An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

eir's 2012-2013 Universal Service Funding Application

Unfair burden assessment

Response to Consultation and Determination

Decision: D03/25
Reference: ComReg 25/14
Version: Final
Date: 14/03/2025

Content

Annexes

Glossary

"ALTO" means Alternative Operators in the Communications Market.

"Base judgment" means Base NV and Others v. Ministerraad, Case C-389/08, judgment of the CJEU, delivered by the CJEU on 6 October 2010.

"BEREC" means the Body of European Regulators for Electronic Communications.

"BT" means BT Communications Ireland Limited.

"CJEU" means the Court of Justice of the European Union**.**

"CJEU judgment" means Eircom Limited v. Commission for Communications Regulation, Case C-494/21, delivered by the CJEU 10 November 2022.

"Code" means the European Electronic Communications Code, established by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018.

"Code Regulations" means the European Union (Electronic Communications Code Regulations 2022 (S.I. 444 of 2022).

"ComReg" means the Commission for Communications Regulation, established by section 6(1) of the 2002 Act.

"Consultation 11/77" means "Consultation on sharing mechanism for any USO Fund: Principles and Methodologies", Document No. 11/77, 28 October 2011.

"Consultation 23/113" means "eir's 2010-2011 Universal Service Fund Application Unfair burden assessment. Consultation and Draft Determination", Document No. 23/113, 6 December 2023.

"Consultation 24/79" means "eir's 2011-2012 Universal Service Funding Application Unfair burden assessment. Consultation", Document No. 24/79, 26 September 2024.

"Consultation 24/96" means "eir's 2012-2013 Universal Service Funding Application Unfair burden assessment. Consultation", Document No. 24/96, 6 December 2024.

"CRO" refers to the Companies Registration Office.

"D06/10" means "Response to Consultation – The Provision of Telephony Services under Universal Service Obligations. Decision Notice (and Decision Instrument)", Document No. 10/46, Decision No. D06/10, 30 June 2010.

"D04/11" means "Decision on the Costing of universal service obligations: Principles and Methodologies", Document No. 11/42, Decision No. D04/11, 31 May 2011.

"D12/14" means "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers. Response to Consultation and Decision", Document No. 14/89, Decision No. D12/14, 28 August 2014. This was a response to the 2012 FVA Consultation.

"D07/19" means "Assessment of eir's 2012-2013 Universal Service Fund Application, Assessment of the net cost and unfair burden for the period 2012-13", Document No. 19/38, Decision No. D07/19, 17 April 2019.

"D17/24" means "eir's 2010-2011 Universal Service Funding Application Unfair burden assessment. Response to Consultation and Final Determination," Document No. 24/43R, Decision No. D17/24, 27 June 2024.

"D01/25" means "eir's 2011-2012 Universal Service Funding Application - Unfair burden assessment - Response to Consultation and Determination," Document No. 25/01R, Decision No. D01/25, 16 January 2025.

"direct net cost" of the USO is the avoidable costs attributable to the provision of the USO (both direct and indirect), minus revenues (both direct and indirect) attributable to the provision of the USO.

"eir" means Eircom Limited.

"Framework Regulations" mean the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. 333 of 2011).

"FVA" means fixed voice access.

"HCA" means historical cost accounting.

"Information Requirements" means the additional information formally requested on 11 March 2024 from the relevant undertakings by ComReg, using its statutory powers (Section 13D(1) of the 2002 Act).

"ISDN" means integrated services digital network.

"MCE" means mean capital employed.

"MDF" means main distribution frame.

"MDF area" means a geographic area as described by the MDF map.

"MEA" means modern equivalent asset.

"Minister" means the Minister for the Environment, Climate and Communications.

"**net cost**" is calculated as the difference between the 'direct net cost' and the intangible benefits which accrue to the USP, by virtue of being the USP.

“NRA” means National Regulatory Authority.

“OAO” means other authorised operators.

“Oxera” means Oxera Consulting, LLP.

“Oxera Initial Unfair Burden Report 2012/13”, refers to the report prepared by Oxera, titled “Oxera unfair burden report 2012/13”, dated 5 December 2024, included as Annex 2 of Consultation 24/96, (24/96a).

“Oxera Unfair Burden Report 2012/13”, refers to the report prepared by Oxera, titled “Oxera unfair burden report 2012/13” dated 13 February 2025 which is included as Annex 3 of this document.

“PSTN” means the public switched telephone network.

“QKDR” means the Quarterly Key Data Reports published by ComReg.

“RIA” means regulatory impact assessment.

“ROCE” means the return on capital employed.

“SB-WLR” means single billing through wholesale line rental.

“SMP” means significant market power.

“Three” means Three Ireland (Hutchison) Limited.

“Universal Service Regulations” means the European Communities (Electronic Communications Networks and Services)(Universal Service and Users’ Rights) Regulations 2011 (S.I. 337 of 2011).

"UPC” means UPC Ireland, now Virgin Media.

“USO” means universal service obligations.

“USO model” refers to the USO direct net cost model underpinning eir’s USO funding applications to ComReg as a whole, including all calculations, data, spreadsheets, the model summary, and the individual net cost models (Area, Customer, Payphone, Directories, and Disabled End Users’ Services). These individual direct net cost models may be referred to cumulatively as “USO models”.

“USP” means universal service provider.

“Virgin Media” refers to Virgin Media Ireland Limited.

“Vodafone” means Vodafone Ireland Limited.

“WACC” means the weighted average cost of capital.

“2002 Act” means the Communications Regulation Act 2002, as amended.

"2008 WACC" means the WACC set by ComReg at 10.21% in the 2008 WACC Decision.

"2008 WACC Decision" means "Eircom's Cost of Capital. Response to Consultation and Decision Notice", Document No. 08/35, Decision No. 01/08, 22 May 2008.

"2012 FVA Consultation" means "Market Review Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers. Consultation and Draft Document," Document No. 12/117, 26 October 2012.

Redacted Information

In preparing this document ComReg has treated claims that information is confidential in accordance with its "Guidelines on the treatment of confidential information".[1] Where information of a confidential nature is referenced in this determination document, or the accompanying consultant's report, the relevant information has been redacted and a [✂[redacted]✂] symbol has been inserted.

[1] "Guidelines on the treatment of confidential information", Document No. 05/24, 22 March 2005, https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg0524.pdf.

1. Executive summary

1.1. Eircom Limited ("eir"), as the designated universal service provider ("USP"), submitted an application to the Commission for Communications Regulation ("ComReg") for funding in respect of the net cost of meeting its universal service obligations ("USO") during its financial year 2012-2013.[2] In this document ComReg outlines the unfair burden assessment for 2012-2013 and the reasons for its determination that, for 2012-2013, the determined net cost of the provision of the USO does not represent an unfair burden on eir.

1.2. A USO is a safety net to ensure that a set of at least the minimum services are available to all end-users and at an affordable price.[3] In the context of electronic communications services, the universal service ensures that basic telephone services are available at an affordable price and specified quality.

1.3. In exercising its functions, ComReg has an objective to promote the interests of users within the Community and in that regard ComReg has an obligation to take all reasonable measures to ensure that all users have access to a universal service[4]. ComReg has statutory powers to designate one or more undertakings as USP and oblige them to provide certain telecommunications services.

1.4. A USP may submit applications for USO funding. ComReg is then required to determine:

(i) the net cost; and

(ii) whether that net cost is an unfair burden on the USP.

1.5. In D04/11[5], ComReg set out: (i) how the net cost is to be calculated and (ii) principles and methodologies to apply to ComReg's assessment as to whether a net cost associated with meeting the USO, if any, represents an unfair burden on the USP.

1.6. In July 2016, following a process of engagement between ComReg and eir, eir re-submitted its final 2012-2013 USO funding application in which it claimed a positive net cost of €8,012,033.

---

[2] Referred to as "2012-2013".

[3] Recital 212 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (the "Code"), https://eur-lex.europa.eu/eli/dir/2018/1972/oj.

[4] Section 12(2)(c)(i) of the Communications Regulation Act 2002, as amended (the "2002 Act"), www.irishstatutebook.ie/eli/2002/act/20/enacted/en/html.

[5] "Decision on the Costing of universal service obligations: Principles and Methodologies", Document No. 11/42, Decision No. D04/11, 31 May 2011 ("D04/11"), https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies.

1.7. Following a consultation on its preliminary views in relation to eir's final application for funding for 2012-2013, ComReg determined the net cost of provision of the universal service in that year and decided that this did not represent an unfair burden on eir in the financial year in question ("D07/19").[6]

1.8. eir appealed D07/19 along with four other decisions made by ComReg relating to other years. The High Court stayed these proceedings and referred a question concerning the unfair burden assessment to the Court of Justice of the European Union ("CJEU") for a preliminary ruling pursuant to Article 267 of the Treaty of the Functioning of the European Union.

1.9. The CJEU ruled that:

> "Articles 12 and 13 of Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), must be interpreted as requiring the competent 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".

1.10. Following the judgment of the CJEU (the "CJEU judgment")[7], the High Court made orders, amongst other things, setting aside one section of D07/19[8] i.e. the aspect of D07/19 which related to unfair burden assessment and remitting that aspect to ComReg for review in accordance with the CJEU judgment.

1.11. The ComReg determined positive net cost for 2012-2013 is €7,723,749. This was not disturbed and accordingly stands.

1.12. ComReg is of the view that, in order for D04/11 to be applied in a way that is consistent with the CJEU judgment, this means that, regardless of the impact of a positive net cost on the USP's profitability (Decision 40 of D04/11), ComReg will conduct a competitive assessment as set out in Decision 41 and Decision 42 of D04/11, and assess whether the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38(iii)(b) of D04/11.

[6] "Assessment of eir's 2012-13 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2012-2013", Document No. 19/38, Decision No. D07/19, 17 April 2019. https://www.comreg.ie/publication/assessment-of-eirs-2012-2013-universal-service-fund-application-assessment-of-the-net-cost-and-unfair-burden-for-the-period-2012-2013.

[7] Eircom Limited v. Commission for Communications Regulation, Case C-494/21, Judgment of the Court, delivered 10 November 2022 ("the CJEU judgment"), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CJ0494.

