



Commission for
Communications Regulation

Universal Service Obligation: Provision of Access at a Fixed Location

Submissions to Consultation 15/124

Submissions to Consultation

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1: ALTO

18 December 2015

Ms Barbara Delaney
Director - Retail Division
Commission for Communications Regulation
Irish Life Centre
Lower Abbey Street
Dublin 1

Dear Barbara & Retail Division

Re.Universal Service Obligation – Provision of access at a fixed location
Consultation Ref: 15/124

We write in response to the above Consultation, the closing date for comments being today 18 December 2015.

As ComReg is very aware ALTO rejects the notion that Eir is entitled to claim any support from industry by means of funding for Universal Service Obligations – USO. We are aware that a sum between €36m and €38m is sought by means of retrospective applications to ComReg by Eir, which is a sum that may have to be met by industry in the event that an unfair burden is found.

Many ALTO members are publicly quoted and trading companies who are not in a position to facilitate reopening of statutory and other accounts and accounting processes to facilitate *ex post* and unnecessary funding applications by Eir, or any other party for that matter dating back four years in time.

The continuation of this position is deeply unsatisfactory to industry and fosters uncertainty in terms of the regulatory regime in Ireland, and in respect of operating costs.

ALTO has recently studied the historical context for fixed access regulation in Ireland and notes that Eir (previously Eircom) has failed to recover costs via the retail price cap, which we argue are now being sought in the context of USO (perhaps by means

of cross recovery). The regulatory metric applicable is CPI-0%, which would have resulted in a recovery by Eir of in or about €45m during the USO funding periods currently under review within ComReg.

In terms of ComReg's previous findings of "*no unfair burden*", with regard to Eir, ALTO believes that a similar finding is appropriate in the context of all of the periods under review at this time.

Answers to Consultation Questions:

Q. 1. ComReg's preliminary view is that, pending completion of its review, it is appropriate that the current safeguards remain in place after 31 December 2015. Do you agree with ComReg's preliminary view that Eir should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months to complete the review? Please give reasons to support your view.

A. 1. ALTO agrees with this position as proposed by ComReg, strictly without prejudice to the generality of the foregoing remarks in this response, which obviously differ to the extent expressed regarding unfair burden and Eir's position relating to failed price cap recovery.

Q. 2. Do you agree or disagree with ComReg's draft high level assessment of the impact of the proposed regulatory options? Are there any other factors that you consider to be relevant? Please set out reasons for your answer.

A. 2. ALTO does not disagree with ComReg's draft high level assessment of the impact of the proposed regulatory options.

Q. 3. Do you have any comments on the Draft Decision Instrument at Annex 1? Please set out reasons for your answer.

A. 3. ALTO makes no comment on the Draft Decision Instrument at this time.

Finally, we request that ComReg conclude its deliberations in this area with due speed and efficiency in order to facilitate and foster the necessary certainty that

ALTO expects in EU markets where its members operate predominantly. We anticipate a finding of no unfair burden with regard to all of the Eir funding applications, and during the periods in question. We also expect ComReg to assess Eir's funding applications based on the cost recovery modelling allowed for within retail line rental pricing and with regard to our comments on Price Cap.

ALTO

18 December 2015

2: Eir

eir

Response to ComReg Consultation Paper:

Universal Service Obligation

Provision of Access at a Fixed Location

ComReg Document 15/124



18th December 2015

**DOCUMENT CONTROL**

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

Executive Summary

eir is disappointed that this consultation is taking place. If ComReg had consulted on the scope of the universal service in sufficient time and in accordance with good regulatory practice this consultation would not have been necessary.

eir has called for a proper review of the Access at a Fixed Location (AFL) Universal Service Obligations (USO) since 2010. Whilst this review commenced with the consultation ComReg 15/89 in September 2015, eir is faced again, for the fourth time, with a proposal from ComReg to effectively roll-over onerous and outdated obligations because ComReg has failed to discharge its duties in a timely and efficient manner. ComReg's failure to properly administer the review is in breach of its statutory obligations. It is also in breach of the spirit and the terms of the USO Settlement Agreement. In 2014 eir was left with no choice but to appeal ComReg's unreasonable roll-over of eir's USO designation and settled this appeal on the basis and the understanding that by 31st December 2015 a full review of the USO would have been completed. It is of very serious concern and disappointing that eir should face the very same issue, ComReg having failed to meet the commitments it made in the current Strategy Statement¹, ComReg Decision 10/14², and the USO Settlement Agreement to undertake a full and timely review of the AFL USO.

ComReg has an obligation to determine whether there is likely to be a shortfall in the provision of telephony services at a fixed location if obligations are not imposed. Despite repeatedly (in 2010, 2012 and 2014) designating eir as a Universal Service Provider (USP) for all services, for repeated short periods to allow proper consideration of the issues, ComReg is again proposing to extend the 2006 obligations, including the quality of service obligations, for a further short period, while it engages in a full consideration of the issues.

