An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

eir’s 2011-2012 Universal Service Funding Application

Unfair burden assessment

Submissions to Consultation 24/79

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Content

Section

alto

alternative operators in the communications market

Consultation: 2011 – 2012 Universal Service Fund Application. Unfair Burden Assessment - Ref: 24/79.

Submission By ALTO

Date: November 5th 2024

ALTO is pleased to respond to the Consultation: Assessment of eir's 2011 – 2012; Universal Service Fund Application. Unfair Burden Assessment - Ref: 24/79.

ALTO welcomes this opportunity to comment on this timely and important set of consultation papers.

Preliminary Remarks

ALTO notes and welcomes the fact that considerable effort has been expended in re-analysing the various eir's USO funding claim for this period.

It is obviously highly undesirable to have taken over ten years to reach this stage of the process which as a result creates considerable risk and an unacceptable level of uncertainly for all operators on the market. Nevertheless, we are aware of the fact of protracted litigation, and we agree with ComReg's conclusions that there should be no funding awarded to eir for the period in question.

Entirely separately, eir appears to have not recovered amounts for which they were legally permitted to do so under the price cap regime, totalling on aggregate: €45.5m, they did not offset the benefits they achieved from the various discount schemes and promotions, together with various self-inflicted uneconomic decisions.

Period 2011 – 2012:

For the year 2011 to 2012 eir made a retrospective USO funding application to ComReg in the sum of **€7.26m** - Adjusted to **€6.99m**
Result: <u>No Burden on assessment</u>
ComReg Consultation/Decision Reference: 17/81
Positive net cost for 2011 – 2012 was <u>€6</u>.7m
WACC **10.21%**

ROCE **22.3%**

CPI 2011 - 2012: 1.72%

Average annual eir retail access lines: 999

Price cap if availed of: €21.932

Price Cap under-recovery €11.6m

Total Price Cap under-recovery: €45.5m

Price Cap and Promotions

ALTO submits that during the currency of the funding application listed above, eir failed to recover revenues permitted for recovery by virtue of the existence of what is known as the price cap on copper lines.[1]

Since September 2008 eir has been free to raise retail access rental prices by CPI-0% each year under the existing price cap regime that was last amended in September 2007.[2] This was replaced in the latest year, however the amount of €45.5m was not recovered by eir at all and appears to have not been considered by ComReg or its consultants in its analysis of the USO funding applications in each discrete year.

It should be noted that ALTO's calculations above do not include the additional revenue that would have been earned from SB-WLR rental that would have increased in parallel with any retail price increases. This is because SB-WLR pricing was determined by retail minus pricing regime, at circa CPI-14%.

It is submitted that if those promotions together with the price cap allowances were taken full account of, then eir's request for funding would have reduced dramatically. However, the reality is that eir's credibility and veracity of the various and pending

[1] This was later replaced by cost orientation

[2] See ComReg document 07/76

USO funding applications is questionable. Furthermore, these are self-inflicted uneconomic decisions made by eir. ComReg noted in the statement accompanying Decision D04/11 that "*ComReg must ensure that the USP is not compensated for inefficient decisions in the past or costs incurred inefficiently*".[3] As it stands, eir failed to recover **€45.5m** in allowed revenues (a principle which should simply cancel out any and all USO funding applications) to underpin ComReg's findings, which ALTO also agrees with. ALTO previously made these points to ComReg in December 2015 under Consultation Reference 15/124.[4]

Decision Instrument D04/11

Decision D04/11[5] ComReg's "*Decision on the Costing of universal service obligations: Principles and Methodologies Ref. 11/42*" was consulted publicly and all parties had the opportunity to appeal the Decisions. Hence the formal public consultation process was executed correctly, and the rules were set and not appealed or changed. eir and the wider industry must accept that basis.

Response to Consultation Questions:

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

A. 1. ALTO agrees with ComReg's approach to the unfair burden assessment together with the more structured and methodological approach deployed concerning Decisions 38 – 42 and considering the recent judgment of the Court of Justice of the European Union. ALTO is of the opinion that ComReg has properly deployed the principles; processes and methodologies appropriate in order to calculate the direct net cost in the circumstances.

[3] Paragraph 2.8, https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/
[4] https://www.comreg.ie/media/dlm_uploads/2015/12/ComReg15124s.pdf
[5] https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/

ALTO notes that ComReg has undertaken a full and thorough consultation on the principles, processes and methodologies in Decision 04/11 whilst noting the above observations.

ALTO has reviewed ComReg's findings and the relevant decision in the funding application period and believes that those findings are correct.

ALTO also notes that ComReg has deployed the principles in Case C-389/08 *Base & Others v Ministerraad* concerning the discretion permitted when a National Regulatory Authority undertakes the task of assessing burdens.