[8] The final paragraph of section 1.2 of the determination. Beginning "Pursuant to the calculation of the positive net cost…."

1.13. ComReg reconducted the unfair burden assessment for 2012-2013 on the basis of this determined net cost and in accordance with D04/11 read in light of the CJEU judgment.[9] ComReg received advice from its economic advisors Oxera Consulting ("Oxera") which was carefully considered by ComReg, and which informed ComReg's unfair burden assessment. In Consultation 24/96 ComReg consulted upon how it proposed to apply Decisions 38-42 of D04/11,[10] in light of the CJEU judgment and its unfair burden assessment for 2012-2013.[11] In contrast to its approach in 2019, ComReg proposed to conduct a competitive assessment and assess whether the positive net cost caused a significant competitive disadvantage for eir as USP.

1.14. There were four respondents[12] to Consultation 24/96. Submissions to Consultation 24/96 are considered and responded to in Chapter 5.

1.15. ComReg considers that the matters below are important to note:

- Certain aspects of the unfair burden assessment for 2012-2013 were established as part of ComReg's original assessment of eir's funding application (i.e. the application of Decision 38(i) and Decision 38(ii) and the administrative cost assessment in Decision 38(iii)(a) and Decision 39). These aspects remain undisturbed and are not revisited in this determination.

- The assessment to be carried out is whether the "net cost" of meeting the USO represents an "unfair burden." This is not a general assessment of unfairness of the burden of the USO. This focus on the net cost is central to the legislative regime and this fact is reflected in D04/11, the CJEU judgment, the Base judgment[13], and the relevant legislation.

- There is nothing in D04/11 or the CJEU judgment relating to promoting/demoting or weighting the criteria of assessment. Indeed, the CJEU judgment does not take issue with and cites ComReg's application of Decision 40 (see paragraph 21 of the CJEU judgment).

- ComReg in D04/11 set out the principles and methodologies for assessment of unfair burden. D04/11 was made following a public consultation, has been in place for a significant amount of time and has not been challenged.

[9] Note that ComReg previously applied its approach to Decisions 38-42 of D04/11 read in light of the CJEU judgment, in the context of its 2010-2011 and 2011-2012 unfair burden assessments.
[10] In particular, Decision 38(iii)(b) and Decisions 40-42.
[11] "eir's 2012-2013 Universal Service Funding Application Unfair burden assessment. Consultation" Document No. 24/96, 6 December 2024, https://www.comreg.ie/publication/eirs-2012-2013-universal-service-funding-application-unfair-burden-assessment-consultation.
[12] Alternative Operators in the Communications Market ("ALTO");BT Communications Ireland Limited ("BT"); Virgin Media Ireland Limited ("Virgin Media"); and Vodafone Ireland Limited ("Vodafone").
[13] Base NV and Others v. Ministerraad, Case C 389/08, Judgment of the Court delivered on 6 October 2010 ("Base judgment"), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-389/08.

1.16. ComReg asked Oxera to consider the submissions received to Consultation 24/96 and to revise its report as it considered appropriate. ComReg considered the advice received from Oxera. ComReg agrees with Oxera's analysis and conclusions in the Oxera Unfair Burden Report 2012/13.

1.17. In order to reflect the requirements of the CJEU judgment, when establishing if the net cost represents an unfair burden and applying D04/11, ComReg took account of eir's particular characteristics (the quality of eir's equipment, eir's economic and financial situation, and eir's market share), and when examining those characteristics took account of eir's situation relative to that of its competitors in the relevant market.

1.18. In the application of Decisions 40 to 42 of D04/11, which are relevant for Decision 38(iii)(b), ComReg's findings are summarised as follows:

- **Decision 40:** In 2012-2013, the net cost did not significantly affect 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 regulated WACC.

- **Decision 41:** In 2012-2013 the net cost did not materially impact eir's ability to compete on equal terms with competitors going forward, as:

  - there is no available evidence of a causal link between the financial distress and challenges observed and the net cost of the USO; and

  - the results of the wider period of financial analysis undertaken (2009/10 - 2022/23) show that the USO did not prevent eir from undertaking necessary investment nor did it impede eir from making improvements to its financial health, as evidenced by improvements in its credit rating.

- **Decision 42:** in 2012-2013, 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 with its competitors, eir was able to maintain a steady ARPU over the assessed period 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 Irish group level exceeded that of its competitors, while eir's Irish group-level ROCE was greater than all but one of its competitors. The available evidence suggests that market entry barriers did not prevent new entrants (i.e. eir's competitors) from achieving growth.

1.19. **Decision 38(iii)(b):** Based on the analysis undertaken in the application of Decisions 40 to 42 and the findings in relation to these decisions, ComReg considers that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2012-2013.

1.20. Notwithstanding the information constraints identified, ComReg is satisfied that it had sufficient information available to conduct the unfair burden assessment for 2012-2013.

1.21. ComReg when concluding the unfair burden assessment considered the conclusions reached in relation to each of the decisions from D04/11 referenced. No one of these decisions is, in and of itself, determinative. ComReg is of the view that the conclusions relating to each of the decisions referenced converge to indicate that the net cost of providing the USO in 2012-2013 does not constitute an unfair burden on eir.

1.22. Having fully considered all relevant information, including the responses to Consultation 24/96 and the advice received from Oxera, for the reasons summarised in this document, in particular in Chapter 4, ComReg has determined that the net cost of the provision of the USO in 2012-2013 does not represent an unfair burden on eir.

2. Background

2.1. Context

2.1. The liberalisation of the telecommunications market in Ireland, driven by the European Union, commenced in the 1990s. In 2012, the Irish market was fully opened up to competition. eir as the incumbent telecommunications provider was the dominant player in the market[14]. Its competitors continued to gain market share. eir owned and operated one fixed network which was ubiquitous (i.e. passed almost all premises in the country).

2.2. Requirements for a universal service were introduced as part of the process of liberalisation. The first USO designation was made in Ireland in 1999 and eir was designated as the USP. The universal service obligations imposed on eir were to ensure that basic fixed line telephone and other minimum telecommunications services, such as public payphones and printed directory services, were available to end-users at an affordable price.

2.3. ComReg, by way of D07/12[15], designated eir as the USP to provide certain telecommunications services, for the period 1 July 2012 to 30 June 2014.[16]

2.4. In 2012-2013 there was a well-established wholesale regime in place which allowed competing operators (known as "other authorised operators" or "OAOs") to offer service by purchasing from eir and reselling what was known as single billing wholesale line rental ("SB-WLR"). At that time all of eir's competitors for fixed line services except one (UPC, now Virgin Media) were purchasing and re-selling eir's SB-WLR product.

2.5. Regulated SB-WLR wholesale prices were set based on a price regulation regime whereby the nationally averaged price for this wholesale service was set by reference to eir's retail public switched telephony network ("PSTN") price

---

[14] "Market Analysis: Retail Fixed Narrowband Access Markets", Document No. 07/61, Decision No. 07/61, 24 August 2007 (the "2007 Market Review"), https://www.comreg.ie/?dlm_download=decision-notice-market-analysis-retail-fixed-narrowband-access-markets; "Market Review Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers. Consultation and Draft Document", Document No. 12/117, 26 October 2012 ("2012 FVA Consultation"), http://www.comreg.ie/_fileupload/publications/ComReg12117.pdf; "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers. Response to Consultation and Decision", Document No. 14/89, Decision No. D12/14, 28 August 2014, https://www.comreg.ie/publication/market-review-retail-access-to-the-public-telephone-network-at-a-fixed-location-for-residential-and-non-residential-customers-2/.

[15] "The Provision of Telephony Services under Universal Service Obligations. Response to Consultation, Decision and Decision Instrument", Document No. 12/71, Decision No. D07/12, 29 June 2012, https://www.comreg.ie/?dlm_download=the-provision-of-telephony-services-under-universal-service-obligations-response-to-consultation-decision-and-decision-instrument.

[16] eir's 2012-2013 financial year is from 1 July 2012 to 30 June 2013 i.e. within the designation period.

(commonly referred to as 'a retail minus basis')[17]. Accordingly, the wholesale price paid by all undertakings (including eir retail) for SB-WLR was the same standard national wholesale price. As such, eir's competitors[18] were making a contribution to the cost of funding the network used to provide USO, which contribution was equivalent to that being made by eir's retail arm.

2.6. The combination of the Irish telecommunications market opening up to competition and the USO obligation on eir meant there was a risk of calls revenue being depleted, significantly reducing eir's ability to cross-subsidise any "access deficit"[19]. USO funding is designed to address this risk and to ensure that those who were availing of the access network were contributing to its cost.

2.7. Tariff rebalancing (where prices adjust to reflect costs) was one of the main regulatory objectives during the liberalisation of the telecommunications market. ComReg used price regulation to complete tariff rebalancing.[20] By 2007 ComReg considered that there was no "access deficit" in the Irish telecommunications market, and tariffs were balanced (i.e. prices had adjusted to reflect costs).[21] In summary, tariff re-balancing addressed the historic access deficit.

2.2. Universal service designation and funding

2.8. A USP may submit to ComReg a written request to receive funding for the net costs of meeting the USO. ComReg is required to determine, based on a verifiable and verified net cost calculation, whether the net cost of meeting the USO represents an unfair burden on the USP.[22] 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.

2.3. eir's 2012-2013 funding application

2.9. In October 2014 eir submitted its initial application for funding for provision of the universal service in 2012-2013. In that application eir claimed a net cost of

[17] Regulated wholesale prices have been set on a cost-oriented basis since 2016.
[18] Note that this does not apply to UPC, which competed using its own network.
[19] Prior to the introduction of competition, when eir was a monopoly, there was a revenue deficit associated with access charges. Revenue from "calls" (i.e. connection and line rental charges) cross subsidised the cost of providing the access network (lines poles etc.). This is known as the "access deficit."
[20] In 2003 ComReg Telecommunications Tariff Regulation Order revoked the earlier 1996 and 1999 orders and set a CPI-0% price cap. https://www.irishstatutebook.ie/eli/2003/si/31/made/en
[21] 2007 Market Review.
[22] 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") 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. 337 of 2011) ("the Universal Service Regulations").

