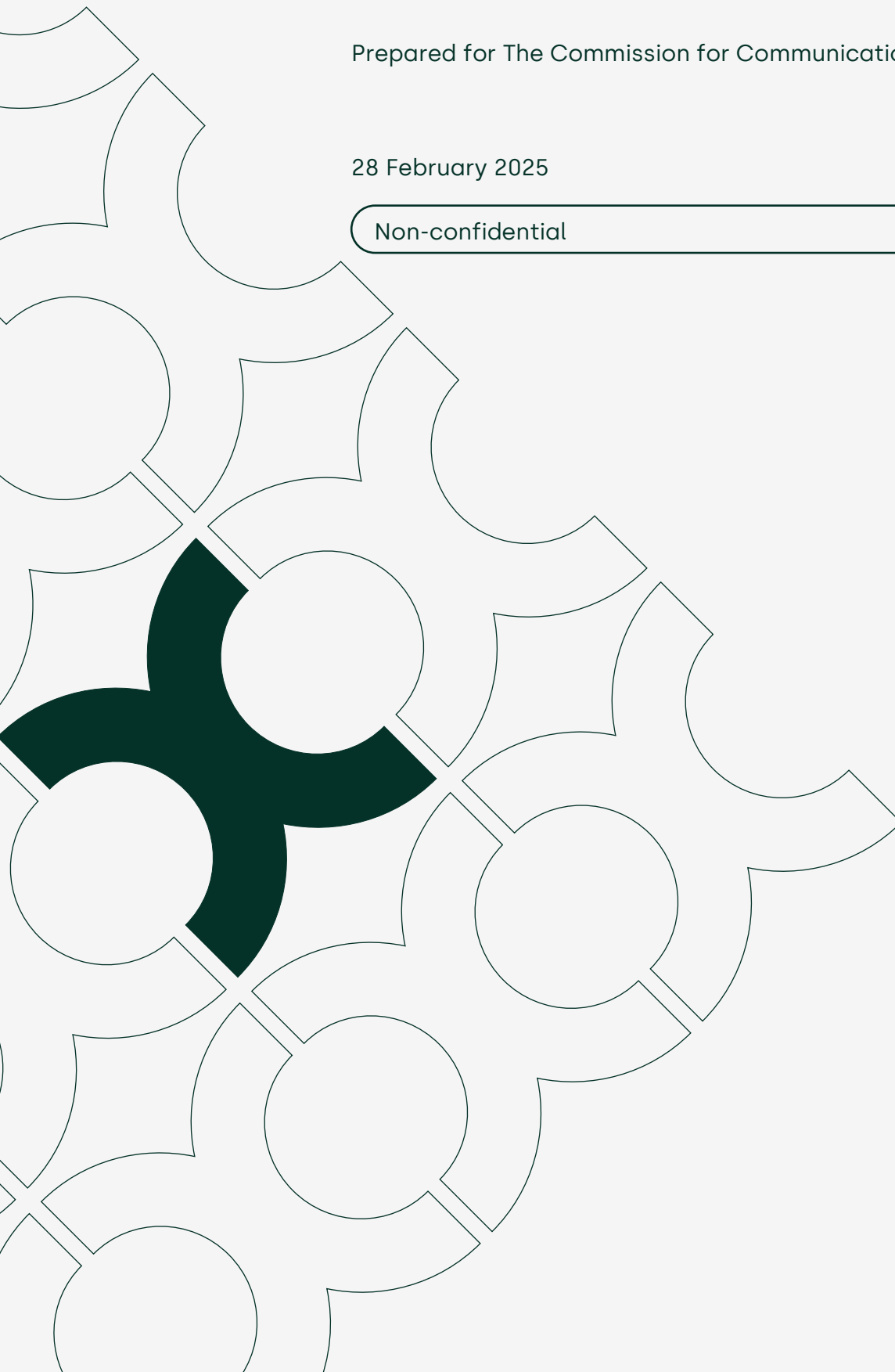


Oxera unfair burden report 2013/14

Prepared for The Commission for Communications Regulation

28 February 2025

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Contents

1	Introduction	4
2	Approach to the assessment of an unfair burden	8
3	Assessment of eir's financial and competitive position	11
3A	The scope of the market	13
3B	Application of Decision 40	18
3C	Application of Decision 41 (revised)	28
3D	Application of Decision 42	42
4	Conclusion	61
A1	Products within eir's fixed-line business that are potentially dissociable from the USO business	64
A2	Data constraints and implications for the preferred analysis	67
A3	Administrative cost assessment	75
A3B	Administrative costs of establishing and operating a sharing mechanism	75
A3C	Assessing the cost of establishing and operating a sharing mechanism relative to the transfer to a USP	76
A3D	Conclusion on the administrative cost assessment	77

Figures and tables

Table 3.1	Selected products included in the fixed-line market definition [X Redacted X]	17
Figure 3.1	eir's fixed-line business EBIT	20
Figure 3.2	eir's fixed-line business ROCE benchmarked against the 2008 WACC	26
Figure 3.3	eir's fixed-line business ROCE including and excluding the net cost of the USO	27
Table 3.2	eir's operational performance in 2009/10–2013/14	29

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Table 3.3	eir's operational performance, 2009/10–2022/23	31
Figure 3.4	eir's CAPEX in its fixed-line business	34
Figure 3.5	Irish group-level CAPEX ratios, 2010/11–2015/16	37
Figure 3.6	eir's dividends paid to equity shareholders, 2009/10–2022/23	40
Figure 3.7	USO direct net cost	45
Figure 3.8	Cross-subsidisation (internalisation) of the net cost of the USO	46
Figure 3.9	Breakdown of eir's fixed-line ROCE by category	47
Figure 3.10	Breakdown of eir's Wholesale ROCE by product	48
Figure 3.11	Irish group-level EBIT, 2009/10–2013/14	51
Figure 3.12	Irish group-level ROCE, 2009/10–2013/14	52
Figure 3.13	Average prices achieved over time in retail fixed-line market [X Redacted X]	53
Figure 3.14	Changes in retail fixed-line market share, by revenue [X Redacted X]	55
Figure 3.15	Changes in retail fixed-line market share, by number of subscribers [X Redacted X]	57
Table A1.1	Products and sub-products highlighted as potentially dissociable from the USO business	64
Table A2.1	Data constraints	69

1 Introduction

- 1.1 Decision D04/11 (D04/11) of the Commission for Communications Regulation (ComReg) sets out the principles and methodologies for assessing whether the universal service obligation (USO) results in a net cost that represents an unfair burden on the universal service provider (USP).¹ In accordance with Irish legislation, in order for the USP to receive compensation for any positive net cost (hereafter referred to as 'net cost'), it is necessary to first determine that the net cost constitutes an unfair burden.²
- 1.2 Eircom Limited's (eir) USO during the period under consideration included the provision of:³
- access at a fixed location;
 - a printed telephone directory and the maintenance of the National Directory Database (NDD);
 - public pay phones;
 - services to consumers with disabilities; and
 - measures to assist consumers to control their expenditure.
- 1.3 ComReg has engaged Oxera to provide expert economic analysis and advice to assist it in assessing whether the net cost arising from eir's obligation to provide a universal service for the period 1 July 2013 to 30 June 2014⁴ represents an unfair burden. The results of our analysis are presented in this report, which has taken into account D04/11,⁵ the Base and others judgment,⁶

¹ ComReg (2011), 'Decision on the Costing of universal service obligations: Principles and Methodologies', Reference No. 11/42, Decision No. D04/11, 31 May.

² Regulation 75 of the European Union (Electronic Communications Code) Regulations 2022, S.I. 444 of 2022 ('S.I. 444 of 2022').

³ ComReg (2012), 'Response to Consultation Decision and Decision Instrument – The Provision of telephony services under Universal Service Obligations', Document No. 10/46, Decision No. D07/12, 29 June, pp. 25, 30, 33, 36, 39–40.

⁴ Referred to as 2013/14 in this report.

⁵ ComReg (2011), op. cit.

⁶ Case C-389/08, Base NV and Others vs Ministerraad, Judgment of the Court of Justice (Fourth Chamber) of 6 October 2010, referred to as the 'Base judgment' throughout this document.

the 2022 CJEU judgment,⁷ the subsequent Order of the High Court⁸ and responses to the ComReg information requirements dated 12 March 2024.⁹

- 1.4 The CJEU judgment ruled that ComReg, in determining whether the net cost of eir's universal service provision constitutes an unfair burden, is required to take account of the situation of eir relative to that of its competitors in the relevant market:



[...]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.**

CJEU judgment, paragraph 54 [emphasis added]

- 1.5 In the judgment, the CJEU noted that the USP remaining profitable does not allow conclusions to be drawn about the USP's ability to compete with the other operators present in the market:

⁷ Eircom Limited v. Commission for Communications Regulation, Case C494/21, Judgment of the Court (Fifth Chamber) of 10 November 2022. This is referred to as the 'CJEU judgment.'

⁸ The High Court (2023), 'Order of Mr Justice O'Moore made on 10 July 2023 in Eircom Limited -v- Commission for Communications Regulation', 10 July 2019/167 MCA.

⁹ ComReg (2024), 'Section 13D information requirement', 12 March.



[...] The mere finding that such a provider remains profitable despite the burden on it by virtue of the net cost of its universal service obligations does not allow conclusions to be drawn as to the repercussions of that net cost for that provider's ability to compete with the other operators present in an evolving market [...]

CJEU judgment, paragraph 49

- 1.6 The net cost determined by ComReg in Decision D08/19 is €9,514,559 for 2013/14.¹⁰ ComReg has instructed Oxera to use the determined net cost in conducting its unfair burden assessment.
- 1.7 The existence of a positive net cost does not automatically constitute an unfair burden or automatically give rise to the need for USO funding.
- 1.8 This report is intended to assist ComReg in making a determination pursuant to Regulation 75 of S.I. 444 of 2022.
- 1.9 The report is structured as follows.
 - Section 2 sets out the approach to the assessment 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 assessment.
 - Appendix A1 sets out our understanding of the sub-products within eir's fixed-line business that could potentially be dissociable from the USO business.

¹⁰ ComReg (2019), 'Assessment of eir's 2013-2014 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2013-2014', Reference No. 19/39, Decision No. D08/19, 17 April, p. 73.

- Appendix A2 sets out the preferred analysis that would ideally have been 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.
- Appendix A3 presents the administrative cost assessment, which is the application of Decisions 38 (iii) (a) and 39.

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2 Approach to the assessment of an unfair burden

- 2.1 Having considered the CJEU judgment and its impact on D04/11, ComReg has advised Oxera of its 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, when applying D04/11, **ComReg has advised Oxera that it must disregard the first ten words of Decision 41** (i.e. the text 'If the positive net cost significantly affects a USP's profitability [...]').
- 2.2 This means that, regardless of the impact of a positive net cost on the USP's profitability, Oxera will conduct a competitive assessment, as set out in Decisions 41 and 42, and assess whether the positive net cost causes a significant competitive disadvantage for a USP, as set out in Decision 38 (iii) (b).
- 2.3 In applying each of the Decisions 38 to 42 (the aspects of D04/11 that relate to unfair burden assessment), Oxera will conduct an assessment of the characteristics particular to the USP within the context of the competitive environment in which it operates. This is in accordance with the Base judgment, which states that, for an unfair burden to be found, account must be 'taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share'.¹¹
- 2.4 Where appropriate and possible, we will also undertake analysis of eir's competitors in the relevant market over the relevant period, thus taking into account the USP's situation relative to that of its competitors in the market. By carrying out its assessment in this way, Oxera will ensure that the 'comparative component' required by the CJEU is included.
- 2.5 To reflect the requirements of the CJEU judgment, when applying D04/11, we will assess and take account of the characteristics of eir described below.

¹¹ Case C-389/08, Base NV and Others vs Ministerraad, Judgment of the Court of Justice (Fourth Chamber) of 6 October 2010.

Note that we have categorised eir's characteristics in accordance with the three characteristics identified in the Base judgment, whereas for ease of reference, in the rest of this document we follow the structure set out in D04/11.¹²

- **Quality of equipment:**

- eir's CAPEX;
- Irish group-level CAPEX/revenue and CAPEX/depreciation and amortisation ratios.

- **Economic and financial situation:**

- changes in eir's accounting profits (earnings before interest and taxes (EBIT¹³));
- eir's profitability (return on capital employed (ROCE) compared with a competitive benchmark);
- eir's operational performance (e.g. financial metrics such as gearing, dividend payments, liquidity coverage ratios);
- eir's position relative to competitors (EBIT, ROCE, changes in prices over time, changes in market share, assessment of barriers to market entry).

- **Market share:**

- market share and changes in market share of eir and its competitors (by revenue and number of subscribers).

2.6 This analysis was undertaken on the basis of the information available. In Table A2.1, we set out our preferred analysis, the information constraints we encountered, and the analysis we undertook with the available information.

2.7 Ultimately, no one single indicator is determinative. We, therefore, consider

¹² Which as ComReg notes in D04/11 (para 5.31), is consistent with the Base judgment.

¹³ Measured as revenues less operating costs.

the aforementioned characteristics in our assessment of whether the net cost of the USO represents an unfair burden on air in 2013/14.

- 2.8 In relation to Decision 38 (iii) (a), we assess the administrative costs of a sharing mechanism as presented in Appendix A3. We conclude that the net cost of the USO of around €9.5m for 2013/14 is material compared with the current estimated administrative cost of a sharing mechanism of approximately €200,000.
- 2.9 In relation to Decision 39, we compare the administrative costs of a sharing mechanism to the net transfers to the USP. We conclude that the net cost of the USO in 2013/14 was not relatively small, and the cost of establishing and operating a sharing mechanism of €200,000 would not be disproportionate to the net transfers to the USP. Following these conclusions, USO financing would be justified if it were found that the provision of the USO in 2013/14 represented an unfair burden on the USP.

3 Assessment of eir's financial and competitive position

- 3.1 Decision 38 (iii) (b) and Decisions 40 to 42 require ComReg to assess eir's financial and competitive position in the relevant period and market, to establish whether the net cost causes a significant competitive disadvantage and is an unfair burden on eir as the USP.
-

Decision 38 (iii) (b): [For there to be an unfair burden on a USP, the positive net cost] causes a significant competitive disadvantage for 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.

Decision 41 (revised): 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.
-

3.2 The assessment of eir's financial and competitive position is set out as follows:

- **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 4D.4, under the application of Decision 42;
- **section 3C** applies Decision 41 (revised), to assess whether the net cost has a material impact on eir's ability to compete on equal terms with competitors going forward;
- **section 3D** applies the criteria of Decision 42 to inform our analysis as to whether the net cost burden is unfair.

3.3 In section 4, we then consider our findings in relation to Decisions 40, 41 and 42 in the round, to consider whether Decision 38 (iii) (b) has been met.

3.4 In undertaking the analysis for 2013/14, we have focused on information relating to the period July 2013–June 2014, as this was eir's financial year. In certain cases, we extend the analysis until the end of 2014 either due to the availability of data or to accommodate competitors with different financial year start and end dates. This is consistent with Decision 21 of D04/11 which provides that 'USO funding applications shall be based on annual information which coincides with the USP's financial year'.

3.5 In the circumstances, and in particular given the long time between the year being assessed and when the assessment is taking place, we have been instructed by ComReg to cross-check the result of Decision 41 with the result of the same analysis using the actual data available to date (up until the latest full financial year of 2022/23). In some instances, data availability has meant that undertaking this analysis was not possible and we have undertaken an alternative approach. The data constraints and implications for the preferred analysis are summarised on a Decision-by-Decision basis in

Appendix A2.

3A The scope of the market

3.6 In its assessment of an unfair burden, ComReg is required by the CJEU judgment to take account of the situation of the USP relative to that of its competitors in the relevant market.¹⁴ It is, therefore, first necessary to establish the relevant market in which the assessment of an unfair burden should be undertaken.

3.7 We did not undertake a full market definition and analysis, as is applied in the context of market reviews and competition law.¹⁵ In this section, therefore, we consider potential options for assessing the scope of the market relevant for the analysis, before reaching a conclusion on what we consider to be the appropriate scope of the market. This then forms the basis for our assessment of eir's profitability and competitive position relative to its competitors, with respect to the application of Decisions 40 to 42.

3A.1 Options for the scope of the market

3.8 The CJEU judgment notes that 'an assessment of the characteristics particular to a universal service provider in the light of the competitive environment in which that provider operates is also consistent with the objectives of the Universal Service Directive'.¹⁶ As such, it is necessary to identify a relevant scope of the market (covering both eir and its competitors) to examine whether the net cost of the USO has a significant impact on eir's financial and competitive position. We have identified three potential options for the scope of the market for consideration.

- **Option 1: the core USO market.** The scope of the market would be restricted to eir's USO retail business and regulated wholesale products related to the USO (i.e. the Wholesale Regulated and Retail PSTN & ISDN

¹⁴ Eircom Limited v. Commission for Communications Regulation (2022), op. cit., para. 54.

¹⁵ This was in accordance with ComReg's view that conducting a full market definition would not be necessary or appropriate in the context of this unfair burden assessment.

¹⁶ Eircom Limited v. Commission for Communications Regulation (2022), op. cit., para. 48.

Access business).¹⁷ This market would exclude unregulated wholesale and retail products, mobile products and products associated with other subsidiaries. This is a notional definition as, unlike options 2 and 3 presented below, eir's fixed network does not provide the USO on a standalone basis.

- **Option 2: the fixed-line market.**¹⁸ The scope of the market would include fixed-line wholesale and fixed-line retail products, including business and residential, data communications and interconnection products. This market would exclude mobile products and products associated with other subsidiaries.
- **Option 3: the Irish telecommunications market.** The scope of the market would include telecoms products and products directly related to telecoms, both regulated and unregulated, mobile and fixed. In principle, this market would exclude any products that are completely unrelated to telecoms.