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

A. 2. ALTO agrees with ComReg's approach to information and information constraints. As ALTO has mentioned above and indeed as is acknowledged by ComReg in the Consultation document, it is far from ideal that a USO burden analysis is being carried out 11 – 12 years after the relevant period (litigation delays allowed for). We note that Oxera have taken a position in relation to information constraints as directed by ComReg.

We further note that the Oxera Report at Appendix A.2 at pages 69 - 76 states with clarity that on a comparative analysis basis there is little difference between what 'preferred analysis' and the 'analysis presented'. As this issue is as important to industry and ALTO members, we support the methodology and clarity brought to bear on the position as is set out by Oxera.

Q. 3. Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2011-2012 did not represent an unfair burden on eir? Please give reasons for your answer.

A. 3. ALTO agrees with ComReg's position in the year under consultation at this time. ALTO notes that for there to be an unfair burden, three cumulative conditions must be met re. Decision 39:

> *"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."*

It is clear from eir's remarkable financial performance, its market share/dominance and significantly higher returns than anticipated, it is not the case that an unfair burden can be determined on any objective assessment of the company's results and financial performance.

1. 2011 – 2012: WACC 10.21% - ROCE 22.3% (12.09% differential)

USO Assessment Rules

ALTO notes that ComReg set out a clear set of conditions for the USO in Decision D04/11[6] which was consulted publicly, and all parties had the opportunity to appeal the Decisions. Hence the formal public consultation process was executed correctly,

[6] https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/

and the rules were set and not appealed or changed. eir and the wider industry must accept that basis.

ALTO notes that ComReg and its consultants Oxera provide considerable clarity with the consultation and the recent judgment of the Court of Justice of the European Union in the application of the various rules of D04/11 to assess whether the USO costs were an unfair burden on eir. On reading the consultation the rules do appear to have been implemented correctly.

Unfair Burden

We agree with the assessment within the Oxera unfair burden report 2011/2012 that the USO cost was not an unfair burden as eir was able to maintain a Return On Capital Employed (ROCE) above the maximum of the range for the allowable Weighted Average Cost of Capital (WACC). i.e., it was able to maintain a return on investment above the level expected by regulation.

ALTO emphasises eir's position regarding unfair burden versus financial performance concerning unfair burden.

Oxera Report Extract 2011 – 2012 – Page 28:

> *"[A] comparison of eir's actual profitability (ROCE) against the competitive benchmark return (the WACC). This shows that in 2011/12, eir's fixed-line business ROCE exceeded the WACC by 12.1%.*
>
> *To further contextualise eir's financial position, it is relevant to note that:*
>
> *• the ROCE for the fixed-line business exceeded not only the point estimate of the allowed WACC, but also the upper end of the WACC range estimated by ComReg, by 11.2%;*

• *for there to be no returns above the WACC, the net cost of the USO would have to have been around **27 times higher**; or, alternatively,*

• *the absolute profit (EBIT) for the fixed-line business would have to have been around 54% lower for the application period, 2011/12.*[7]*"*

Conclusion

ComReg and the industry can be left in no doubt that no unfair burden existed in the period under consultation based on the assessment and independent expert information provided above.

ALTO remarks that as a matter of commercial fairness, having to consider potential funding requests and accounting reserves that are now stale and historical, there may be some legal timeclock impediments if some form of burden was found – given the passage of time.

ALTO

5 November 2024

[7] Oxera Report, page 28 – Link: https://www.comreg.ie/media/2024/09/ComReg-2479a.pdf

BT Response to the ComReg Consultation:

eir's 2011-2012 Universal Service Funding Application

Unfair burden assessment

Issue 1: 5th November 2024

Non - Confidential Version

1.0 Introduction

We welcome the opportunity to comment to the ComReg assessment and we will provide our response to the questions below.

Before addressing the detail of the assessment, we would say this whole process has taken far too long and it is not reasonable that BT and industry in 2024 should be reviewing an assessment of Eir's USO funding application for 2011 to 2012. In our view ComReg should never have allowed this situation to occur with the first consultations for the 2011 – 2012 USO assessment delayed until 2019.

That said we welcome ComReg is now working pragmatically and with due process to complete the process. Given the similarities in process within this consultation to the earlier 2010 – 2011 consultation we continue to support our views in the earlier consultation and have not overly duplicated them in this response.

2.0 BT Response to the Questions

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

BT Response

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

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

BT Response

Our view is the 2011-2012 assessment should have been concluded in a timely manner and that it took far too long before the initial ComReg Decision on the Assessment was issued in 2019. We consider this delay led to the constraints that ComReg is now facing.