€7,948,457 for this period, after taking account of intangible benefits of €1,800,036.

2.10. 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 2012-2013 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 2012-2013 from €7,948,457[23] to €8,012,033.

2.11. On 27 November 2017 ComReg published Consultation 17/95[24], in which ComReg set out and consulted upon its preliminary views in relation to eir's final application for funding for 2012-2013, having regard to the Universal Service Regulations, D04/11, and the consultants' reports.

2.4. ComReg's 2010-2015 funding decisions

2.12. On 18 April 2019, ComReg published the following 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" ("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").

2.13. In each of the Decisions, ComReg determined the net cost of provision of the

[23] eir's USO Funding Submission – 15 July 2016.

[24] "Assessment of eir's 2012-2013 Universal Service Fund Application, Assessment of the net cost and unfair burden for the period 2012-2013, Consultation and Draft Determination", Document No. 17/95, 22 November 2017, https://www.comreg.ie/?dlm_download=assessment-eirs-2012-2013-universal-service-funding-application.

universal service and decided that it did not represent an unfair burden on eir in the financial year in question.

2.5. Appeal against the Decisions

2.14. On 15 May 2019, eir issued an appeal in the High Court against the Decisions.[25]

2.15. On 19 February 2021, the Court decided to stay the proceedings and refer a question concerning the unfair burden assessment to 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 multiple telecommunication services providers operating in the market; (ii) one service provider (the “Universal Service Provider” or “USP”) has been selected by the National Regulatory Authority (“NRA”) to perform Universal Service Obligations (“USOs”); (iii) it has been determined by the NRA that there is a positive net cost associated with the performance of the USOs (“USO Net Cost”); and (iv) it has been determined by the NRA that the USO Net Cost is material compared to the administrative costs of the establishment of a sharing mechanism in respect of the USO Net Cost amongst participants in the market;
>
> If the NRA is required, pursuant to its obligations under the Universal Services Directive 2002/22, to consider whether the USO Net Cost is excessive in view of the ability of the USP to bear it, account being taken of all the USP's characteristics, in particular, the quality of its equipment, its economic and financial situation and its market share (as referred at paragraph 42 of Base) is it permissible under the Directives for the NRA to conduct that assessment by having regard exclusively to the characteristics/situation of the USP, or is it required to assess the characteristics/situation of the USP relative to its competitors in the relevant market?”.

2.16. On 10 November 2022, the CJEU delivered its judgment.[26] The CJEU responded 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

[25] Eircom Limited v. The Commission for Communications Regulation, High Court Commercial, Record No 2019/167 MCA.

[26] The CJEU judgment.

that operator, taking account of its situation relative to that of its competitors in the relevant market".[27]

2.6. High Court orders

2.17. On 10 July 2023, the High Court made orders[28] which, amongst other things:

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

2.18. 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.

2.7. 2010-2011 unfair burden assessment

2.19. On 6 December 2023 ComReg published Consultation 23/113.[29] In Consultation 23/113 ComReg set out how it proposed to apply Decisions 38-42 of D04/11, in light of the CJEU judgment and its unfair burden assessment for 2010-2011.

2.20. On 4 June 2024, following consideration of all relevant information, including the responses to consultation and the advice received from Oxera, ComReg determined that net cost of the provision of the universal service obligation in

[27] Paragraph 55 of the CJEU judgment.
[28] "Universal Service Funding Applications 2010-2015 Update. Information Notice", Document No. 23/83, 13 September 2023, https://www.comreg.ie/publication/universal-service-funding-applications-2010-2015-update.
[29] "eir's 2010-2011 Universal Service Fund Application Unfair burden assessment. Consultation and Draft Determination," Document No. 23/113, 6 December 2023 ("Consultation 23/113"), https://www.comreg.ie/publication/eirs-2010-2011-universal-service-fund-application-assessment-of-the-unfair-burden-consultation-and-draft-determination.

2010-2011 does not represent an unfair burden on eir.[30]

2.8. 2011-2012 unfair burden assessment

2.21. On 26 September 2024 ComReg published Consultation 24/79.[31] In Consultation 24/79 ComReg set out how it proposed to apply Decisions 38-42 of D04/11, in light of the CJEU judgment and its unfair burden assessment for 2011-2012.

2.22. On 10 January 2025 following consideration of all relevant information, including the responses to consultation and the advice received from Oxera, ComReg determined that net cost of the provision of the universal service obligation in 2011-2012 does not represent an unfair burden on eir.[32]

2.9. 2012-2013 unfair burden assessment

2.23. The ComReg determined positive net cost for 2012-2013 is €7,723,749.[33]

[30] "eir's 2010-2011 Universal Service Funding Application Unfair burden assessment. Response to Consultation and Final Determination", Document No. 24/43R, Decision No. D17/24, 27 June 2024, https://www.comreg.ie/publication/eirs-2010-2011-universal-service-funding-application-unfair-burden-assessment-response-to-consultation-and-final-determination-24-43.

[31] "eir's 2011-2012 Universal Service Funding Application, Unfair burden assessment, Consultation", Document No. 24/79, 26 September 2024.

[32] "eir's 2011-2012 Universal Service Funding Application Unfair burden assessment. Response to Consultation and Final Determination", Document No. 25/01R, Decision No. D01/25, 16 January 2025, https://www.comreg.ie/publication/eirs-2011-2012-universal-service-funding-application-unfair-burden-assessment-response-to-consultation-and-determination-d01-25-2 .

[33] "Assessment of eir's 2012-13 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2012-2013", Document No. 19/38, Decision No. D07/19 17 April 2019. https://www.comreg.ie/publication/assessment-of-eirs-2012-2013-universal-service-fund-application-assessment-of-the-net-cost-and-unfair-burden-for-the-period-2012-2013.

Table 1: Determined net cost calculation

USO Net Cost 2012-2013		€
Direct net cost (a)	Uneconomic Areas	€268,296
	Uneconomic Customers	€8,286,066
	Directories	€0
	Public Payphones	€311,887
	Services for disabled end users	€56,933
	Consultancy fees	€0
	Direct net cost	**€8,923,182**
Intangible benefits (b)	Enhanced brand recognition	€1,002,351
	Life-cycle	€167,257
	Ubiquity	€11,144
	Marketing	€18,681
	Total intangible benefits	**€1,199,433**
Net cost (after intangible benefits)		**€7,723,749**

2.24. ComReg undertook the unfair burden assessment for 2012-2013 in the light of the CJEU judgment. 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 constitutes an unfair burden on eir.

2.10. Consultation 24/96

2.25. On 6 December 2024 ComReg published Consultation 24/96, and the Oxera Initial Unfair Burden Report 2012/13.

2.26. Consultation 24/96 sought the views of respondents in respect of the following three consultation questions:

1	Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer.
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).

3	Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2012-2013 did not represent an unfair burden on eir? Please give reasons for your answer.

2.27. Submissions to Consultation 24/96 were received from the following four respondents:

- ALTO;
- BT;
- Virgin Media; and
- Vodafone.

2.28. Copies of all non-confidential submissions to consultation are published on ComReg's website. ComReg has considered the comments of the four respondents.

2.29. ComReg has summarised the key elements of the respondents' comments, and ComReg's views in relation to these, in Chapter 5.

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 revoked[34] and replaced by the Code Regulations. The Code Regulations are part of the transposition of Directive (EU) 2018/1972[35] which repealed and recast, amongst other things, the Universal Service Directive[36] and established the European Electronic Communications Code ("the Code"), a comprehensive set of new and revised rules for the electronic communications sector.

3.3. D04/11 continues in force as if it were made under the Code Regulations[37] 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 (unless the Minister for the Environment, Climate and Communications ("the Minister") intends to introduce a mechanism to compensate the undertaking for the determined net costs under transparent conditions from public funds) 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

[34] European Union (Electronic Communications Code) (Amendment) Regulations 2023 (S.I. No. 300/2023), https://www.irishstatutebook.ie/eli/2023/si/300/made/en/pdf.

[35] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), https://eur-lex.europa.eu/eli/dir/2018/1972/oj.

[36] 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, page 51) ("the Universal Service Directive"), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0022.

[37] Regulation 113 of the Code Regulations.

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 a USP's funding application.

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. In D04/11 ComReg based its interpretation of the unfair burden on the Base judgment, where at paragraph 49 the CJEU ruled that a burden is unfair if it:

> "….is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share."

3.9. D04/11 must now be read in light of the CJEU judgment of 10 November 2022. ComReg has considered the CJEU judgment and its impact on D04/11.

3.10. The CJEU judgment requires ComReg:

> "….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."

3.11. As set out in Consultation 24/96, 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 to 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,").

3.12. This means that, regardless of the impact of a positive net cost on the USP's profitability, ComReg will conduct a competitive assessment as set out in Decision 41 and Decision 42, and assess whether the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38(iii)(b).

3.13. 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.

3.14. In applying Decisions 38-42 (the aspects of D04/11 which relate to unfair burden assessment) ComReg will take account of the CJEU judgment. Therefore ComReg, when establishing if the net cost represents an unfair burden on the USP, will assess whether it: "….is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics" (Base judgment) and when examining those characteristics "particular to that operator" "tak[e] account of its situation relative to that of its competitors in the relevant market".

3.15. For ease of reading, Decisions 38-42 are set out below at Table 1 and the text ComReg considers necessary to disregard is struck through.[38] All subsequent references to Decision 41 in this document refer to Decision 41 as set out below.

[38] See also Annex 1.

Table 1: Decisions 38-42 (with strikethrough)

Determining if there is an unfair burden	
Decision 38	For an unfair burden on a USP, 3 cumulative conditions must be met: 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	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.
Decision 40	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
Decision 41	~~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.
Decision 42	ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair: 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

3.16. In Consultation 24/96 ComReg set out how it proposed to apply Decisions 38-42 of D04/11, in light of the CJEU judgment. ComReg considers that the matters below are important to note:

- Certain aspects of the unfair burden assessment for 2012-2013 were established as part of ComReg's original assessment of eir's funding application (i.e. the application of Decision 38(i) and Decision 38(ii) and the administrative cost assessment in Decision 38(iii)(a) and Decision 39). These aspects remain undisturbed and are not revisited in this determination.

