



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

eir's 2010-2011 Universal Service Funding Application

Unfair burden assessment

NON-CONFIDENTIAL

Consultation and Draft Determination

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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1. Executive summary

- 1.1. Eircom Limited (“eir”), as the designated universal service provider (“USP”), submitted an application for funding in respect of the net costs of meeting its universal service obligations (“USO”) during its financial year 2010-2011. The Commission for Communications Regulation (“ComReg”) is obliged to assess this application to determine whether any net cost represents an unfair burden on eir.
- 1.2. This document details and consults on ComReg’s preliminary views in relation to the unfair burden assessment for 2010-2011. The document is structured as follows:
 - **Chapter 2** sets out the background to the assessment.
 - **Chapter 3** outlines the legal context upon which ComReg is conducting the assessment.
 - **Chapter 4** details ComReg’s approach to the unfair burden assessment.
 - **Chapter 5** details ComReg’s unfair burden assessment as applied to 2010-2011, including the key findings of the “Oxera unfair burden report 2010/11” (published as part of this consultation at **Annex 2**), which was carefully considered by ComReg prior to it forming its preliminary view.
 - **Chapter 6** outlines next steps in the consultation process.
- 1.3. ComReg is of the preliminary view that for the financial year 2010-2011, the determined net cost of the provision of the USO does not represent an unfair burden on eir.
- 1.4. ComReg welcomes written responses on any of the issues raised in this consultation document. Following consideration of responses, ComReg will make a determination regarding the unfair burden assessment for 2010-2011.

2. Background

- 2.1. Where an undertaking (a USP) is designated as having an obligation (a USO), it may submit to ComReg a written request to receive funding for the net costs of meeting the USO. ComReg is then required to determine, based on a net cost calculation, whether the cost of meeting the USO represents an unfair burden on the USP¹.
- 2.2. eir as the designated USP, may submit applications for USO funding in accordance with ComReg Decision D04/11² (“D04/11”). D04/11 sets out how the USP, should they so choose, is to make an application, including how the net cost (after intangible benefits) is to be calculated, and sets out principles and methodologies to apply to ComReg’s assessment as to whether a net cost associated with meeting the USO provision, if any, represents an unfair burden on the USP.
- 2.3. In September 2014 eir submitted its initial application for funding for 2010-2011. In this application eir claimed a net cost of €9,945,473 for this period, after taking account of intangible benefits of €1,463,421.
- 2.4. Following a process of engagement between ComReg and eir during which ComReg outlined certain clarifications and adjustments that it required, in February 2016 eir re-submitted its 2010-2011 USO funding application and in July 2016 re-submitted its final application. As a result of these clarifications, eir adjusted the positive net cost claimed for 2010-2011 from €9,945,473 to €7,929,495.
- 2.5. On 5 September 2017 ComReg published Consultation 17/73³, in which ComReg set out and consulted upon its preliminary views in relation to eir’s final application for funding for 2010-2011, having regard to the Universal Service Regulations,

¹ This process is provided for in Regulation 75 of the European Union (Electronic Communications Code) Regulations 2022, S.I. 444 of 2022 (“the Code Regulations”), [Link](#), and was previously provided for in Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011, S.I. No. 337 of 2011 (“the Universal Service Regulations”), [Link](#).

² ComReg Decision 04/11, “Decision on the Costing of universal service obligations: Principles and Methodologies”, Document No. 11/42, 31 May 2011 (“D04/11”), [Link](#).

³ ComReg Decision 17/73, “Assessment of eir’s 2010-2011 Universal Service Fund Application, Assessment of the net cost and unfair burden for the period 2010-2011” Consultation and Draft Determination, Document No. 19/36, 05 September 2017 (“ComReg 17/73”), [Link](#).

D04/11, and the consultants' reports⁴.

2.6. On 18 April 2019, ComReg published the following ComReg Decisions:

- D05/19 “Assessment of eir’s 2010-2011 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2010-2011” (“ComReg Decision D05/19”).
- D06/19 “Assessment of eir’s 2011-2012 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2011-2012” (“ComReg Decision D06/19”).
- D07/19 “Assessment of eir’s 2012-2013 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2012-2013” (“ComReg Decision D07/19”).
- D08/19 “Assessment of eir’s 2013-2014 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2013-2014” (“ComReg Decision D08/19”); and
- D09/19 “Assessment of eir’s 2014-2015 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2014-2015” (“ComReg Decision D09/19” and together “the Decisions”).

2.7. In each of the Decisions, ComReg determined the net cost of provision of the universal service and decided that this did not represent an unfair burden on eir in the financial year in question.

2.8. On 15 May 2019, eir issued an appeal in the High Court against the Decisions⁵.

2.9. On 6 November 2020, the Court decided to stay the proceedings and refer a question concerning the unfair burden assessment to the Court of Justice of the European Union (“the CJEU”) for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. The following is the question referred:

“In circumstances where:

- (i) the telecommunications market has been liberalised and there are

⁴ TERA Report “Assessment of eir’s USO funding application – direct net cost 2010-2011”, Reference Number 19/36a, [Link](#); Oxera Report “Assessment of eir’s calculation of intangible benefits for 2010-2011”, Reference Number 19/36b, [Link](#); and Oxera report “Unfair Burden Report 2010-2011”, Reference Number 19/36c, [Link](#).