The obligations imposed in 2006 are long outdated as recognised by ComReg in the current consultation.

The Universal Services Directive³ in Article 1.1 sets out the purpose of the USO which is to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice, and to deal with circumstances in which the needs of end users are not satisfactorily met by the market. Article 3.2 requires that this is done by the most efficient and appropriate means, and in an objective, transparent and proportionate manner. It must also be done in a way which does not distort the market. eir believes that the proposed designation of eir as USP for an "interim period" is an invalid exercise of ComReg's powers under the Universal Service Regulations. In particular, the "roll-over designation" mechanism that ComReg proposes is inconsistent with its obligation under the Universal Service Regulations to put in place a proper designation mechanism that allows consideration of other undertakings as USP. However, eir is the only operator being considered by ComReg to fulfil the role of USP for this interim period.

The quality of service obligations which ComReg is seeking to impose, again, should be substantially reduced or dropped entirely. Extending them further, and proposing unrealistic targets and punitive measures for non-compliance, is disproportionate and is in breach of ComReg's obligations under the Communications Regulation Act 2002, particularly its obligations in relation to encouraging investment in infrastructure and innovation. ComReg should recognise that it should be encouraging eir to invest in broadband and fibre instead of recycling out of date 2006 obligations. We do not know what the outcome of the National Broadband Plan (NBP) tender will be and ComReg's proposed approach will demand that eir diverts substantial investment funds into a technology approach which will almost certainly result in stranded assets. Furthermore, ComReg

¹ ComReg 14/75 – Strategy Statement for Electronic Communications 2014-2016

² The provision of telephony services under the USO - Access at a Fixed Location

³ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002

is encouraging investment in long life legacy assets (for example the “Regulated” lifetime of overhead access copper is 15 years) on the basis of a temporary designation for a short period despite acknowledging that encouraging such investment is wrong⁴.

As ComReg cannot lawfully “roll-over” eir’s designation as USP in the manner it is proposing to do for an additional period of time, eir’s designation as USP will lapse on 31st December 2015. The fact that ComReg believes that it is necessary to designate a USP for the period from 1st January 2016 to 30th June 2016 to ensure that all reasonable requests for connection at a fixed location to a public communications network will be met does not mean that ComReg may ignore the requirements of the Universal Service Regulations, particularly as the reason for doing so is that it did not allow for a sufficient period of time to put in place an appropriate designation mechanism following a full review of the proper scope of the USO. If ComReg wishes to re-designate eir as USP, it may do so but only after it has properly designated eir and after having considered any continued requirement for an obligation to provide access at fixed location in the light of market developments, and having considered the possibility of designating some other alternative operator as USP.

As a consequence of ComReg’s administrative processes and the absence of a proper review, ComReg considers (although eir disputes) there is a significant risk that consumers will suffer because, in the absence of a USP, all reasonable requests for connection at a fixed location to a public communications network may not be met. Even of this where the case, which eir disputes, against a background of very significant investment by eir in its access network, there is at this point in time simply no justification for rolling-over the regime put in place in D02/08. In the circumstances, on the basis that ComReg will complete its review of the USO by 30 June 2016, and strictly without prejudice to eir’s view that ComReg is not permitted to roll-over eir’s designation as it has proposed to do, eir will not object to its designation as USP for a maximum period of up to 6 months but only if such designation is in respect to the least onerous set of obligations that will allow reasonable requests for connection at a fixed location to be met. This means that the USO Designation must be amended such that D02/08 no longer applies.

⁴ Paragraph 42, ComReg 15/124

Response to Consultation

Q.1 ComReg's preliminary view is that, pending completion of its review, it is appropriate that the current safeguards remain in place after 31 December 2015. Do you agree with ComReg's preliminary view that Eir should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months to complete the review?

eir is disappointed that this consultation is taking place. If ComReg had consulted on the scope of the universal service in sufficient time, in accordance with its obligation under the USO Settlement Agreement and in accordance with good regulatory practice this consultation would not be necessary.

ComReg has not properly considered whether there is a need for a USO designation. Rather, ComReg has assumed there is still a need. eir does not agree with ComReg's preliminary view that eir should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months to complete the review

eir has called for a proper review of the AFL USO since 2010. Whilst this review appears to have commenced with the consultation ComReg 15/89 in September 2015, eir is faced again, for the fourth time, with a proposal from ComReg to effectively roll-over onerous and outdated quality of service obligations, as well services which ComReg has acknowledged no longer meet consumer needs because ComReg has failed to conduct its administrative processes in a timely and efficient manner.