- 3.9 In theory, an economic assessment of whether the net cost has an impact on profitability and the ability of the USP to compete should reflect all products that are particular to the USP and not dissociable from the USO.
- 3.10 The 'dissociability test' is used for the consideration of a range of issues relating to network effects and can support an understanding of the wider economic impact of the USO. Where such wider network effects are directly linked to changes in the USO (either costs or revenues) then they could be considered not dissociable from the USO. In other words, the non-USO products which rely on the fixed network used to provide the USO cannot be separated from its USO products. In some cases, this may mean that it would be more appropriate to consider the economic effect on the wider fixed network including such dissociable elements of the fixed network than to

¹⁷ Eircom Limited (2014), 'Historical Cost Separated Accounts for the year ended 30 June 2014', 30 November.

¹⁸ Within this section and throughout the document, we refer to both the 'fixed-line market' and 'fixed-line business'. These terms have distinct meanings. The 'fixed-line market' refers to what is described in option 2, includes eir and its competitors, and relates to the environment in which they interact (at a certain level of their business). The 'fixed-line business' is the relevant, specific, part of eir's business that relates to the fixed-line market.

consider only those activities that are more directly linked to USO.

3A.2 Assessment of the options for the scope of the market

3.11 If the core USO market (option 1) were to be used for the unfair burden assessment, the assessment of the USP's financial position and competitive position would only include an assessment of those products that are directly related to the discharge of the USO. However, using the core USO market (option 1) would estimate the impact of the net cost on eir with reference to the scope of the universal service itself, whereas the analysis of the impact of the net cost of the USO on eir should instead take into account all relevant areas of its business. Analysis using the core USO market (option 1) would need to include consideration of the extent to which the finances of the remainder of the USP's business are affected by the same factors that are causing the net cost, and therefore how eir's profitability as the USP is best measured. This approach is consistent with Decisions 1–7 of D04/11 and is adopted by eir's consultant, Frontier Economics, in its consideration of indirect revenues that eir gains in profitable areas due to providing products to uneconomic areas or uneconomic customers under the USO.¹⁹ Both Decisions 1–7 of D04/11 and Frontier Economics' approach include costs that are incurred indirectly as a result of the USO, even if, from an accounting perspective, they are not allocated to the USO. They also both include revenues from other products that are offered over eir's fixed network that is used in the provision of the USO, and therefore contribute to the financing of the USO. Accordingly, the core USO market (option 1) would exclude parts of eir's fixed-line business that are not dissociable from the USO activities, and which are relevant to assess eir's financial and competitive position.

3.12 If the wider telecommunications market (option 3) were to be used for the unfair burden assessment, the assessment of the USP's financial and competitive position would include products that are not directly or indirectly linked to the USO or affected by the same factors that are causing the net cost (e.g. mobile products for customers from outside Ireland) and

¹⁹ Frontier Economics (2016), 'USO Model Documentation –2013/14. A report prepared for eir', July, pp. 7, 20–27.

therefore which are dissociable from the USO.

- 3.13 If the fixed line market (option 2) were to be used for the unfair burden assessment, the assessment of the USP's financial position and competitive position would take into account costs that are incurred indirectly as a result of the USO, even if they are not allocated to USO products (as in option 1), and revenues from other products (regulated and unregulated) that are offered over eir's fixed network that is used in the provision of the USO. As mentioned above, this is consistent with the approach adopted by Frontier Economics for the USO model.²⁰ The relevant comparisons between eir and its competitors under this option would use each of their fixed-line businesses—the fixed-line businesses of eir's competitors will include similar (non-USO) products to eir's fixed-line business. Where data limitations do not support comparisons between fixed-line businesses, we would instead use numbers as reported at Irish group-level as a proxy.
- 3.14 Eir's fixed-line business provides the assets that are used in providing the USO, as well as the revenues that would confer eir's ability to internalise the cost of the provision of the USO. Accordingly, our view is that the activities included in eir's fixed-line business are largely not dissociable from the USO (with some potential exceptions) and therefore the fixed-line market represents a good proxy for the business that can be directly linked to eir's fixed network used to provide the USO. See Appendix A1 for an assessment of the activities within eir's fixed-line business (operating within the fixed-line market) that could be viewed as dissociable, and could therefore in principle be excluded from the assessment. A more narrow definition of the fixed-line market, based on a subset of eir's fixed-line business—after excluding dissociable sub-products—is not considered in our assessment given the lack of availability of sufficiently granular data required to disaggregate eir's fixed-line business.²¹ We have been advised by ComReg that any adjustment required as a result of this disaggregation, were it possible, is unlikely to be

²⁰ Frontier Economics (2016), op. cit.

²¹ See Appendix A1 for an assessment of activities within eir's fixed-line business that could be viewed as dissociable, and therefore could in principle be excluded from the assessment. A more narrow definition of the fixed-line market after excluding dissociable activities is not considered in our assessment given data availability issues in disaggregating eir's fixed-line business.

material.

- 3.15
- Our view is consistent with D04/11 and reflects the approach adopted by eir and Frontier Economics in the 2013/14 USO direct net cost model, which included a number of products in its fixed-line business (and that are incremental to the USO market definition)—see Table 3.1 below.

Table 3.1 **Selected products included in the fixed-line market definition**
[✂ Redacted ✂]

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Source: As advised by ComReg (Frontier Economics).

- 3.16
- In the ComReg information requirements dated 12 March 2024, data on revenues, assets, liabilities, CAPEX and depreciation and amortisation at the fixed-line business level was obtained from operators (with more than 2% market share) for the period 2013/14. This data would allow for analysis of profitability through ROCE and EBIT metrics, and of investment through net CAPEX in the fixed-line market (option 2). However, as eir’s competitors were unable to provide sufficient data at the fixed-line business level to enable this analysis to be conducted (we provide reasons for this in Appendix A2), accounts at the Irish group-level are instead used in our analysis of eir’s

position relative to competitors. We note that this analysis has limitations as the information used also includes activities that are not relevant to the scope of the market.

- 3.17 An overview of the other operators in the fixed-line market is set out in section 3D.4, as part of the assessment of eir's position relative to its competitors.

3A.3 Conclusion on the scope of the market to be used for the assessment of an unfair burden

- 3.18 For the reasons set out above, we consider that the scope of the market relevant to assess the financial and competitive position of the USP—and appropriate for the application of Decision 38 (iii) (b) and Decision 40 to Decision 42—is the fixed-line market (option 2).

- 3.19 From a geographical perspective, we primarily consider the fixed-line market at the national level in our analysis (i.e. Irish fixed-line market). This is consistent with the requirements of D04/11 (i.e. the net cost of the USO should be calculated based on the designated area, which in 2013/14 was national).

3B Application of Decision 40

- 3.20 Decision 40 requires ComReg to assess whether the net cost significantly affects eir's' profitability and/or ability to earn a fair rate of return on its capital employed.

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.

- 3.21 In this section, we undertake an assessment of eir's financial position, with a view to establishing the effect of the net cost on eir's profitability and its

ability to earn a fair rate of return on its capital employed, in order to apply Decision 40.

3.22 As part of the consideration of Decision 40, an assessment of eir's financial position relative to its competitors is presented in section 3D.4.

3.23 We assess eir's level of profitability and carry out a profitability analysis based on ROCE, which also reflects the requirements of Decisions 42 (i) and 42 (ii):

- **Decision 42 (i): Changes in profitability, including an understanding of where a USP generates most of its profits over time.** In this context, we analyse eir's return on capital employed relative to a competitive benchmark, to establish the effect of the net cost on the USP's profitability and ability to earn a fair rate of return on its capital employed, as outlined in Decision 40.
- **Decision 42 (ii): Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ('EBITDA') analysis.** In this context, we look at eir's fixed-line business profitability on the basis of EBIT.

3.24 Decisions 42 (i) and 42 (ii) are further considered in section 3D.1.

3.25 For the reasons outlined in section 3A, in carrying out our assessment, we use the fixed-line market as the basis for our assessment (thereby assessing eir's profitability and rate of return at its fixed-line business level),²² and consider information available up to 2013/14.

3B.1 Changes in eir's accounting profits

3.26 In 2013/14, eir reported operating profit (EBIT) of €215m in its fixed-line business, measured as revenues, less operating costs.

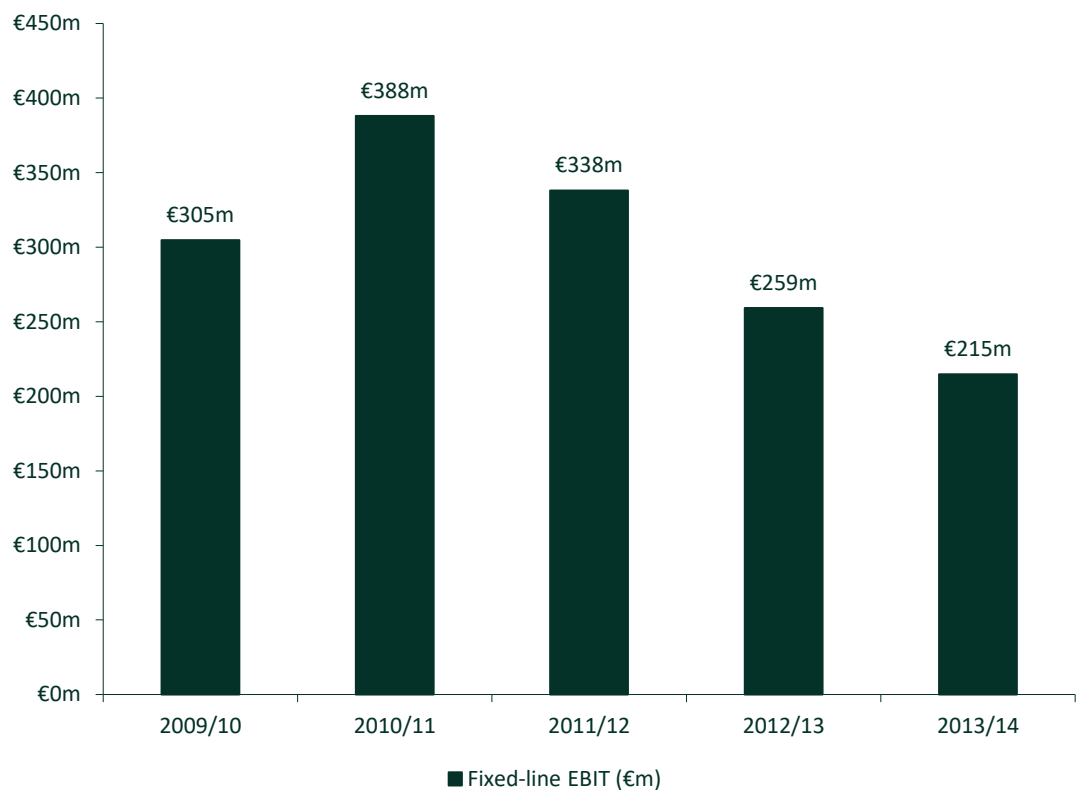
3.27 As noted earlier, Decision 42 (ii) identifies an analysis of the change in EBITDA

²² As highlighted in section 3A.2, there are some categories of products within the fixed-line market that could be potentially removed because they may be dissociable from the USO. However, we have not been able to assess the impact of this due to data availability issues.

as an example of a measure of profits.²³ Another standard financial indicator to measure profitability is EBIT, which is EBITDA net of depreciation and amortisation expense. Our analysis of the USP's financial position focuses on EBIT, rather than EBITDA, as EBIT is a more commonly used measure of operating profit.

3.28 Figure 3.1 shows that between 2012/13 and 2013/14, eir's fixed-line EBIT decreased by around €45m.²⁴

Figure 3.1 eir's fixed-line business EBIT



Note: The 2009/10 data shown here is not directly comparable to the data for 2010/11, 2011/12, 2012/13 and 2013/14 due to changes in the format of the regulatory accounts.

Source: Oxera analysis based on eir's historical-cost regulatory separated accounts for the years ending 30 June 2010, 30 June 2011, 30 June 2012, 30 June 2013 and 30 June 2014.

²³ ComReg (2011), op cit., p. 87.

²⁴ A like-for-like comparison of eir's revenues and profitability in 2010/11, 2011/12, 2012/13 and 2013/14 against those in 2009/10 is not possible, due to changes in the format of the regulatory accounts. In particular, eir's 2009/10 regulatory accounts were disaggregated into Businesses and Activities categories, whilst its historical-cost regulatory accounts for 2010/11 were split into Market Groups and Markets categories. Further information on data constraints is set out in Appendix A2. ComReg (2010), 'Response to consultation document no. 09/75 and final direction and decision: accounting separation and cost accounting review of eircom limited', Reference No. 10/67, Decision No. D08/10, 31 August, para. 1.8–1.10. See also Eircom Limited (2014), op. cit.

3B.2 Changes in profitability

3.29 In accordance with Decisions 40 and 42 (i), Oxera has undertaken analysis of eir's profitability in order to assess whether eir was able to earn a fair rate of return on its capital employed in 2013/14.

3.30 Specifically, we have compared the ROCE measure of eir's financial returns to a competitive benchmark level of return on capital, as described by ComReg's estimate of eir's weighted average cost of capital (WACC). We observe that eir's fixed-line business was profitable over the period of analysis (2013/14).

What is ROCE?

3.31 ROCE is an accounting-based financial returns metric, which captures the relationship between operating profits and capital employed in a business. The ROCE measure is widely used to assess profitability in market investigations and inquiries (e.g. by the European Commission and by the Competition and Markets Authority (CMA) in the UK).

3.32 Oxera's estimate of eir's ROCE is calculated as the ratio of its operating profits (measured by EBIT) and capital employed (measured by assets values based on historical-cost accounting (HCA))²⁵ in its fixed-line business. Oxera can reliably estimate eir's ROCE since eir's level of operating profit and capital employed for its fixed-line business is detailed in its HCA regulatory accounts.

3.33 The ROCE can then be compared to a suitable competitive benchmark, in this case the WACC (see the description below).

What is WACC?

3.34 The WACC is commonly used by regulators and authorities in competition cases as a benchmark measure of the return that investors (i.e. equity

²⁵ These are values as reported by eir in its historical-cost regulatory separated accounts. Decision 1 of D04/11 requires that the HCA methodology be used to calculate the net cost of the USO. Relying on eir's HCA provides a robust and auditable basis for analysis, while ensuring consistency with D04/11.

owners and lenders) can expect from investing in a business.²⁶ The WACC represents an investor's opportunity cost of assuming the risk of investing in a company, or, in other words, the return that an investor would require to finance a company. It therefore provides a natural and economically robust benchmark for assessing the level of a firm's profitability.

- 3.35 In price control decisions, regulators (including ComReg) typically use a WACC estimate in determining the allowed return that investors can earn. In competition cases, authorities typically use a WACC estimate as a benchmark return in order to examine whether excess profits have been, or are being, earned.

The use of ROCE as a profitability measure is appropriate

- 3.36 In the context of the specific application of D04/11, we consider it appropriate to use ROCE to measure eir's profitability. In particular, the citation in Decision 40 of D04/11 requires an assessment of a USP's ability to earn a 'fair rate of return on capital employed', and so is consistent with undertaking a ROCE-based assessment of profitability.
- 3.37 There are many regulatory bodies that utilise ROCE for profitability analysis. The CMA in the UK is one such example, as in its guidelines, ROCE is referred to as its typical approach to profitability analysis, stating that 'ordinarily, where data permits, we use ROCE, as this can be computed annually'.²⁷ This advantage of ROCE is especially pertinent in an annual unfair burden assessment.
- 3.38 There are multiple precedents of ROCE being used in relevant contexts. For example, the CMA noted in its market investigation of local bus services in the UK, that where an industry is mature, operator's businesses are stable in

²⁶ For example, BEREC, in its response to the European Commission, stated that: 'WACC is generally recognised as the best way to evaluate the allowed return on the capital invested in network infrastructure. It is relevant for regulatory purposes as it is one of the main elements in defining cost-oriented prices, carrying out price/margin squeeze tests, including ERT and implementing the regulatory accounting obligations.' BEREC (2018), 'BEREC Position Paper Input to the Commission's WACC consultation 2018', 4 October, BoR (18) 167.

²⁷ Competition Commission (2013), 'Guidelines for market investigations: Their role, procedures assessment and remedies. CC3 (Revised). Appendix Q: Profitability Methodology', April, p. Q7.

nature and there are difficulties with regard to data, ROCE can be the most 'practical and suitable' profitability measure.²⁸ We also note that in an Office of Communication (Ofcom) review of mobile network operators (MNOs) in the UK, the financial returns of MNOs were assessed using ROCE relative to a cost of capital set by Ofcom.²⁹ Finally, in a Portuguese state aid case the European Commission considered ROCE relative to WACC as the test of an airline's ability to 'generate a sufficient return from its operations'.³⁰

3.39 A profitability analysis based on the internal rate of return (IRR) could, in principle, provide a conceptually correct alternative. However, for the purposes of the application of Decision 40, we consider that it is appropriate to measure profitability using ROCE, rather than IRR-based analysis, for the following reasons.

- IRR-based profitability analysis would ideally require the use of economically meaningful asset values in the analysis, with reference to the value-to-the-owner rule (whereby the assets are valued on the basis of the current cost rather than the historical cost).³¹ However, eir reports the historical-cost values of its assets only in its regulatory separated accounts—information on the current cost of its assets is not available. Furthermore, even if that information were available, historical values need to be used to ensure internal consistency with the requirements of D04/11.
- The IRR provides a lifetime measure of profitability (i.e. over the lifetime of the assets, or the investment horizon), which is not appropriate for an

²⁸ Competition Commission (2011), 'Local bus services market investigation', 20 December, p. 10-3.

²⁹ Ofcom (2022), 'Ofcom's future approach to mobile markets and spectrum, Conclusions paper', 6 December, p. 21.

³⁰ European Commission (2021), 'Commission Decision (EU) 2022/763 on the State aid SA.60165-2021/C (ex 2021/N) which Portugal is planning to implement for TAP SGPS', 21 December, para. 229.

³¹ The value-to-the-owner rule would value the assets according to their current cost. Specifically, the rule values assets as either the modern equivalent asset (MEA) (the lowest cost of purchasing assets today that can deliver the same set of goods and services as the existing assets), the present value (the expected future cash flows discounted at the asset's cost of capital) or the net realisable value (the price the asset would fetch if it were sold today). The MEA value could be proxied by the replacement cost of the assets. See Oxera (2003), 'Assessing profitability in competition policy analysis', Office of Fair Trading, Economic Discussion Paper 6, July, para. 4.12.

annual unfair burden assessment. In the current context of assessing eir's ability to bear the net cost of the USO, within an annual funding cycle, it is appropriate to focus on the profitability analysis for the specific year of the USO funding application. This approach aligns the focal point of the profitability analysis with the USO net cost calculation, which is assessed with reference to the USP's financial year.

