An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

eir's 2013-2014 Universal Service Funding Application

Unfair burden assessment

Consultation

Reference: ComReg 25/11

Version: Final

Date: 28/02/2025

Additional Information

All responses to this consultation should be clearly marked: "Reference: Submission re ComReg 25/11", and sent by post or e-mail, to arrive on or before 5pm on 9 April 2025, to:

Retail Division
Commission for Communications Regulation
One Dockland Central,
Guild Street,
Dublin 1, Ireland,
D01 E4X0
Ph.: +353-1-8049600

E-Mail: retailconsult@comreg.ie

Please note ComReg will publish all respondents' submissions with the Response to this Consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Legal Disclaimer

This Consultation is not a binding legal document and also does not contain legal, commercial, financial, technical, or other advice. The Commission for Communications Regulation ("ComReg") is not bound by it, nor does it necessarily set out ComReg's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of ComReg. Inappropriate reliance ought not therefore to be placed on the contents of this document.

Redacted Information

In this document, ComReg has maintained the confidentiality of commercially sensitive information, in accordance with ComReg's guidelines on the treatment of confidential information[1] (the "Confidentiality Guidelines"). Where information of a confidential/commercially sensitive nature is discussed in this document or the accompanying consultants' reports, the relevant information has been redacted and a [✂█✂] symbol has been inserted.

[1] "ComReg's Guidelines on the treatment of confidential information", Document No. 05/24, 22 March 2005, https://www.comreg.ie/?dlm_download=response-to-consultation-guidelines-on-the-treatment-of-confidential-information.

Content

Chapter Page

Annexes

Glossary

“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.

“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 on 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 10/77” means “Preliminary Consultation - Call for Input, Costing and Financing of Universal Service Obligations”, Document No. 10/77, 28 September 2010.

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

“CRO” refers to the Companies Registration Office.

“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.

“D07/61” means “Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations Market Analysis: Retail Fixed Narrowband Access Markets”, Document No. 07/61, Decision No. D07/61, 24 August 2007.

“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.

“D08/19” means “Assessment of eir’s 2013-14 Universal Service Fund Application, Assessment of the net cost and unfair burden for the period 2013-2014”, Document No. 19/39, Decision No. D08/19, 17 April 2019.

“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” means 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).

“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.

“Oxera” means Oxera Consulting, LLP.

“Oxera Unfair Burden Report 2013/14”, refers to the report prepared by Oxera, titled “Oxera unfair burden report 2013/14” (25/11a) which is included as Annex 2 of this consultation document.

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

“RIA” means regulatory impact assessment.

“ROCE” means the return on capital employed.

“SMP” means significant market power.

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

“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.

“WACC” means the weighted average cost of capital.

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

1 Executive summary

1.1. Eircom Limited ("eir"), as the designated universal service provider ("USP"),[2] submitted an application for funding in respect of the net costs of meeting its universal service obligations ("USO") during its financial year 2013-2014.[3] The Commission for Communications Regulation ("ComReg") is obliged to assess this application to determine whether any net cost represents an unfair burden on eir.

1.2. This document details and consults on ComReg's preliminary views in relation to the unfair burden assessment for 2013-2014. The document is structured as follows:

- **Chapter 2** sets out the background to the assessment;
- **Chapter 3** outlines the legal context;
- **Chapter 4** details ComReg's approach to the unfair burden assessment;
- **Chapter 5** details ComReg's unfair burden assessment for 2013-2014, including the key findings of the "Oxera Unfair Burden Report 2013/14" (published as part of this consultation at **Annex 2**), which was carefully considered by ComReg prior to it forming its preliminary view; and
- **Chapter 6** outlines next steps in the consultation process.

1.3. ComReg is of the preliminary view that for 2013-2014, the determined net cost of the provision of the USO does not represent an unfair burden on eir.

1.4. ComReg welcomes written responses on any of the issues raised in this consultation document. Following consideration of responses, ComReg will make a decision regarding the unfair burden assessment for 2013-2014.

[2] "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.

[3] Referred to as "2013-2014".

2 Background

2.1. Where an undertaking (a USP) is designated as having an obligation (a USO), it may submit to ComReg a written request to receive funding for the net cost of meeting the USO. ComReg is then required to determine, based on a net cost calculation, whether the cost of meeting the USO represents an unfair burden on the USP.[4]

2.2. Eir, as the designated USP, may submit applications for USO funding in accordance with ComReg Decision D04/11[5] ("D04/11"). D04/11 sets out how the USP, should they so choose, is to make an application, including how the net cost (after intangible benefits) is to be calculated, and sets out principles and methodologies to apply to ComReg's assessment as to whether a net cost associated with meeting the USO provision, if any, represents an unfair burden on the USP.