⁵ Eircom Limited v. The Commission for Communications Regulation, High Court Commercial, Record No 2019/167 MCA, [Link](#).

- multiple telecommunication services providers operating in the market;
- (ii) one service provider ... has been selected by the National Regulatory Authority (“NRA”) to perform Universal Service Obligations ...;
 - (iii) it has been determined by the NRA that there is a positive net cost associated with the performance of the [Universal Service Obligations]; and
 - (iv) it has been determined by the NRA that the [Universal Service Obligations] Net Cost is material compared to the administrative costs of the establishment of a sharing mechanism in respect of the [Universal Service Obligations] Net Cost amongst participants in the market;

If the NRA is required, pursuant to its obligations under the [Universal Service Directive], to consider whether the [Universal Service Obligations] Net Cost is excessive in view of the ability of the [Universal Service Provider] to bear it, account being taken of all the [Universal Service Provider’s] characteristics, in particular, the quality of its equipment, its economic and financial situation and its market share (as referred [to] at para. 42 of [the judgment of 6 October 2010, Base and Others (C-389/08, EU:C:2010:584)]) is it permissible under the Directives for the NRA to conduct that assessment by having regard exclusively to the characteristics/situation of the [Universal Service Provider], or is it required to assess the characteristics/situation of the [Universal Service Provider] relative to its competitors in the relevant market?”

2.10. On 10 November 2022, the CJEU delivered its judgment⁶. The CJEU responded⁷ to the question referred as follows:

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

2.11. On 10 July 2023, the High Court made orders which, amongst other things:

- i. set aside the following determinations relating to ComReg’s unfair

⁶ Eircom Limited v. Commission for Communications Regulation, Case C-494/21, Judgment of the Court, delivered 10 November 2022 (“the CJEU judgment”), [Link](#).

⁷ Paragraph 55 of the CJEU judgment.

burden:

- a) section 1.3 of the determination in ComReg Decision D05/19
- b) the final paragraph of section 1.2 of the determination in ComReg Decision D06/19 (beginning “Pursuant to the calculation of the positive net cost...”)
- c) section 1.3 of the determination in ComReg Decision D07/19
- d) section 1.3 of the determination in ComReg Decision D08/19
- e) section 1.3 of the determination in ComReg Decision D09/19;

and

- ii. ordered that those aspects of the Decisions identified above be remitted to ComReg for review in accordance with the CJEU judgment.

2.12. Accordingly, the net cost determined by ComReg in the Decisions remains undisturbed. The existence of a positive net cost does not automatically constitute an unfair burden or automatically give rise to the need for USO funding.

2.13. The ComReg determined positive net cost for 2010-2011 is €7,503,531⁸.

⁸ ComReg Decision D05/19, “Assessment of eir’s 2010-11 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011”, Document No. 19/36, 17 April 2019, [Link](#). Note that this determined both that there is a direct net cost and that the benefits of the USO do not outweigh the net cost; see paragraph 205 and paragraph 217(ii).

Table 1: Determined net cost calculation

USO Net Cost 2010-2011		2010-2011 ComReg €
Direct net cost (a)	Uneconomic Areas	€183,793
	Uneconomic Customers	€8,643,518
	Directories	-
	Public Payphones	€185,310
	Services for disabled end users	€58,935
	Consultancy fees	-
	Direct net cost	€9,071,556
Intangible benefits (b)	Enhanced brand recognition	€1,298,367
	Life-cycle	€259,711
	Ubiquity	€3,596
	Marketing	€6,351
	Total intangible benefits	€1,568,025
Net cost (after intangible benefits)/Positive net cost		€7,503,531

- 2.14. ComReg is now re-conducting the unfair burden assessment for 2010-2011 in the light of the CJEU judgement. D04/11 sets out the principles and methodologies to be considered in determining whether a net cost represents an unfair burden on a USP. Those principles and methodologies have informed ComReg's assessment of whether the positive net cost of providing the USO constituted an unfair burden on eir.
- 2.15. This document details and consults on ComReg's preliminary views in relation to the unfair burden assessment for 2010-2011. Following consideration of responses to this consultation, ComReg will make a determination regarding the unfair burden assessment for 2010-2011.