Following ComReg Decision 10/14 of 7th July 2014 designating eir as the USP for a period of 18 months, eir appealed that Decision, the same Decision that ComReg is now seeking to extend, and that appeal was settled by agreement between eir and ComReg. eir has repeatedly highlighted its concern that a proper review of the AFL USO regime in Ireland, looking at the services which consumers need is long overdue. As part of the Settlement Agreement, ComReg agreed "*to undertake a forward-looking review of the requirement for the Access at a Fixed Location element of the USO and issue in this context a consultation paper or papers no later than end June 2015*".

In 2012 ComReg specifically chose a two year period in order to allow sufficient time for it to conduct a proper assessment of the future scope of the USO given that it needed to observe the effects of technological developments and market provision on broadband availability, to establish the most appropriate designation method(s) and to have sufficient time to allow a transition period to a new USP⁵. In 2014 ComReg again specifically chose an 18 month period to undertake this activity. In 2015 ComReg is yet again proposing a 6 month period to complete the same activity. eir understands that this should all have been implemented by ComReg during the designation period that will expire on 31st December 2015, and ComReg's review should have been completed well in advance of this deadline. As a direct result of ComReg's inactivity on this issue over the past 18 months despite conducting relevant market research⁶ confirming the 2006 obligations are outdated, we are now confronted, again, with a situation where there is simply insufficient time for ComReg to do what it said it would do, in breach of the Settlement Agreement and of its statutory obligations.

In our response to ComReg 15/89, we made the point that the consultation was published late. No justification was given for the delay in publication despite the explicit terms of the Settlement Agreement and ComReg's statement⁷ in July 2014 that it had "*decided, as soon as practicable, to*

⁵ Para 18 of D07/12.

⁶ ComReg 15/123a, see particularly the key findings on page 8 and pages 36 to 51

⁷ Paragraph 2.2, ComReg 14/71

commence a review process, including a public consultation, in respect of a review of the requirements in relation to the requests for connection, pricing and quality of service (QoS) measures. This includes the Reasonable Access Threshold (RAT), which is currently set at €7,000 and the target requirements for Functional Internet Access (FIA), currently set at 94% at 28Kbps), the future requirement for Geographically Averaged Prices (GAP) and the Quality of Service Targets established by D02/08, in respect of the Access at a Fixed Location USO.”

The delay is contrary to the commitment in ComReg’s Decision 10/14⁸ to “*undertake a review of certain aspects of the AFL USO, including a public consultation of the obligations set out in sections 2.3, 2.4 and 2.5, and such review will be commenced **as soon as practicable after 7 July 2014***.” Now in 2015 we are faced with a consultation issued one month and one week in advance of the expiry date of the AFL USO Designation. ComReg has set a response deadline of 18th December 2015, allowing just seven working days for ComReg to consider responses to this consultation if the AFL USO is to be maintained from 1st January 2016 as ComReg intends. This is unreasonable.

ComReg’s current Strategy Statement emphasises the need for timely and robust regulatory processes and the need to improve the effectiveness and efficiency of ComReg’s business processes.⁹ Section 4.1 (para. 73) of that document emphasises the need to ensure that the services provided as part of the USO appropriately align with consumers’ changing needs. It explicitly states that ComReg would review all aspects of USO over the 18 month period from the publication of D10/14. eir is of the strong view that it would be entirely unreasonable to extend its current AFL USO obligations past 31st December 2015 as no proper justification has been advanced.

eir considers that the proposed roll-over of its designation as USP represents an unlawful exercise of ComReg’s powers under the Universal Service Regulations 2011. It is in breach of the requirements to ensure that there is a proper designation process. It cannot be presented as a mere “fait accompli”.

As ComReg may not lawfully “roll-over” eir’s designation as USP for an additional period of time, eir’s designation as USP will lapse on 31st December 2015. If, as ComReg says, it believes that it is necessary to designate a provider to ensure that all reasonable requests for connection at a fixed location to a public communications network will be met from 31st December 2015 it may re-designate eir but only after it has put in place a mechanism that complies with statutory requirements and after having considered any continued requirement for an obligation to provide access at fixed location in the light of consumer needs.

Article 3(2)¹⁰ requires “*Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.*” The legislation is clear that Member States must actively undertake analysis (we refer to this as ‘positive analysis’) in order to **determine** what is necessary and **seek to** apply a balanced regime which does not distort competition and benefits consumers. ComReg’s proposed approach, to simply roll-over, with eir’s designation, the full set of obligations that has applied to eir since it was designated as USO in 2006, because ComReg, and ComReg alone, has allowed the process to time out, does not provide the positive analysis required and is not compatible with the requirements of the regulatory framework.

⁸ Section 3.1, Decision 10/14, ComReg 14/71, emphasis added

⁹ <http://www.comreg.ie/fileupload/publications/ComReg1475.pdf>, page 11.