2.3. In March 2015 eir submitted its initial application for funding for 2013-2014. In this application eir claimed a net cost of €11,255,985 for this period, after taking account of intangible benefits of €1,094,751.

2.4. Following a process of engagement between ComReg and eir during which ComReg outlined certain clarifications and adjustments that it required, in February 2016 eir re-submitted its 2013-2014 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 2013-2014 from €11,255,985 to €10,008,142.

2.5. On 15 December 2017 ComReg published Consultation 17/109,[6] in which ComReg set out and consulted upon its preliminary views in relation to eir's final application for funding for 2013-2014, having regard to the Universal Service Regulations, D04/11, and the consultants' reports.[7]

---

[4] 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"), https://www.irishstatutebook.ie/eli/2022/si/444/made/en/print, and was previously provided for in Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, S.I. No. 337 of 2011 ("the Universal Service Regulations"), https://www.irishstatutebook.ie/eli/2011/si/337/.

[5] "Decision on the Costing of universal service obligations: Principles and Methodologies", Document No. 11/42, Decision 04/11, 31 May 2011, https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/.

[6] "Assessment of eir's 2013-2014 Universal Service Fund Application, Assessment of the net cost and unfair burden for the period 2013-2014, Consultation and Draft Determination", Document No. 17/109, 15 December 2017, https://www.comreg.ie/?dlm_download=assessment-eirs-2013-2014-universal-service-funding-application.

[7] "Assessment of eir's USO funding application – Direct net cost 2013-2014", Document No. 19/39a, 18 April 2019, https://www.comreg.ie/?dlm_download=tera-assessment-of-eirs-uso-funding-application-direct-net-cost-2013-201. "Assessment of eir's calculation of intangible benefits for 2013/14", Document

2.6. 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" ("ComReg Decision D07/19").

- D08/19[8] "Assessment of eir's 2013-2014 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2013-2014" ("D08/19"); and

- D09/19 "Assessment of eir's 2014-2015 Universal Service Fund Application Assessment of the net cost and unfair burden for the period 2014-2015" ("ComReg Decision D09/19" and together "the Decisions").

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

2.8. On 15 May 2019, eir issued an appeal in the High Court against the Decisions.[9]

2.9. On 19 February 2021, the Court decided to stay the proceedings and refer a question concerning the unfair burden assessment to the Court of Justice of the European Union ("the CJEU") for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. The following is the question referred:

"In circumstances where:

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

No. 19/39b, 18 April 2019, https://www.comreg.ie/?dlm_download=oxera-assessment-of-eirs-calculation-of-intangible-benefits-for-2013-14. "Oxera unfair burden report 2013/14", Document No. 19/39c, 18 April 2019, https://www.comreg.ie/?dlm_download=oxera-unfair-burden-report-2013-14.

[8] "Assessment of eir's 2013-14 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2013-2014", Document No. 19/39, Decision No. D08/19 17 April 2019. https://www.comreg.ie/?dlm_download=assessment-of-eirs-2013-2014-universal-service-fund-application-assessment-of-the-net-cost-and-unfair-burden-for-the-period-2013-2014.

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

telecommunication services providers operating in the market;

(ii) one service provider … has been selected by the National Regulatory Authority ("NRA") to perform Universal Service Obligations …;

(iii) it has been determined by the NRA that there is a positive net cost associated with the performance of the [Universal Service Obligations]; and

(iv) it has been determined by the NRA that the [Universal Service Obligations] Net Cost is material compared to the administrative costs of the establishment of a sharing mechanism in respect of the [Universal Service Obligations] Net Cost amongst participants in the market;

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

2.10. On 10 November 2022, the CJEU delivered its judgment.[10] The CJEU responded[11] to the question referred as follows:

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

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

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

[10] 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.

[11] Paragraph 54 of the CJEU judgment.

a) section 1.3 of the determination in ComReg Decision D05/19

b) the final paragraph of section 1.2 of the determination in ComReg Decision D06/19 (beginning "Pursuant to the calculation of the positive net cost…")

c) section 1.3 of the determination in ComReg Decision D07/19

d) section 1.3 of the determination in D08/19

e) section 1.3 of the determination in ComReg Decision D09/19;

and

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

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

2.13. On 6 December 2023 ComReg published Consultation 23/113, and the accompanying Oxera Unfair Burden Report 2010-11.[12] In Consultation 23/113 ComReg set out how it proposed to apply the outstanding aspects of Decisions 38-42 of D04/11[13] in light of the CJEU judgment and its unfair burden assessment for 2010-2011.