3. Legal context

3.1. New Regime

- 3.1. The net cost upon which the unfair burden is to be assessed was calculated and determined pursuant to Regulation 11 of the Universal Service Regulations.
- 3.2. In June 2023, the Universal Service Regulations were revoked⁹ and replaced by the Code Regulations. The Code Regulations are part of the transposition of Directive (EU) 2018/1972 which repealed and recast, amongst others, the Universal Service Directive¹⁰ and established the European Electronic Communications Code¹¹ (“the Code”), a comprehensive set of new and revised rules for the telecoms sector.
- 3.3. D04/11 continues in force as if it were made under the Code Regulations¹² and references to Regulations 11 and 12 of the Universal Service Regulations will, going forward be read as references to Regulations 75 and 76 of the Code Regulations, respectively.
- 3.4. Any future determination of an unfair burden by ComReg will be made pursuant to Regulation 75 of the Code Regulations. Where ComReg determines that the net cost of meeting a USO represents an unfair burden on an undertaking it will provide for financing of that net cost pursuant to Regulation 76 of the Code Regulations “Financing of universal service obligations and transparency” which replaces Regulation 12 of the Universal Service Regulations “Financing of universal service obligations”.

3.2. D04/11

- 3.5. In D04/11, ComReg set out the principles and methodologies to be applied to the calculation of the net cost and to the subsequent determination by ComReg of whether a resulting positive net cost (if any) constitutes an unfair burden on the USP.
- 3.6. Decisions 1 to 37 of D04/11 set out the basis for calculating the direct net cost and the intangible benefits associated with being the USP and must be adhered to in any assessment of USP’s funding applications.

⁹ European Union (Electronic Communications Code) (Amendment) Regulations 2023 (S.I. No. 300/2023), [Link](#).

¹⁰ 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 (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51) (“the Universal Service Directive”), [Link](#).

¹¹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), [Link](#).

¹² Regulation 113 of the Code Regulations.

- 3.7. Decisions 38 to 42 of D04/11 set out the general and objective criteria by which ComReg will assess whether a positive net cost, in the particular year of application, may be considered an unfair burden on the USP. The unfair burden assessment must be conducted in accordance with D04/11 (which has been continued under the new regime).
- 3.8. D04/11 must now be read in light of the CJEU judgment. ComReg has considered the CJEU judgment and its impact on D04/11.
- 3.9. ComReg is of the view that, in order for D04/11 to be applied in a way that is consistent with the CJEU judgment, Decisions 40-42 of D04/11 cannot be applied sequentially. Therefore, going forward, when applying D04/11 ComReg must disregard the first ten words of Decision 41 (i.e., the text “If the positive net cost significantly affects a USP’s profitability,”).
- 3.10. This means that, regardless of the impact of a positive net cost on the USP’s profitability, ComReg will conduct a competitive distortions assessment as set out in Decision 41 and Decision 42, and assess if the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38(iii)(b).
- 3.11. ComReg will conduct an assessment of the characteristics particular to a universal service provider in light of the competitive environment in which that provider operates, and will in this way take account of the situation of the universal service provider relative to that of its competitors in the relevant market. By carrying out its assessment in this way, ComReg will ensure the “comparative component” required by the CJEU is included.
- 3.12. In applying Decisions 38-42 (the aspects of D04/11 which relate to unfair burden assessment) ComReg will take account of the CJEU judgment and “examine the characteristics particular to that operator, taking account of its situation relative to that of its competitors in the relevant market”.
- 3.13. For ease of reading, Decisions 38-42 are set out below and the text ComReg considers necessary to disregard is struck through.

Table 2: Application of Decisions 38-42 as revised

Determining if there is an unfair burden	
Decision 38	<p>For an unfair burden on a USP, three cumulative conditions must be met:</p> <ul style="list-style-type: none"> i. There must be a verifiable and verified direct net cost. ii. The benefits of the USO must not outweigh the net cost (i.e. there is a positive net cost). iii. This positive net cost is (a) material compared to administrative costs of a sharing mechanism, and (b) causes a significant competitive disadvantage for a USP.
Decision 39	<p>If the positive net cost is relatively small, ComReg will determine, on the basis of audited costs of the USO, whether USO financing is or is not justified, taking into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and taking into account whether these costs are disproportionate to any net transfers to a USP.</p>
Decision 40	<p>If the positive net cost is not relatively small, ComReg will assess whether or not this net cost significantly affects a USP's profitability and/or ability to earn a fair rate of return on its capital employed; and</p>
Decision 41	<p>If the positive net cost significantly affects a USP's profitability, ComReg will assess whether or not such a net cost materially impacts a USP's ability to compete on equal terms with competitors going forward.</p>
Decision 42	<p>ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair:</p> <ul style="list-style-type: none"> i. Changes in profitability, including an understanding of where a USP generates most of its profits over time. ii. Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ("EBITDA") analysis. iii. Changes in direct USO net cost, if any, over time. iv. Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time. v. Changes in prices over time. vi. Changes in market share and/or changes in related markets. vii. Market entry barriers.

4. Approach to assessment of unfair burden

4.1. Net cost

- 4.1. As set out in chapter 2, the net cost determined by ComReg in the Decisions remains undisturbed. Accordingly, ComReg has instructed Oxera to base its analysis on the determined positive net cost for 2010-2011 of €7,503,531.