¹⁰USD 2009

In previous submissions, most recently in response to consultation ComReg 15/89, we have highlighted the fundamental changes that have taken place since 2006 in respect of the communications services which Irish consumers use.

In seeking to again roll over (for a fourth time) the AFL USO for an interim period, absent a proper review, ComReg is in effect concluding that nothing has changed since 2006. This is an erroneous assessment. The market landscape in 2015 is radically different to that in 2006. In terms of the provision of basic telephony services, there is now near ubiquitous mobile network availability throughout Ireland. According to ComReg market research findings¹¹ 67% of households have a fixed telephone service whereas mobile phone ownership stands at 97%. eir's retail market share of fixed lines nationally has fallen from 56% in 2013 to 46% in 2015. There are competing fixed network infrastructures in urban areas and eir's retail market share in a significant portion of the market, Dublin, is now 27% relative to UPC at 54%. There is clear evidence of a persistent migration of fixed voice call origination towards mobile networks and over the top / social media services. These alternatives to fixed line basic telephony services are now the primary methods used by citizens to maintain social inclusion. Furthermore consumer preferences are changing with 35% of landline service purchasers claiming to have a landline to facilitate access to broadband service. Narrowband voice services (as mandated by the AFL USO) provided over a fixed copper network is increasingly irrelevant to the modern market. There is no objective justification to simply roll-over the USP designation imposed on eir.

It is surprising that ComReg is seeking to roll-over the obligations given its acknowledgement in the consultation paper that "*ComReg is of the preliminary view that the current AFL USO regime is not appropriately aligned with the current or future long term needs*".¹² In the context of the ongoing review¹³ "*ComReg has to consider and is preparing its preliminary views on a number of complex issues including:*

- *How to take account of the probable long-term replacement of current generation access networks with new networks, and the consequent risk that investments in those current generation networks could have only a short-term benefit, while at the same time ensuring that end user rights in relation to access at a fixed location are upheld.*
- *Whether the reasonable access request test(s) should be extended to consider whether a USP should not be required to fulfil a request for access at a fixed location if suitable affordable alternative services were available at that location, such services potentially including services available from mobile operators, other fixed operators and/or an operator contracted under the NBP.*
- *What requirements should be specified in relation to functional internet access in light of current internet usage, available technology and in the context of the deployment of next generation access networks on a commercial basis and as a result of the NBP.*
- *What the appropriate affordability measures are, considering changes in networks and end-user usage patterns in respect of the set of universal services.*
- *What the appropriate quality of service levels are for current generation networks in the context of the deployment of next generation access networks on a commercial basis and as a result of the NBP."*

ComReg is correct to identify the importance of ensuring that the USO regime does not inhibit efficient investment. However the quality of service regime ComReg is proposing creates an immediate compliance jeopardy for eir and promotes inefficient investment incentives.

¹¹ ComReg Consumer ICT Survey, ComReg 15/123a

¹² Paragraph 64, ComReg 15/124

¹³ Paragraph 42, ComReg 15/124

ComReg's proposed rollover means that the annual performance targets set in ComReg Decision D02/08 will be binding on eir for the 6 month designation period. This gives rise to a number of concerns:

1. The Settlement Agreement was established to provide certainty as to how matters including the annual performance targets would be assessed for the period 1st January 2015 to 31st December 2015. The Settlement Agreement set the annual fault occurrence performance target at 14.5 recognising that eir cannot achieve the D02/08 fault occurrence target of 12.5 for the year ending 31st December 2015.
2. eir expects to achieve¹⁴ a lower annual fault occurrence rate than as set out in the Settlement Agreement but higher than that set out in D02/08. eir has met its commitment in the Settlement Agreement regarding capex investment in the copper access network. However, absent many tens of millions of Euros of investment in the copper access network, eir cannot achieve the D02/08 fault occurrence targets. As highlighted in our response to ComReg 15/89 there are a number of other factors that make the targets in D02/08 disproportionate. This includes the fact that eir has commenced a migration to a fibre access network which is expected to replace the rural overhead copper network by 2020.
3. The D02/08 targets are set as annual targets. eir's performance against the targets is subject to seasonality and the first calendar quarter of the year is typically the most challenging due to winter weather impacting network performance. It is unrealistic and unreasonable to expect eir to be able to achieve the annual D02/08 target in a 6 month period which includes the typically worst performing quarter.
4. If the annual targets in D02/08 were to continue to be assessed, this would require the 6 months of the designation period to be augmented with a period of 6 months either before or after the 6 month designation period. If the 6 month period prior to the designation period was used, 1st July to 31st December 2015, this would be in direct contravention of the Settlement Agreement which set an annual target for the period including 1st July to 31st December 2015 to achieve a fault occurrence rate of no more than 14.5. ComReg cannot unilaterally amend the Settlement Agreement requiring eir to achieve a fault occurrence rate of 12.5 for the period 1st July to 31st December 2015. Nor do we consider it would be lawful for the period after the 6 month designation period to be included for the purpose of assessing performance during the designation period. That is effectively extending the designation, and as such is not lawful

The absence of a proper assessment places eir, ComReg and the Minister in legal jeopardy, particularly as ComReg has presented no robust evidence to allow the Minister to determine whether the elements of the USO AFL now proposed for first half of 2016 can be justified at this time¹⁵.