2.14. Following responses to consultation, on 4 June 2024 ComReg determined that for the financial year 2010-2011, the determined net cost of the provision of the universal service obligation in 2010-2011 does not represent an unfair burden on eir.[14]

2.15. On 26 September 2024 ComReg published Consultation 24/79, and the accompanying Oxera Unfair Burden Report 2011-12.[15] In Consultation 24/79 ComReg set out how it proposed to apply the outstanding aspects of Decisions 38-42 of D04/11, in light of the CJEU judgment and its unfair burden assessment for

[12] "eir's 2010-2011 Universal Service Funding Application, Unfair burden assessment, Consultation and Draft Determination", Document No. 23/113, 6 December 2023, https://www.comreg.ie/publication/eirs-2010-2011-universal-service-fund-application-assessment-of-the-unfair-burden-consultation-and-draft-determination. https://www.comreg.ie/publication/oxera-unfair-burden-report-2010-11-2.

[13] Decision 38(iii)(b) and Decisions 40-42.

[14] "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.

[15] "eir's 2011-2012 Universal Service Funding Application, Unfair burden assessment, Consultation", Document No. 24/79, 26 September 2024. https://www.comreg.ie/?dlm_download=eirs-2011-2012-universal-service-funding-application-unfair-burden-assessment.

2011-2012.

2.16. Following responses to consultation, on 16 January 2025 ComReg determined that for the financial year 2011-2012, the determined net cost of the provision of the universal service obligation in 2011-2012 does not represent an unfair burden on eir.[16]

2.17. On 6 December 2024 ComReg published Consultation 24/96, and the accompanying Oxera Unfair Burden Report for 2012-13.[17] In Consultation 24/96 ComReg set out how it proposed to apply the outstanding aspects of Decisions 38-42 of D04/11[18], in light of the CJEU judgment and its unfair burden assessment for 2012-2013.

2.18. Following submissions to Consultation 24/96, ComReg will determine whether, for the financial year 2012-2013, the determined net cost of the provision of the universal service obligation does or does not represent an unfair burden on eir.

2.19. The ComReg determined positive net cost for 2013-2014 is €9,514,559.[19]

[16] "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.

[17] "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.

[18] Decision 38(iii)(b) and Decisions 40-42.

[19] D08/19, page 73.

Table 1: USO net cost 2013-2014: Determined net cost calculation

USO net cost 2013-2014: Determined net cost calculation		
Direct net cost (a)	Uneconomic Areas	€229,518
	Uneconomic Customers	€9,447,160
	Directories	€550,000
	Public Payphones	€223,519
	Services for disabled end users	€40,614
	Direct net cost	**€10,490,811**
Intangible benefits (b)	Enhanced brand recognition	€846,896
	Life-cycle	€110,564
	Ubiquity	€6,579
	Marketing	€12,213
	Total intangible benefits	**€976,252**
Net cost (after intangible benefits)		**€9,514,559**

2.20. ComReg is now re-conducting the unfair burden assessment for 2013-2014 in the light of the CJEU judgment.[20] D04/11 sets out the principles and methodologies to be considered in determining whether a net cost represents an unfair burden on a USP. Those principles and methodologies have informed ComReg's assessment of whether the positive net cost of providing the USO constituted an unfair burden on eir.

2.21. This document details and consults on ComReg's preliminary views in relation to the unfair burden assessment for 2013-2014. Following consideration of submissions to this consultation, ComReg will make a decision regarding the unfair burden assessment for 2013-2014.

[20] Aspects of the assessment remain undisturbed, namely the application of Decisions 38(i) and 38(ii) of D04/11 and the administrative cost assessment (Decisions 38(iii)(a) and 39 of D04/11).

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[21] and replaced by the Code Regulations. The Code Regulations are part of the transposition of Directive (EU) 2018/1972[22] which repealed and recast, amongst others, the Universal Service Directive[23] and established the European Electronic Communications Code ("the Code"), a comprehensive set of new and revised rules for the telecoms sector.

3.3. D04/11 continues in force as if it were made under the Code Regulations[24] 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 USP.

---

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

[22] 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.

[23] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51) ("the Universal Service Directive"), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0022.

[24] Regulation 113 of the Code Regulations.