- IRR-based profitability analysis requires cash flow data, which is not presented in eir's regulatory accounts and would therefore require further estimations and approximations.

The use of the WACC as the benchmark to assess profitability

- 3.40 Our view is that it is appropriate to use the ex-ante regulated WACC for the purpose of the profitability analysis required by Decision 40, as the WACC was estimated specifically for eir using assumptions of a notional efficient regulatory network in line with good regulatory practice. In ComReg's assessment, this was an appropriate estimate of eir's cost of capital.
- 3.41 The WACC decision in 2008 provides an adequate risk-adjusted return for eir's regulated fixed-line business, including USO activities, which is relevant for the period under consideration as it was constructed to be a forward-looking estimate and ComReg did not (re)set an (annual) regulated WACC in 2013/14—therefore, the 2008 decision was also applied in 2013/14.³² For the period of 2008 to 2014, ComReg determined that eir's regulated WACC was 10.21%, taken from a range of 7.77–11.08%.^{33,34,35} A revised regulated WACC was applicable in the financial year FY 2014/15, following a ComReg decision on 18 December 2014. In this decision, it was determined that the regulated

³² ComReg (2008), 'Response to Consultation and Decision Notice, Eircom's Cost of Capital', Reference No. 08/35, Decision No. D01/08, 22 May.

³³ ComReg (2014), 'Cost of Capital, Mobile Telecommunications, Fixed Line telecommunications, Broadcasting (Market A and Market B)', Reference No. 14/136, Decision No. D15/14, 18 December, p. 119.

³⁴ The 2008 WACC decision was not appealed by eir, and it incorporated evidence from extensive stakeholder engagement and submissions.

³⁵ The use of a range in calculating a WACC is common practice.

WACC would be 8.18%.³⁶ This value is lower than the previous regulated WACC of 10.21%. The proximity of the 2013/14 financial year to the downwards revision of the regulated WACC in the 2014 decision indicates that the WACC of 10.21% in 2013/14 may be a conservative measure of the adequate risk-adjusted return.

3.42 As the 2008 WACC was calculated specifically for eir, its use in analysing eir's profitability is consistent with the requirements of the Base judgment, as it reflects eir's individual characteristics.³⁷

3.43 In our view, a ROCE-based profitability analysis is a key indicator of eir's ability to earn a fair rate of return on its capital employed. As long as the actual returns earned by eir (i.e. its return on capital) are in excess of the WACC (i.e. the cost of capital), this suggests that eir is earning sufficient returns that an investor would require in order to invest.

Profitability analysis

3.44 Figure 3.2 compares eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). It shows that the ROCE of eir's fixed-line business in 2013/14 was 12.59%, exceeding the 2008 WACC of 10.21% by 2.38 percentage points. While this is a decrease in the ROCE relative to the year 2012/13, it is important to further contextualise eir's financial position by noting that:

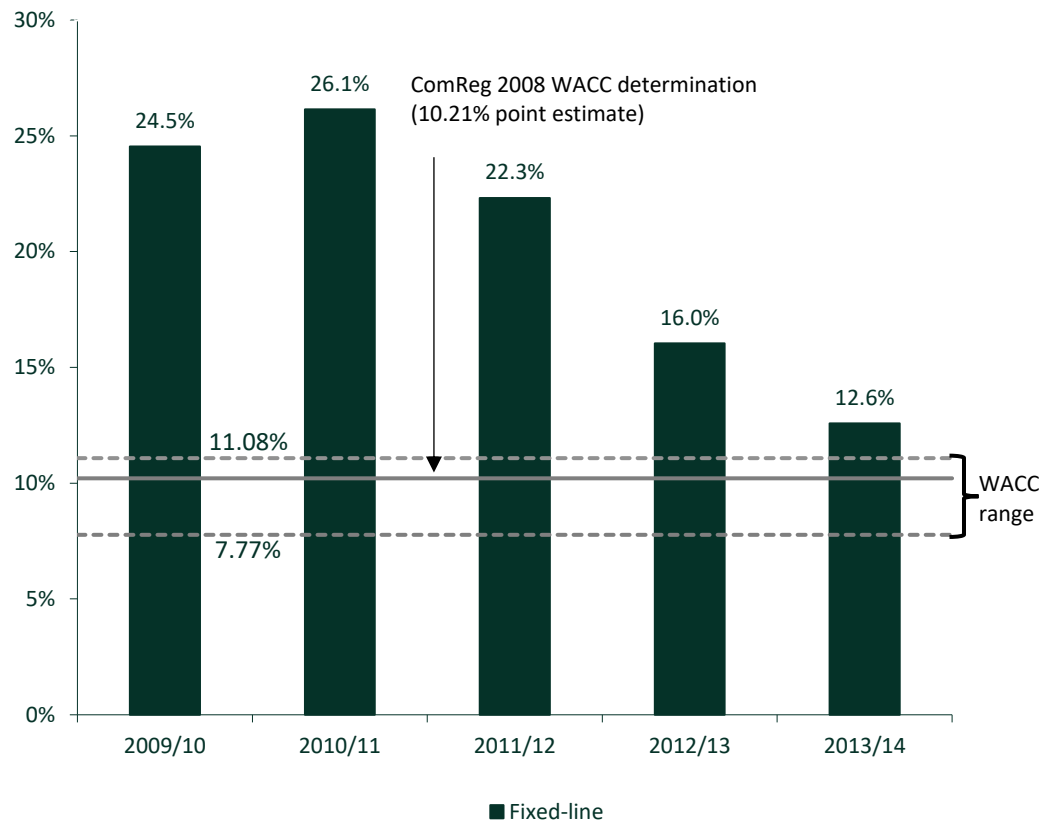
- the ROCE for its fixed-line business in 2013/14 exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg in 2008, by 1.51 percentage points; and
- for there to be no returns above the WACC, the net cost of the USO would have to have been around 5.3 times higher or, alternatively, the

³⁶ ComReg (2014), 'Cost of Capital, Mobile Telecommunications, Fixed Line telecommunications, Broadcasting (Market A and Market B)', Reference No. 14/136, Decision No. D15/14, 18 December, p. 80.

³⁷ Case C-389/08, Base NV and Others vs Ministerraad, Judgment of the Court of Justice (Fourth Chamber) of 6 October 2010.

absolute level of operating profit (EBIT) for its fixed-line business would have to have been around 19% lower for the application period, 2013/14.

Figure 3.2 eir's fixed-line business ROCE benchmarked against the 2008 WACC



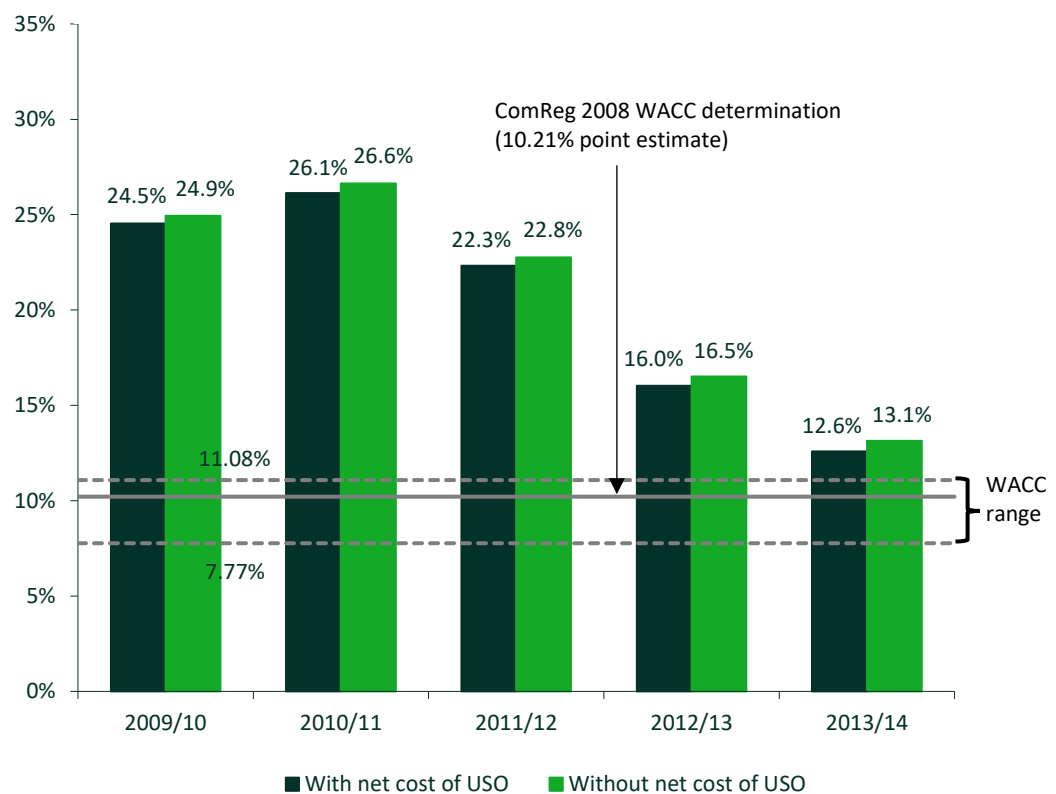
Note: The 2009/10 data shown here is not directly comparable to the data for 2010/11, 2011/12, 2012/13 and 2013/14 due to changes in the format of the regulatory accounts.

Source: Oxera analysis based on ComReg's 2008 WACC determinations (ComReg (2008), op. cit.) and eir's historical-cost regulatory separated accounts.

3.45 Figure 3.3 shows the impact of the net cost of the USO on the profitability of eir's fixed-line business. It shows both the ROCE with the net cost of USO and the counterfactual scenario of the ROCE without the net cost of USO. In the counterfactual scenario, eir's ROCE would have been approximately 0.5 percentage points higher in 2011/12, 2012/13 and 2013/14. (Note: this 0.5 percentage points estimate can also be interpreted as the net cost of the USO as a proportion of mean capital employed.) This means that the profitability of eir's fixed-line business was not materially undermined by the net cost of the USO. We note that, conceptually, the capital employed in the counterfactual could change, although there is no evidence available to

adjust this. Given the large proportion of eir's assets which are used to support products and sub-products that are not dissociable from the USO, we consider our analysis to be a good proxy of the impact of the net cost of the USO on eir's profitability.

Figure 3.3 eir's fixed-line business ROCE including and excluding the net cost of the USO



Note: The 2009/10 data shown here is not directly comparable to the data for 2010/11, 2011/12, 2012/13 and 2013/14 due to changes in the format of the regulatory accounts.

Source: Oxera analysis based on ComReg's 2008 WACC determinations (ComReg (2008), op. cit.) and eir's historical-cost regulatory separated accounts.

- 3.46 The ROCE is a measure of accounting profitability for a given period of time, typically annual. As previously demonstrated in Figure 3.2, the analysis indicates that eir's fixed-line business achieved profits exceeding the 2008 WACC in 2013/14. For eir to achieve returns in line with the 2008 WACC, the net cost would have to be around 5.3 times higher; or the absolute level of operating profit (measured as EBIT) for the fixed-line business would have to be 19% lower.

3B.3 Summary of the application of Decision 40

- 3.47 Overall we consider that, for the year 2013/14, 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 2008 WACC, including being in excess of the upper end of the WACC range estimated by ComReg for the relevant period.

3C Application of Decision 41 (revised)

- 3.48 Decision 41 requires ComReg to assess whether or not such a net cost materially impacts eir's ability to compete on equal terms with competitors going forward.

Decision 41 (revised): 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.

- 3.49 To assess this, we present operational metrics for 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14, to provide an indication of eir's operational health, as a proxy to assess eir's ability to compete going forward. This is set out in section 3C.1.
- 3.50 In the circumstances, and in particular given the long time between the year being assessed and when the assessment is taking place, we have been instructed by ComReg to check the results of the analysis conducted in the context of Decision 41, set out in section 3C.1, with the results of the same analysis using the actual data available to date (up until the latest full financial year of 2022/23). This is set out in section 3C.2.
- 3.51 A comparison of eir's performance relative to that of its competitors is set out in section 3D.4, as part of the assessment of Decision 42.

3C.1 An assessment of eir's operational performance, 2009/10–2013/14

3.52 To evaluate eir's ability to compete going forward, we have carried out an assessment of whether there is any indication that the USO net cost affected eir's economic and financial situation during 2009/10–2013/14.

3.53 We present financial metrics in relation to eir's operational health in 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14, as a proxy to assess its ability to compete going forward. This is set out in Table 3.2.

Table 3.2 eir's operational performance in 2009/10–2013/14

Indicator	2009/10 level	2010/11 level	2011/12 level	2012/13 level	2013/14 level
Gearing	41%	170%	122%	132%	126%
Dividend	€155m	€0m	€0m	€0m	€0m
CAPEX	€153m	€109m	€176m	€247m	€261m
Credit rating	N/A	N/A	B- / Caa1 / B	B- / Caa1 / B	B- / B3 / B
Cash ratio (liquidity)	0.35	0.13	0.56	0.63	0.36
Quick ratio (liquidity)	0.75	0.21	0.94	1.08	0.75
Current ratio (liquidity)	0.78	0.21	1.01	1.14	0.80

Note: Metrics are presented at the group level, with the exception of CAPEX which is presented at the fixed-line level. Gearing is calculated as net debt / (net debt + total equity), where net debt is total liabilities minus cash and cash equivalents. For example, in 2013/14, eir's net debt was €3,092m and its equity was -€647m, hence the calculation €3,092m / (€3,092m – €647m) shows that its gearing was 126%. The cash ratio is a liquidity measure that shows a company's ability to cover its short-term obligations using only cash and cash equivalents. The quick liquidity ratio determines a debtor's capacity to pay off current debt obligations without needing to raise external capital. The current ratio is a liquidity ratio that measures a company's ability to pay short-term obligations or those due within one year. For the current ratio, a ratio below 1 indicates that the total current assets are insufficient to cover short-term liabilities. In 2013/14, eir had a B- rating from Fitch, a B3 rating from Moody's and a B rating from S&P. This put eir in the 'High credit risk' category according to all three credit ratings scales.

Source: eircom Limited (2011), 'Financial Statements'; eircom Holdings (Ireland) Limited (2013), 'Annual Report for Bondholders Year Ended June 30, 2013', 26 September; eircom Holdings (Ireland) Limited (2015), 'Annual Report for Bondholders Year Ended June 30, 2015', 27 August; Credit ratings of Fitch, S&P and Moody's.

3.54 Table 3.2 shows that eir in 2013/14:

- remained highly indebted with a gearing ratio of 126%. This shows that eir's debt liabilities were greater than its total value of equity;

- had slightly decreased its leverage relative to 2012/13, at which point the gearing ratio was 6 percentage points lower;
- was unable to pay dividends in 2013/14 (similar to 2010/11, 2011/12 and 2012/13);
- was able to undertake more CAPEX investment than in the four previous years; and
- had deteriorated its liquidity coverage ratios. Cash, quick and current ratios are used to assess a firm's ability to repay its short-term debts. A value of less than one for the current ratio indicates that the total current assets are insufficient to cover short-term liabilities.

3.55 We also note that, in 2014, eir's credit rating put it in the 'speculative grade' according to Fitch, Moody's and S&P. This indicates that eir's debt had significant credit risk. This was also the case in 2012 and 2013. There was a one notch increase in eir's credit rating from Moody's, according to which eir improved from a Caa1 rating in 2012/13 to a B3 rating in 2013/14.

3.56 We observe that, despite still facing financial challenges in 2013/14, eir recovered somewhat relative to 2012/13, increasing its CAPEX but not its gearing ratio. The gearing ratio in 2013/14 is slightly lower than in 2012/13, but higher than in 2011/12. Based on the analysis above, the evidence does not show a causal link between the financial challenges experienced by eir and the USO net cost.

3C.2 An assessment of eir's operational performance in 2009/10–2022/23

3.57 As mentioned at paragraph 3.50, we have been instructed by ComReg to check the results of the analysis conducted in the context of Decision 41, with reference to a longer period of analysis, i.e. using the data on operational performance available to date (up until the latest full financial year of 2022/23). This is presented in Table 3.3 below.

Table 3.3 eir's operational performance, 2009/10–2022/23

Indicator	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
Gearing	41%	170%	122%	132%	126%	130%	133%	140%	134%	138%	125%	133%	121%	134%
Dividend	€155m	€0	€0	€0	€0m	€1m	€1m	€1m	€1m	€400m	€80m	€450m	€800m	€237m
CAPEX	€153m	€109m	€176m	€247m	€261m	€235m	€246m	€249m	€280m	€239m	€230m	€339m	€238m	€256m
Cash ratio	0.35	0.13	0.56	0.63	0.36	0.37	0.30	0.27	0.37	0.41	0.44	0.48	0.83	0.22
Quick ratio	0.75	0.21	0.94	1.08	0.75	0.82	0.75	0.65	0.75	0.77	0.73	0.79	1.16	0.45
Current ratio	0.78	0.21	1.01	1.14	0.80	0.86	0.79	0.72	0.78	0.88	0.95	0.90	1.35	0.54

Note: Metrics are presented at the group level, with the exception of CAPEX which is presented at the fixed-line level. Gearing is calculated as net debt / (net debt + total equity), where net debt is total liabilities minus cash and cash equivalents. For example, in 2013/14, eir's net debt was €3,092m and its equity was -€647m, hence the calculation €3,092m / (€3,092m – €647m) shows that its gearing was 126%. The cash ratio is a liquidity measure that shows a company's ability to cover its short-term obligations using only cash and cash equivalents. The quick liquidity ratio determines a debtor's capacity to pay off current debt obligations without needing to raise external capital. The current ratio is a liquidity ratio that measures a company's ability to pay short-term obligations or those due within one year. For the current ratio, a ratio below 1 indicates that the total current assets are insufficient to cover short-term liabilities.