As explained above, ComReg's exercise of its powers is an invalid exercise such that eir's designation as a USP will lapse on 31st December 2015. In addition, even if ComReg could lawfully designate eir as USP for the period starting 1st January 2016, eir does not accept that ComReg could simply re-impose for an interim period the obligations which have attached to the AFL USO.

ComReg's proposed position appears to be linked to an incorrect interpretation of the requirements of the European Regulatory Framework. *"ComReg considers that in light of its role to ensure that consumers and end-users throughout the state receive affordable AFL at an acceptable quality, the evidence supporting a complete withdrawal of the existing AFL USOs would need to be incapable*

¹⁴ Assuming no exception weather event(s) and related damage from the date of this response to 31st December 2015.

¹⁵As required by Regulation 3(5) of SI 337 of 2011

*of being disputed.*¹⁶ There is no legal basis for this assertion or any evidence either way in this or the earlier consultation. We believe this is an incorrect interpretation of the USO regulations¹⁷. Regulation 7 provides that ComReg ‘may designate’ an undertaking so that the AFL may be provided over the whole of the State and then provides that a designated undertaking shall provide the AFL (Regulation 3). This is not and was not intended to be an obligation on ComReg to designate an undertaking, ComReg has discretion as to whether or not it should do so. Our view is confirmed when the practices in other Member States are considered. Germany, Luxembourg, Poland, Romania and Estonia do not have a USO and the Slovak Republic, Sweden and the Czech Republic do not have an AFL obligation, so there is no need to impose such an obligation on eir even for such a short period of time. The fact that these countries all do not have an AFL obligation means that ComReg’s arguments as to the counterfactual, what would happen absent a designation, do not stand up to scrutiny. 8 countries including countries with relatively high rural populations like Estonia and the Slovak Republic must be confident as to the market continuing to provide national services at a fixed location. There is also no evidence of a market failure in Ireland so as to require a designation.

Having discretion whether or not to designate an operator gives ComReg a choice. If it was intended that there should be no ability to dispute whether the AFL was provided over the whole of the State the Regulation would have said that ComReg had a duty to ensure that the AFL was provided over the whole of the State. If ComReg is satisfied that eir is in fact providing an AFL everywhere then there is no need for a designation. Indeed that would be the most efficient approach. The test ComReg has set out is too high.

Under section 12 of the Communications Regulation Act 2002 ComReg has an obligation to ensure users have access to a universal service, but under the Act ComReg also has to be proportionate. It would not be proportionate to impose an obligation which has not been properly analysed, is out of date as recognised by ComReg, and which does not encourage efficient investment in infrastructure and has the potential to distort competition.

As a consequence of ComReg’s administrative processes and the absence of a proper review, ComReg considers that there is a significant risk that consumers will suffer because, in the absence of a USP, all reasonable requests for connection at a fixed location to a public communications network may not be met. eir disputes that this is the case but in any event, even if it were the case, it could not justify imposing on eir the very burdensome performance obligations imposed on eir in D02/08. Against a background of very significant investment by eir in its access network, there is at this point in time simply no justification for rolling-over the regime put in place in D02/08. In the circumstances, on the basis that ComReg will complete its review of the USO by 30 June 2016, and strictly without prejudice to eir’s view that ComReg is not permitted to roll-over eir’s designation as it has proposed to do, eir will not object to its designation as USP for a maximum period of up to 6 months but only if such designation is in respect to the least onerous set of obligations that will allow reasonable requests for connection at a fixed location to be met. Further to eir’s submissions above, this means that the USO Designation must be amended such that D02/08 no longer applies.

¹⁶ Paragraph 14, ComReg 15/124

¹⁷ S.I. No. 337/2011 - European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011

Q.2 Do you agree or disagree with ComReg’s draft high level assessment of the impact of the proposed regulatory options? Are there any other factors that you consider to be relevant?

eir disagrees with ComReg’s draft high level assessment of the impact of the proposed regulatory options. Chapter 5 of the consultation paper called ‘Regulatory Impact Assessment (RIA)’ is not a proper RIA. It is nothing more than a qualitative statement on the part of ComReg to support an unsubstantiated position. ComReg states¹⁸ that “A RIA should identify the impact of the various options on stakeholders, on competition and on consumers and also the key risks associated with each option.” We wholeheartedly agree with this description of a RIA, however that is not what ComReg presents in chapter 5.