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, is 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,[25] 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. 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. ComReg is of the view that, in order for D04/11 to be applied in a way that is consistent with the CJEU judgment, Decisions 40-42 of D04/11 cannot be applied sequentially. Therefore, going forward, when applying D04/11 ComReg must disregard the first ten words of Decision 41 (i.e., the text "If the positive net cost significantly affects a USP's profitability,").

3.12. 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

[25] 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.

by the CJEU is included.

3.14. In applying the outstanding aspects of Decisions 38-42[26] 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. All subsequent references to Decision 41 in this document refer to Decision 41 as set out below.

[26] Decision 38(iii)(b) and Decisions 40-42 of D04/11.

Table 2: Decisions 38-42 as revised

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.

4 Approach to assessment of unfair burden

4.1. General

4.1. 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, taking into account the CJEU judgment. ComReg instructed Oxera that certain aspects of the unfair burden assessment for 2013-2014 were established as part of ComReg's original assessment of eir's funding application (i.e. 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.

4.2. Net cost

4.2. As set out in Chapter 2, the net cost determined by ComReg in the Decisions remains undisturbed. Accordingly, ComReg instructed Oxera to base its analysis on the determined positive net cost for 2013-2014 of €9,514,559.

4.3. The market

4.3. ComReg is of the view that, in order for it to conduct the unfair burden assessment, the relevant market[27] must firstly be identified and described. The USP's situation relative to that of its competitors can be assessed and taken into account (as is required by the CJEU judgment) by considering relatively simple and straightforward indicators such as those considered in Decision 42.

4.4. ComReg does not consider that an unfair burden assessment pursuant to Regulation 75 of the Code Regulations requires a full market analysis as provided for in Part 8 Chapter 3 of the Code Regulations.

4.5. ComReg's view, as set out above, is based upon its interpretation of the Code, the Universal Service Directive, the Universal Service Regulations the Framework Regulations and the CJEU judgment and it is supported by submissions made in the context of previous related consultations and eir's 2019 legal challenge.

4.6. ComReg notes that it previously conducted full market analyses of the Retail Fixed

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

Narrowband Access[28] and Retail Fixed Voice Access[29] Markets (in 2007 and 2014 respectively). ComReg has taken these into account in its assessment of unfair burden.

4.7. Accordingly, ComReg has shared with Oxera its view of the type of assessment required in the USO funding context.

4.4. Information constraints

4.8. ComReg is in 2025 undertaking an unfair burden assessment in respect of 2013-2014. In this circumstance there are inevitable information constraints. In particular some information is unavailable; and, even where available, some information is only available at a more aggregated level than is ideal.

4.9. In some cases, data is available from company-level databases reporting financial information such as profits and investment. Large firms will be typically diversified into different economic activities, and some will operate multi-nationally. Aggregation in data reporting therefore often occurs across different areas (economic activities and geographic location).

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

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

4.5. Information shared with Oxera

4.5.1. eir’s historical cost separated accounts

4.12. eir’s regulated accounts in the application year 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

[28] “Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations Market Analysis: Retail Fixed Narrowband Access Markets”, Document No. 07/61, Decision No. D07/61, 24 August 2007, (“D07/61”) https://www.comreg.ie/?dlm_download=decision-notice-market-analysis-retail-fixed-narrowband-access-markets.

[29] “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers”, Document No. 14/89, Decision No. D12/14, 28 August 2014, (D12/14”) https://www.comreg.ie/media/2018/01/ComReg1489.pdf.

systems.

4.13. ComReg personnel engaged with Oxera to assist Oxera in understanding eir's historical cost separated accounts.

4.5.2. eir's 2013-2014 USO funding application

4.14. eir's 2013-2014 USO funding application, consists of the following documents:

- [✂ [redacted] ✂].

4.5.3. Companies Registration Office

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

4.16. ComReg procured the relevant accounts for those service providers operating in the Irish fixed line market for the relevant periods, where available.[30] In some cases, service providers' reporting is amalgamated into regional or global group accounts.[31]

4.17. The information procured by ComReg from the CRO was provided to Oxera.

4.5.4. ComReg Quarterly Key Data reports

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

4.19. Through its Quarterly Key Data Reports ("QKDR") and the Data Portal ComReg

[30] 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, Vodafone.

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

informs stakeholders of the key trends and developments in the Irish electronic communications market.