4.2. Administrative costs of establishing and operating a sharing mechanism

- 4.2. If ComReg, on the basis of the net cost calculation, finds that the net cost of meeting a USO represents an unfair burden, Regulation 76 of the Code Regulations provides that ComReg shall, “unless the Minister intends to introduce a mechanism to compensate the undertaking for the determined net costs under transparent conditions from public funds, establish a sharing mechanism administered by it or by a body independent from the designated undertakings, which body shall be under the supervision of the [ComReg].”
- 4.3. In ComReg 10/77¹³ ComReg elicited initial views of stakeholders on the establishment of a sharing mechanism. In Consultation 11/77¹⁴ ComReg conducted a further consultation in which it sought further views of stakeholders on a range of issues relating to the development of an appropriate sharing mechanism of a positive net cost (if determined to be an unfair burden).
- 4.4. In Consultation 11/77 ComReg was of the preliminary view that it is well positioned to administer the USO funding mechanism. ComReg considered that the administration of a USO fund is similar to operating ComReg’s levy (which it currently does¹⁵) and as such considers that it has the necessary competencies to undertake this requirement. These administrative functions would include the collection and dissemination of declarations by liable undertakings and the notification of parties of their respective contribution levels. Liable undertakings would discharge their respective contributions to ComReg – which would subsequently be disbursed to the USP.
- 4.5. Furthermore, given ComReg’s knowledge and understanding of the administrative issues some level of efficiencies should be achievable, in particular, if the

¹³ ComReg Document No. 10/77, “Preliminary Consultation - Call for Input, Costing and Financing of Universal Service Obligations”, 28 September 2010 (“ComReg 10/77”), [Link](#).

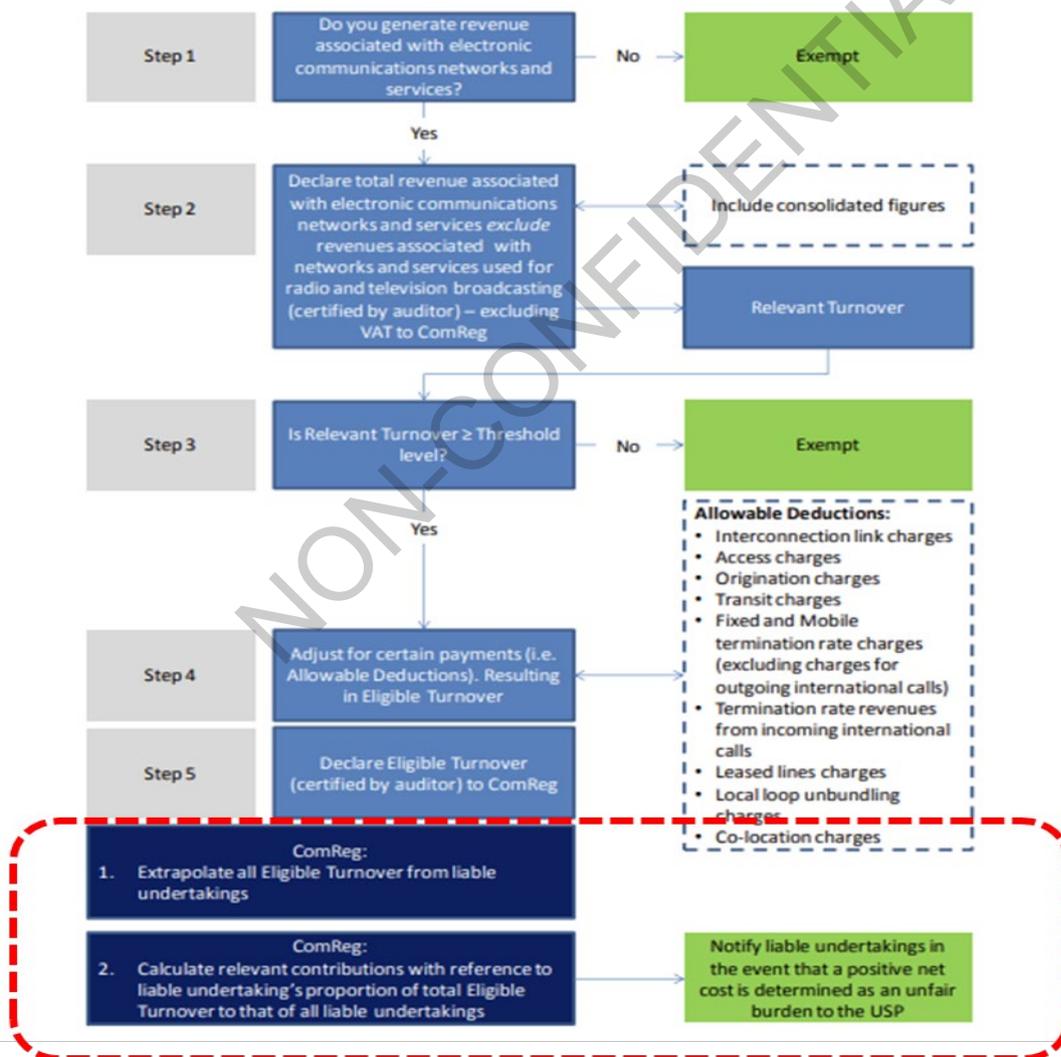
¹⁴ ComReg Document No. 11/77, “Consultation on sharing mechanism for any USO Fund: Principles and Methodologies”, 28 October 2011 (“Consultation 11/77”), [Link](#).