Source: eircom Limited (2011), 'Financial Statements'; Eircom Holdings (Ireland) Limited, annual reports for bondholders (years ending 2013 to 2023).

- 3.58 Our review was based on an assessment of primary sources including eir's annual reports, statutory and regulatory accounts, and bond prospectuses, as well as independent secondary sources such as reports by credit rating agencies (Moody's, S&P and Fitch), equity analysts and news outlets.
- 3.59 There are specific data availability constraints relating to the period before 2013/14. Specifically, we note that credit rating agencies and equity analysts cover eir from 2012 onwards, after Moceir Holding (Ireland) Ltd. (Eircom) was created following the debt restructuring of ERC Ireland Preferred Equity Limited and related companies in June 2012. Appendix A2 sets out data constraints.
- 3.60 While looking over the time horizon of 2009/10 to 2022/23, we observe that eir increased its capital investment, and improved its financial health with a gradual improvement of its creditworthiness.³⁸ Therefore, the following key findings are supported.
- 1 The USO net cost has not prevented eir from undertaking necessary investments.
 - 2 There is no available evidence of a causal link between the financial challenges experienced by eir, that have been observed over time, and the USO net cost.
 - 3 The USO net cost has not impeded eir from making improvements to its financial health over time.

The USO net cost has not prevented eir from undertaking necessary investments

- 3.61 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 judgment³⁹ requires that quality of equipment should be considered as one of the characteristics to be taken into account

³⁸ For example, S&P Global Ratings (2017), 'Irish Telecoms Group Eir Upgraded To 'B+' On Continued Improvement In Credit Quality; Outlook Stable', pp. 3–4.

³⁹ Case C-389/08, Base NV and Others vs Ministerraad, Judgment of the Court of Justice (Fourth Chamber) of 6 October 2010.

when considering if the USO net cost is excessive in view of the USP's ability to bear it.

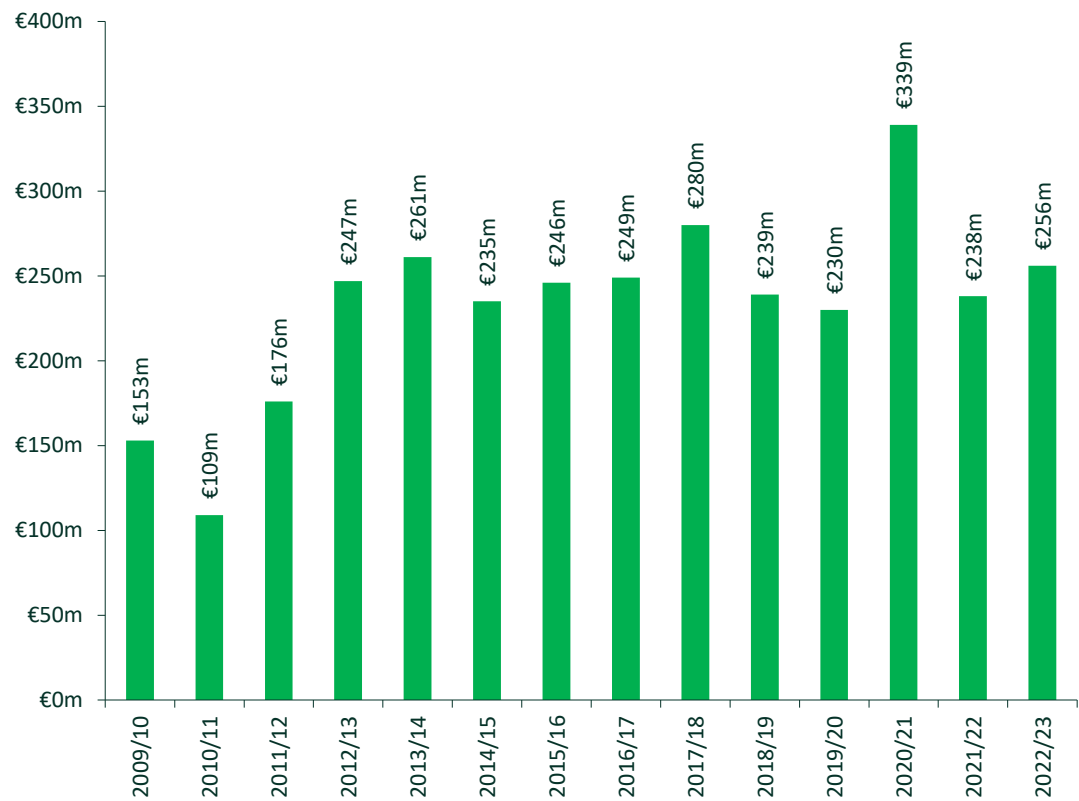


[...] It cannot be ruled out that the burden which the net cost of universal service obligations represents for such a provider prevents, or makes more difficult or more complicated, the **financing of investments in new technologies or related markets**, investments which its competitors might possibly be in a position to make, and which are therefore likely to procure significant competitive advantages for those competitors.

CJEU judgment, para 49 [emphasis added]

- 3.62 We observe that eir launched a number of investment programmes over the extended period under consideration. Figure 3.4 shows eir's level of CAPEX in its fixed-line business for the period FY2009/10–2022/23.
- 3.63 It is evident that eir increased its CAPEX from €109m in FY2010/11 to between €230m (minimum) and €339m (maximum) during the period of FY2012/13–2022/23. The total CAPEX in eir's fixed-line business during the entire period FY2009/10–2022/23 sums to €3.3bn.⁴⁰

⁴⁰ eircom Limited (2011), 'Financial Statements', p 41; Eircom Holdings (Ireland) Limited (2013), 'Annual Report for Bondholders Year Ended June 30, 2013', p156; Eircom Holdings (Ireland) Limited (2015), 'Annual Report for Bondholders Year Ended June 30, 2015', p. 164; Eircom Holdings (Ireland) Limited (2017), 'Annual Report for Bondholders Year Ended June 30, 2017', p. 167; Eircom Holdings (Ireland) Limited (2019), 'Annual Report for Bondholders Year Ended June 30, 2019', p. 107; Eircom Holdings (Ireland) Limited (2022), 'Annual Report for Bondholders for the Financial Period ended 31 December 2021', p. 110; Eircom Holdings (Ireland) Limited (2023), 'Annual Report for Bondholders for the Financial Period ended 31 December 2022', p. 60; Eircom Holdings (Ireland) Limited (2024), 'Annual Report for Bondholders for the Financial Period ended 31 December 2023', p. 57.

Figure 3.4 eir's CAPEX in its fixed-line business

Note: eir's total CAPEX of the fixed-line business is the sum of CAPEX incurred for intangible assets and property, plant and equipment.

Source: eircom Limited (2011), 'Financial Statements', p. 41; Eircom Holdings (Ireland) Limited, annual reports for bondholders (years ending 2013 to 2023).

- 3.64 This evidence indicates that, despite the requirement to provide the USO, eir has been able to increase investment specifically in its fixed-line business and overall in areas such as software, bandwidth, licences and infrastructure. eir itself stated that it financed its CAPEX from cash on hand and cash flow from operations.⁴¹ eir's ability to use internal financing to fund large capital investments over the extended period under consideration is also evidenced by its expectations both of funding, and of being in a position to fund, CAPEX programmes rolling out, including the Next Generation Access Network (NGA network) and enhancing current services, IT capabilities and TV through 'cash on hand and cash flow from operations'.⁴²

⁴¹ eircom Holdings (Ireland) Limited (2014), 'Annual Report for Bondholders Year Ended June 30, 2014', p. 15.

⁴² Ibid.

- 3.65 In addition, a review of secondary sources suggests that eir has successfully carried out necessary investment since 2012, which has been well regarded by rating agencies.⁴³ Overall, the significant investment programme since 2012, and its resulting positive consequences, are evident in the commentary of several independent sources. Besides Fitch's 2012 statement that unconstrained competitors can invest in the most profitable parts of the market,⁴⁴ the secondary sources do not make reference to the USO as a factor affecting eir's investment plans to compete in the market and its financial position.
- 3.66 As part of the ComReg information requirements dated 12 March 2024, specified⁴⁵ competitors of eir were asked to provide data on property, plant and equipment (PPE) and intangible asset CAPEX as well as depreciation and amortisation expenses for their fixed-line businesses. Such information would allow for a comparison of eir's ability to invest relative to competitors and would act as a proxy for quality of equipment at the relevant market level. However, operators were unable to provide this data for their fixed-line businesses and so a direct comparison of investments between operators in the fixed-line market was not possible. In the absence of this information, we have undertaken the following analysis for the wider telecommunications market, based on the Irish group-level, despite this not being the relevant market for the provision of the USO. While remaining conscious of the limitations of this analysis, a comparison of CAPEX relative to revenues, as well as CAPEX relative to depreciation and amortisation, at the Irish group-level over the period 2010/11–2015/16 is presented in Figure 3.5 for eir, UPC,

⁴³ For example, Moody's (2012) noted the potential for eir to strengthen its competitive position over time and improve its long-term sustainability through its accelerated investment plan. Equity analysis reported that eir responded to its declining market shares by launching a €400m CAPEX programme over five years to upgrade its fibre network. S&P Global Ratings (2017) noted that 'eir's investments in its fibre network support its position in the fixed broadband market, and should assist further growth, offsetting the declining legacy voice revenues. Moody's (2012), 'Rating Action: Moody's assigns Caa1 rating to Eircom's new holding company; stable outlook', p. 1; S&P Global Ratings (2017), 'Irish Telecoms Group Eir Upgraded To 'B+' On Continued Improvement In Credit Quality; Outlook Stable', pp. 3–4.

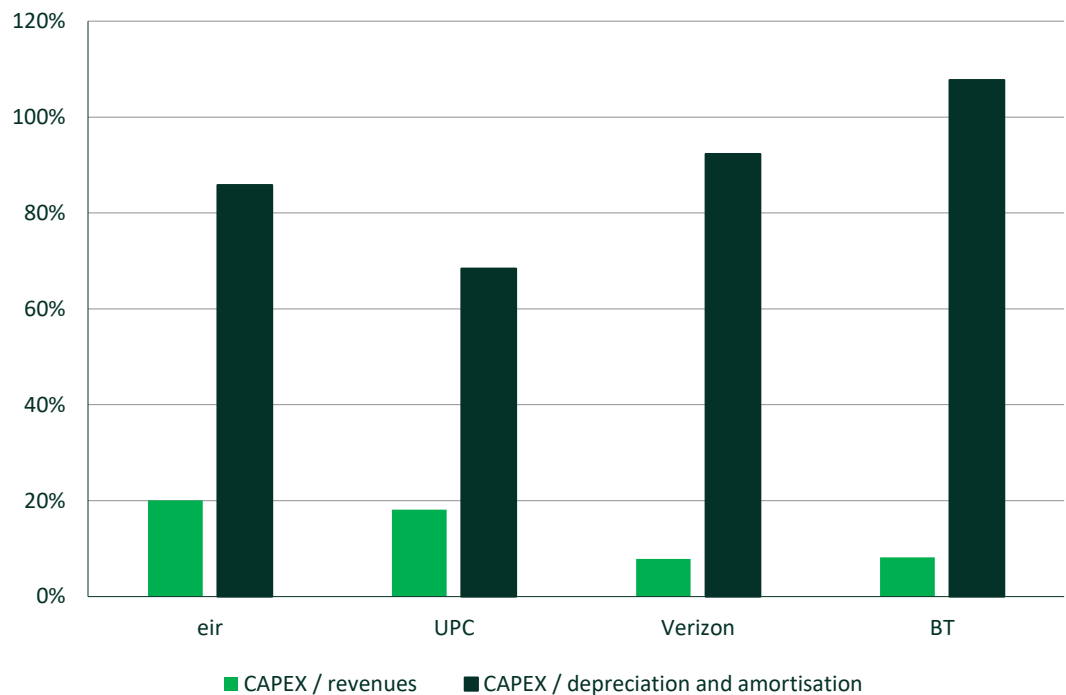
⁴⁴ Fitch (2012), 'Fitch Assigns Eircom 'B-' IDR; Outlook Negative'.

⁴⁵ Information requirements were obtained from eir, Digiweb, Virgin (UPC), BT, Magnet, Vodafone and Verizon.

Verizon and BT.⁴⁶

- 3.67 Analysis of Irish group-level data for this period shows that at 20%, eir's CAPEX / revenues ratio is greater than that of UPC, Verizon and BT, whilst, at 86% its CAPEX / depreciation and amortisation ratio is significantly higher than UPC's (68%) but lower than that of Verizon (92%) and BT (108%). Therefore, with the exception of BT, all operators had a CAPEX / depreciation and amortisation ratio below 100%, evidencing that for each of them their asset base was shrinking over the assessed period. This provides indicative evidence that eir was able to compete on equal terms with its competitors. However, because data for all operators is at the Irish group-level, the analysis is not directly applicable to the relevant market scope (since it includes information beyond the fixed-line market). Furthermore, due to the size of eir's fixed network and the comparison of investment levels with other operators—which at the time operated primarily as resellers and were thereby presumably less capital-intensive in this business segment—the analysis can only be treated as indicative.

⁴⁶ In response to the ComReg information requirements dated 12 March 2024, [X] were the only firms to provide the necessary information to carry out this analysis.

Figure 3.5 Irish group-level CAPEX ratios, 2010/11–2015/16

Note: CAPEX is the sum of capital expenditure in tangible and intangible assets. Revenue is total sales. Depreciation and amortisation is the sum of depreciation of tangible assets and amortisation of intangible assets.

Source: Financial statements of eircom Limited and UPC Communications Ireland Limited. Information requirement responses from Virgin (formerly UPC), Verizon and BT.

- 3.68 In summary, the assessment undertaken in this section, and review of independent industry commentary, show that there is no evidence to suggest that the USO net cost impeded eir's ability to carry out significant investments, and indicates that it was able to continue to compete in the market going forward.

There is no available evidence of a causal link between the financial challenges experienced by eir, that have been observed over time, and the USO net cost

- 3.69 While it is apparent that eir faced financial challenges over time, consistent with the results presented in section 3C.1, and evidenced by it entering into an examinership in March 2012,⁴⁷ we observe that there is no available

⁴⁷ An examiner was appointed to eir on 30 March 2012. Examinership is a mechanism providing for the rescue and return to health of an ailing, but potentially viable company. The High Court (2012), 'In the Matter of Eircom Ltd & Ors v Companies Act', IEHC 158, para. 20.

evidence of a causal link between the financial challenges experienced by eir and the USO net cost.

3.70 Indeed, while credit rating agencies list a number of reasons for eir's financial performance, constraints arising from the USO are mentioned only once over 2012–23 (as cited previously): i.e. 'not being subject to the regulatory imposed constraints of universal service, UPC has been able to focus investment and commercial activity in the most obviously profitable parts of the market'.⁴⁸

3.71 Instead, credit rating agencies give several other reasons for eir's financial challenges. The key reasons repeatedly highlighted include:

- eir's level of indebtedness (a highly leveraged capital structure with a slow pace of deleveraging);⁴⁹
- high CAPEX and restructuring costs having constrained free cash-flow generation;^{50,51}
- negative revenue and operating profit trends in the years up to FY2013/14 (albeit we note that the effect of the net cost of the USO would have been incorporated within the headline level of operational profits);⁵² and
- a challenging operating environment in light of an increasingly competitive market and eir losing retail fixed-line market shares.⁵³

3.72 There is evidence to suggest that management decisions taken by eir have affected its financial situation and resulted in challenges for the company. One such challenge is its high level of indebtedness, in line with the first bullet above. This is highlighted in the High Court's judgment on eir's

⁴⁸ Fitch (2012), 'Fitch Assigns Eircom 'B-' IDR; Outlook Negative', p. 2.

⁴⁹ Moody's (2013), 'Rating Action: Moody's upgrades Eircom's rating to B3; stable outlook', p. 2.

⁵⁰ Free cash-flow generation is a measure of the cash that a company generates after accounting for cash outflows to support operations and maintain its capital assets.

⁵¹ Moody's (2017), 'Rating Action: Moody's upgrades Eir to B1; stable outlook', p. 1; Fitch (2019), 'Fitch Affirms Eir's IDR at 'B+' /Stable, Downgrades New Senior Secured Debt to 'BB-(EXP)', pp. 2–3.

⁵² Oxera analysis based on eir's annual reports.

⁵³ Moody's (2012), 'Rating Action: Moody's assigns definitive B3 ratings to Eircom's amended Term Loan; stable outlook', p. 1; Fitch (2013), 'Fitch Affirms Eircom at 'B-'; Outlook Negative', p. 1.

examinership in 2012, where eir's high debt was flagged as a significant issue of concern resulting in its insolvency. As part of its assessment, the High Court attributed eir's indebtedness to the multiple changes in ownership since eir's privatisation.⁵⁴

- 3.73 eir acknowledged its level of indebtedness as a concern, citing in each annual report for bondholders between 2013 and 2023 that its 'substantial leverage and debt service obligations' could adversely affect the business, constituting a key risk related to its financial profile.⁵⁵
- 3.74 eir's liquidity position was cited as 'adequate' by Moody's in 2014,⁵⁶ averaging €276m in 'cash and cash equivalents' over FY2009/10–FY2022/23.⁵⁷ Despite this, high use of short-term liabilities in the form of 'trade payables', 'accruals' and 'deferred income' contributed to weak liquidity ratios for the firm of 0.41, 0.76, and 0.84, for average cash, quick and current ratios, respectively, over the stated period (i.e. FY2009/10 to FY2022/23; see Table 3.3).⁵⁸ Each of these is a metric used to assess a firm's ability to repay its short-term debts, represented by the value of current liabilities. For the current ratio, a value of 1.0 indicates that the current assets are sufficient to cover short-term liabilities. Hence, over the assessed period the analysis suggests that eir has not had a healthy level of liquidity.
- 3.75 Dividend payout is another indicator of financial health, as a company uses its profits to make dividend payments to its equity shareholders. Figure 3.6 below depicts the annual dividends paid to equity shareholders by eir from FY2009/10–2022/23. From FY2010/11–2013/14 eir paid no dividends, and then from FY2014/15–2017/18 just €1m was paid out each year, which suggests it was experiencing difficulties during these years. However, there is no available evidence of a causal link between the financial challenges

⁵⁴ The High Court (2012), 'In the Matter of Eircom Ltd & Ors v Companies Act', IEHC 158, para 4.