4.20. ComReg provided Oxera with the relevant QDKR reports and associated information for the period 2013-2014.

4.5.5. ComReg annual report

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

4.22. ComReg considered its Annual Report for the year 2013-2014. ComReg provided Oxera with a copy of this annual report.

4.5.6. ComReg analysis information

4.23. ComReg provided Oxera with copies of previous market analyses conducted i.e. Retail Fixed Narrowband Access Markets in 2007[32] and Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers in 2014.[33]

4.24. ComReg provided Oxera with copies of the relevant ComReg documents related to setting the WACC in 2008 and 2014, i.e., the 2008 Response to Consultation and Decision Notice on Eircom's Cost of Capital,[34] and the 2014 Response to Consultation and Determination on the Cost of Capital.[35]

4.5.7. Responses to the Information Requirements

4.25. On 11 March 2024, ComReg sent the Information Requirements formally requesting additional information from the relevant undertakings. This information, where available, would have enabled Oxera to conduct its preferred analysis.[36] 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.

4.26. 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

[32] D07/61.

[33] D12/14.

[34] "Eircom's Cost of Capital - Response to Consultation and Decision Notice", ComReg Document No. 08/35, Decision 01/88, 22 May 2008, https://www.comreg.ie/?dlm_download=response-to-consultation-and-decision-notice-d0108-eircoms-cost-of-capital.

[35] "Response to Consultation on Cost of Capital", Document No. 14/136, 18 December 2014, https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg14136.pdf.

[36] As set out at A2 of the Oxera Unfair Burden Report 2013/14.

preferred analysis.[37]

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

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

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

5 Unfair burden assessment 2013-2014

5.1. This Chapter sets out ComReg's preliminary views in relation to the assessment as to whether the positive net cost to eir of providing the USO in 2013-2014 constituted an unfair burden. It summarises the Oxera Unfair Burden Report 2013/14 and ComReg's preliminary views.

5.2. The existence of a positive net cost does not automatically constitute an unfair burden or automatically give rise to the need for USO funding. The principles and methodologies of D04/11, the relevant statutory provisions, the CJEU judgment, the responses to the Information Requirements, the Oxera Unfair Burden Report 2013/14, and other relevant information informed ComReg's assessment of whether the positive net cost of providing the USO in 2013-2014 constituted an unfair burden.

5.1. Oxera Unfair Burden Report 2013/14

5.3. To assist ComReg in assessing whether the provision by eir of the USO in 2013-2014 represents an unfair burden on eir, and to inform its views, ComReg engaged Oxera to provide expert economic analysis and advice.

5.4. 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. Oxera was provided with ComReg's interpretation of how the CJEU judgment affected D04/11 and ComReg's approach to the assessment process.

5.5. Oxera's assessment was provided to ComReg in a report titled the "Oxera unfair burden report 2013/14", published as part of this consultation at Annex 2. The Oxera Unfair Burden Report 2013/14 is structured as follows:

- Section 2 sets out the approach to the determination of an unfair burden, taking into account the relevant legal context;
- Section 3 presents an assessment of eir's financial and competitive position, which is the application of Decision 38 (iii) (b) and Decisions 40 to 42.
- Section 4 concludes Oxera's unfair burden report;
- Appendix A1 sets out Oxera's understanding of the sub-products within eir's fixed-line business that could potentially be dissociable from the USO business;
- Appendix A2 sets out the preferred analysis that Oxera would ideally have carried out, the data constraints that are applicable to the unfair burden assessment for 2013/14, and the analysis taken in light of these constraints; and

- Appendix A3 presents the administrative cost assessment, which is the application of Decisions 38(iii)(a) and 39 of D04/11.

5.6. In Chapter 3 Oxera carried out an **"Assessment of eir's financial and competitive position in 2013-2014".** 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 3A sets out the scope of the market in which the assessment of an unfair burden should be undertaken;
- Section 3B applies **Decision 40**, to assess whether or not the net cost significantly affects eir's profitability. The analysis of eir's profitability relative to its competitors is captured in section 3D.4, under the application of Decision 42
- Section 3C applies **Decision 41**, to assess whether the net cost materially impacts eir's ability to compete on equal terms with competitors going forward; and
- Section 3D applies the **criteria of Decision 42** to inform the analysis as to whether the net cost burden is unfair.

5.7. In section 4 of the Oxera Unfair Burden Report 2013/14 Oxera concluded by applying the three cumulative conditions in Decision 38.[38] Oxera considered its findings in relation to Decisions 40, 41 and 42 in the round. Oxera considered that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2013-2014 (i.e. that the condition in Decision 38(iii)(b) of D04/11 has not been met). Oxera concluded that its view is that the net cost of the USO did not represent an unfair burden on eir in 2013-2014.