¹⁵ Pursuant to section 30 of the Communications Regulation Act 2002, [Link](#).

notification requirements are amalgamated as part of the notification requirements for ComReg’s levy. ComReg remains of these preliminary views.

- 4.6. Below is an illustrative flowchart of ComReg’s preliminary view (as set out in Consultation 11/77) regarding how liable parties/undertakings will be identified as being potentially required to contribute to a sharing mechanism.
- 4.7. ComReg considers that an independent audit of the apportionment and collection of the net cost from operators may be required. There may be some additional costs pertaining to legal advice, external auditing and IT infrastructure and support.
- 4.8. On this basis, ComReg estimates that the current administrative cost of establishing and operating a sharing mechanism is €200,000.

Figure 1: sharing mechanism steps (Consultation 11/77)



4.3. The market

- 4.9. ComReg is of the view that, in order for it to conduct the unfair burden assessment, the relevant market¹⁶ must firstly be identified and described. The USP's situation relative to that of its competitors can be assessed and taken into account (as is required by the CJEU judgment) by considering relatively simple and straightforward indicators such as those considered in Decision 42.
- 4.10. ComReg does not consider that an unfair burden assessment pursuant to Regulation 75 of the Code Regulations requires a full market analysis as provided for in Part 8 Chapter 3 of the Code Regulations.
- 4.11. ComReg's view, as set out above, is based upon its interpretation of the Code, the Universal Service Directive, the Universal Service Regulations the Framework Regulations and the CJEU judgment and it is supported by submissions made in the context of previous related consultations and eir's 2019 legal challenge.
- 4.12. ComReg notes that it previously conducted full market analyses of the Retail Fixed Narrowband Access¹⁷ and Retail Fixed Voice Access¹⁸ Markets (in 2007 and 2014 respectively). ComReg has taken these into account in its assessment of unfair burden.
- 4.13. Accordingly, ComReg has shared with Oxera its view of the type of assessment required in the USO funding context.

4.3.1. Information constraints

- 4.14. ComReg is in late 2023 undertaking an unfair burden assessment in respect of 2010-2011. In this circumstance there are inevitable information constraints. In particular some information is unavailable; and even where available some information is only available at a more aggregated level than is ideal.
- 4.15. In some cases, data is available from company-level databases reporting financial information such as profits and investment. Large firms will be typically diversified into different economic activities, and some will operate multinationally. Aggregation in data reporting therefore often occurs across different areas

¹⁶ For the avoidance of doubt, in this context ComReg uses the term "relevant" to mean "appropriate" and is not referring to the term "relevant market" as it was defined in the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 ("the Framework Regulations") or the term as it is used in relation to Regulation 49 of The Code Regulations market analysis.

¹⁷ ComReg Decision 07/61, "Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations Market Analysis: Retail Fixed Narrowband Access Markets", Document No. 07/61, 14 July 2007 ("D07/61"), [Link](#).

¹⁸ ComReg Decision 12/14, "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers", Document No. 14/89, 28 August 2014, ("D12/14"), [Link](#).

(economic activities and geographic location).

4.16. Accordingly, limitations in the availability of relevant data and information may constrain the preferred analysis that would be undertaken if full relevant information were available.

4.17. ComReg asked Oxera to address any information constraints within its report.

4.4. Information shared with Oxera

4.4.1. eir's historical cost separated accounts

4.18. ComReg in D08/10¹⁹ prescribed changes to the historical separated accounts to increase transparency, by improving the availability of adequate information on the costs and performance of the various parts of eir's regulated business and to better align with the market-based regulation that was being adopted as part of the European regulatory framework.

4.19. There had been various changes which ComReg considered necessitated the review of eir's regulatory reporting requirements. These included, inter alia:

- The length of time since the last review and recent changes in other jurisdictions;
- The experiences of ComReg and eir in the intervening period of assessing and understanding financial information used in the regulatory process;
- The completion of a number of market analyses; and
- The need to reflect the market-based structures in accordance with the European regulatory framework.

4.20. The current eir regulated accounts are comprised of the following documents, which eir is required to produce:

- Separated Accounts to the market level;
- Additional Financial Statements ("AFS") for material services and products;
- Additional Financial Information ("AFI") for other financial data; and
- Accounting Documentation describing, in detail, eir's regulatory accounting

¹⁹ ComReg Decision 08/10, "Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited", Document No. 10/67, 31 August 2010 ("ComReg D08/10"), [Link](#).

systems.

- 4.21. This reporting structure means that eir does not necessarily have to disclose unregulated information that was previously published.
- 4.22. ComReg personnel engaged with Oxera to assist Oxera in understanding eir's historical cost separated accounts.

4.4.2. Companies registration office

- 4.23. The Companies Registration Office ("CRO") is the central repository of public statutory information on Irish companies and business names. The CRO requires companies operating in Ireland to file annual returns.
- 4.24. ComReg has procured the relevant accounts for those service providers operating in the Irish fixed line market for the relevant periods, where available²⁰. In some cases, service providers' reporting is amalgamated into regional or global group accounts²¹.
- 4.25. The information procured by ComReg from the CRO has been provided to Oxera.