- The assessment to be carried out is whether the "net cost" of meeting the USO represents an "unfair burden." This is not a general assessment of unfairness of the burden of the USO. This focus on the net cost is central to the legislative regime and this fact is reflected in D04/11, the CJEU judgment, the Base judgment, and the relevant legislation.

- There is nothing in D04/11 or the CJEU judgment relating to promoting/demoting or weighting the criteria of assessment. Indeed, the CJEU judgment does not take issue with and cites ComReg's application of Decision 40 (see paragraph 21 of the CJEU judgment).

- ComReg in D04/11 set out the principles and methodologies for assessment of unfair burden. D04/11 was made following a public consultation, has been in place for a significant amount of time and has not been challenged.

4. Unfair burden assessment 2012-2013

4.1. This Chapter sets out ComReg's assessment as to whether the positive net cost to eir of providing the USO in 2012-2013 constitutes an unfair burden in 2012-2013. It summarises Oxera's Unfair Burden Report 2012/13, ComReg's conclusions and determination.

4.1 Net cost

4.2. The 2012-2013 net cost determined by ComReg in Decision D07/19 remains undisturbed. Accordingly, ComReg's assessment of the unfair burden for 2012-2013 is based on the determined positive net cost for 2012-2013 of €7,723,749.

4.2 Oxera Unfair Burden Report 2012/13

4.3. To assist ComReg in assessing whether the provision by eir of the USO in 2012-2013 represented an unfair burden on eir, ComReg engaged Oxera to provide expert economic analysis and advice.

4.4. 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 judgment. ComReg instructed Oxera that certain aspects of the unfair burden assessment for 2012-2013 were established as part of ComReg's original assessment of eir's funding application (i.e. the application of Decision 38(i) and Decision 38(ii) of D04/11 and the administrative cost assessment in Decision 38(iii)(a) and Decision 39 of D04/11) and that these aspects remain undisturbed. Oxera was provided with ComReg's interpretation of how the CJEU judgment affected D04/11 and ComReg's approach to the assessment process.

4.5. ComReg instructed Oxera to base its analysis on the determined positive net cost for 2012-2013 of €7,723,749.

4.6. ComReg provided Oxera with relevant information to inform its advice to ComReg. In particular, ComReg provided Oxera with: (i) eir's historical cost separated accounts; (ii) the responses to the Information Requirements; (iii) accounts for service providers operating in the Irish fixed line market for the relevant periods, where available; (iv) ComReg quarterly key data reports; (v) relevant ComReg market analyses; (vi) the 2012-2014 USO designation and associated consultation documents; (vii) ComReg Annual Report 2012-2013.[39]

4.7. Oxera's assessment was provided to ComReg in the Oxera Initial Unfair Burden

[39] See Annex 2.

Report 2012/13, published at Annex 2 of Consultation 24/96.

4.8. The Oxera Initial Unfair Burden Report 2012/13 set out Oxera's preferred profitability and competitive assessment analysis[40] and the associated data constraints. In question 2 of Consultation 24/96, ComReg asked respondents whether (i) they agreed with ComReg's approach to information and information constraints; (ii) whether they were of the view that ComReg should consider any additional relevant information when conducting the unfair burden assessment; and (iii) to provide copies of that information (including the full source references and independent verification, where appropriate). No respondents provided additional information in response to this question.

4.9. Oxera was provided with all submissions to Consultation 24/96.

4.10. ComReg asked Oxera to review the Oxera Initial Unfair Burden Report 2012/13 in light of the information provided.

4.11. Having considered all of the aforementioned information, Oxera finalised the Oxera Unfair Burden Report 2012/13[41] and provided it to ComReg.

4.12. In Section 4 of the Oxera Unfair Burden Report 2012/13, 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 4A sets out the scope of the market;
- Section 4B applies **Decision 40**;
- Section 4C applies **Decision 41 (revised)**; and
- Section 4D applies the **criteria of Decision 42** to assess whether or not the net cost burden is unfair.

4.13. In Section 5 of the Oxera Unfair Burden Report 2012/13, Oxera concluded by applying the three cumulative conditions in Decision 38[42]. Oxera considered that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2012-2013 (i.e. that the condition in Decision 38(iii)(b) of D04/11 has not been met). Oxera concluded that the cumulative conditions of Decision 38 are not met and that the net cost of the USO did not represent an unfair burden on eir in 2012-2013.

4.14. The first annex (A1) of the Oxera Unfair Burden Report 2012/13 sets out Oxera's understanding of sub-products within eir's fixed line business that could

[40] See A2 of the Oxera Unfair Burden Report 2012/13.
[41] Dated 13 February 2025. This report is an update to the Oxera Initial Unfair Burden Report 2012/13, at paragraph 1.4 Oxera indicate that "Our analysis and findings do not change in this report."
[42] Decision 38 iii (b) is informed by an assessment of whether the criteria under Decisions 40 to 42 are met, in the round.

potentially be dissociable from the USO business.[43] The second annex (A2) of this report sets out the data constraints faced, and the analysis undertaken in light of these constraints.

4.3 ComReg's Assessment

4.15. ComReg when assessing whether the positive net cost of providing the USO constitutes an unfair burden on eir considered, amongst other things, the D04/11 principles and methodologies, the relevant statutory provisions, the CJEU judgment, the responses to the Information Requirements, the information which it provided to Oxera[44], the Oxera Unfair Burden Report 2012/13 (included as Annex 3 to this document), and submissions to Consultation 24/96.

4.16. Decision 38(i) and Decision 38(ii) were established as part of ComReg's original assessment of eir's funding application[45], which found that there is a verifiable and verified direct net cost, and that the benefits of the USO do not outweigh the net cost. These aspects remain undisturbed.

4.17. The administrative cost assessment (Decision 38(iii)(a) and Decision 39) was conducted as part of ComReg's original assessment of eir's funding application.[46] ComReg established that Decision 38(iii)(a) has been met. This aspect also remains undisturbed. In this context, ComReg asked Oxera to consider this aspect, and it concluded that USO financing would be justified if it were found that the provision of the USO in 2012-2013 represented an unfair burden on the USP.

4.3.1 Assessment of eir's financial and competitive position

4.3.1.1 Valuation Method

4.18. Historical cost accounting and the regulatory weighted cost of capital[47] are prescribed by D04/11 for use when determining the "net cost". Accordingly, ComReg, in assessing the unfair burden of the net cost of the USO, has used similar methodologies. Using a different valuation method (i.e. different to HCA) and/or different rate of return on capital (i.e. different to the regulatory WACC) when assessing unfair burden of that same net cost would not make sense. Such an approach would in essence involve using different parameters for two aspects of the one exercise and mean that the internal consistency of the exercise would be compromised.

[43] Following discussions with ComReg.
[44] As summarised in Annex 2 of this document.
[45] D07/19.
[46] D07/19.
[47] Where the pricing of regulated wholesale products is based on the regulatory weighted cost of capital.

4.3.1.2 Scope of the market

4.19. ComReg in Consultation 24/96 set out that to conduct the unfair burden assessment, the relevant market[48] must firstly be identified and described.

4.20. The relevant market is the basis for the assessment of the USP's profitability relative to its competitors (Decision 40) and competitive position (Decisions 41 and 42) and whether the positive net cost causes a significant competitive disadvantage for a USP (Decision 38(iii)(b)). The USP's situation relative to that of its competitors can then be assessed and taken into account, as is required by the CJEU judgment.[49]

4.21. ComReg has considered the relevant aspects in Section 4A of the Oxera Unfair Burden Report 2012/13.

4.22. eir's fixed-line business includes most activities within its fixed-line wholesale and retail divisions[50] and covers business and residential, data communications and interconnection services. Mobile services are excluded.

4.23. The sub-products included within eir's fixed line business are largely non-dissociable from the USO. ComReg recognises that there are a very small number of sub-products[51] that could potentially be dissociable from the USO business relating to the "Wholesale Residual" (unregulated) and the "Retail Residual". However, the data required to assess the impact of excluding these sub-products from the profitability analysis is not available.

4.24. Comparable competitor information is needed to facilitate a 'like for like' fixed line business analysis. Unlike eir, its competitors were not required to produce historical cost accounts and associated financial statements (with the requisite granular level of information).

4.25. ComReg agrees with Oxera's analysis and conclusions. Therefore ComReg has decided that for the purpose of the 2012-2013 unfair burden assessment the appropriate market to use to analyse eir's competitive position is the fixed-line

[48] 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 the context of a Regulation 49 of the Code Regulations market analysis.

[49] 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. ComReg's view 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.

[50] As defined in eircom Limited (2013), "Historical Cost Separated Accounts: For the year ended 30 June 2013", page 39.

[51] Interconnect International Access; Mast Access; TV Service Connections/Rental; Global conferencing services; Staff on Loan Agency; Tera Business; Meteor Mobile re emobile; eMobile handsets.

market, and where competitor information is unavailable at the Irish fixed-line market level, data at the aggregate group level (Irish Telecommunications market) should be used.

4.3.1.3 Profitability assessment

4.26. Decision 40 states:

> "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…".

4.27. ComReg has considered Section 4B (Application of Decision 40) of the Oxera Unfair Burden Report 2012/13 in which it assesses changes in eir's accounting profits (using EBIT), changes in profitability (using ROCE), and the use of the WACC as the benchmark to assess profitability. ComReg agrees with Oxera's analysis and conclusions in this regard.