At paragraph 76 ComReg states “For the reasons set out above ComReg is of the preliminary view that there will likely be a continued need for an AFL USO throughout the State for the immediate future, for a period of 5-7 years from 1 January 2016.” ComReg offers no reasoning ‘above’ as to why it has reached this view. Indeed the only reference to a designation period of 5 to 7 years is at paragraph 3 where ComReg observes that this is the subject of the earlier consultation, ComReg 15/89.

At paragraph 79, in what we assume is a statement of the ‘policy issue and objectives’ of the RIA, ComReg states “In light of the above, ComReg requires a further period of time, beyond December 2015, to prepare and issue its further consultation to allow time for submissions and for ComReg to consider those submissions and to ultimately issue a Decision.” When considering the material set out ‘above’ in the consultation document it appears that ComReg requires more time because it is conducting a review and has failed to conduct that review in a timely manner. No other explanation is offered.

ComReg considers there are two options:

Option 1 - To propose now to alter or not impose the AFL USOs commencing 1 January 2016.

Option 2 - To propose now to keep the current end-user protections in place for a period of months commencing 1 January 2016 until its review has been properly completed.

The articulation of options suggests a certain amount of bias in ComReg’s thinking. Option 2 is ComReg’s preferred option whereas option 1 is essentially anything else. Option 1 in fact contains two distinct and very different options. The option to not impose the AFL USO for the 6 month period (no regulation) and the option to impose an amended AFL USO (proportionate regulation). In our view given that option 2 is not compatible with the regulatory framework and ComReg’s duties the only possible option at this late hour is the option to not impose the AFL USO for the 6 month period.

In paragraphs 81 to 88 ComReg sets out what it considers determines the impact on stakeholders and competition. ComReg is of a view that “there is a risk that the market would not deliver basic AFL services” and although the current regime is appropriately aligned with current or future needs ComReg considers “an AFL USO needs to remain in place at least until such time as it has completed its review.” ComReg offers no quantification of the perceived ‘risk’ or estimate of the social detriment that may arise.

ComReg instead seeks to suggest that imposing an unchanged designation for a further 6 months has no downside because the “USP can seek funding”. This perspective is incorrect. If there is an

¹⁸ Paragraph 74, ComReg 15/124

unfair burden the net cost will have to be funded by operators, including eir, and ultimately by their customers. It also provides no comfort to the USP when, as we highlighted in our response to ComReg 15/89, there is also a clear need to review the operation of the funding arrangements for AFL USO. Four applications by eir for funding are currently with ComReg for a total net cost of €36.6m. The administrative process for considering these applications is extremely slow and with no apparent end in sight to ComReg's completion of its review of any of the outstanding applications. It is difficult to see how the AFL USO regime can be said to be either equitable or operating effectively if it is applied in an entirely one sided manner to the detriment of the existing USP. There is a requirement in the Directive to provide that any USO is not provided in a manner which distorts competition. The Directive suggests that this is avoided by compensating the USP for the specific net cost involved. However eir has received no compensation to date.

The final step in ComReg's RIA is to assess the impacts and choose the best option. Given that ComReg has not quantified the impacts the assessment is superficial, largely repeating unsubstantiated statements from earlier in the RIA.

ComReg concludes¹⁹ it *“is of the view that these measures are unlikely to result in a disproportionate cost burden relative to the benefits to the end users. For the reasons set out above, the benefits to consumers are likely to be significant. In contrast, if these obligations were removed no such benefits would follow to the detriment of the consumers and potentially inconsistent with the Universal Service Regulations.”*

ComReg reaches an unsupported and incorrect conclusion. It says that the benefits of the USO to consumers are likely to be significant and if they were removed there would be no benefits to consumers – this simply does not follow. ComReg presents as Option 1 that ComReg could alter or not impose the AFL USO commencing 1 January 2016. However there is no consideration to the manner in which the regime could be altered so that it is properly transitional and does not maintain in place obligations which cannot be met, or met at a significant cost to eir and are contrary to ComReg's obligation to encourage efficient investment. The counterfactual ignores the possibility that pending completion of the Review within the next six months, eir will continue to meet reasonable requests for access at a fixed location in the absence of an obligation to do so and a punitive and unreasonable performance regime.

In summary, the material presented by ComReg as its RIA does not constitute a proper RIA and cannot be held out to substantiate ComReg's proposed position to roll-over the current USO designation despite the fact, acknowledged by ComReg, that the current regime is no longer fit for purpose.

¹⁹ Paragraph 94, ComReg 15/124



Q.3 Do you have any comments on the Draft Decision Instrument at Annex 1?

