumstances have changed significantly. In such a case, it is envisaged that ComReg would use the data for the period in question.

ComReg does not agree that extending the time limit to 12 months following the end of Eircom's financial period would be appropriate as it believes that to do so would increase uncertainty in the market in relation to funding.

The formal decision reflecting the above conclusions is set out in section 4 of this decision notice.

## 4 Decisions

### 1. **Relevant period of assessment for Eircom's current request for universal service funding dated 11 May, 2006**

- (a) The relevant period for assessing Eircom's request for universal service funding dated 11 May, 2006 shall be Eircom's financial period commencing 1 April, 2006. The assessment shall be based on Eircom's actual cost data in respect of that financial period.
- (b) A full justification for Eircom's request for funding shall be submitted in writing to ComReg, within one month of the publication of relevant audited separated accounts, but no later than six months following the end of Eircom's financial period.
- (c) If Eircom does not comply with (b) above, ComReg shall not be bound to consider Eircom's current request for funding dated 11 May, 2006.

### 2. **Requests for universal service funding for financial periods subsequent to Eircom's current financial period**

- (a) If Eircom wishes to make a request to ComReg for universal service funding in respect of its provision of the universal service for financial periods subsequent to Eircom's current financial period, any such request shall be submitted to ComReg on an annual basis. Any such request (if it is made) shall be made within one month of the publication of relevant audited separated accounts, but no later than six months following the end of Eircom's financial period.
- (b) The period for assessment for such request (if any) under (a) shall be Eircom's most recent financial period preceding the date of such request and a request under (a) by Eircom shall be made on that basis.
- (c) If Eircom wishes to make a request for universal service funding under (a), it shall notify ComReg of its intention to submit such a request no later than one calendar month in advance of it so submitting.
- (d) Without prejudice to ComReg's statutory powers to require information from Eircom, Eircom shall furnish ComReg with supporting information that is sufficient to support a request for universal service funding under (a), at the same time that it submits a request.
- (e) Failure by Eircom to comply with (a) or (b) or (c) or (d) shall result in the request for funding being non-compliant. ComReg will not be bound to consider a request for universal service funding that does not comply with (a) or (b) or (c) or (d).

These decisions are effective and legally binding, 28 days from the publication date of this decision notice<sup>2</sup>.

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<sup>2</sup> Under the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (as amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2006) Eircom has a period of 28 days, from the date they are notified to it (which is the publication date hereof) to appeal these decisions.

## 5 Next Steps and Further Consultation

As noted in the consultation document, ComReg considers that the issues under consideration are ones that require consultation under Regulation 27 of the Universal Service Regulations and Regulation 19 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003<sup>3</sup>.

Steps following this decision:

- ComReg will engage with Eircom in relation to the information that is considered necessary to support its current application. Through this process ComReg will define what supporting information is required and sufficient for the purposes of assessing Eircom's current request for universal service funding.
- ComReg will begin and complete the process of obtaining the necessary information from Eircom, which will enable it to assess its request for universal service funding. ComReg will then commence assessing the information once it is received from Eircom. However, ComReg may require further information from Eircom pending the completion of its assessment. Where ComReg does not obtain all information that is reasonably required and sufficient from Eircom, it may decide that Eircom's request for funding is incomplete and to discontinue the assessment in respect of the financial period for which the request for funding was made and it shall notify Eircom of its intention to do so. In such circumstances, no determination would be made by ComReg in respect of the financial period for which the request for funding was made.
- If ComReg determines that Eircom's universal service obligations do not represent an unfair burden, it shall notify Eircom of that determination, together with the reasons for the determination as soon as reasonably practicable after the determination is made.
- ComReg will make publicly available the results of the cost calculations and the conclusions of any audit or verification undertaken.
- If ComReg determines that there is a net cost arising and also an unfair burden on Eircom, ComReg will consult with industry generally in relation to providing for an appropriate funding mechanism and will set out its preliminary views in relation to same. ComReg will make publicly available the results of the cost calculations and the conclusions of any audit or verification undertaken.

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<sup>3</sup> These Regulations transpose in to Irish law Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

- ComReg will take in to account views expressed in response to that consultation and ComReg will then publish its final decision.
- As noted in the consultation, regulatory impact assessment will be undertaken by ComReg where it is required.

## Appendix – Relevant Legislation and Policy Documents

### 1. **Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (“the Universal Service Directive”).**

Articles 12 and 13 of the Universal Service Directive make provision for the costing and financing of universal service obligations respectively.

### 2. **The European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003.**

Regulations 11 and 12 of the Universal Service Regulations transpose Articles 12 and 13 of the Universal Service Directive in to Irish law and make provision for the costing and financing of universal service obligations respectively.

### 3. **The Communications Regulation Act, 2002.**

ComReg is required to act in accordance with its functions and objectives under the Communications Regulation Act, 2002. S 12 defines ComReg’s objectives in the exercise of its functions and informs ComReg’s discretion in relation to measures that it may take in pursuance of its statutory objectives.

### 4. **Ministerial Policy Direction No. 4 of 2003.**

This Ministerial Policy Direction directs ComReg in the following terms:

“The Commission shall ensure that in making regulatory decisions in relation to the electronic communications market, it takes account of the state of the industry and in particular the industry’s position in the business cycle and the impact of such decisions on the sustainability of the business of undertakings affected.”<sup>4</sup>

### 5. **General Ministerial Policy Direction No.1 of 2004.**

This Ministerial Policy Direction directs ComReg amongst other things, to:

“(b) Policy direction

ComReg shall focus on the promotion of competition as a key objective. Where necessary, ComReg shall implement remedies which counteract or remove barriers to market entry and shall support entry by new players to the market and entry into new sectors by existing players...”<sup>5</sup>

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<sup>4</sup> Policy Direction made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February, 2003.

<sup>5</sup> Policy Direction made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources, on 26 March, 2004.