4.28. ComReg considers that the use of ROCE is appropriate for the reasons outlined in the Oxera Unfair Burden Report 2012/13 and in particular notes that ROCE is widely used to assess profitability in market investigations and inquiries by the Competition and Markets Authority (CMA) in the UK, as well as by the European Commission. ComReg also used ROCE in its RTE excessive pricing investigation.[52]

4.29. ComReg considers the 2008 WACC of 10.21%, to be the appropriate benchmark against which to measure eir's profitability in 2012-2013. ComReg considers this approach to be appropriate for the following reasons:

- the WACC is prescribed by D04/11 for use when determining the "net cost";
- the 2008 WACC was calculated specifically for eir, using assumptions of a notional efficient network in line with good regulatory practice and, in ComReg's view, is an appropriate and a robust estimate of the cost of capital for eir's regulated fixed-line business, which includes the USO. The WACC is calculated to allow a reasonable return on investment for eir, as an operator designated with SMP[53];
- for regulated businesses, it is standard practice for the allowed rate of return, or allowed WACC, to be determined on an ex-ante basis as the allowed profit on invested capital;

[52] "Investigation into an alleged abuse of an alleged dominant position by RTÉ/RTÉNL, contrary to Section 5 of the Competition Act 2002, and/or Article 102 of the Treaty on the Functioning of the European Union. Information Notice", Document No. 14/62, 20 June 2014, paragraphs 110-112 and 131, https://www.comreg.ie/publication/information-notice-closure-of-investigation-into-an-alleged-abuse-of-an-alleged-dominant-position-by-rtartanl.

[53] In 2012 and 2013, eir had SMP in fixed line access markets at the wholesale and retail levels.

- the potential impact of financial turmoil and volatility in financial markets was taken into account.[54] The 2008 WACC Decision relied on the substantial body of empirical estimation and analysis conducted by Oxera on behalf of ComReg. As part of this analysis, Oxera assessed the potential impact of the then-ongoing financial turmoil on the individual cost of capital parameter estimates to investigate whether an adjustment to the original estimates consulted on would be appropriate[55];
- the regulatory allowed WACC gives the best approximation of the forward-looking return that stakeholders can expect in an efficiently run business[56];
- the WACC level was established using robust and well recognised techniques[57]; and
- departing from a regulatory WACC, would result in uncertainty and inconsistency in regulatory decisions[58].

4.30. Conducting a profitability assessment using a comparison of the ROCE to WACC is consistent with the requirements of Decision 42 i (changes in profitability, including an understanding of where a USP generates most of its profits over time); and Decision 42 ii (changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation, and amortisation ('EBITDA')).

4.31. Therefore, ComReg considers it appropriate to conduct a profitability assessment using a comparison of ROCE to WACC in the context of the unfair burden assessment.

4.3.1.4 Competitive assessment

4.32. The CJEU judgment requires ComReg to conduct a competitive assessment, that

---

[54] Paragraph 4.3, page 28, of "Eircom's Cost of Capital. Response to Consultation and Decision Notice", Document No. 08/35, Decision No. 01/08, 22 May 2008 ("2008 WACC Decision"), https://www.comreg.ie/?dlm_download=response-to-consultation-and-decision-notice-d0108-eircoms-cost-of-capital.

[55] "eircom's cost of capital Prepared for Commission for Communications Regulation", Document No. 07/88a, 1 November 2007, https://www.comreg.ie/?dlm_download=oxeras-report-on-eircoms-cost-of-capital-appendix-c.

[56] The WACC is based on a Hypothetical Efficient Fixed Line Operator with an efficient capital structure, a standard approach widely used by regulators. A regulator's estimate of the allowed WACC may not necessarily align with the actual ROCE earned by the regulated company. The objective of the WACC allowance is not to determine the exact out-turn return that will be earned; rather, it is to incentivise an efficiently run business – investors have to outperform the regulator's cost assumptions to earn higher than a benchmark return (e.g. a return on regulated equity that exceeds the ex-ante cost of equity allowance). It should also be noted that ComReg does not have any obligation to ensure that eir maintains any particular level of profitability.

[57] In reaching the 2008 WACC Decision and the 2014 WACC Decision, ComReg undertook a rigorous and comprehensive assessment of all aspects underlying the WACC value and adopted international best practice in its estimation techniques and methodologies. ComReg and Oxera used extensive evidence from primary research, peer comparison and regulatory precedent.

[58] As the WACC is a key input in the setting of cost recovery/price control obligations, it has implications for setting of efficient prices for consumers and the creation of ongoing investment incentives for eir's regulated services.

is, assessment of the USP's situation relative to its competitors.

4.33. Decision 41 of D04/11 states:

> "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."

4.34. Decision 42 of D04/11 states:

> "ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair:
>
> 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."

4.35. ComReg, in light of the elapsed time between 2012-2013 and when the unfair burden assessment is taking place, instructed Oxera to cross-check the results of its analysis of Decision 41 with the results conducing the same analysis using up to date available data (latest full financial year of 2022/2023).[59]

4.36. The 'going forward' aspect of the competitive assessment looked at the next financial year, as USO funding applications may be made on an annual basis. In this exceptional circumstance, where there is a significant time lag between the year of application and the assessment, ComReg did consider additional relevant information pertaining to subsequent years. For the avoidance of doubt, this should not be taken as indication of how ComReg will assess annual funding applications in the future.

4.37. ComReg considered Section 4C (Application of Decision 41) and Section 4D

[59] This analysis is set out in Section 4C.1 and 4C.2 of the Oxera Unfair Burden Report.

(Application of Decision 42) of Oxera's Unfair Burden Report 2012/13 in which it assesses eir's operational performance[60] and changes in profitability, accounting profits and related financial measures, changes in the USO net cost over time, changes in the level of cross-subsidies between products and changes over time, and assessment of eir's position relative to its competitors in the market. ComReg agrees with Oxera's analysis and conclusions in these sections.

4.38. The CJEU judgment highlights the importance of considering the impact of the USO on eir's ability to finance its investment in new technologies and markets. Similarly, the Base judgment requires that quality of equipment should be considered as one of the characteristics to be taken into account when considering if the USO net cost is excessive. ComReg has considered and agrees with Oxera's use of the ability to invest[61] as a proxy for quality of equipment, in the fixed-line market. ComReg also considered the relevant regulatory context. This included analysis conducted by ComReg prior to the imposition of regulatory obligations. These obligations (namely eir's SMP obligations, price control measures and USP designation) were imposed following full public consultations and in some instances consultation with the Body of European Regulators for Electronic Communications ("BEREC"), the Competition Authority[62] and the European Commission. The analysis underpinning these regulatory obligations provides near-contemporaneous analysis, which is used *inter alia* to inform ComReg's assessment of unfair burden in 2012-2013.

4.39. In particular, ComReg considered previous market analyses conducted, i.e. the 2007 Market Review and the 2014 FVA Market Analysis.[63] The products, services and operators in these markets overlap considerably with the 'fixed line market' which has been identified as the relevant market for the competitive assessment. Therefore, these market analyses are very relevant to this unfair burden assessment. The 2007 Market Review provides information on prior market conditions, while the 2014 FVA Market Analysis (which commenced in 2012) offers information on subsequent developments, and therefore these market analyses provide a valuable insight into the situation in the relevant market at the time.

4.40. ComReg has considered the following: (i) the level of competition; (ii) differences in competitive conditions - urban/rural; (iii) retail pricing (national/regional); and (iv) differences in competitive conditions - voice-only or bundled voice, based on

---

[60] 2009/10, 2010/11,2011/12 and 2012/13.

[61] As measured by CAPEX and depreciation and amortisation. See 4.61, Oxera Unfair Burden Report 2012/13.

[62] In 2014 the Competition Authority was amalgamated with the National Consumer Agency to form the Competition and Consumer Protection Commission.

[63] ComReg provided Oxera with copies of the published documentation relating to these market analyses.

extracts from the FVA Market Analysis in forming its decision. Extracts from the documents relating to the FVA Market Analysis which relate to these areas are set out below.

Level of competition

4.41. In Section 5 of D12/14 ComReg summarised the situation in relation to "Existing and potential competition" as follows:

> "In the presence of regulation (CPS/SB-WLR) in the market concerned, existing competition continued to evolve, though high and non-transitory barriers to entry into the LLVA market remained. In this regard, FSPs had not widely replicated the ubiquity of Eircom's network to supply FVA in the LLVA market. Absent regulation ComReg believed that existing competition would be virtually non-existent in the LLVA market. […] While competition was emerging in the form of voice services provided by other operators via broadband infrastructure using managed VOIP services, ComReg's preliminary view was that competition in the LLVA market was currently not effective. Because voice over broadband is not currently offered on a standalone basis to end-users in Ireland, alternative broadband platforms represent an additional choice of supply for only a subset of the population that place a higher value on broadband and the wider bundle of communication services. ComReg's preliminary view was that suppliers of managed voice over broadband did not act as a sufficient constraint on the PSTN/ISDN network nationally (though may have exerted a degree of competitive pressure for a subset of end users that primarily value broadband and bundles of broadband and add on voice services) in view of the significant proportion of the population that value voice as the primary fixed telephony service. The relative competitive strength of alternative FSPs was dampened, with the majority of FVA suppliers being SB-WLR re-sellers. In addition, the increased uptake of LLU (primarily by BT) has not played a significant role in the supply of FVA since BT which is the largest LLU operator is acting as an intermediary in the sale of SB-WLR at a wholesale level (i.e. a resale of Eircom's inputs)."[64]

4.42. ComReg's conclusion in relation to "Existing and potential competition" states:

> "In the presence of regulation, existing competition continues to evolve, though high and non-transitory barriers to entry into each of the relevant FVA markets remain. Absent appropriate regulation in wholesale upstream markets, Eircom's ability to act to an appreciate extent, independently of competitors, customers, and consumers in terms of FVA whether standalone or in a bundle as evidence above will not be mitigated on a

[64] D12/14 paragraph 5.12.

prospective basis over the period of the review;”

4.43. Of note is that the vast majority of OAOs (referred to as “alternative FSPs”) were reliant on eir for their wholesale inputs. ComReg was of the view that “Absent appropriate regulation in wholesale upstream markets, Eircom’s ability to act to an appreciate [sic] extent, independently of competitors, customers and consumers in terms of FVA whether standalone or in a bundle as evidence above will not be mitigated on a prospective basis over the period of the review” and this was one of the factors that led to the conclusions that each of the “Relevant FVA Markets” was not effectively competitive and the designation of eir with SMP.

Differences in competitive conditions – urban/rural

4.44. In the 2012 FVA Consultation ComReg outlined that in urban areas where “the competitive dynamic is… enhanced by the existence of multiple suppliers of multi-bundled products” there had been no change in the pricing or marketing of standalone FVA products. ComReg stated that while the initial availability of FVA bundled offers had a regional (predominantly urban) emphasis, suppliers of such bundles had not yet differentiated their pricing structure within the areas in which they were available.