5.2. Market context in 2013-2014

5.8. When assessing the unfair burden for 2013-2014,ComReg considered previous market analyses conducted, i.e. the review of the Retail Fixed Narrowband Access[39] and Retail FVA Markets[40] (in 2007 and 2014 respectively).[41] These market analyses included analysis conducted by ComReg prior to the imposition of regulatory obligations (namely eir's SMP obligations, price control measures and USP designation) which were imposed following full public consultations and in some instances consultation with the Body of European Regulators for Electronic

[38] Aspects of the assessment remain undisturbed, namely the application of Decisions 38(i), 38(ii) of D04/11 and the administrative cost assessment (Decisions 38(iii)(a) and 39 of D04/11).
[39] D07/61
[40] The "FVA Market Analysis" concluding in D12/14
[41] ComReg provided Oxera with copies of the published documentation relating to these market analyses.

Communications ("BEREC"), the Competition Authority[42] and the European Commission.

5.9. The products, services and operators in these markets referenced overlap considerably with the 'fixed line market' which has been identified as the relevant market for the competitive assessment. The analysis underpinning the FVA Market Analysis related to 2012-2014. Therefore, these market analyses provide a valuable insight into the situation in the relevant market at the time.

5.10. ComReg considered the following, based on extracts from the FVA Market Analysis, in forming its decision: (i) **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**. Extracts from the documents relating to the FVA Market Analysis which relate to these areas are set out below.

Level of competition

5.11. 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

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

> 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).”[43]

5.12. 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 prospective basis over the period of the review”.

5.13. 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

5.14. 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.

5.15. 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

[43] D12/14, paragraph 5.12. LLVA refers to “Lower Level Voice Access” which includes FVA sold standalone and in a bundle.

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." [44] (emphasis added)

5.16. In D12/14 ComReg concluded that the above-mentioned analysis in the 2012 FVA Consultation remained valid.[45]

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

Retail pricing (national/regional)

5.18. In D12/14 it was stated that:

> "(in the 2012 FVA Consultation (setting out ComReg's preliminary views)) ComReg observed that <u>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</u>. Equally, suppliers of FVA bundled services have not yet differentiated their pricing structure within the areas in which they were available." (emphasis added)

5.19. 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

[44] D12/14, paragraphs 3.36 to 3.39.
[45] D12/14, paragraph 3.41.

levelled off on entry of Sky, an FSP likely to be too large over time to ignore."[46]

5.20. 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 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).[47] 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."[48] (emphasis added)

---

[46] D12/14, paragraph 4.184.

[47] "Assessment of retail pricing constraints - Response to submissions on consultation 12/27: 'Next Generation Access ("NGA"): Proposed Remedies for NGA Markets", ComReg Document No. 13/11b, January 2013, https://www.comreg.ie/media/2018/01/ComReg1311b.pdf.

[48] D12/14, paragraphs 4.188 to 4.190.

5.21. The aforementioned analysis was conducted by ComReg in 2012 and published in 2014. Market conditions tend to progress not regress and ComReg does not consider it likely that geographic differences in retail product characteristics or retail prices were present in 2013-2014, when there was no evidence of either in the 2014 FVA Market Analysis.

5.22. In summary, ComReg 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 the extent it could have within the boundaries of regulatory price controls.

Differences in competitive conditions – voice only or bundled voice

5.23. 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."[49]

5.24. 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."[50] (emphasis added).

[49] D12/14, paragraphs 4.10 and 4.11
[50] D12/14, paragraph 4.37

5.25. 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.[51] 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).[52]

5.26. 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 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."[53]

5.27. 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."

5.28. 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."[54]

5.29. 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

[51] 2012 FVA Consultation, paragraphs 4.209 to 4.241.
[52] 2012 FVA Consultation, paragraph 4.217.
[53] D12/14, paragraph 4.157.
[54] D12/14, paragraph 4.156.

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.

Competitive conditions 2012-2014

5.30. 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 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.

5.31. These findings from ComReg's consultations demonstrate that in 2013-2014 eir did not face competitive pressure from OAOs in the aforementioned segmental and geographic markets.

5.3. ComReg's preliminary view

5.32. ComReg, prior to forming its preliminary view in relation to whether the positive net cost of providing the USO in 2013-2014 constituted an unfair burden on eir, carefully considered, amongst other things, the D04/11 principles and methodologies, the relevant statutory provisions, the CJEU judgment, the information provided to Oxera, the competitive conditions in 2012-2014 as outlined in the FVA Market Analysis and the Oxera Unfair Burden Report 2013/14.