⁵⁵ Eircom Holdings (Ireland) Limited, annual reports for bondholders (years ending 2013 to 2023), op. cit.

⁵⁶ Moody's (2014), 'Moody's upgrades eircom's rating to B3; stable outlook', 11 February.

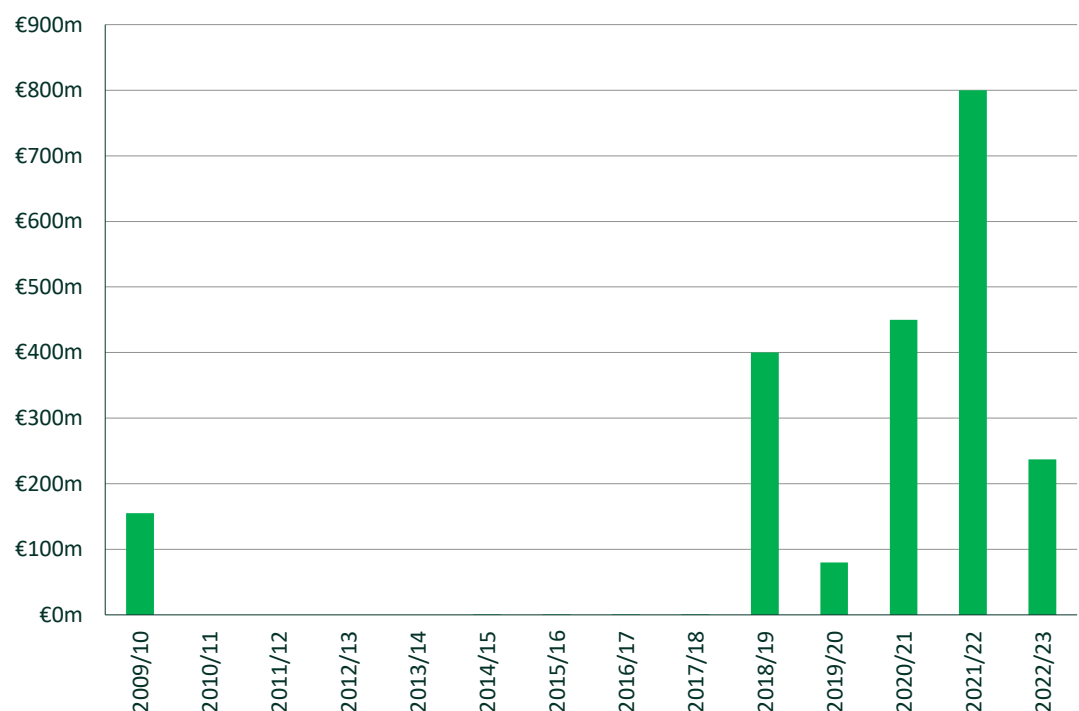
⁵⁷ Oxera analysis based on eir's annual reports for FY2009/10 to FY2022/23.

⁵⁸ Oxera analysis based on eir's annual reports for FY2009/10 to FY2022/23. Cash ratio is calculated as cash and cash equivalents / current liabilities; current ratio is calculated as current assets / current liabilities; and quick ratio is calculated as (cash and cash equivalents + marketable securities + receivables) / current liabilities.

experienced by eir, and the net cost of the USO.

- 3.76 We note that following the acquisition of a majority stake in eir by NJJ Telecom Europe in April 2018, eir's dividend payout increased.⁵⁹ Dividends for the following five financial years ranged from €80m in 2019/20 to €800m in 2021/22. Notwithstanding, eir's position as the USP during these more recent years, the company was able to pay substantial amounts to its shareholders.

Figure 3.6 eir's dividends paid to equity shareholders, 2009/10–2022/23



Note: 2021/22 represents an extended period (July 2021 until December 2022) as eir changed its financial year reporting from end of June to end of December.

Source: eir's financial statements for 2011–23.

- 3.77 Based on this analysis, our view is that eir has indeed faced financial challenges, such as high indebtedness, over the assessed time period, including 2013/14. However, the evidence reviewed indicates that these challenges were not driven by the net cost of the USO.

⁵⁹ eir (2018), 'NJJ-led telecoms consortium completes transaction to acquire majority stake in eir', <https://www.eir.ie/pressroom/eir-MAR-announcement-eircom-Finance-DAC-closing-of-acquisition-and-new-Board-of-Directors-09.04.2018/>, accessed 31 October 2023.

The USO net cost has not impeded eir from making improvements to its financial health over time

- 3.78 The available evidence shows that aspects of eir's financial position have been steadily improving over time, irrespective of its USO status. Such evidence has been found in credit rating agency reports, bond issuances and eir's own annual reports. Indeed, the granting of eir's examinership itself in 2012 required an expectation by the High Court for there to be a reasonable prospect of the company's recovery.⁶⁰
- 3.79 For example, the credit rating agencies indicate improved financial strength, as reflected in credit rating upgrades for eir during 2012–23 (Moody's three notches, Fitch two notches, S&P one notch).⁶¹ This is supported by a lower spread-to-benchmark for eir's bond issuances in 2019 (2.45–3.80%) than that of the bond issued in 2013 (8.54%).⁶² However, it is important to note that all three agencies have continued to consider eir below investment grade over the period of analysis, meaning that its bonds have presented a greater degree of risk than the safest corporate debt investments.⁶³

3C.3 Summary of the application of Decision 41

- 3.80 The evidence we have reviewed, based on information available from 2009/10–2013/14, indicates that there is no causal link between the financial challenges faced by eir and the net cost of the USO in 2013/14.
- 3.81 **The evidence we have reviewed indicates that the net cost of the USO for the year 2013/14 under application has not materially impacted eir's ability to compete on equal terms with competitors going forward.** We also find this conclusion to hold when eir's operational metrics are assessed up until

⁶⁰ The High Court (2012), 'In the Matter of Eircom Ltd & Ors v Companies Act', IEHC 158, para 14.

⁶¹ Fitch (2012), 'Fitch Assigns Eircom 'B-' IDR; Outlook Negative'; Fitch (2019), 'Fitch Affirms Eir's IDR at 'B+/Stable', Rates New Senior Secured Debt 'BB(EXP)'; Moody's (2012), 'Moody's assigns Caa1 rating to Eircom's new holding company; stable outlook'; Moody's (2019), 'Moody's assigns B1 ratings to Eir's new senior secured debt; stable outlook'; S&P Global Ratings (2012), 'Irish Telecommunications Company Moceir Holding (Ireland) (Eircom) Assigned 'B' Rating; Outlook Stable'; S&P Global Ratings (2019), 'Irish Telecom Group Eircom Rating Affirmed At 'B+' On Proposed Dividend Recapitalization; Outlook Stable'.

⁶² Oxera analysis based on data accessed via Dealogic.

⁶³ S&P Global Ratings (2022), 'Guide to Credit Rating Essentials', p. 9.

2022/23. As part of our analysis, we are of the view that there is no available evidence of a causal link between the financial challenges faced by eir and the net cost of the USO. Similarly, the evidence indicates that the requirement to provide the USO over the period has not impeded eir's ability to invest. The strengthening of its performance in some of the assessed areas (i.e. carrying out necessary investment, reducing leverage with debt refinancing on cheaper terms, and improvements to its credit rating) with relatively limited reference to the USO across the reviewed sources suggests that the net cost of the USO did not have a material impact on eir's overall economic, operational and financial performance.

3D Application of Decision 42

- 3.82 Decision 42 requires ComReg to use specific criteria, statically and dynamically, to assess whether the net cost burden is actually unfair.

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 costs, if any, over time
 - (iv) estimates of average level of cross-subsidies 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
-

3D.1 Changes in profitability, accounting profits and related financial measures

3.83 Decision 42 (i) and (ii) require the consideration of the following aspects to determine whether the net cost of the USO is unfair:

- changes in profitability (including an understanding of where a USP generates most of its profits over time) (criterion (i));
- changes in accounting profits and related financial measures (criterion (ii)).

3.84 As part of the consideration of these criteria we analyse: (i) eir's ROCE relative to a competitive benchmark, to establish the effect of the net cost on the USP's profitability; (ii) the absolute level of eir's fixed-line business profitability on an EBIT basis.

3.85 Our analysis of this is set out in sections 3B.2 and 3B.1 respectively, where we

conclude that eir's fixed-line business was profitable over the period of analysis (2013/14), as:

- Its fixed-line business ROCE exceeded the regulated WACC range estimated by ComReg at that time.
- eir reported EBIT of €215m in its fixed-line business.

3.86 In section 3D.4 we explore how eir's profitability compares to the profitability of its competitors.

3.87 Sections 3D.2 and 3D.3 cover, respectively, changes in direct USO net cost over time (Decision 42 (iii)) and the level of cross-subsidies between products and changes over time (Decision 42 (iv)).

3D.2 Changes in direct USO net cost over time

3.88 Decision 42 (iii) requires an assessment of changes in direct USO net cost over time. Figure 3.7 shows that from 2012/13 to 2013/14 the USO direct net cost increased.

Figure 3.7 USO direct net cost

Source: ComReg (2014), 'Assessment of Eircom's Universal Service Fund Application for 2009-2010—Response to Consultation and Determination', Reference No. 14/03, 9 January; ComReg (2019), 'Assessment of eir's 2010-2011 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2010-2011', Reference no. 19/36, Decision no. D05/19, p. 69; ComReg (2019), 'Assessment of eir's 2011-2012 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2011-2012', Reference no. 19/37, Decision no. D06/19, p. 74; ComReg (2019), 'Assessment of eir's 2012-2013 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2012-2013', Reference No. 19/38, Decision No. D07/19, 17 April, p. 71.; ComReg (2019), 'Assessment of eir's 2013-2014 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2013-2014', Reference No. 19/39, Decision No. D08/19, 18 April, p. 50.

3.89 We understand that the changes in the direct net cost are due to both changes in the net cost of uneconomic customers and the total number of uneconomic customers increasing in 2013/14 relative to 2012/13.⁶⁴

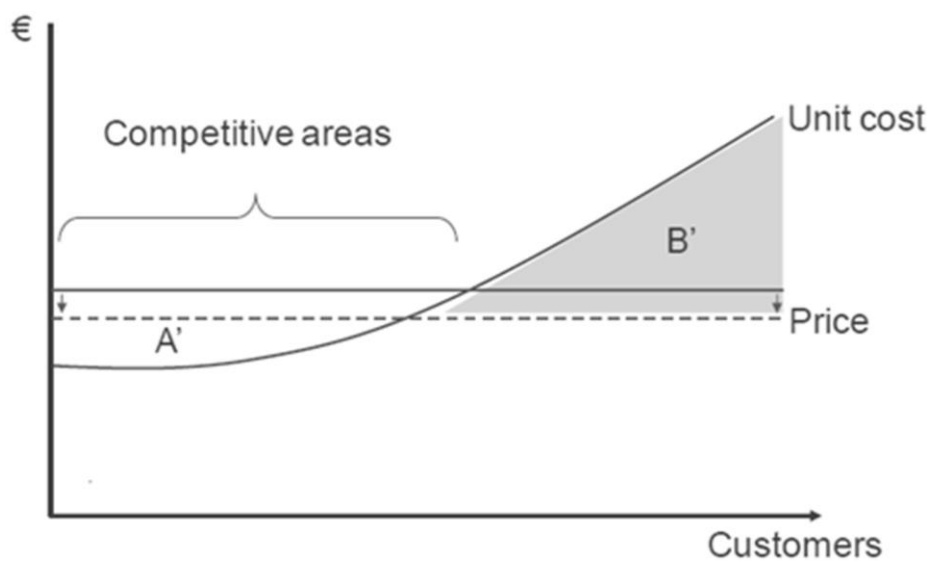
3D.3 The average level of cross-subsidies between services and changes over time

3.90 Decision 42 (iv) requires the consideration of estimates of the average level of cross-subsidies between classes of more or less separately accounted for

⁶⁴ Tera (2017), 'Assessment of Eir's USO funding application – Direct net cost 2013-2014 – Redacted', Reference No. 19/39a, December, Table 12, p. 60.

services, and changes in these over time. In line with this, ComReg's approach to the assessment of whether the net cost of the USO represents an unfair burden also considers whether eir, as the USP, is able to earn sufficient profits to finance its costs in uneconomic areas/customers from profits in economic areas/customers. This is referred to as a 'cross-subsidy' and is illustrated in D04/11 as shown in Figure 3.8.

Figure 3.8 Cross-subsidisation (internalisation) of the net cost of the USO

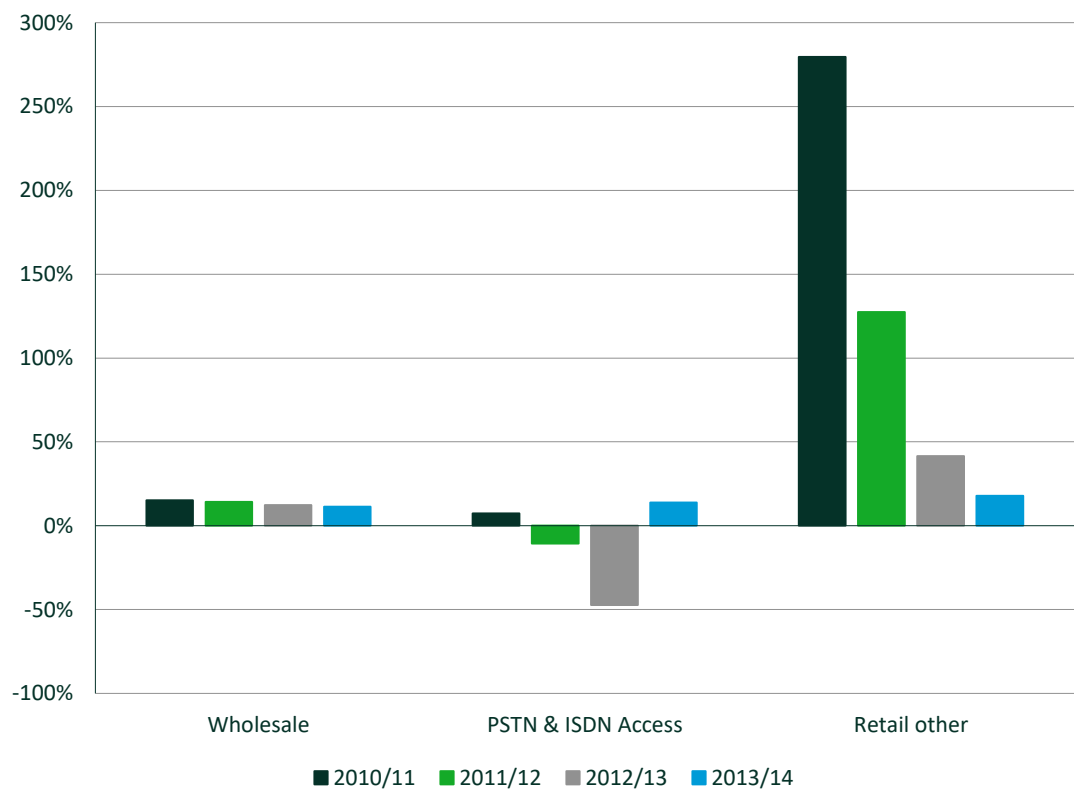


Source: ComReg (2011), 'Decision on the costing of universal service obligations: Principles and Methodologies', Reference No. 11/42, Decision No. D04/11, 31 May, p. 67, Figure 3.

- 3.91 As highlighted previously, we consider that eir's fixed-line business serves as a good proxy for the part of its business that is directly linked to the USO. This is because eir's fixed-line business includes products that rely on the use of the assets used in the provision of the USO. If the USP earns sufficient profits within its fixed-line business to enable it to cross-subsidise the costs of providing the USO, this indicates that it would be able to manage the burden of the net cost of the USO.
- 3.92 To undertake an assessment of cross-subsidies, we compare the profitability of the different categories within eir's fixed-line business from 2010/11 to

2013/14 inclusive.⁶⁵ Figure 3.9 shows eir's fixed-line ROCE for the categories Wholesale, PSTN & ISDN Access and Retail other. For Wholesale and Retail other, the ROCE has decreased from 2010/11 to 2013/14. Within eir's fixed-line business, 'Retail other' is the relatively most profitable category, however it did see a fall in profitability of around 57% between 2012/13 and 2013/14, from a ROCE of 41.4% to 17.8%. This decrease was mainly driven by eir's mean capital employed, which increased 1.3 times from €247.8m in 2012/13 to €332.1m in 2013/14, whilst operating profit fell by 42%.