4.4.3. ComReg quarterly key data reports

- 4.26. Statistical information on the Irish electronic communications market and benchmark data from other countries is collected and analysed by ComReg's wholesale division.
- 4.27. Through its Quarterly Key Data Reports ("QKDR") and the Data Portal ComReg informs stakeholders of the key trends and developments in the Irish Electronic Communications market.
- 4.28. ComReg has provided Oxera with the relevant QDKR reports and associated information for the period 2010-2011.

4.4.4. ComReg market analysis information

- 4.29. ComReg has provided Oxera with copies of previous market analyses conducted i.e. Retail Fixed Narrowband Access Markets in 2007²² and a Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers in 2014²³.

²⁰ BT Ireland; Digiweb; eircom Limited; Hutchinson 3G Ireland Limited; Imagine Communications Group Limited; Lycamobile Limited; Tesco Mobile Ireland; Magnet Networks Limited; Telefonica; UPC Communications Ireland Limited.

²¹ Sky Ireland financial reporting is consolidated into its UK British Sky Broadcasting Group plc.

²² ComReg Decision 07/61 (op. cit.).

²³ ComReg Decision 12/14 (op. cit.).

- Q. 1 Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.
- Q. 2 Do you agree with ComReg's approach to information and information constraints? Please give reasons for your answer. If you are of the view that ComReg should consider any additional relevant information when conducting the unfair burden assessment, please provide copies of that information (including full source references and independent verification, where appropriate).

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5. Unfair burden assessment 2010-2011

5.1. Oxera unfair burden report 2010-11

- 5.1. To facilitate ComReg in forming a preliminary view as to whether the provision by eir of the USO in 2010-2011 represented an unfair burden on eir, and to inform its views ComReg engaged Oxera.
- 5.2. ComReg instructed Oxera to conduct its analysis by reference to the principles and methodologies for assessing an unfair burden in Decisions 38 to 42 of D04/11, in light of the CJEU judgement. Oxera was provided with ComReg's interpretation of how the CJEU judgment affected D04/11 and ComReg's approach to the assessment process (see Chapter 3).
- 5.3. Oxera's assessment was provided to ComReg in a report titled the "Oxera unfair burden report 2010/11", published as part of this consultation at Annex 2. The Oxera unfair burden report 2010-2011 is structured as follows:
 - Section 2 sets out the approach to the determination of an unfair burden, taking into account the relevant legal context.
 - Section 3 presents the administrative cost assessment, consistent with Decisions 38(iii)(a) and 39 of D04/11.
 - Section 4 presents the application of Decision 40–42 of D04/11 including: an assessment of eir's financial and competitive position, taking account of eir's specific characteristics and situation relative to that of its competitors in the relevant market.
 - Section 5 sets out Oxera's conclusion.
 - Appendix 1 sets out Oxera's understanding of sub-products within eir's fixed line business that could potentially be dissociable from the USO.
 - Appendix 2 sets out the data constraints faced, and the analysis undertaken, in light of these constraints.
- 5.4. In summary, Oxera carried out the following:
 - **Administrative cost assessment (Decision 39 and 38(iii)(a))** – Oxera assessed the proportionality of the cost of establishing and operating a sharing mechanism relative to the transfer to the USP.

- **Assessment of eir’s financial and competitive position in 2010-2011** – Oxera assessed eir’s financial and competitive position in the relevant period and market, to establish whether there was an unfair burden on eir (the USP). Specifically:
 - Section 4.1 sets out the scope of the relevant market in which the assessment of an unfair burden should be undertaken.
 - Section 4.2 applies **Decision 40**, to assess eir’s financial position with respect to its profitability.
 - Section 4.3 applies **Decision 41**, to assess whether the net cost materially impacts eir’s ability to compete with competitors going forward.
 - Section 4.4 applies the **criteria of Decision 42** to determine whether or not the net cost burden is unfair.
 - Section 5 reviews the evidence of eir’s financial and economic position to form a view on the outcome of **Decision 38 (iii) b** as to whether the positive net cost causes significant competitive disadvantages for a USP.

5.5. In section 5 Oxera concluded by applying the three cumulative conditions in Decision 38. Oxera concluded that its view is that the net cost of the USO did not represent an unfair burden on eir in 2010-2011.

5.2. ComReg’s preliminary view

5.6. ComReg carefully considered Oxera’s unfair burden report 2010/11 prior to forming its preliminary view regarding whether the provision of the USO in 2010-2011 represented an unfair burden on eir.

5.7. In respect of the choice of relevant business, based on Oxera’s analysis, and in particular because the activities included within the fixed line business are non-dissociable from the USO, ComReg agrees that the fixed-line market is the appropriate market upon which to analyse eir’s competitive position.²⁴

5.8. ComReg notes that two of the three conditions in Decision 38 of D04/11 (outlined above) are met, as:

- i. There is a verified direct net cost to eir of €7,503,531. This figure represents the net cost as determined by ComReg; and
- ii. The benefits of the USO, amounting to €1,568,025, do not outweigh the net cost (i.e., there is a positive net cost).