4.45. eir, in response to the 2012 FVA Consultation, took issue with this point of view, as is outlined in D12/14 in a section titled “Significant differences in competitive conditions between urban and rural areas” as follows:

> “Eircom commented on the differences in competitive conditions between urban and rural areas. It considered that ComReg’s analysis failed to acknowledge the increasing level of competition in urban areas. Eircom argued that the emergence of major competitors, such as UPC and Vodafone, combined with the continuing expansion of LLU and the entry of Sky Ireland has made urban areas highly competitive as opposed to the less competitive rural areas. Eircom also pointed to its decreased national market share and argued that the reductions are much more pronounced in the urban areas. In doing so, Eircom presented their analysis of projected urban, rural, and national market shares in the fixed voice access (FVA) market for lower-level services.
>
> All-important trends and market developments, such as, the presence of operators relying on [local loop unbundling] LLU as well as other eir wholesale inputs, the continuing expansion of UPC’s cable network and presence of other fixed service providers (FSPs) including those prospectively providing broadband with managed VOIP were described in detail in the fixed voice access (FVA) Consultation and taken into account in the subsequent analysis. Essentially, ComReg analysed in detail the potential impact of these trends and market developments on market

definition, market power and the need for any regulatory obligations, in Chapters 4 and 5 of the fixed voice access (FVA) Consultation. On that basis, ComReg considered that geographically differentiated competitive conditions were adequately assessed in the FVA Consultation.

With regard to Eircom's analysis on the likely development of market shares in the [low level fixed voice access] LLVA market, ComReg notes that Eircom has not provided detailed documentation of the forecasting model. While Eircom listed the factors taken into consideration when producing the forecast of market shares it is not clear what weight was assigned to each of these factors. Furthermore, information on the selected forecasting methodology was not provided. Thus, ComReg considers it inappropriate to attach much weight to the projections of the market shares in the LLVA market. However, ComReg considers this information together with the wider market share information and trends that is available.

ComReg notes that due to the limited availability of reliable data, the precise market shares in the FVA market(s) in urban and rural areas are not known. Figure 3 which is based on household survey evidence categorised at county level, gives some high-level indication of the growing residential presence of UPC 's cable service in particular urban areas, particularly in the Dublin region. However, it is important to note that Figure 3 does not represent actual market shares for Dublin and other regions where UPC is present – it is based on survey evidence only and hence can be interpreted only as indicative evidence. In addition, it should be recalled that ComReg identified a relevant FVA product market that incorporates both residential and non-residential services. UPC 's share of the non-residential customer segment is likely to be significantly lower than that of Eircom across all regions, with the 2013 Business ICT Survey indicating only a 3% national share of business FVA customers for UPC."[65] (emphasis added)

4.46. In D12/14 ComReg concluded that the above-mentioned analysis in the 2012 FVA Consultation remained valid.[66]

4.47. It is clear that in 2012 ComReg was of the view that in urban areas, where there was more competition due to multiple suppliers of multi-bundled products, there had been no change in the pricing or marketing of standalone FVA products. Similarly, while the initial availability of FVA bundled offers had a regional (predominantly urban) emphasis, suppliers of such bundles had not yet differentiated their pricing structure within these areas. In general, the Updated Retail Trends Analysis and Updated Pricing Structures in 13/95 showed no major changes to those trends identified in the 2012 FVA Consultation, such that they

[65] D12/14 paragraphs 3.36 to 3.39.
[66] D12/14 paragraph 3.41.

would materially impact upon the analysis set out in the 2012 FVA Consultation or impact the conclusions of D12/14.

Retail pricing (national/regional)

4.48. In D12/14 it was stated that:

> "(in the 2012 FVA Consultation (setting out ComReg's preliminary views)) ComReg observed that there was no apparent evidence of any significant sub-national pricing or marketing in the supply of FVA. At the retail level, FSPs pursued a business policy of marketing and pricing uniformly on a national basis, which suggested that competitive conditions for FVA were homogenous nationwide. In urban areas where the competitive dynamic is relatively more enhanced by the existence of multiple suppliers of multi-bundled products, including UPC, there had been no change in the pricing or marketing of standalone FVA products. Equally, suppliers of FVA bundled services have not yet differentiated their pricing structure within the areas in which they were available." (emphasis added)

4.49. In D12/14 it was concluded that:

> "While it is apparent that consumers are responding to UPC's relatively attractive product bundles, variations of competitive conditions with respect to bundled FVA is not limited to the presence of UPC. Recent developments such as the entry of Sky into the broadband and telephony market, Vodafone's presence and the launch of IPTV over Eircom's NGA network suggest that service providers will increasingly compete for subscribers on the basis of popular bundled services on a national basis. Although UPC's market share of FVA continues to grow, that rate of growth appears to have somewhat levelled off on entry of Sky, an FSP likely to be too large over time to ignore."[67]

4.50. In relation to "Geographic variation in products and pricing" in D12/14 response to the 2012 FVA Consultation it states:

> "Eircom suggests that the product types and quality available to the market are different in UPC areas and rural areas and it responds differently depending on UPC's presence. However, if there are sufficiently differentiated conditions of demand and supply to justify the identification of sub-national markets for FVA and in particular bundled FVA, ComReg would expect more evidence of FSPs engaging in geographically differentiated pricing strategies for FVA. However, despite Eircom's contention, there is currently no apparent evidence of any significant sub-national pricing or marketing - irrespective of whether FVA is standalone or

[67] D12/14 paragraph 4.184.

bundled, all operators have continued to price and market on a national basis at both the retail and wholesale level. (emphasis added)

In particular, the headline price of Eircom's standalone FVA remains constant over time. Although Eircom is subject to a [retail price cap] RPC on its narrowband FVA, [public switched telephony network] PSTN and ISDN access respectively, it is nevertheless free to reduce its standalone FVA prices, which ComReg would expect it to do if, it faced sufficient competitive pressure. On the other hand, given Eircom's 2014 USO designation, it is currently required to offer FVA (and calls) at geographically averaged prices.

In addition, the headline prices of Eircom's (non-NGA [next generation access]) bundles including an FVA component have remained broadly constant over time for the same product categories (see for example, Table 2 at paragraph 4.94 above). Despite Eircom's declining market share, Eircom had not responded to UPC's offers by reducing its prices to the extent it could have within the boundaries of regulatory price controls (price floors in the wholesale broadband access market, in particular).[68] So far, Eircom's competitive response has manifested itself predominantly through increasing the value of certain broadband bundles with quality upgrades and time limited promotions, primarily in urban areas which may infer differences for certain high speed fibre based broadband services if prices are compared in quality-adjusted terms. There are differences in terms of availability of faster broadband speeds, Eircom has introduced upgrades in urban areas only and some products do not exist in rural areas."[69] (emphasis added)

4.51. The aforementioned analysis was conducted by ComReg in 2012, and did not support the presence of geographic differences in retail product characteristics or retail prices in 2012-2013.

4.52. In summary, ComReg's analysis in 2012 found no evidence of OAOs (FSPs) engaging in geographically differentiated pricing strategies for FVA. eir was free to reduce its standalone FVA prices, which ComReg would have expected it to do if it faced sufficient competitive pressure. eir's competitive response manifested itself predominantly through increasing the value of certain broadband bundles with quality upgrades and time limited promotions, primarily in urban areas. eir had not responded to UPC's offers by reducing its prices to

[68] Oxera (2013), "Assessment of retail pricing constraints - Response to submissions on consultation 12/27: 'Next Generation Access ("NGA"): Proposed Remedies for NGA Markets", January. https://www.oxera.com/wp-content/uploads/media/Oxera/downloads/reports/Assessment-of-retail-pricing-constraints.pdf.

[69] D12/14 paragraphs 4.188 to 4.190.

the extent it could have within the boundaries of regulatory price controls.

Differences in competitive conditions – voice only or bundled voice

4.53. In D12/14 ComReg stated:

> "Eircom considers that there is a clear distinction between the characteristics and preferences of the different groups of customers depending on whether they are voice only or bundled voice. The latter market should, according to Eircom be further broken down into separate geographic markets defined to recognise the differing competitive constraints that exist within and outside of the [local exchange areas] LEAs.
>
> As part of its consideration of these issues, ComReg conducted a Supplementary Consultation and considered further the matter of the candidate market (i.e. the appropriate focal products) and market definition, regarding in particular, the treatment of bundled services."[70]

4.54. ComReg concluded in relation to the "Appropriate focal product":

> "On the basis of the analysis set out in the [fixed voice access] FVA and Supplementary Consultations, as well as the Oxera report and, having taken into account the respondents' views and the national circumstances, ComReg has decided that, consistent with the European Commissions' 2007 Recommendation, other European Commission guidance, the BEREC report, best practice analysis consistent with competition law and the practice of other NRA's, standalone FVA remains the correct focal product and the starting point for it to carry out the FVA market definition and SMP analysis according to circumstances in Ireland."[71] (emphasis added).

4.55. In the 2012 FVA Consultation ComReg's preliminary view was that the relevant geographic market for both the wide LLVA (FVA sold standalone and in a bundle) and HLVA product markets was national in scope.[72] ComReg noted that eir had the largest nationwide market share, and supplied FVA nationwide over its ubiquitous PSTN network (whether sold inside or outside bundles).[73]

4.56. In D12/14 ComReg stated:

> "Regarding competition from alternative infrastructure, UPC's network covers the most densely populated areas within the State with its coverage extending to some 746,100 households (approximately 45% of households

[70] D12/14 paragraphs 4.10 and 4.11.
[71] D12/14 paragraph 4.37.
[72] Paragraphs 4.209 to 4.241 of the 2012 FVA Consultation.
[73] 2012 FVA Consultation, paragraph 4.217.

in Ireland). ComReg's view was that in locations where, in particular, cable-based voice services are available, Eircom is facing increasing risk of its voice customers substituting away to cable broadband with managed VOIP. ComReg indicated that broadly Eircom has a lower share of FVA subscriptions in areas where UPC is offering FVA, relative to areas where UPC is not, though this difference primarily related to the wider Dublin region. This suggested a degree of localised competitive pressure in relation to the provision of FVA. It was noted, however, that UPC's services were primarily targeted at households, and it had a much smaller share of business subscriptions, providing only 3% of business FVA subscriptions in Ireland."[74]

4.57. ComReg in the 2012 FVA Consultation:

> "acknowledged some localised competitive pressures, particularly insofar as FVA is sold as part of a bundle with other services, it considered the conditions of competition were not considered to be materially different and stable across different geographic areas to define FVA markets sub-nationally."