Figure 3.9 Breakdown of eir's fixed-line ROCE by category



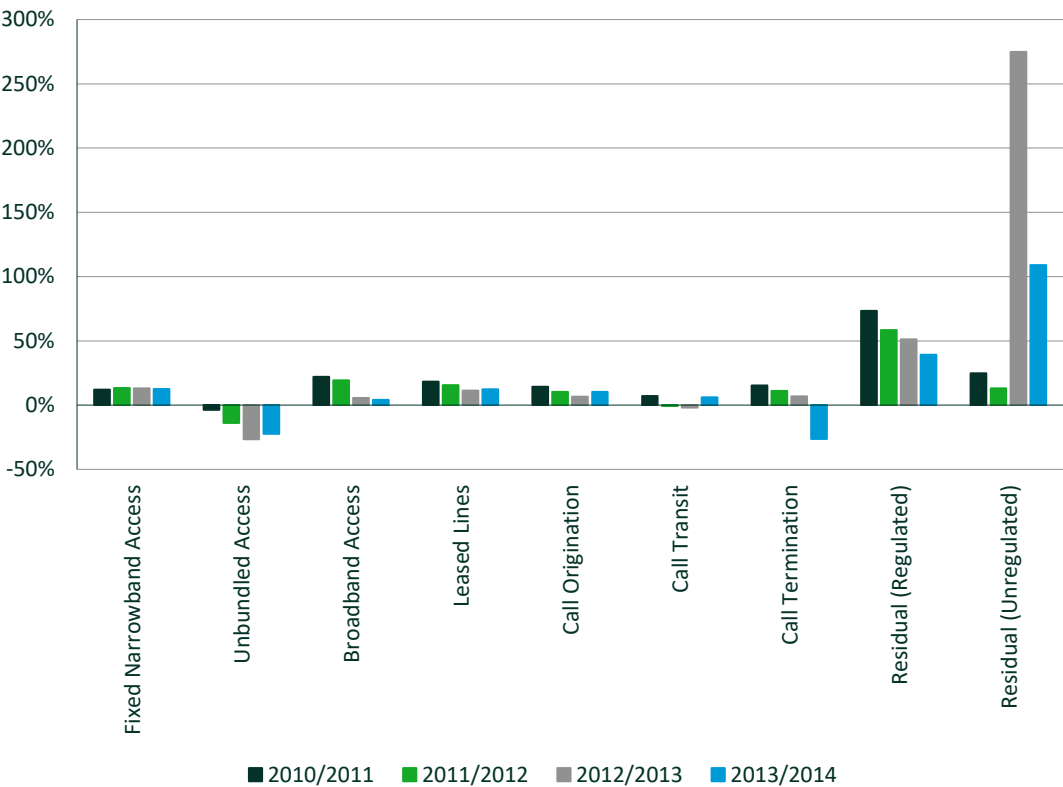
Source: Oxera analysis based on eir's historical-cost regulatory separated accounts for the years ending 30 June 2011, 30 June 2012, 30 June 2013 and 30 June 2014.

3.93 Figure 3.10 breaks down the change in eir's Wholesale ROCE by each product.

⁶⁵ For the 2010/11 application, it was not possible to undertake this analysis due to changes in the format of the regulatory accounts. In particular, in the 2009/10 regulatory accounts eir's business was disaggregated into Businesses and Activities categories, while the HCA regulatory accounts for 2010/11 split eir's business into Market Groups and Markets categories. As a result, we previously looked at the overall profitability of eir's fixed-line business (ComReg (2010), 'Response to consultation document no. 09/75 and final direction and decision: accounting separation and cost accounting review of eircom limited', Reference no. 10/67, Decision no. D08/10, 31 August.)

More than half of all products saw a decline from 2012/13 to 2013/14. This is in line with Figure 3.2, which also shows a decline in eir’s fixed-line ROCE in 2013/14, although the fixed line ROCE remains above the 2008 WACC.

Figure 3.10 Breakdown of eir’s Wholesale ROCE by product



Source: Oxera analysis based on eir’s historical-cost regulatory separated accounts for the years ending 30 June 2011, 30 June 2012, 30 June 2013 and 30 June 2014.

3.94 As part of ComReg’s information requirements dated 12 March 2024, each operator’s number of subscribers and revenues at the retail fixed-line market level, split by county, was requested. This data was intended to be used to explore whether prices differed in 2013/14 between urban areas (which are typically lower cost and more profitable), and rural areas (typically less profitable). If eir’s competitors were charging lower prices in urban areas, this might have implications for eir’s ability to cross-subsidise the USO net cost. However, only eir was able to provide figures at this geographical level, so this analysis could not be carried out. Information on data constraints for the 2013/14 assessment is set out in Appendix A2.

- 3.95 For 2013/14, we are of the view that eir was in a position to internalise the net cost, or in other words, to cross-subsidise the provision of the USO by using profits that were earned within its fixed-line business. This is evidenced by the strong profitability of eir's fixed-line business during 2013/14, as set out in sections 3B.1 and 3B.2.
- 3.96 While there are certain parts of eir's fixed-line business that were subject to price regulation in 2013/14, and controls that may effectively limit its ability to cross-subsidise the USO net cost, we consider that the effects of price regulation are already captured in the profitability analysis. eir also has the ability to outperform its incentive-based price control through increasing its efficiency and thereby achieving profitability levels greater than the regulated WACC and retaining the proceeds.⁶⁶
- 3.97 The profitability analysis establishes whether the total revenues generated by the assets used in the provision of the USO provide a sufficient rate of return. Therefore, to the extent that price regulation constrains eir's revenues, this effect would manifest itself in lower actual returns generated by eir and, therefore, a reduced ability to cross-subsidise the USO from these regulated activities. Furthermore, to the extent that the regulated business activities within eir's fixed-line business have a common asset base with the fixed network used to provide the USO, it can be expected that these revenues and profits can be used to internalise the cost of providing the USO.

3D.4 Assessment of eir's position relative to its competitors in the market

- 3.98 The 2013/14 period saw continued developments in the competitive landscape of Irish telecoms. Competition continued to increase following the liberalisation of the market and the introduction of regulation in the late 1990s.
- 3.99 The 2013/14 period saw greater competition in the retail market, partly driven

⁶⁶ We also note that eir's regulatory obligations require that eir Retail and an access seeker using regulated products to access eir's network make the same contribution to the cost of the network, on a per customer basis. In this context, the distinction between regulated and unregulated products is not relevant.

by the increased uptake of local-loop unbundling (LLU), with a total of 87,528 total LLU connections as of June 2014, up from 73,175 in June 2013. eir continued its roll out of Next Generation Access (NGA) services that began in May 2013, with the service available to 850,000 households as at June 2014. UPC also continued to be an important player in the market, offering download speeds in excess of 100 Mbps.⁶⁷

- 3.100 The fixed-line market experienced continued product convergence, with a number of operators focusing on bundled offers, such as fixed voice and broadband products as well as television, voice and broadband.
- 3.101 With a market share by revenue of [X■■■X], eir was the main player in the retail fixed-line market in 2013/14. Other operators with smaller market shares included Vodafone ([X■■■X]), UPC ([X■■■X]), BT ([X■■■X]), Sky ([X■■■X]) and Imagine ([X■■■X]).⁶⁸ A number of other operators were also present in the market at the time. However, given their small market shares (less than 2% each), for this analysis, they have been grouped together as other authorised operators (OAOs).⁶⁹
- 3.102 In accordance with the CJEU judgment, the analysis in this section presents an assessment of eir's ability to compete relative to its competitors in the fixed-line market. This is done with reference to:
- the profitability of eir relative to its competitors;
 - changes in prices over time (Decision 42 (v));
 - changes in market share (Decision 42 (vi)); and
 - changes in market entry barriers (Decision 42 (vii)).

The profitability of eir relative to its competitors

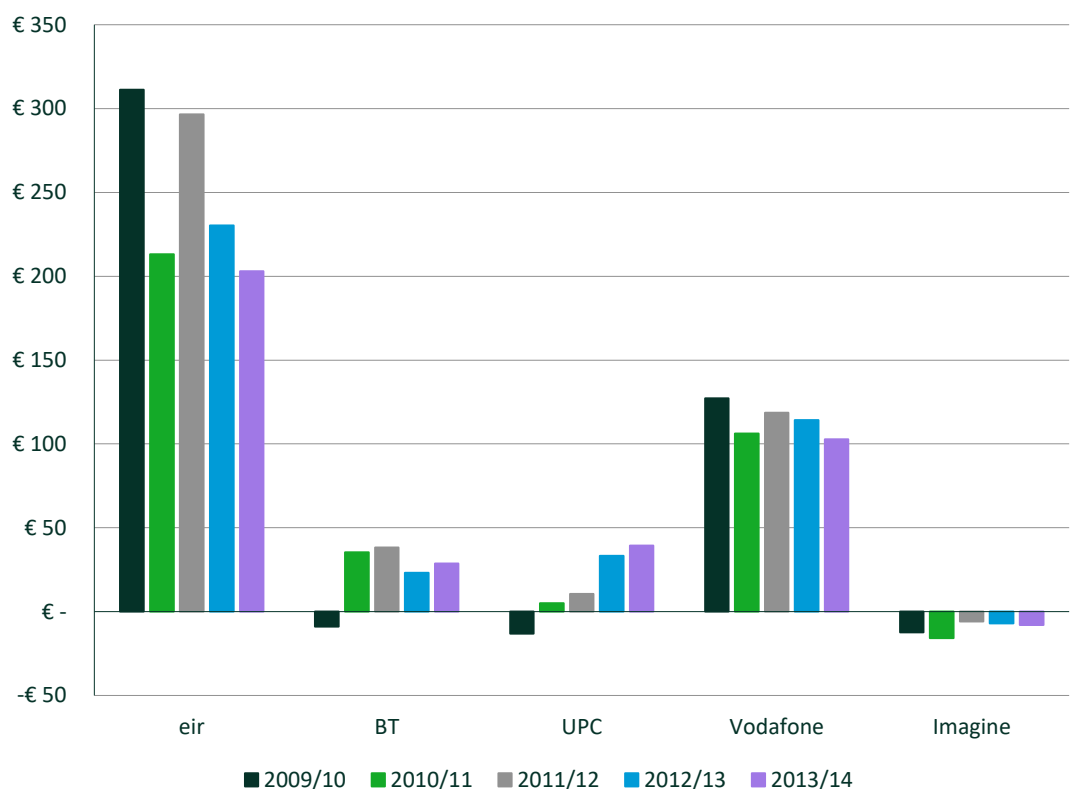
⁶⁷ ComReg (2015), 'Annual report 2013/14', 30 June, pp. 13 and 23.

⁶⁸ The figures reflect the average retail market share between Q1 2013 and Q4 2014 for each of the companies.

⁶⁹ Note that 'OAO' has a different definition to 'operators' (which are all firms operating in the market—i.e. including those with greater than 2% market share), and 'competitors' (which are the operators that are in competition with eir).

3.103 Comparing eir's profitability with that of its competitors can provide an indication of eir's relative performance. The ComReg information requirements dated 12 March 2024 asked operators to provide the necessary data to conduct a profitability analysis for eir's competitors in the fixed-line market. In particular, it was envisaged that this data would be used to make a direct comparison between eir's fixed-line EBIT and ROCE and that of its competitors. Operators were not able to provide all of the information requested and public accounts do not contain the necessary data. So as a proxy, and being mindful of the limitations of the analysis, the Irish group-level EBIT has been calculated for the four largest competitors to eir for 2009/10–2013/14, and compared as shown in Figure 3.11 below.

Figure 3.11 Irish group-level EBIT, 2009/10–2013/14



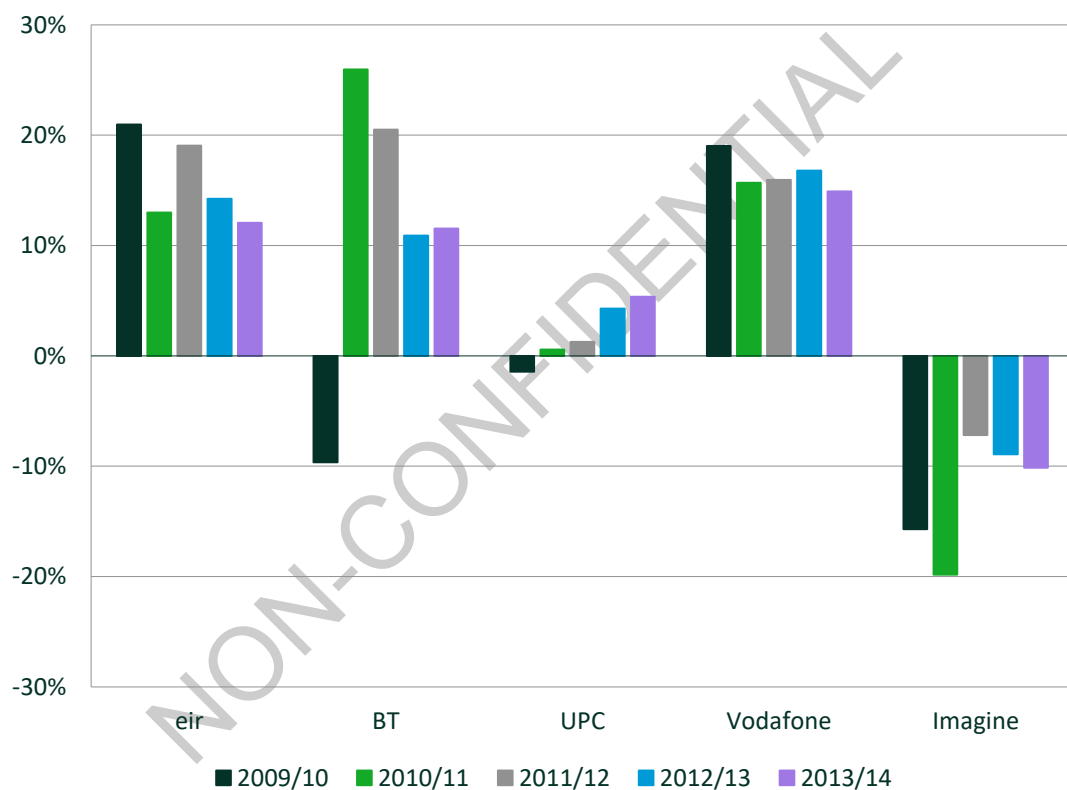
Note: eir's group-level EBIT is calculated by Oxera based on historical-cost accounts. Competitors' Irish group-level EBIT is based on financial statements.

Source: Oxera analysis based on eir's historical-cost regulatory separated accounts for the years ending 30 June 2010, 30 June 2011, 30 June 2012, 30 June 2013 and 30 June 2014 and the 2010/11, 2011/12, 2012/13 and 2013/14 financial statements of BT Communications Ireland Limited, UPC Communications Ireland Limited, Vodafone Ireland Limited, and Imagine Communications Group Limited.

3.104 The indicative analysis shows that eir's EBIT at the Irish group-level significantly exceeded that of its competitors in 2013/14.

3.105 Figure 3.12 below shows the Irish group-level ROCE for eir and its competitors for 2009/10–2013/14, indicating that, at 12%, eir's profitability in 2013/14 was significantly higher than UPC's and Imagine's, the latter having a negative ROCE during the period, and slightly higher than BT's ROCE (11.6%).

Figure 3.12 Irish group-level ROCE, 2009/10–2013/14



Note: eir's group-level ROCE is calculated by Oxera based on historical-cost accounts. Competitors' Irish group-level ROCE is calculated based on financial statements.

Source: Oxera analysis based on eir's historical-cost regulatory separated accounts for the years ending 30 June 2010, 30 June 2011, 30 June 2012, 30 June 2013 and 30 June 2014 and the 2010/11, 2011/12, 2012/13 and 2013/14 financial statements of BT Communications Ireland Limited, UPC Communications Ireland Limited, Vodafone Ireland Limited, and Imagine Communications Group Limited.

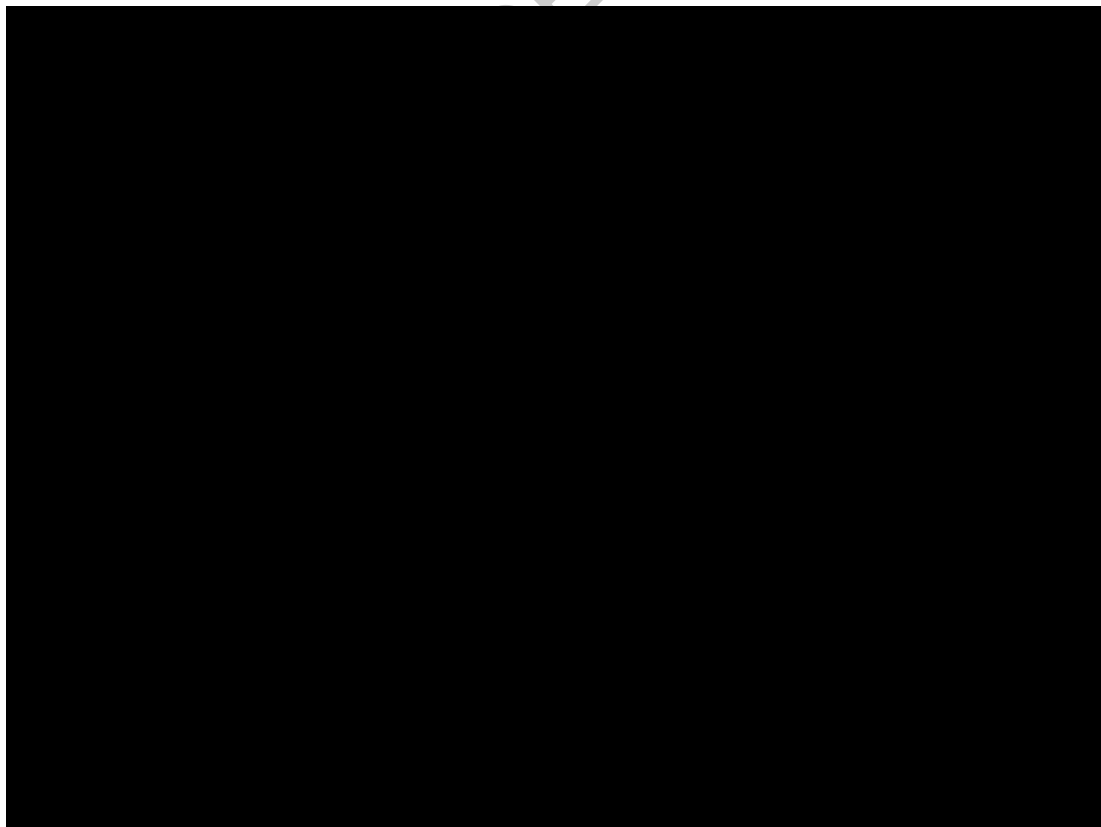
Changes in prices over time

3.106 This section applies Decision 42 (v) of D04/11 by assessing how eir's prices have changed over time relative to those of its competitors.

3.107 Figure 3.13 below presents the average prices achieved in the retail fixed-line

market by eir and four of its largest competitors, with BT excluded due to incomplete subscriber data. ARPU is used as a proxy for average price. The trend shown is of stable prices in the retail fixed-line market for eir from Q4 2010 to Q1 2013. While eir's ARPU experienced a reduction during 2013 and 2014, it never fell below €[REDACTED]. UPC experienced a steadily increasing ARPU until Q4 2013 and constant thereafter, whilst Vodafone's saw a peak also in Q4 2013 before decreasing to €[REDACTED] in Q4 2014. Imagine saw growth in ARPU during the period Q4 2011 to Q2 2012, but then a relatively constant ARPU from Q3 2012 to Q4 2014. Sky now appears as a named operator as its market share is above 2%, with an ARPU increasing from €[REDACTED] in Q1 2013 to €[REDACTED] in Q4 2014.