5.33. In respect of the choice of relevant market, ComReg agrees with Oxera's analysis and conclusions. ComReg notes in particular that activities included within eir's fixed line business are non-dissociable from the USO and agrees that, for the purpose of the 2013-2014 unfair burden assessment, the appropriate market to use to analyse eir's competitive position is the Irish fixed-line market, and where competitor information is unavailable at the Irish fixed-line market level, the numbers as reported at Irish group-level should be used as a proxy.[55]

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

i. There is a verified direct net cost to eir of €9,514,559. This figure represents the net cost as determined by ComReg; and

ii. The benefits of the USO do not outweigh the net cost (i.e., there is a positive net cost).

5.35. **Decisions 38(i)** and **38(ii)** were established as part of ComReg's assessment of eir's funding application, finding that there is a direct net cost and that the benefits of the USO do not outweigh the net cost.

5.36. 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.[56] This aspect 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 2013/14 represents an unfair burden on the USP.

5.37. **Decision 38(iii)(b)** provides "The positive net cost [is] (b) causes a significant competitive disadvantage for a USP":

5.38. ComReg has carefully considered Section 3 of Oxera's Unfair Burden Report 2013/14 in which it applied Decisions 40 to 42.

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

- **Decision 40:** In 2013-2014, 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 regulatory allowed WACC.

- **Decision 41:** The net cost of the USO for the year 2013-2014 did not materially impact eir's ability to compete on equal terms with competitors going forward, as:

  - there is no evidence of a causal link between the financial distress and challenges observed over time and the provision of the USO; and

[55] ComReg has considered the activities within the fixed-line business as listed in eir's HCA, and identified certain sub-products that may be considered potentially dissociable from the USO. Ideally, an analysis of the market would exclude these sub-products. ComReg does not consider that these particular sub-products would have a material impact on the estimates. For details, see Annex A1 of the Oxera Unfair Burden report 2013/14.

[56] D08/19.

- the results of the wider period of financial analysis undertaken, taking account of the investment horizon of 2009/10 to 2022/23, also indicates that discharging the USO did not materially impact the USP's ability to compete, as:
  - the USO did not prevent eir from undertaking necessary investments; and
  - the USO has not impeded eir from making improvements to its financial health, as evidenced by improvements in its credit rating over the period of analysis.

- **Decision 42:** In 2013-2014 eir was profitable and was in a position to cross-subsidise the provision of the USO by using profits earned in its fixed-line business. Indeed, when compared to its competitors, eir was able to maintain a comparatively high 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 group level exceeded that of its competitors, while eir group's 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.

- **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 is of the preliminary view that the net cost of the USO did not cause a significant competitive disadvantage for eir in 2013-2014.

5.40. Notwithstanding the information constraints identified, ComReg is of the preliminary view that it had sufficient information available to conduct the unfair burden assessment for the period 2013-2014.

5.41. ComReg, when forming its preliminary view in relation to the unfair burden assessment, considered the preliminary views 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 preliminary views relating to each of the decisions converge to indicate that the net cost of providing the USO in 2013-2014 did not constitute an unfair burden on eir.

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

5.43. As a result, ComReg is of the preliminary view that the provision of the USO in 2013-2014 does not represent an unfair burden on eir.

Q.3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2013-2014 (i.e. €9,514,559) does not represent an unfair burden on eir? Please give reasons for your answer.

6 Next steps and submitting comments

6.1. During the consultation submission period, ComReg welcomes written responses in relation to any of the issues raised in this consultation document. The timeframe for receipt of submissions to this consultation document is **5pm on 9 April 2025**. It is requested that comments within submissions make reference to the relevant question numbers from this consultation document.

6.2. Responses to this consultation should be submitted in written form (post or email) to the following address/email, and clearly marked: "Submission to ComReg 25/11".

Commission for Communications Regulation,
Retail Policy,
One Dockland Central,
1 Guild St.,
North Dock,
Dublin 1,
D01E4XO,
Ireland.

Email: RetailConsult@comreg.ie

6.3. In order to promote further openness and transparency, ComReg will publish all respondents' submissions to this consultation, subject to the provisions of the Confidentiality Guidelines.

6.4. Respondents are requested to clearly identify confidential material and place such material in a separate annex to responses.

