



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Universal Service Requirements

Provision of access at a fixed location (AFL USO): Interim Designation

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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Content

1. eir

eir Response to ComReg Consultation:

Universal Service Requirements

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ComReg Document 21/66



29 June 2021

DOCUMENT CONTROL

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The comments submitted in response to this consultation document are those of Eircom Limited and Meteor Mobile Communications Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

Response to consultation

Q. 1. Do you agree with ComReg's preliminary view that it is appropriate to maintain the current AFL USO designation on eir (D05/16) by way of an interim designation for the period 1st July 2021 to 30th October 2021, or until the date that ComReg makes a final decision on the future need for a designation of a USP for AFL USO, whichever is the earlier?

1. eir does not agree that it is appropriate to maintain the current AFL USO designation by way of an interim designation.
2. eir is surprised that ComReg has issued this consultation, ComReg 21/66, just two days before the submission deadline for the draft designation consultation, ComReg 21/51, and just five working days before the expiry of the current designation.
3. The deadline for this consultation is the day before the last day under the current designation on 30th June 2021. Given that ComReg intends for the interim designation to commence on 1st July 2021, this would suggest ComReg intends to make a Decision on 30th June 2021, the day after the deadline for submissions. The severely truncated consultation timetable calls into question whether ComReg has and will fully and properly consider and evaluate the inputs and submissions arising from the consultation process. It would seem that the outcome of this so-called consultation process must be a foregone conclusion.
4. The timing of the current consultation is extremely questionable, one week in advance of the expiry of the current designation. ComReg's purported justification for the interim designation is that "*ComReg is cognisant that it needs time to fully consider the responses to AFL USO extant Consultation*". However, this must already have been apparent to ComReg in advance of issuing its consultation (ComReg 21/51) and certainly not two days before the submissions to that consultation were due.
5. ComReg ought to know how to run a review and consultation process and be fully aware that the views of interested parties must be fully considered and evaluated. ComReg must also be aware that it can take ComReg many months to fully consider responses and reach a final decision on the merits. In the case of Market Reviews, which are of a similar order of magnitude to the level of market intervention of USO, it typically takes around a year for ComReg to complete its processes between consultation and final decision. It is also worth noting at this point that the 30th June 2021 deadline is known by ComReg and therefore cogent planning, consultation and consideration by ComReg on this matter clearly has not been given any due consideration – contrary to ComReg's statutory functions.

6. It is inconceivable that ComReg has planned this consultation with less than a day to fully consider responses. ComReg's AFL USO review process is entirely flawed and illegal.
7. As we note in eir's response to ComReg 21/51 ComReg has had ample time to plan a proper and timely review of the AFL USO. However ComReg's mismanagement of the process appears to be either a continued administrative oversight by ComReg and/or a cynical attempt is being made to circumvent fair regulatory process acting disproportionately against eir's interest. The current consultation reinforces this concern. eir does not accept that the timelines associated with consultation 21/51 are fair or appropriate but even so ComReg could have at least issued its interim designation proposal in parallel.
8. ComReg mentions four factors that ComReg claims have informed its proposal to impose an interim designation at paragraph 7.
9. The first factor mentioned is "*the forthcoming expiration of the current designation of eir as USP with AFL USO*". This is not a justification for an interim designation. The fact that ComReg by its own action or inaction is very late with its review is not a justification to impose regulatory obligations. The justification is of ComReg's own making and was entirely avoidable. It is extremely concerning that this is in ComReg's reasoning a justifying factor for its proposed decision. ComReg's negligence will carry with it an associated net cost of at least €3 million¹ for the interim designation period.
10. The second factor mentioned by ComReg is "*ComReg's preliminary views in the AFL USO extant Consultation that AFL USO is still required*". The extant consultation, ComReg 21/55, is simply that, a consultation. It is not regulatory policy that is settled. The whole concept of a consultation process is for the regulator to conduct its business transparently, to fully consider the views of interested parties, to reach informed decisions. ComReg cannot at this point in time rely on draft conclusions that are subject to a lawful consultation process and draft conclusions in a separate consultation that relies on justification to impose the AFL USO designation for a further period that has not yet concluded. This is an invalid self-perpetuating circular justification which does not validate ComReg's proposed decision making.
11. eir refers to its response to ComReg 21/51 in terms of its views on ComReg's preliminary views on the AFL USO.

¹ Based on pro rata of annual net cost that eir has previously established was in the region of €10m for previous years.

12. The third statement by ComReg is that an interim designation is needed “*to avoid potential consumer harms arising from any potential lacuna period between the end of the current designation period (30 June 2021) and ComReg making a final decision on the future of the need for AFL USO*”. As eir notes in its response to ComReg 21/51 there is no justification to continue to impose an AFL USO. ComReg has failed to demonstrate that there is potential harm arising if the AFL USO is discontinued. ComReg cannot simply state something is so without adducing any evidence. In many respects this is essentially predicated on the same circularity as the second factor and is not a valid justification for the proposed interim designation. eir also notes that the lacuna is entirely of ComReg’s own making and cannot subsequently be relied upon as justification for the imposition of material and market distorting regulatory obligations.
13. The fourth factor mentioned is the need to “*allow ComReg to fully consider stakeholders responses to the AFL USO extant Consultation*”. As highlighted in respect of the third factor mentioned, ComReg’s failure to manage a fair and timely review either through deliberate action or inaction is not a valid justification.
14. ComReg should not proceed with the proposed interim designation.
15. eir also notes ComReg’s stated intention² to “*continue to monitor QoS performance for any designated undertaking and ComReg will continue to publish QoS trends...ComReg will issue Information Requests (in accordance with Section 13D(1) of the communications Regulation Act 2002 (as amended)) requiring the USP to provide to ComReg such information, including reports as ComReg considers necessary to carry out its functions. ComReg will rely on its statutory information gathering powers to obtain the necessary information during the relevant designation period, at this time*”.
16. It is curious that ComReg has chosen to refer to ‘any designated undertaking’ when it is clearly only eir that is in the frame. In any event eir does not believe that the powers granted to it under S13D were ever intended to create a reporting regime in support of USO or SMP obligations. The reporting regime is a cost associated with the substantive obligations which has to be considered in the context of the merits of the substantive obligations — which ComReg have clearly failed to do. Absent a new Decision justifying the establishment of a USO QoS regime and its design, ComReg cannot use S13D in the manner contemplated.

² Paragraphs 8 and 9