The following comments are without prejudice to eir's position that ComReg cannot lawfully impose a designation on eir to be USP for the 6 month period commencing 1st January 2016.

Section 2.2 of the draft decision seeks to amend section 4.1 of D10/14. ComReg appears to be giving itself a broad discretion to unilaterally amend the expiration date of the designation period. This is not compatible with the Regulatory Framework. The amendment to section 4.1 should therefore be revised as follows: "*4.1 This Decision and Decision Instrument is effective from 1 January 2016 and shall remain in force until 30 June 2016—~~or as amended by ComReg.~~*" If ComReg wishes to make an amendment it may only be implemented following a further decision following a proper consultation process.

In addition D10/14 should be further amended so that Paragraphs 2.3 and 2.4 are deleted given the recognition that the requirements of the named decisions are no longer fit for purpose.

3: Sky



RESPONSE TO COMRGE 15/124: UNIVERSAL SERVICE OBLIGATION, PROVISION OF ACCESS AT A FIXED LOCATION

1. Sky agrees with ComReg's preliminary view that it is appropriate that the current USO safeguards remain in place after 31 December 2015. We also agree that Eircom Ltd ("Eircom") should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months pending the completion of ComReg's review.
2. ComReg has queried whether other factors are relevant in consideration of its assessment of the impact of the proposed regulatory options outlined in the consultation. Sky consider of particular importance is the fact that ComReg has determined in the past that the net cost of being Universal Service Provider ("USP") to Eircom did not pose an "unfair burden" on the company. Sky concurs with that view based on foot of the analysis presented on the historical claim. However, Sky considers that in recent years not only does Eircom not have an "unfair burden" but in fact is unlikely to have a positive net cost when all appropriate factors are taken into account.
3. In this regard a positive net cost cannot be deemed legitimate where the USP has elected not to mitigate against any such alleged loss through either act or omission. Eircom are clearly culpable of such behaviour with respect to the pricing strategy it has adopted for its Access at a Fixed Location ("AFL") services in recent years. It has chosen not to avail of the incentive to drive additional profits on its USO service through the Retail Price Cap ("RCP") that was specifically designed to facilitate such an outcome. Furthermore, in 2013 it decided for strategic reasons to discount the price of the USO service below cost¹ in Large Exchange Areas ("LEAs") in order to drive uptake in a non-USO service. It is imperative that current and future assessments of any alleged net cost to Eircom as the USP takes account of the extent to which Eircom has failed to mitigate against any such alleged losses. ComReg may also wish to take these factors in account (expanded on below) in assessing the regulatory impact of extending obligations on Eircom for a further 6 months.

Retail Price Cap inextricably linked to Eircom's USO affordability obligation

4. At paragraph 47 of the consultation ComReg note that the RCP on Eircom is not a Universal Service Obligation but rather the result of a market definition and analysis exercise and the finding of SMP in the market for retail fixed voice access ("FVA"). Nevertheless, it is clear that ComReg has always regarded the same RCP on FVA services as being inextricably linked to Eircom's affordability obligation under its USO. As noted on ComReg's public website in the section entitled 'Consumer Initiatives - Universal Service Obligation';

¹ Comparing a cost based assessment of €16.72 for WLR by ComReg in 15/67 versus a price of €15.03 charged by Eircom.



*“The regulations [USO] require that the USP adheres to the principal of maintaining affordability for universal services. Currently, **affordability is maintained by** way of a number of different measures which include...within **the retail price cap** regime, overall safeguard control on consumer bills...” [Emphasis added]*

5. This is a crucial point in the context of Eircom’s claims that a fund ought to be established to cover an alleged net cost of being the USP. That claim will need to be tested against ComReg’s longstanding barometer of affordability for AFL, namely the RCP on FVA. If Eircom has of its own volition charged retail prices below those permissible under the RCP then any grounds for a claim of a USP fund would be severely undermined. Given that Eircom also has SMP in the FVA market (a designation it did not challenge) it follows that it is capable of firstly, profitably making such price increases² (which would be marginal in any event) and secondly doing so without breaching its obligation with respect to affordability by complying with the RCP.
6. In the event that Eircom has chosen not to relieve itself of any alleged net cost as a consequence of not making permissible price increases, any such purported ‘burden’ associated with that net cost cannot be deemed to be an ‘unfair burden’. Eircom must not be permitted to voluntarily take on a purported regulatory burden and subsequently seek to tax/have the associated costs passed on to other operators in the market

Additional profits voluntarily forgone by Eircom

7. Indeed Eircom has previously advocated that ComReg take an approach to regulation that seeks *“to strive to create an environment where operators have an incentive to gain additional profits under fair competition”*³. This is precisely the approach ComReg took in adopting an incentive based regulatory policy via the RPC whereby an operator that is subject to a RPC is allowed to keep above normal profits (cost of capital) on additional efficiency gains to those initially envisaged by the regulator when the RPC was put in place.
8. That Eircom chose not to avail of the pricing flexibility it was granted under the RCP is neither the fault of ComReg nor the OAOs it has sought to receive USP funding from. As per Sky’s letter to ComReg on 13 August 2015 we estimate between September 2009 and August 2014 forgone revenue by Eircom as a consequence of not availing of allowances under the RCP was conservatively estimated in excess of **€45m**.