4.58. However, in D12/14 ComReg maintained:

> "that the geographic market is national in scope, but that the competitive conditions are sufficient for the purposes of the adoption of differentiated remedies. ComReg will monitor the situation with respect to the geographic conditions however."[75]

4.59. In summary, in the context of the FVA Market Analysis eir argued that there should be a bundled voice market further broken down into separate geographic markets. ComReg concluded that standalone FVA was the correct focal point and starting point for the FVA market definition. Having considered eir's arguments relating to geographic segmentation, ComReg was of the view that "conditions of competition were not considered to be materially different and stable across different geographic areas to define FVA markets sub-nationally." ComReg therefore considered the geographic market to be national in scope. (emphasis added)

Competitive conditions 2012-2014

4.60. In summary, in the FVA market analysis conducted between 2012-2014, ComReg found that:

- the level of competition was evolving but high, and non-transitory barriers to

[74] D12/14, paragraph 4.157.
[75] D12/14, paragraph 4.156.

entry into the LLVA market remained, with the majority of operators reliant on eir for wholesale services;

- there were no significant differences in competitive conditions between urban and rural areas. Despite the presence of multiple suppliers of bundled products in urban areas, ComReg identified no change in the pricing or marketing of standalone FVA products relative to rural areas;

- FVA retail pricing was uniform on a national basis, with no evidence of sub-national pricing or marketing; and

- competitive conditions were not significantly affected by whether voice services were offered standalone or bundled. ComReg considered the market to be national in scope for standalone FVA.

4.61. These findings from ComReg's consultations demonstrate that in the period 2012-2013 eir did not face competitive pressure from OAOs in the aforementioned segmental and geographic markets.

4.3.2 Conclusion

4.62. In the application of Decisions 40 to 42, which are relevant for Decision 38(iii)(b), ComReg's findings are summarised as follows:

- **Decision 40:** In 2012-2013, the net cost did not significantly affect 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 regulated WACC.

- **Decision 41:** In 2012-2013 the net cost did not materially impact eir's ability to compete on equal terms with competitors going forward, as:

    - there is no available evidence of a causal link between the financial distress and challenges observed and the net cost of the USO; and

    - the results of the wider period of financial analysis undertaken (2009/10-2022/23) show that the USO did not prevent eir from undertaking necessary investment nor did it impede eir from making improvements to its financial health, as evidenced by improvements in its credit rating.

- **Decision 42:** in 2012-2013, 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 with its competitors, eir was able to maintain a steady ARPU over the assessed period 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 Irish group level exceeded that of its competitors, while eir’s Irish group-level ROCE was greater than all but one of its competitors. The available evidence suggests that market entry barriers did not prevent eir’s competitors from achieving growth.

4.63. **Decision 38(iii)(b):** Based on the analysis undertaken in the application of Decisions 40 to 42 and the findings in relation to these decisions, ComReg finds that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2012-2013.

4.64. Notwithstanding the information constraints identified, ComReg is satisfied that it had sufficient information available to conduct the unfair burden assessment for the period 2012-2013.

4.65. ComReg, when concluding the unfair burden assessment, considered the findings reached in relation to each of the decisions from D04/11 referenced. No one of these decisions is, in and of itself, determinative. ComReg notes that the findings relating to each of the decisions converge to indicate that the net cost of providing the USO in 2012-2013 does not constitute an unfair burden on eir.

4.66. ComReg having applied Decisions 40 to 42 and considered the related findings has decided, for the reasons summarised above, that the condition in Decision 38(iii)(b) of D04/11, has not been met.

4.67. Certain aspects of the unfair burden assessment for 2012-2013 were established as part of ComReg’s original assessment of eir’s funding application (i.e. the application of Decision 38(i) and Decision 38(ii) and the administrative cost assessment in Decision 38(iii)(a) and Decision 39). These aspects remain undisturbed and are not revisited in this determination.

4.68. As a result, ComReg determines that the provision of the USO in 2012-2013 does not represent an unfair burden on eir.

5. Submissions to Consultation 24/96

5.1. The purpose of public consultations is to allow ComReg to consider the views of interested parties in the context of reaching a decision on particular matters. All views are considered, and account taken of the merits of views expressed. It should, however, be noted that the process is not equivalent to a voting exercise on proposals and ComReg exercises its judgement having considered the merits of the views expressed. It is not practical for ComReg to provide commentary on each individual submission.[76]

5.2. There were four respondents to Consultation 24/96. These were ALTO[77], BT[78], Virgin Media[79]and Vodafone.[80] Non-confidential versions of each submission will be published.

5.3. The following section sets out the consultation questions, associated submissions received, and ComReg's responses to the relevant points raised.

5.1 Question 1 - Respondents' submissions

5.4. ComReg asked in Question 1:

> "Do you agree with ComReg's approach to the unfair burden assessment? Please give reasons for your answer."

5.5. ComReg notes that all four respondents (ALTO, BT, Virgin Media and Vodafone) provided responses to Question 1.

5.6. ALTO states that:

> "ALTO is of the opinion that ComReg has properly deployed the principles; processes and methodologies appropriate in order to calculate the direct net cost in the circumstances…
>
> ALTO has reviewed ComReg's findings and the relevant decision in the funding application period and believes that those findings are correct."

[76] "Consultation Procedure Guidelines," Document No.24/04, 11 January 2024, https://www.comreg.ie/media/2024/01/ComReg2404.pdf.

[77] "Consultation: 2012-2013 USO funding application – Assessment of the unfair burden – Ref: 24/96. Submission By ALTO," 17 January 2025.

[78] "BT Response to the ComReg Consultation: eir's 2012-2013Universal Service Funding Application Unfair burden assessment". 17 January 2025.

[79] "Virgin Media response to: ComReg Consultation on "eir's 2012-2013 Universal Service Funding Application - Unfair burden assessment" (ComReg Ref: 24/96 published on 6 December 2024)", 17 January 2025.

[80] "Vodafone Response to Consultation Eir's 2012-2013 Universal Service Funding Application. Unfair Burden Assessment," 17 January 2025.

5.7. BT states that:

> "We note the ComReg process is fixed by long established regulatory Decisions that were not challenged (appealed) at their issue other than the recent limited changes required by the European and Irish courts, hence we accept the approach is in line with the established rules and the updates of the Irish and European courts.."

5.8. Virgin Media states that:

> "We agree with ComReg's approach to the unfair burden assessment ….
>
> We also agree with ComReg that an assessment, as to whether a net cost is excessive, must be based on Eir's ability to bear it, taking account of Eir's characteristics, and when examining those characteristics account must be taken of Eir's situation relative to its competitors in the relevant market. This approach takes proper account of both the Base judgment and the CJEU judgment."

5.9. Vodafone states that:

> "Vodafone is satisfied with the findings that there is no USO unfair burden."

5.2 Question 1 – ComReg's response

5.10. ComReg notes that in response to Question 1 ALTO, BT and Virgin Media agreed with ComReg's approach to the unfair burden assessment.

5.3 Question 2 – Respondents' submissions

5.11. ComReg asked in Question 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)."

5.12. ALTO and Virgin Media indicated their agreement with ComReg's approach to information and information constraints.

5.13. Vodafone states that:

> "The passage of time is stark and the information constraints arising are not a surprise…." and that "…the spectre of USO funding has been held

over industry for far too long."

5.14. BT states its view that "delay led to the constraints ComReg is now facing" and provided specific comments in relation to what, in its view, ComReg should consider when conducting the unfair burden assessment stating that:

"2. We continue to consider the relevant market revenues should relate to telephone and broadband services and exclude lease line services - as leased line operators do not benefit from the presence or absence of a USO obligation for fixed lines.

3. We consider that market shares should be assessed as the retail value of relevant services divided among the retail and wholesale actors who generated that value."

5.15. In response to this question ALTO states that:

"… the Oxera Report at Appendix A.2 at pages 67 - 72 states with clarity that on a comparative analysis basis there is little difference between what 'preferred analysis' and the 'analysis presented' [sic]. As this issue is as important to industry and ALTO members, we support the methodology and clarity brought to bear on the position as is set out by Oxera."

5.16. No respondents identified or provided any additional information for ComReg to consider when conducting the unfair burden assessment.

5.4 Question 2 – ComReg's response

5.17. ComReg notes that while one respondent (BT) responded with suggestions in relation to additional information that could be considered, no respondents provided copies of any additional relevant information that should be taken into consideration when conducting the 2012-2013 unfair burden assessment.

5.18. ComReg notes that ALTO expresses its support for "the methodology and clarity brought to bear on the position as is set out by Oxera." In relation to ALTO's comment that there is "little difference between what 'preferred analysis" and the 'analysis presented'", ComReg notes Oxera's statement that "in our view, the preferred analysis, if followed, would be unlikely to reach a materially different conclusion to the analysis presented"[81]. ComReg agrees with this statement and is of a similar view.

5.19. ComReg now addresses each of BT's comments referenced above namely:

[81] Page 70 of the Oxera Unfair Burden Report 2012/13.

- that revenues related to leased line services should be excluded from the relevant market revenue;
- that market shares should be assessed as "retail value of relevant services" divided by "retail and wholesale actors who generated that value;"

5.20. BT suggests the exclusion of revenues related to leased lines services. The inclusion of leased lines in the fixed-line business for the purpose of the unfair burden assessment is neither new nor erroneous. ComReg's position in respect of leased lines remains unchanged. In 2019 leased lines was one of the activities included by ComReg (and Oxera) in the fixed-line business for the purpose of the unfair burden assessment[82]. ComReg and Oxera consider leased lines non-dissociable from eir's fixed lined business in this context. ComReg considers this approach to be correct as leased lines and the universal service use the same network elements to deliver service. ComReg's position in respect of leased lines therefore remains unchanged.