Figure 3.13 Average prices achieved over time in retail fixed-line market
[REDACTED]



Note: Data presented for Q4 2010–Q4 2014. BT has been excluded due to incomplete subscriber data. ARPU is calculated as total revenue/number of subscribers. For the period Q1 2012–Q3 2014, data for Imagine was received for a company named Access Telecom, which we understand to be a trading name of Imagine. For the period Q3 2013–Q4 2014 Vodafone data includes a change in revenue due to the acquisition of additional firms. Fixed-line revenues were re-stated in Q4 2013, so strict comparisons with prior years' fixed revenues cannot be made.

Source: As advised by ComReg. ComReg information requirements dated 12 March 2024.

- 3.108 In addition to the above, analysis of ARPU split by geographical area and by single-, double- and triple-play bundles could provide further insights as to eir's competitiveness relative to other operators in the market.⁷⁰

Geographical area analysis may help in understanding if prices differ significantly between urban and rural areas, and, if so, whether eir's competitors were targeting only those geographies where prices are indeed higher. Bundling analysis could provide insights as to whether certain operators benefited from competitive advantages due to their ability to package multiple products. The ComReg information requirements dated 12 March 2024 asked operators to provide the data required to conduct the detailed geographical and bundling analyses at the retail fixed-line business level for eir and its competitors. However, as only eir was able to provide [REDACTED], this analysis could not be undertaken.

Changes in market share

- 3.109 This section applies Decision 42 (vi) of D04/11 by assessing how eir's market share has changed over time, relative to those of its competitors. This approach is consistent with the CJEU judgment:



The mere finding of facts relating to market share of that provider, considered in isolation, does not allow any useful conclusions to be drawn in the absence of a **comparison with the market shares held by its competitors**

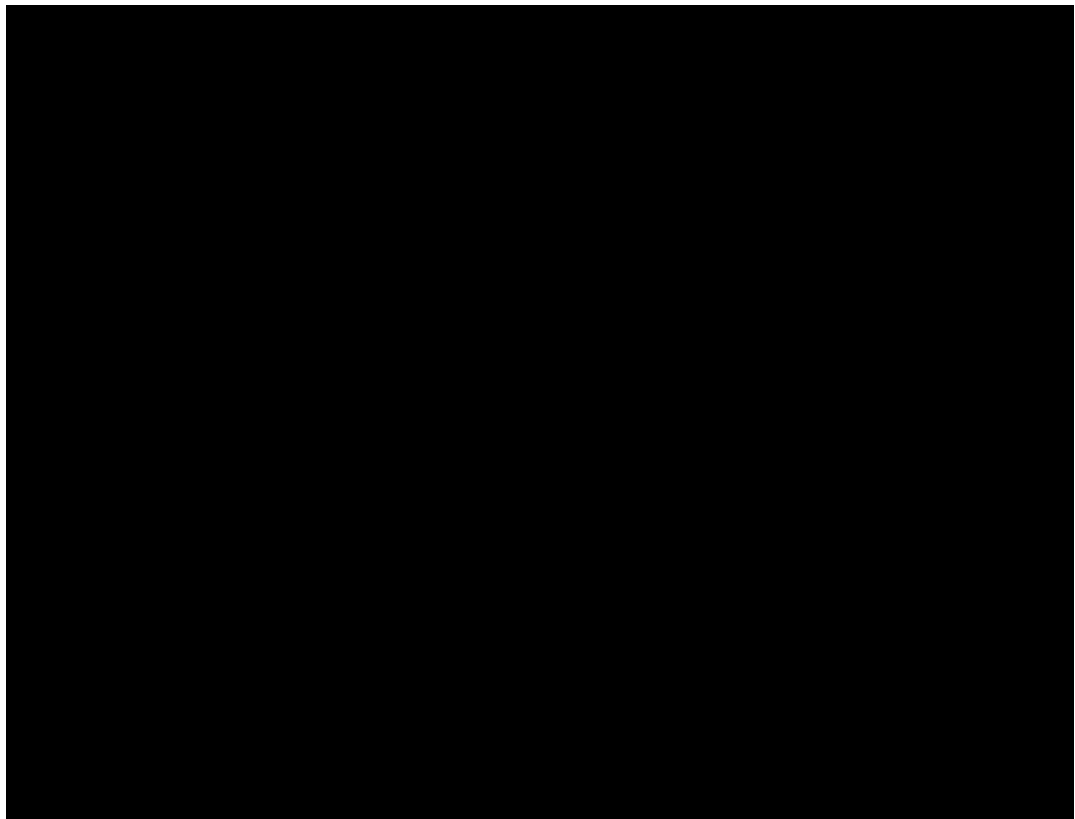
Court of Justice (2022), op. cit. Excerpt from paragraph 43 [emphasis added]

- 3.110 Figure 3.14 presents the market shares of eir and its competitors based on retail fixed-line market revenue. It shows that eir had a relatively high share

⁷⁰ Single-play subscriptions refer to the sole provision of a fixed telephony product; double-play subscriptions refer to a bundling of two products (e.g. fixed telephony and internet); triple-play subscriptions refer to a bundling of three products (e.g. fixed telephony, internet and TV).

of the fixed-line market in the period, with a gradual decline from [X [REDACTED] X] in Q1 2010 to [X [REDACTED] X] by Q4 2014.

Figure 3.14 Changes in retail fixed-line market share, by revenue [X Redacted X]



Note: OAOs, other authorised operators. For the period Q1 2012–Q3 2014, data for Imagine was received for a company named Access Telecom, which we understand to be a trading name of Imagine.

Source: As advised by ComReg.

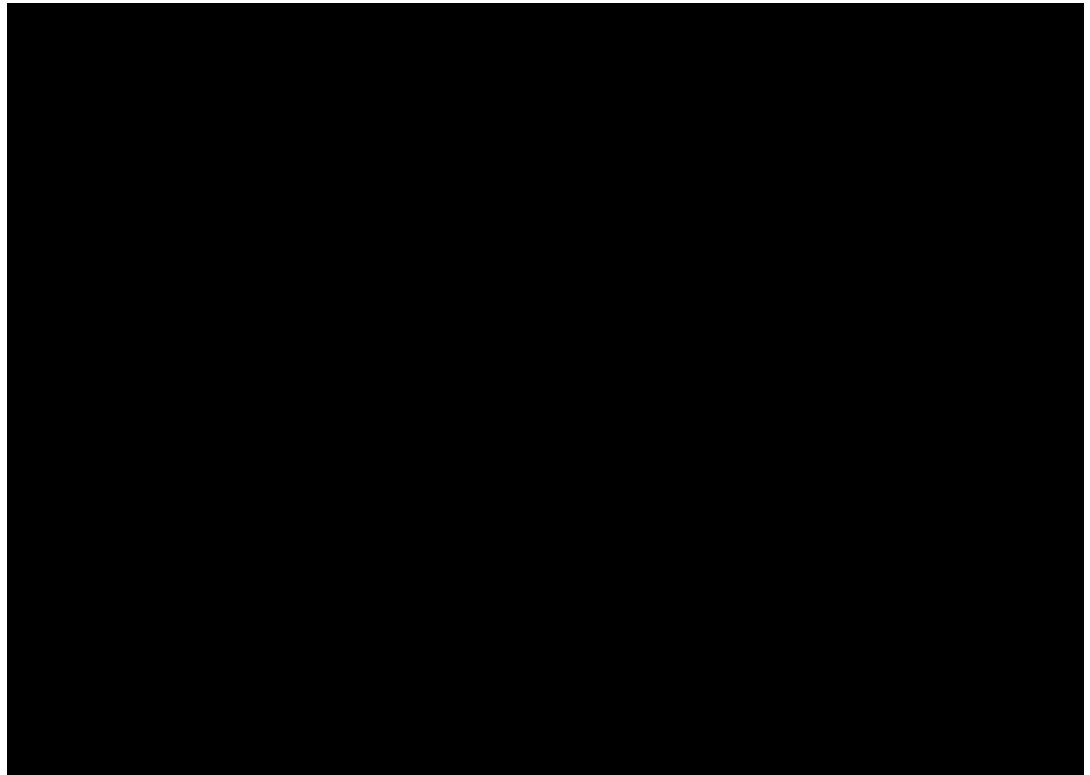
- 3.111 Despite its declining market share, eir remained the market participant with the largest market share by revenue during the period under assessment with other operators' share modest but increasing. UPC experienced growth from [X [REDACTED] X] share in Q1 2010 to [X [REDACTED] X] in Q4 2014, while Vodafone increased from [X [REDACTED] X] share in Q1 2010 to [X [REDACTED] X] in Q4 2014, with its position in the market partially attributable to its acquisition of BT's retail and low-end small and medium enterprise (SME) customers.⁷¹ BT held a [X [REDACTED] X] market share in Q4 2014, whilst Imagine saw a marginal decline from [X [REDACTED] X] to

⁷¹ The Competition Authority (2009), 'Determination of merger notification M/09/015 – Vodafone Ireland / BT Ireland'.

[X] over the five-year period from Q1 2010 to Q4 2014. Sky increased its market share between Q1 2013 and Q4 2014 from [X] to [X], with the remaining [X] of market share by revenues in Q4 2014 being held collectively by OAOs.

- 3.112 Another metric through which relative market shares can be assessed is the number of subscribers each operator has, and how this changed during the relevant period. Figure 3.15 presents the fixed-line market shares at the retail level, based on subscriber numbers held by eir and its competitors over the period Q4 2010 to Q4 2014. It shows that eir's share of total subscribers decreased slightly, from [X] to [X] over the 17 quarters, a reflection of growing competition in the fixed-line market. Despite this, eir was able to achieve a stable ARPU until Q1 2013, as shown in Figure 3.13. In addition, despite seeing its ARPU fall during 2013 and 2014, eir maintained a higher ARPU than its competitors.

Figure 3.15 Changes in retail fixed-line market share, by number of subscribers [X Redacted X]



Note: Data presented for Q4 2010–Q4 2014. BT has been excluded due to incomplete subscriber data. For the period Q1 2012–Q4 2013, data for Imagine was received for a company named Access Telecom, which we understand to be a trading name of Imagine.

Source: As advised by ComReg.

- 3.113 General market trends, unrelated to the provision of the USO, are likely to have also led to declining revenues for eir and more competition in the retail fixed-line market over the relevant period. An example of such a trend is in the growth of voice over internet protocol (VOIP) whereby customers make calls over the internet using services such as Skype and FaceTime, rather than traditional phone calls. Another trend has been the increased uptake of bundles, with the share of retail fixed-line market subscriptions being either double- or triple-play passing the 50% mark in Q3 2013 and reaching 53.9% in Q2 2014.⁷²

Market entry barriers

⁷² ComReg (2014), 'Irish Communications Market: Quarterly Key Data Report, Data as of Q2 2014', 11 September, p. 21. Note that these figures are taken from the published report for the relevant quarter, not any subsequent restatement.

- 3.114 This section applies Decision 42 (vii) of D04/11 by reviewing evidence of the level of market entry barriers.
- 3.115 ComReg's regulatory framework in place in 2013/14 assumed that competition would develop over time and that prices were set at levels such that eir was able to earn a fair return on capital after taking into account the impact of any changes in its competitive position.⁷³ Therefore, changes in the number/identity and market shares of competitors should be considered, albeit an observed fall in eir's market share does not, in and of itself, lead to the conclusion that there was a significant causal decline in profitability that renders eir unable to meet the net cost of the USO.
- 3.116 We cannot directly and unequivocally observe the strength of market entry barriers over time as these are complex and multi-faceted; they include factors such as technical requirements, asset intensity levels and capital requirements that are faced by new entrants at any point in time. However, we can observe whether new entrants emerge and whether they can successfully compete for higher market shares over time. In the case of the Irish retail fixed-line market, we observe that Figure 3.14 and Figure 3.15 show the market shares of competitors by revenue and subscribers respectively. These figures indicate that the market barriers did not prevent new entrants (i.e. eir's competitors) from achieving growth. At the same time, the majority market share position of eir is consistent with ComReg's findings that there were high levels of sunk cost persisting in the market and high non-transitory barriers to entry in the Irish retail fixed voice access market.⁷⁴
- 3.117 Figure 3.14 shows eir's strong position in terms of retail fixed-line market revenue, holding [REDACTED] in Q1 2010, and despite a fall, eir remained the main operator with [REDACTED] market share in Q4 2014. The position of Vodafone following its acquisition of BT Ireland's retail customers (as discussed in paragraph 3.111) demonstrates that market entry barriers in

⁷³ Specifically, the existing framework for the regulation of access, the USO regulations and the price controls imposed on eir.

⁷⁴ ComReg (2014), 'Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers', Response to Consultation and Decision, Reference No. 14/89, Decision No. D12/14, 28 August, para. 6.54.

Ireland are not insurmountable by a large multinational corporation.

3.118 Furthermore, we observe that eir's competitors largely depended on eir's regulated wholesale fixed voice products to offer retail voice solutions to customers, with competition for the provision of infrastructure emerging in some densely populated areas. This is not atypical; it is indeed a common feature of network industries that the network operator is required to provide access on a fair and reasonable, non-discriminatory basis. In 2013/14, high fixed sunk network costs in the industry represented a persistent barrier to competing with eir along the full value chain,⁷⁵ and this could in turn have facilitated eir's maintenance of a resilient market position.

3.119 eir faced specific challenges such as the development of UPC's presence in the retail market for broadband services, its network reaching speeds in excess of 100 Mbps.⁷⁶ Additional market trends, such as the increasing consumer preference for bundling of products (e.g. telephony, broadband and TV), also presented advantages to competitors with an existing strong presence in providing these products, such as Vodafone. However, these market factors are reflected in the profitability analysis in section 3B.2, as eir's profitability (measured by its ROCE) is a composite measure of both demand- and supply-side factors. Hence, eir's profitability reflects the strength of the underlying business as well as the market environment and competitive pressures faced by eir during the application period.

3.120 While we cannot directly and unequivocally observe the strength of market entry barriers over time as these are complex and multi-faceted, the available evidence suggests that market entry barriers did not prevent eir's competitors from achieving growth.

3D.5 Summary of the application of Decision 42

3.121 For the 2013/14 application we conclude that:

⁷⁵ ComReg (2014), op. cit., para. 6.43.

⁷⁶ ComReg (2015), op. cit., p. 23.

- eir's fixed-line business was profitable over the period of analysis, with its ROCE exceeding the regulated WACC range;
- eir reported EBIT of €215m in its fixed-line business, measured as revenues less operating costs;
- eir was in a position to cross-subsidise the net cost of the USO by using profits earned in its fixed-line business;
- indicative analysis shows that eir's EBIT at the Irish group-level exceeds that of its competitors, while eir group's ROCE was greater than all but one of its competitors;
- eir was able to maintain a comparatively high ARPU for the period;
- eir's retail fixed-line market shares, by revenue, in the period declined from [X ■■■ X] in Q1 2010 to [X ■■■ X] by Q4 2014. However, eir remained the main player in the market, with the next largest players at the time, UPC and Vodafone, each accounting for only [X ■■■ X] of the market in Q4 2014;
- eir's share of total subscribers in the retail fixed-line market saw a decline from [X ■■■ X] in Q1 2010 to [X ■■■ X] in Q4 2014, but it maintained its position as the operator with the largest subscriber base; and
- while we cannot directly and unequivocally observe the strength of market entry barriers over time as these are complex and multi-faceted, we do observe that the market shares of some of eir's competitors marginally increased from 2009/10 to 2013/14, showing that barriers to entry did not prevent new entrants (i.e. eir's competitors) from achieving growth.

4 Conclusion

- 4.1 Decision 38 of D04/11 requires that for there to be an unfair burden on a USP, ComReg must be of the view that three cumulative conditions are met.

Decision 38: For there to be 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

-
- 4.2 **Decisions 38 (i) and 38 (ii)** were established as part of ComReg's assessment of eir's funding application, finding that there is a verifiable and verified direct net cost and that the benefits of the USO do not outweigh the net cost.⁷⁷

- 4.3 **Decision 38 (iii) (a)** was established as part of ComReg's assessment of eir's funding application, finding that the positive net cost is material compared to the administrative costs of a sharing mechanism. In this context, ComReg asked Oxera to consider this aspect. Appendix A3 of this report presents Oxera's view that the net cost of €9.5m is indeed material compared with the administrative cost of a sharing mechanism (currently estimated at c. €200,000) fulfilling the criterion of Decision 38 (iii) (a).

- 4.4 **Decision 38 (iii) (b)** is informed by an assessment of whether the criteria under Decisions 40 to 42 are met, in the round. We summarise our conclusions, which are based on the analysis conducted for Decisions 40 to

⁷⁷ ComReg (2019), 'Assessment of eir's 2013-2014 Universal Service Fund Application: Assessment of the net cost and unfair burden for the period 2013-2014', Reference No. 19/39, Decision No. D08/19, 17 April, para. 221 and para. 233 (ii).

42 set out in sections 3B to 3D, as follows:

- **Decision 40:** in 2013/14 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 2013/14, the net cost did not materially impact eir's ability to compete on equal terms with competitors going forward for two reasons. Firstly, there is no available evidence of a causal link between the financial distress and challenges observed and the net cost of the USO. Secondly, the results of the wider period of financial analysis that we have 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 2013/14, 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 with 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 Irish group-level exceeded that of its competitors, while eir's Irish group-level ROCE was greater than all but one of its competitors.

4.5 While no one indicator is determinative, if the universal service obligation was an unfair burden on eir in 2013/14, indications of this would be apparent from the analysis undertaken. No such indications have emerged from our analysis. Based on the analysis undertaken in sections 3B to 3D, having applied Decisions 40 to 42, considered the analysis and taken the findings into account, we are of the view that the positive net cost did not cause a significant competitive disadvantage for eir.

- 4.6 The indicators demonstrate that the net cost of the USO did not represent an unfair burden on eir in 2013/14.
- 4.7 As a result, having examined eir's particular characteristics, applied Decisions 38–42 and considered all of the evidence outlined, we are of the view 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 2013/2014.