Eircom strategy of subsidising USO services with non-USO services

9. Furthermore, Eircom has previously argued that *‘no regulator could expect it to cross-subsidise its USO through profits from other areas of its business’*⁴. However, this is the approach Eircom itself took as part of its NGA roll-out strategy whereby it reduced the

² Indeed eircom itself indicated that other operators (without market power unlike itself) could make *“substantial profits”* as a consequence of Eircom’s investment in Universal Service areas on retail services. As such it must logically follow that the SMP operator would equally be able to profitably raise retail prices (see Eircom response to ComReg 13/45, page 9).

³ Eircom response to ComReg 13/45, page 11.

⁴ Eircom response to ComReg 13/45 page 14.



price of its WLR service⁵ and cross-subsidised the service with profits from other services. In this example a key component (WLR revenues) of the revenue stream Eircom are permitted to tap into to offset any purported net cost was not only not maximised (by availing of permissible increases under the RCP⁶) but was in fact substantially discounted.

10. Finally, as part of the WLR discount strategy adopted by Eircom, it exercised considerable control over the retail strategies of its competitors which is an issue that was covered extensively by Sky in its response to ComReg's consultation 15/67. That ability to impact/disrupt the retail pricing strategies of its competitors is a benefit Eircom enjoys as the USP not afforded to other operators. This is a matter that ought to be taken into account in future assessment of any "unfair burden" review.

Current consultation and future USP claim reviews

11. Sky considers that the above factors ought to be taken into account by ComReg as part of the current consultation. It is also imperative that the above factors are taken into account in any outstanding or future claims for USP funding by Eircom.

Sky Ireland, 18 December 2015

⁵ From May 2013 to January 2015 a €3 discount was applied to monthly WLR charges for large sections of the country particularly in urban and suburban areas.

⁶ WLR prices would increase in line with increases in the retail price under the Retail minus pricing regime for WLR.

4: Vodafone



VODAFONE RESPONSE TO CONSULTATION ON UNIVERSAL SERVICE OBLIGATION: PROVISION AT FIXED LOCATION Comreg 15/ 124

18TH DECEMBER 2015

Introduction

Vodafone welcomes the opportunity to respond to the latest USO consultation where ComReg seeks to extend the designation of eir as USP for a further six months

Vodafone would raise grave concerns at the manner in which ComReg have approached USO designations in recent years. There has been a long series of consultations and extended designations of eir without a clear view, despite detailed industry responses, on the future direction of USO and the closely related issue of the funding of the USO. The outcome of this confusion and lack of clear direction is a late consultation from ComReg to close two weeks before the designation expires and to ask industry again on its views around a 6 month designation. There cannot be sufficient time for ComReg to assess the responses and make its decision in the time allowed to 31st December 2015.

Vodafone would welcome a more coherent strategy on USO and more substantial consultations in 2016 to address the important issues on designation.

Responses to Questions

Q. 1 ComReg's preliminary view is that, pending completion of its review, it is appropriate that the current safeguards remain in place after 31 December 2015. Do you agree with ComReg's preliminary view that Eir should be designated to continue to meet the obligations that are currently in place for a further period of up to 6 months to complete the review? Please give reasons to support your view

Vodafone disagree with ComReg's proposal to extend the designation by 6 months. This is consistent with Vodafone's view on existing USO designation and the policy of USO generally. There is a clear trend to cancel fixed lines, particularly in rural areas in favour of mobile connectivity and a general trend to focus fixed connections on broadband only.

Vodafone note ComReg's views on funding and the establishment of unfair burden. Vodafone believe there is no unfair burden and ComReg should promptly decide on the funding applications made by eir and clearly state for all the outstanding years there is no



unfair burden. For all operators concerned about these decisions, ComReg's delay in deciding on these issues is creating investment uncertainty for operators.

Vodafone would note ComReg's comments on price cap and the market analysis obligations however Vodafone disagrees with the implied view that the price cap and level of retail line rental is not related to any cost of USO or unfair burden. Eir has the discretion to address the cost of the supply of USO services through increased revenues and the scope is there within the regulatory framework to address cost through higher prices.

Q.2Do you agree or disagree with ComReg's draft high level assessment of the impact of the proposed regulatory options?

No comments

Q.3 Do you have any comments on the Draft Decision Instrument at Annex 1?

No Comments