6.5. Respondents are also requested to provide any electronic submissions in an unprotected format so that they can be appended into ComReg's submissions document for electronic publication.

7 Regulatory Impact Assessment (RIA)

7.1. A RIA is a structured approach to the development of policy and analyses the impact of regulatory options on different stakeholders. ComReg's approach to RIA is set out in the Guidelines published in August 2007.[57] In conducting the RIA, ComReg takes account of the RIA Guidelines[58] issued by the Department of An Taoiseach in June 2009 and adopted under the government's Better Regulation programme.

7.2. Section 13(1) of the Communications Regulation Act 2002, as amended, requires ComReg to comply with certain Ministerial Policy Directions. Policy Direction 6 of February 2003 requires that before deciding to impose regulatory obligations on undertakings ComReg must conduct a RIA in accordance with European and International best practice, and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme. In conducting the RIA, ComReg also has regard to the fact that regulation by way of issuing decisions, for example imposing obligations or specifying requirements, can be quite different to regulation that arises by the enactment of primary or secondary legislation.

7.3. ComReg's published RIA Guidelines, in accordance with a policy direction to ComReg, state that ComReg will conduct a RIA in any process that may result in the imposition of a regulatory obligation, or the amendment of an existing obligation to a significant degree, or which may otherwise significantly impact on any relevant market or any stakeholders or consumers. However, the RIA Guidelines also note that in certain instances it may not be appropriate to conduct a RIA and, in particular, that a RIA is only considered mandatory or necessary in advance of a decision that could result in the imposition of an actual regulatory measure or obligation, and that where ComReg is merely charged with implementing a statutory obligation then it will assess each case individually and will determine whether a RIA is necessary and justified.

7.4. In this consultation document, ComReg is not proposing to impose a discretionary regulatory obligation that would require a regulatory impact assessment (RIA) but is acting under a statutory obligation imposed on it by Regulation 75 of the Code Regulations, which requires that upon receipt of a request for funding/compensation from the USP, ComReg shall calculate the net cost of provision and assess whether the universal service obligation represents an unfair burden for the USP. As such, if a request for funding/compensation has been received, ComReg has no discretion as to whether or not such an assessment is undertaken. Therefore, a RIA is not being

[57] "ComReg's Approach to Regulatory Impact Assessment, Response to Consultation and Guidelines", Document No. 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 No. 07/56a, 10 August 2007, https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg0756a.pdf.

[58] RIA Guidelines - Department of Taoiseach.

undertaken for this consultation document.

8 Draft Determination

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

   i. Pursuant to Regulation 75(4) of European Union (Electronic Communications Code) Regulation 2022 ("the Code Regulations");

   ii. Having applied the principles and methodologies set out in "Decision on the Costing of universal service obligations: Principles and Methodologies", ComReg Document No. 11/42, Decision No. D04/11 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): responses received to ComReg's section 13D information requirements dated 24 March 2024, ComReg Document No. 25/11, the Oxera Unfair Burden Report 2013/14 (25/11a), Submissions to Consultation (25/XXs), ComReg Document No. 25/XY and the Oxera Unfair Burden Report 2013/14 (25/XYa);

   v. Having regard to ComReg's functions and objectives under sections 10 and 12 respectively of the Communications Regulation Act 2002, as amended, ComReg's objectives under Regulation 4 of the Code Regulations and ComReg's task under Regulation 5(1)(f) 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 D08/19 (Document No. 19/39), 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 2013-2014, determined that there was a positive net cost in 2013-2014 of €9,514,559 comprised of the following figures ("the net cost"):

USO net cost 2013-2014: Determined net cost calculation		
Direct net cost (a)	Uneconomic Areas	€229,518
	Uneconomic Customers	€9,447,160
	Directories	€550,000
	Public Payphones	€223,519
	Services for disabled end users	€40,614
	Direct net cost	**€10,490,811**
Intangible benefits (b)	Enhanced brand recognition	€846,896
	Life-cycle	€110,564
	Ubiquity	€6,579
	Marketing	€12,213
	Total intangible benefits	**€976,252**
Net cost (after intangible benefits)		**€9,514,559**

viii. Having, in ComReg Decision D08/19, 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 2013-2014 represents an unfair burden on the USP.

2. ComReg has determined that for the financial year 2013-2014, 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 2013-2014 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: Questions

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

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

Q. 3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2013-2014 (i.e. €9,514,559) does not represent an unfair burden on eir? Please give reasons for your answer.

Annex 2: Oxera Unfair Burden Report 2013/14