²⁴ ComReg has considered the activities within the fixed-line business as listed in eir’s HCA, and identified certain sub-products that may be considered potentially dissociable from the USO. Ideally, an analysis of the market would exclude these sub-products. ComReg does not consider that these particular sub-products would have a material impact on the estimates. For details, see Annex A1 in Oxera’s report.

- 5.9. Decision 38 (i) and 38 (ii) were established as part of ComReg’s assessment of eir’s funding application, finding that there is a direct net cost and that the benefits of the USO do not outweigh the net cost.
- 5.10. Decision 38 (iii) (a) provides: “The positive net cost is (a) material compared to administrative costs of a sharing mechanism”.
- 5.11. ComReg has carefully considered Section 5 of Oxera’s unfair burden report 2010-2011. ComReg has taken Oxera’s conclusions into account and is of the preliminary view that the size of the positive net cost in 2010-2011 is material compared to the administrative costs of a sharing mechanism. This preliminary view is informed by Oxera’s assessment showing that the size of the positive net cost (i.e., €7,503,531) is not relatively small and that the positive net cost and/or net transfers to the USP (if an unfair burden were determined by ComReg) would most likely exceed the administrative costs of establishing and operating any sharing mechanism (estimated at €200,000).
- 5.12. Therefore, ComReg is of the preliminary view that Decision 38 (iii) (a) is met.
- 5.13. Decision 38 (iii) (b) provides “The positive net cost [is] (b) causes a significant competitive disadvantage for a USP”:
- 5.14. ComReg has carefully considered Section 4 of Oxera’s unfair burden report 2010-2011 in which it applied Decisions 40 to 42.
- 5.15. In the application of Decisions 40 to 42, which are relevant for Decision 38 (iii) (b), ComReg’s preliminary views are summarised as follows:
- **Decision 40** In 2010-11, the net cost has not significantly affected eir’s profitability and/or ability to earn a fair rate of return on its capital employed. Indeed, eir’s returns were in excess of the competitive benchmark of a ‘fair rate of return’ as measured by the regulatory allowed WACC.
 - **Decision 41** The net cost of the USO for the year 2010-11, when considered under the contemporaneous ‘snapshot’ view, did not materially impact eir’s ability to compete on equal terms with competitors going forward, as:
 - there is no evidence of a causal link between the financial distress and challenges observed over time and the provision of the USO.
- Moreover, the results of the retrospective view, taking account of the investment horizon of 2009/10 to 2021/22, also indicates that discharging the USO did not materially impact the USP’s ability to compete, as:
- the USO did not prevent eir from undertaking necessary investments; and

- the USO has not impeded eir from making improvements to its financial health, as evidenced by improvements in its credit rating over the period of analysis.
- **Decision 42** In 2010-2011 eir was profitable and was well positioned to cross-subsidise the provision of the USO by using profits earned in its fixed-line business. Indeed, when compared to its competitors, eir was able to maintain a steady ARPU for the period 2009-2011, and, despite a reduction in market shares, remained the main player in the market (by revenue and subscriber numbers). Indeed, indicative analysis shows that eir's EBIT at the group level exceeded that of its competitors, while eir group's ROCE was broadly in line with those of its competitors.

5.16. ComReg is of the preliminary view, for the reasons summarised above, that the conditions in Decisions 40 to 42 of D04/11 and by consequence, the conditions in Decision 38 (iii) (b) of D04/11, have not been met. As a result, ComReg is of the preliminary view that the provision of the USO in 2010-2011 did not represent an unfair burden on eir.

Q. 3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2010-2011 (i.e., €7,503,531) does not represent an unfair burden on eir? Please give reasons for your answer.

6. Next steps and submitting comments

- 6.1. During the consultation submission period, ComReg welcomes written responses in relation to any of the issues raised in this consultation document. The timeframe for receipt of submissions to this consultation paper is **5pm on 7 February 2024**. It is requested that comments within submissions make reference to the relevant question numbers from this consultation document.
- 6.2. In order to promote further openness and transparency, ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's Guidelines on the Treatment of Confidential Information – ComReg 05/24.
- 6.3. Respondents are requested to clearly identify confidential material and place such material in a separate annex to responses.
- 6.4. Respondents are also requested to provide any electronic submissions in an unprotected format so that they can be appended into ComReg's submissions document for electronic publication.