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A1 Products within eir's fixed-line business that are potentially dissociable from the USO business

A1.1 Following discussions with ComReg, we understand that there are sub-products within eir's fixed-line business that could potentially be dissociable from the USO business. This specifically relates to sub-products within the Wholesale Residual (Unregulated) and Retail Other business segments. These are highlighted in the table below.

Table A1.1 Products and sub-products highlighted as potentially dissociable from the USO business

Segment	Sub-segment	Product	Sub-product	Dissociable
Wholesale Residual (Unregulated)	Wholesale Residual (Unregulated)	Wholesale Residual (Unregulated)	Foreign Call Traffic Inpayments Bands 1–10	No
			Interconnect International Access	Potentially
			International LL Connections/ Rental	No
			Wholesale Network Management Services	No
			CPE Fees	No
			Mast Access	Potentially
			Repayable Works Orders	No
			SCCP revenues	No
			Wholesale Duct Rental	No
			Internal Trade with Tetra	No
Retail Other	Retail voice calls	Retail voice calls	Retail voice calls	No
	Retail DSL/broadband	Retail DSL/broadband	Retail DSL/broadband	No
	Retail Residual	Leased Lines	National LL Connections	No
			National LL Rentals	No
			Retail Ethernet & SANs Connections & Rentals	No
			International LL Connections & Rental	No
	Data Services		Business IP Connections & Rental	No
			ATM Connections/ Rental	No

Segment	Sub-segment	Product	Sub-product	Dissociable
			Frame Relay Rental	No
			Eirpac Rental & Traffic	No
			Other Switched Data Services	No
	Apparatus Supply	Apparatus Supply		No
	Legacy Operator Services	Legacy Operator Services		No
	Value added voice	Freefone Connections		No
		Freefone Rental		No
		Freefone National & Mobile Traffic		No
		Freefone International Traffic		No
		VPN/IVPN Access		No
		VPN/IVPN Traffic		No
		VOIP Non Traffic		No
		SIP Ancillary Services		No
		VOIP Local/National		No
		VOIP ROI Mobile		No
		VOIP UK		No
		VOIP International		No
		SIP Non Traffic Revenues		No
		SIP On-Net		No
		SIP Local/National		No
		SIP ROI Mobile		No
		SIP UK		No
		SIP International		No
		PRS Access Rental		No
		PRS Traffic		No
		Call Management Services Connections		No
		Call Management Services Rental		No
		Call Management Services Traffic		No
	Value Added Non-Voice	Value Added Non-Voice		No

Segment	Sub-segment	Product	Sub-product	Dissociable
		Directory Enquiry	National Directory Enquiries 1811	No
			International DQ 11818	No
			eircom Access to OAO DQ	No
			Teleconference Calls 11811	No
		Public Payphones	Public Payphones	No
		Other Remaining Activities	TV Service Connections/Rental	Potentially
			eBS CPE Rentals	No
			Global Conferencing Services	Potentially
			Network Management Services	No
			Property & Accommodation Rental	No
			Staff on Loan Agency	Potentially
			Tetra Business	Potentially
			Meteor Mobile re emobile	Potentially
			eMobile Handsets	Potentially
		Other Internet Services	Internet Access 1890/1891/1892/1893	No
			eircom net Internet Rental	No
			eircom net Internet Set-up fees	No

Source: As advised by ComReg.

- A1.2 The removal of sub-products identified as potentially dissociable would result in a subset of eir's fixed-line business that could be identified as not dissociable from the USO. The granularity of data required to exclude these sub-products from eir's fixed-line business is not available.
- A1.3 Our understanding, based on discussion with ComReg, is that, given the nature of the sub-products identified, their removal would not significantly alter the results of the profitability analysis presented throughout the report.

A2 Data constraints and implications for the preferred analysis

- A2.1 In this section we highlight, for each of the decisions, the 'preferred analysis', i.e. what we would do if data constraints were not an issue, we set out the data constraints faced in carrying out the analysis presented in the report for 2013/14 followed by the 'analysis presented', which sets out the approach followed. In our view, the preferred analysis, if followed, would be unlikely to reach a materially different conclusion to the analysis presented.
- A2.2 The table also presents the data that was received following the ComReg information requirements dated 12 March 2024. This request asked operators (with more than 2% market share) to provide data that would assist with the unfair burden assessment.⁷⁸ The information requirements included the data necessary to calculate EBIT and ROCE in the fixed-line market, and CAPEX and depreciation and amortisation to compare ability to invest, and as a proxy for quality of equipment, in the fixed-line market. It also requested number of subscribers, revenues and average broadband speed for retail fixed-line subscribers split geographically by the 26 counties of Ireland with the aim of understanding if prices were materially different between urban areas and rural areas. Subscriber numbers and revenues were also requested at the retail fixed-line level split by single, double and triple play to enable an assessment of whether certain operators exhibited competitive advantages through provision of bundled products.
- A2.3 While the operators were able to provide some of the requested information, there was a significant amount which was either wholly unavailable or unavailable at the level of granularity requested. For example, one operator cited that the data is c. 14 years old, and so archived data and its local understanding of the market at the time has been relied upon to provide the data.⁷⁹ Another operator was unable to provide data related to assets, liabilities, CAPEX and depreciation and amortisation at the fixed-line level as

⁷⁸ The operators from which information was requested were eir, Virgin (formerly UPC), BT, Vodafone, Imagine, Digiweb, Verizon, Magnet and AT&T.

⁷⁹ [REDACTED]

it is difficult to strip out specific line items, although it did state that it would expect any differences to be immaterial.⁸⁰ Except for [REDACTED], no respondent was able to provide data at the requested geographical split, with one operator stating that it does not hold county-level data.⁸¹ Additionally, an operator was not able to provide revenue data for the period as the data in its files is hardcoded and provides no breakdown.⁸² Further information related to the data that was or was not provided by respondents is specified in Table A2.1 where appropriate.

- A2.4 In applying D04/11 whilst incorporating the precedent of the Base judgment, and the CJEU judgment, we have assessed the characteristics of eir as set out in Table A2.1 below. Note that in this table, we have categorised eir's characteristics using Decisions 40 to 42 in D04/11. As we set out in paragraph 2.5, these characteristics are also consistent with the three characteristics identified in the Base judgment.

⁸⁰ [REDACTED]

⁸¹ [REDACTED]

⁸² [REDACTED]

Table A2.1 Data constraints

Reference	Preferred analysis	Analysis presented (and reason, if different to preferred analysis)	Data used/sources
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.	Carry out a ROCE analysis and compare it to the regulatory benchmark (WACC). This could be complemented by other forms of profitability assessment, such as EBIT margins and analysing the impact of the USO on the ROCE. This should be carried out at the level that would exclude potential activities within eir's fixed-line business that are dissociable from the USO (see discussion in Appendix A1).	We carried out the profitability analysis based on the preferred metrics at the fixed-line business level. We did not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required to do this is not available.	The analysis of eir's profitability is based on information from its historical cost separated accounts. The WACC benchmark is based on ComReg's 2008 WACC. The net cost figure used was determined by ComReg in Decision D06/19.
Decision 41: 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.	An assessment of certain metrics (e.g. gearing, dividend payments, CAPEX, credit rating and liquidity) to provide an indication of eir's operational health as a means to assess its ability to compete going forward. This would be based on information available in 2013/14. It would also be useful to compare fixed-line CAPEX against other operators, as this would provide an indication as to whether eir's ability to invest and compete on equal terms going forward was significantly different to its competitors, whilst also	We carried out an assessment of whether there are any indications that the net cost of the USO affected eir's economic and financial situation in 2009/10–2013/14 based on an assessment of eir's level of gearing, dividend payments, CAPEX and liquidity. In the circumstances, and in particular given the length of time that has elapsed between the focal year that is being assessed and when the assessment is taking place, we were instructed by ComReg to check the results obtained from the information available in 2013/14 with the results of	The analysis of eir's operational performance is informed by a review of eir's annual reports and financial statements. Analysis of eir's CAPEX and investments relies upon annual reports, financial statements and credit rating agency reports. The analysis of eir's CAPEX with its competitors at the Irish group-level uses data from annual reports, financial statements and data from the ComReg information requirements dated 12 March 2024.

providing a proxy for the quality of equipment for eir and its competitors.

the same analysis using the actual data available to date (up until the latest full financial year of 2022/23).

We note that credit rating agencies and equity analyst reports only cover eir from 2012 onwards and therefore information on credit ratings was not available for 2009/10 and 2010/11.

The ComReg information requirement dated 12 March 2024 asked for the necessary data to analyse CAPEX for eir and competitors at the fixed-line business level. Some operators were able to provide CAPEX data, but this was at the Irish group-level, not the fixed-line business level. Therefore we undertook the CAPEX analysis at the Irish group-level including eir and the three listed respondents to act as a proxy for quality of equipment, with the caveat that its ability to inform the assessment is limited.

The assessment of eir's financial challenges and health relies upon annual reports, financial statements, credit rating agency reports and articles from news outlets.

Decision 42 (i): Changes in profitability, including an understanding of where a USP generates most of its profits over time.

Profitability analysis of eir at the fixed-line business level, excluding any activities that could be viewed as dissociable, using ROCE compared to regulated WACC which is a competitive benchmark. Complemented by a comparison of eir's ROCE to the fixed-line market profitability of its competitors and a cross-check on modern equivalent asset (MEA) values for the level of capital employed.

We carried out an assessment of eir's fixed-line business ROCE compared to a competitive benchmark, with and without the net cost.

This assessment did not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for this is not available. A direct fixed-line market comparison is not possible due

The ROCE calculation is based on revenue, operating costs, and mean capital employed information from eir's historical-cost regulatory separated accounts. The WACC benchmark is based on ComReg's 2008 WACC. USO net cost figures for 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14 are from ComReg documents relating to eir's Universal Service Fund applications

to the lack of fixed-line data for competitors and the lack of data on MEA values of the capital employed. For completeness, we also note that while MEA valuation is more economically meaningful than book values, the guidance of D04/11 is that the analysis be based on historical-cost accounts, consistent with the approach that Oxera has taken.

(ComReg 14/03, 19/36, 19/37, 19/38 and 19/39).

Decision 42 (ii): Changes in accounting profits and related financial measures e.g. earnings before interest, tax, depreciation and amortisation ('EBITDA') analysis.

Profitability analysis of eir at the fixed-line business level, excluding any activities that could be viewed as dissociable, using ROCE compared to regulated WACC which is a competitive benchmark. Complemented by a comparison of eir's ROCE to the fixed-line market profitability of its competitors and a cross-check on modern equivalent asset (MEA) values for the level of capital employed.

We carried out an assessment of eir's fixed-line business ROCE compared to a competitive benchmark, with and without the USO net cost. This does not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for such an exclusion is not available.

Direct fixed-line market comparison is not possible due to the lack of fixed-line data for competitors and the lack of data on MEA values of the capital employed. For completeness, we also note that while MEA valuation is more economically meaningful than book values, the guidance of D04/11 is that the analysis be based on historical-cost accounts, consistent with the approach that Oxera has taken.

The ROCE calculation is based on information from eir's historical-cost regulatory separated accounts. The WACC benchmark is based on ComReg's 2008 WACC. USO net cost figures for 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14 are from ComReg documents relating to eir's Universal Service Fund applications (ComReg 14/03, 19/36, 19/37, 19/38 and 19/39).

Decision 42 (iii): Changes in direct USO net cost, if any, over time.	Comparison of the net cost of the USO between 2009/10 to 2013/14.	A comparison was undertaken of the net cost of the USO between 2009/10 to 2013/14.	Our analysis is based on USO net cost figures for 2009/10 to 2013/14 from ComReg documents relating to eir's Universal Service Fund applications (ComReg 14/03, 19/36, 19/37, 19/38 and 19/39).
Decision 42 (iv): Estimates of average level of cross-subsidy between classes of more or less separately accounted for services, and changes in these over time.	Disaggregation of profitability drivers between 2010/11–2013/14 to identify sources of cross-subsidy that would have been available in 2013/14, alongside an assessment of eir's profitability at the fixed-line business level, excluding any activities that could be viewed as dissociable.	We assessed eir's profitability at the fixed-line business level. We also conducted an analysis of eir's profitability at the product level within its fixed-line business for 2010/11, 2011/12, 2012/13 and 2013/14. This does not exclude the sub-products identified as potentially dissociable, as set out in Appendix A1, as the granularity of data required for this is not available.	Fixed-line EBIT margins for eir are based on information from eir's historical-cost regulatory separated accounts.
Decision 42 (v): Changes in prices over time.	ARPU trends for eir and its competitors in the fixed-line market over the relevant period.	We looked at developments in ARPU for a subset of competitors due to data availability issues. Specifically, BT's retail fixed-line business subscriber data is incomplete. We undertook the assessment at the retail fixed-line business level to prevent potential double-counting at the wholesale level. The ComReg information requirement dated 12 March 2024 asked for the number of subscribers and revenues data both across single, double and triple play and across counties of Ireland for the	ARPU calculations for eir, Virgin (formerly UPC), Vodafone and Imagine are presented using quarterly retail fixed-line revenue and subscriber data provided by ComReg. For the period Q1 2012–Q3 2014, data for Imagine was received for a company named Access Telecom, which we understand to be related to Imagine.

		operators' retail fixed-line business. eir did not provide the data split by single, double and triple play, and it was the only operator able to supply the geographic data split.	
Decision 42 (vi): Changes in market share and/or changes in related markets.	Market shares, by revenue and subscriber, for the retail fixed-line market for eir and its competitors, accompanied by an analysis of the profitability of eir and its competitors at the fixed-line market level (EBIT and ROCE).	We reviewed changes in market shares for the main operators in the fixed-line market. We were unable to carry out profitability analysis for eir and its competitors at the fixed-line market level due to information for eir's competitors not being available at the retail fixed-line market level. The ComReg information requirement dated 12 March 2024 asked for the necessary data to calculate EBIT and ROCE at the operators' fixed-line market level for respondents. However, no operator was able to provide the required data at the fixed-line market level. Due to this, we instead used information at the Irish group-level as a proxy.⁸³	Market shares are calculated using quarterly retail fixed-line revenue and subscriber data provided by ComReg for eir and its competitors. Irish group-level profitability is calculated using eir's historical-cost accounts and the 2010/11, 2011/12, 2012/13 and 2013/14 financial statements of BT, Virgin (formerly UPC), Vodafone and Imagine.

⁸³ We note that in its response to the 2011/12 USO consultation (ComReg 24/79), BT indicated that some revenues in its Irish group-level accounts may not be earned in Ireland. We do not expect this to have a substantive impact on our assessment since BT was a small operator in the Irish market in 2013 to 2014 (with a retail fixed-line market share by revenue of [REDACTED]), so relatively small inconsistencies in its revenue data will not impact our conclusions.

Decision 42 (vii): Market entry barriers

Our preferred analysis would include an assessment of factors such as technical requirements, asset intensity levels and capital requirements that are faced by new entrants.

We looked at market trends including market shares in the retail fixed-line market in the 2009/10–2013/14 period. This allows us to conclude on whether new entrants emerge and whether they can successfully compete for higher market shares over time. We cannot directly and unequivocally observe the strength of market entry barriers as these are complex and multi-faceted.

Annual market shares were calculated using quarterly retail fixed-line revenue data provided by ComReg for eir and its competitors.

Source: Oxera.

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A3 Administrative cost assessment

A3.1 Decision 38 (iii) (a) and Decision 39 of D04/11 require ComReg to assess whether the positive net cost in eir's application is material relative to the administrative costs of establishing and operating a sharing mechanism, taking into account whether these net costs are disproportionate to any net transfers to the USP. This assessment was conducted as part of ComReg's original assessment of eir's funding application, and remains undisturbed. In this context, ComReg asked Oxera to consider the administrative cost assessment.

Decision 38: For there to be an unfair burden, 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.

A3.2 As set out in section 1, the determined net cost of €9.5m (€9,514,559) for 2013/14 is the net cost value considered in this report.

A3B Administrative costs of establishing and operating a sharing mechanism

A3.3 If the regulator, on the basis of the net cost calculation, finds that the net cost of meeting a USO represents an unfair burden, Regulation 76 of S.I. 444 of 2022 provides that the regulator will:



unless the Min[i]ster intends to introduce a mechanism to compensate the undertaking for the determined net costs under transparent conditions from public funds, establish a sharing mechanism administered by it or by a body independent from the designated undertakings, which body shall be under the supervision of the Regulator

- A3.4 ComReg has instructed us that it estimates that the current administrative cost of establishing and operating a sharing mechanism is approximately €200,000.

A3C Assessing the cost of establishing and operating a sharing mechanism relative to the transfer to a USP

- A3.5 Decision 39 provides that ComReg will make a determination in relation to whether USO financing is justified if the positive net cost is 'relatively small'. In our view, the net cost of the USO in 2013/14 (i.e. €9.5m) was not relatively small (compared against the estimated administrative costs of setting up a sharing mechanism of €200,000).
- A3.6 Where ComReg determines that the positive net cost is 'relatively small', Decision 39 then provides that ComReg will, in determining whether USO financing is justified, take into account the administrative costs of establishing and operating a sharing mechanism (compared to the positive net cost of the USO) and whether these costs are disproportionate to any net transfers to a USP.
- A3.7 If the net transfers to a USP were calculated on the basis of the USP's share in the relevant market, it is apparent that there would be a significant differential between a likely net transfer estimate to the USP, and the administrative costs estimate for establishing and operating a sharing mechanism.

A3D Conclusion on the administrative cost assessment

A3.8 In relation to Decision 38 (iii) (a), we conclude that the net cost of the USO of €9.5m for 2013/14 is material compared with the current estimated administrative cost of a sharing mechanism of approximately €200,000.

A3.9 In relation to Decision 39, we conclude that the net cost of the USO in 2013/14 was not relatively small, and the cost of establishing and operating a sharing mechanism of €200,000 would not be disproportionate to the net transfers to the USP. Having taken these conclusions into account, USO financing would be justified if it were found that the provision of the USO in 2013/14 represented an unfair burden on the USP.

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