5.21. BT expresses the view that market shares should be assessed as the "retail value of relevant services" divided among the "retail and wholesale actors who generated that value." In the Oxera Unfair Burden Report 2012/13, market share by retail revenue and number of retail subscribers is shown for eir and the largest other authorised operators (OAOs)[83]. eir and UPC (now Virgin Media) were the only fixed network operators in 2012-2013. eir was the only fixed network operator operating at the wholesale level. Both are included in the charts capturing both retail and wholesale operators within the market share analysis. ComReg considers that the way in which market shares are presented in its analysis is correct, and its position in respect of the calculation of retail market shares remains unchanged.

5.5 Question 3 – Respondents' submissions

5.22. ComReg asked in Question 3:

> "Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2012-2013 did not represent an unfair burden on eir? Please give reasons for your answer."

5.23. ComReg notes that ALTO, BT, Virgin Media and Vodafone provided a response

[82] Pg. 24, Oxera Unfair Burden Report 2012/13, Document No. 19/38b, 18 April2019, https://www.comreg.ie/publication/oxera-unfair-burden-report-2012-13.(See footnote 34 which states "In particular, Oxera and ComReg reviewed the following products included in the fixed-line business and concluded that these are characterised as being not dissociable from the USO: 'Wholesale Residual (Unregulated)', 'Retail voice calls', 'Retail broadband', 'Leased lines', 'Data services', 'Apparatus Supply', 'Legacy Operator Services', 'Value Added Voice', 'Value Added Non-Voice', 'Directory Enquiry', 'Public Payphones', 'Other Remaining Activities' and 'Other Internet Services'").

[83] Figure 4.14, pg. 58, Oxera Unfair Burden Report 2012/13.

to Question 3. All four respondents agreed with ComReg's preliminary view.

5.24. BT further comments that:

> "Although there was limited availability of some data … fortunately given the regulated nature of the market and the requirement for Eircom and other operators to continuously provide data to the regulator, a lot of data was still available to ComReg…."

5.25. Virgin Media states that:

> "We agree with ComReg that the positive net cost of the USO in 2012-2013 does not represent an unfair burden on Eir. Three cumulative criteria must be met and ComReg has correctly concluded that the first two are met but not the third. In summary, and with reference to Decision 38 of D04/11, the first two criteria are met because there is a positive net cost of €7,723,749 that is not outweighed by the benefits of the USO. As for the third criterion, the positive net cost did not cause a significant competitive disadvantage for Eir in 2012-2013, for three reasons: it did not significantly affect Eir's profitability or ability to earn a fair rate of return; it did not materially impact Eir's ability to compete on equal terms; and Eir was profitable in 2012-2013 and well positioned to cross-subsidise the USO using profits from its fixed-line business. This conclusion by ComReg is entirely justified and reasonable having regard to the relevant information and how it was assessed."

5.26. Vodafone states that:

> "It is important to note that all operators will have unprofitable customers who are more expensive to service. It is not possible to limit the broad targeting of services based on profitability of the customer. It remains a central theme of the ongoing challenges that absent USO obligations Eir would have limited its service to profitable customers. This is clearly not the case."

5.6 Question 3 – ComReg's response

5.27. ComReg notes that ALTO, BT, Virgin Media and Vodafone all agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2012-2013 (i.e. €7,723,749) does not represent an unfair burden on eir.

6. Regulatory Impact Assessment (RIA)

6.1. 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.[84] In conducting the RIA, ComReg take account of the RIA Guidelines[85] issued by the Department of An Taoiseach in June 2009 and adopted under the government's Better Regulation programme.

6.2. 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.

6.3. 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.

6.4. ComReg considers that in this response to consultation and determination, 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

[84] "ComReg's Approach to Regulatory Impact Assessment. Response to Consultation and Guidelines," Document 07/56, 10 August 2007, https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg_0756.pdf; and "Guidelines on ComReg's Approach to Regulatory Impact Assessment," Document 07/56a, 10 August 2007, https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg0756a.pdf.

[85] RIA Guidelines - Department of Taoiseach.

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 for this response to consultation and determination.

7. 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 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 and the order of the High Court dated 10 July 2023 in the case Eircom Limited v. The Commission for Communications Regulation, High Court Commercial, Record No. 2019/167 MCA;

iv. Having regard to the contents of (including the analysis and reasoning set out in): ComReg Document No. 24/96, Initial Oxera Unfair Burden Report 2012/13 (24/96a), responses received to ComReg's section 13D information requirements dated 24 March 2024, ComReg Document No. 25/14, Submissions to Consultation (25/14s), and the Oxera Unfair Burden Report 2012/13 (25/14a);

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 D07/19, 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 2012-2013, determined that there was a positive net cost in 2012-2013 of €7,723,749 comprised of the following figures ("the net cost"):

USO Net Cost 2012-2013		€
Direct net cost (a)	Uneconomic Areas	€268,296
	Uneconomic Customers	€8,286,066
	Directories	€0
	Public Payphones	€311,887
	Services for disabled end users	€56,933
	Consultancy fees	€0
	Direct net cost	**€8,923,182**
Intangible benefits (b)	Enhanced brand recognition	€1,002,351
	Life-cycle	€167,257
	Ubiquity	€11,144
	Marketing	€18,681
	Total intangible benefits	**€1,199,433**
Net cost (after intangible benefits)		**€7,723,749**

viii. Having, in ComReg D07/19 determined that the estimate of benefits to eir as a result of the provision of the universal service do not outweigh the net cost, that the positive net cost is material compared to the administrative costs of a sharing mechanism and that USO financing would be justified if it were found that the provision of the USO in 2012-2013 represents an unfair burden on the USP.

2. ComReg has determined that for the financial year 2012-2013, 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 2012-2013 does not represent an unfair burden on eir.

3. 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.

The Commission For Communications Regulation

Annex 1: D04/11 – Decisions 38-42

Decisions 38 to 42 of D04/11

Determining if there is an unfair burden	
Decision 38	For there to be an unfair burden on a USP, three cumulative conditions must be met: 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	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.
Decision 40	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
Decision 41	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.
Decision 42	ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair: 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.

Decisions 38 to 42 of D04/11 post CJEU judgment (strikethrough)

Determining if there is an unfair burden	
Decision 38	For there to be an unfair burden on a USP, three cumulative conditions must be met: 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	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.
Decision 40	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
Decision 41	~~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.
Decision 42	ComReg will use the following criteria, statically and dynamically, to determine whether or not a net cost burden is actually unfair: 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.

Annex 2: Information shared with Oxera

eir's historical cost separated accounts for 2012-2013

1. eir's regulated accounts in 2012-2013 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 systems.

2. This reporting structure means that eir does not necessarily have to disclose unregulated information that was previously published.

3. ComReg personnel engaged with Oxera to assist Oxera in understanding eir's 2012-2013 HCA.

4. eir's historical cost separated accounts set out eir's "Definition of the Markets and Businesses" as follows:

> ***Definitions of the Markets and Businesses***
>
> **eircom business structure**
>
> eircom is a unitary business having one network with support functions. It consists of a customer facing division (**eircom Retail**) and a division responsible for providing customers with telephony services, maintaining the core switching and transmission networks, and providing and maintaining customer connections to this network (**eircom Wholesale**). A number of additional services are supplied by **subsidiary companies** which maintain separate accounting records.

eir's 2012-2013 USO funding application

5. eir's 2012-2013 USO funding application consists of the following documents:

    - [✂ [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]

- [redacted] ✂]

6. ComReg considered and shared with Oxera:

- [✂ [redacted]
- [redacted] ✂]

2012-2013 statutory accounts

7. The Companies Registration Office is the central repository of public statutory information on Irish companies and business names. The Companies Acts requires companies operating in Ireland to file annual returns with the CRO.

8. ComReg has procured the relevant accounts for those service providers operating in the Irish fixed line market for the relevant periods, where available[86]. In some cases, service providers' reporting is amalgamated into regional or global group accounts[87].

9. The information procured by ComReg from the CRO was considered by ComReg and provided to Oxera.

ComReg Quarterly Key Data reports

10. Statistical information on the Irish electronic communications market and benchmark data from other countries is collected and analysed by ComReg's wholesale division.

11. 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.

12. ComReg considered the relevant QDKR reports and associated information for the period 2012-2013. ComReg provided Oxera with copies of these documents.

ComReg annual report

13. The ComReg Annual Report serves as a comprehensive overview of the activities of ComReg for the year in question, including regulatory updates and key

[86] 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.
[87] Sky Ireland financial reporting is consolidated into its UK British Sky Broadcasting Group plc.

milestones.

14. ComReg considered its Annual Report for the year 2012-2013. ComReg provided Oxera with a copy of this annual report.

ComReg market analysis information

15. ComReg provided Oxera with copies of previous market analyses conducted i.e. Retail Fixed Narrowband Access Markets in 2007[88] and Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers in 2014[89].

Responses to the Information Requirements

16. On 11 March 2024, ComReg sent the Information Requirements formally requesting information from the relevant undertakings. This information, where available, would have enabled Oxera to conduct its preferred analysis[90]. ComReg requested this information in order to ensure that it had fully considered all available information that could possibly be relevant and investigated all possible avenues.

17. All responses to the Information Requirements were shared with Oxera. Some of the information sought was unavailable, and the information which was available and provided was at an aggregated level, so it was not possible to conduct all of the preferred analysis[91].

[88] D07/61.

[89] D12/14.

[90] As set out at A2 in the Oxera Unfair Burden Report. This includes: data necessary to calculate EBIT and ROCE in the fixed line market; CapEx, depreciation and amortisation, to compare the ability to invest and as a proxy for quality of equipment in the fixed line market; number of subscribers, revenues and average broadband speed for retail fixed line subscribers split geographically by 26 counties, with the aim of understanding if prices were materially different between urban and rural areas; subscriber numbers and revenues at the retail fixed line level (split by single, dual and triple pay), to enable an assessment of whether certain operators exhibited competitive advantages through provision of bundled products.

[91] No respondent was able to provide data at the requested geographical split.

Annex 3: Oxera Unfair Burden Report 2012/13