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7. Regulatory Impact Assessment (RIA)

- 7.1 A RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders. ComReg's approach to RIA is set out in the Guidelines published in August 2007.²⁵ In conducting the RIA, ComReg take account of the RIA Guidelines²⁶ issued by the Department of An Taoiseach in June 2009 and adopted under the government's Better Regulation programme.
- 7.2 Section 13(1) of the Communications Regulation Act 2002, as amended, requires ComReg to comply with certain Ministerial Policy Directions. Policy Direction 6 of February 2003 requires that before deciding to impose regulatory obligations on undertakings we must conduct a RIA in accordance with European and International best practice, and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme. In conducting the RIA, ComReg also has regard to the fact that regulation by way of issuing decisions, for example imposing obligations or specifying requirements, can be quite different to regulation that arises by the enactment of primary or secondary legislation.
- 7.3 ComReg's published RIA Guidelines, in accordance with a policy direction to ComReg, state that ComReg will conduct a RIA in any process that may result in the imposition of a regulatory obligation, or the amendment of an existing obligation to a significant degree, or which may otherwise significantly impact on any relevant market or any stakeholders or consumers. However, the Guidelines also note that in certain instances it may not be appropriate to conduct a RIA and, in particular, that a RIA is only considered mandatory or necessary in advance of a decision that could result in the imposition of an actual regulatory measure or obligation, and that where ComReg is merely charged with implementing a statutory obligation then it will assess each case individually and will determine whether a RIA is necessary and justified.
- 7.4 In this consultation document, ComReg considers that it is not exercising its discretion by imposing a discretionary regulatory obligation that would require a regulatory impact assessment (RIA) but is acting under a statutory obligation imposed on it by Regulation 75 of the Code Regulations, which requires that upon receipt of a request for funding/compensation from the USP, ComReg shall calculate the net cost of provision and assess whether the universal service obligation represents an unfair burden for the USP. As such, if a request for funding/compensation has been received, ComReg has no discretion as to whether or not such an assessment is undertaken. Therefore, a RIA is not being undertaken

²⁵ ComReg Document 07/56, "ComReg's Approach to Regulatory Impact Assessment. Response to Consultation and Guidelines," 10 August 2007, [Link](#); and ComReg Document 07/56a, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", 10 August 2007, [Link](#).

²⁶ RIA Guidelines - Department of Taoiseach.

for this consultation document.

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8. Draft Determination

1. This Determination is hereby issued by the Commission for Communications Regulation (“ComReg”):

- i. Pursuant to Regulation 75(4) of European Union (Electronic Communications Code) Regulation 2022 (“the Code Regulations”);
- ii. Having applied the principles and methodologies set out in ComReg Document D04/11 “Report on Consultation and Decision on the Costing of Universal Service Obligations Principles and Methodologies” dated 31 May 2011;
- iii. Having regard to the judgment of the European Court of Justice in the case of Eircom Limited v. Commission for Communications Regulation, Case C-494/21, delivered 10 November 2022;
- iv. Having regard to the analysis and reasoning set out in ComReg Document No. 23/113 and ComReg Document No. **XX/XX**;
- v. Having regard to ComReg’s functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act 2002, as amended and ComReg’s objectives under Regulation 4 of the Code Regulations;
- vi. Having, where relevant, complied with policy directions issued to ComReg by the then Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004;
- vii. Having, in ComReg Decision D05/19, following the assessment of the funding application received from Eircom Limited (“eir”) on 15 July 2016 in relation to the net cost of meeting its universal service obligations in the financial year 2010-2011, determined that there was a positive net cost in 2010-2011 of €7,503,531 comprised of the following figures (“the net cost”):

USO Net Cost 2010-2011		2010-2011 ComReg €
Direct net cost (a)	Uneconomic Areas	€183,793
	Uneconomic Customers	€8,643,518
	Directories	-
	Public Payphones	€185,310
	Services for disabled end users	€58,935
	Consultancy fees	-
	Direct net cost	€9,071,556
Intangible benefits (b)	Enhanced brand recognition	€1,298,367
	Life-cycle	€259,711
	Ubiquity	€3,596
	Marketing	€6,351
	Total intangible benefits	€1,568,025
Net cost (after intangible benefits)/Positive net cost		€7,503,531

- viii. Having, in ComReg D05/19 determined that the estimate of benefits to eir as a result of the provision of the universal service do not outweigh the net cost.
- ComReg has determined that for the financial year 2010-2011, the determined net cost of the provision of the universal service obligation does not represent an unfair burden on eir and therefore that the universal service obligation in 2010-2011 does not represent an unfair burden on eir.
 - If any section, clause or provision or portion thereof contained in this Determination is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Determination and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Determination, and shall not in any way affect the validity or enforcement of this Determination.

SIGNED FOR AND ON BEHALF OF THE COMMISSION FOR COMMUNICATIONS REGULATION ON THE XX DAY OF XX 202X

Robert Mourik

Chairperson

COMMISSIONER OF THE COMMISSION FOR COMMUNICATIONS REGULATION

Annex 1: Questions

- Q. 1 Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.
- Q. 2 Do you agree with ComReg's approach to information and information constraints? Please give reasons for your answer. If you are of the view that ComReg should consider any additional relevant information when conducting the unfair burden assessment, please provide copies of that information (including full source references and independent verification, where appropriate).
- Q. 3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2010-2011 (i.e., €7,503,531) does not represent an unfair burden on eir? Please give reasons for your answer.

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Annex 2: Oxera unfair burden report 2010/11

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