Given the situation we would like to offer the following comments:

1. We welcome that ComReg has sought the assistance of the well-respected expert consultancy company Oxera. We note Oxera has a wide experience of regulation in various countries and consider this helpful.
2. We continue to consider the relevant market revenues should relate to telephone and broadband services and exclude leased line services – as leased line operators do not benefit from the presence or absence of a USO obligation for fixed lines.
3. We consider that market shares should be assessed as the retail value of relevant services divided among the retail and wholesale actors who generated that value.
4. We consider a new category should be added to Table A1.1 of the Oxera paper which addresses revenue not earned in Ireland or touching the electronic communications business in Ireland. ✂ See Confidential Annex.
5. We note that the selection of Option 2 (pages 16 to 18) of the Oxera report) to address the scope of the market excludes calls between fixed and mobile phones. We assume selection of this option is solely because of the lack of data given calls to and from mobile service are a fundamental/integral part of the Public Switched Telephone Network (PSTN). I.e. revenue is earned by both the uneconomic lines and mobile industry through these calls. Fixed to Mobile call values should include the value of the associated MTR.

Q. 3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2011-2012 did not represent an unfair burden on eir? Please give reasons for your answer.

BT Response

Although there was limited availability of some data due to the passing of some 13 years since the period in question, fortunately given the regulated nature of the market and the requirements for Eircom and other operators to continuously provide data to the regulator, a lot of data was still available to ComReg and based on this, plus the Oxera look at the impact on Eircom and competitors in the market, we agree with ComReg that the USO had a marginal impact on Eircom which was still well able to earn a return well above the WACC, maintained a steady ARPU and maintained the position as the main player in the market.

For 2011–2012 we agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2011-2012 does not represent an unfair burden on eir.

Annex A – Confidential Information

eir's Response to ComReg Consultation:

eir's 2011-2012 Universal Service Funding Application

Unfair burden assessment

ComReg Document: ComReg 24/79

5 November 2024

DOCUMENT CONTROL

Document name	eir response to ComReg Consultation 24/79
Document Owner	eir
Status	Non-Confidential

The comments submitted in response to this consultation document are those of Eircom Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

eir response to ComReg Consultation 24/79

1. eir is concerned that ComReg's consultation follows the same flaws as that undertaken earlier this year in respect of FY10/11 (ComReg 23/113 and ComReg 24/43). The process followed by ComReg in respect of FY10/11 did not constitute a fair consultation process.

2. In ComReg 23/113 ComReg set out a superficial case with limited evidence based on a report prepared by Oxera who appear to be resident economists for ComReg, given ComReg's perhaps over reliance on them for a range of matters.

3. In response to the consultation eir submitted a report prepared for it by RBB Economics which highlighted significant issues with ComReg's methodological approach and recommended a number of more suitable approaches which would be required in order to take into account the clarification received from the European Court of Justice.

4. ComReg's response to consultation and Decision in respect of FY10/11 (ComReg 24/43, Decision D06/24) introduced alternative theories that ComReg sought to rely on. The adapted reasoning and methodology was materially different to the limited reasoning to support ComReg's preliminary views and methodology presented for consultation in ComReg 23/113. Such a material difference between consultation and Decision should have merited a new consultation in the interest of openness and transparency, so that all interested parties could test ComReg's changed methodology and offer informed views.

5. ComReg instead denied interested parties this opportunity, unfairly and contrary to the requirements of the regulatory framework.

6. The current consultation, ComReg 24/79, is largely a cut and paste of the previous consultation, ComReg 23/113, with numbers updated for the relevant year under assessment, FY11/12. As such it is based on an assessment methodology that is different to that ultimately relied upon in ComReg's FY10/11 Decision.

7. It should be noted that eir's silence in respect of ComReg 24/43 does not constitute acceptance of ComReg's materially amended methodology. However eir expected that ComReg would consult in respect of subsequent years using its amended methodology and therefore eir would have an opportunity to provide its views on the material changes made by ComReg. It cannot be the case that ComReg can flip flop between a light consultation process and a materially different reasoning to support its decision document.

8. Separately, eir notes that ComReg has relied on the significant passage of time (for which ComReg itself is fully responsible) to highlight the lack of data/information that is now available to support eir's claim to an unfair burden. ComReg is legally required under Regulation 5 (3) of the EEEC Regulations (SI 444 of 2022) to "*exercise their powers under these Regulations and the Directive impartially, transparently and in a timely manner*". It cannot be legally correct for ComReg to delay its own assessment and impact the rights of eir due to shortcomings and legal failings of its own making.

9. As part of this submission eir refers again to the methodological issues highlighted in the RBB report and urges ComReg to appropriately re-consult on the material methodological changes it considers necessary to respond to the issues raised in the RBB report.

Universal Service Funding Application by eir, 2011-2012. Unfair burden assessment.

Response from Three.

4th November 2024.

Three.ie

Contents

1 Introduction

Three welcomes the opportunity to comment on ComReg's unfair burden assessment in respect of eir's USO funding application for the period 2011-2012.

Notwithstanding the legal processes which have contributed to the timescale leading this point, it is a fact that this consultation deals with issues which are over 10 years old. It is one in a series of assessments required to bring clarity and finality on legacy issues relating to USO funding.

This protracted process represents a significant regulatory overhang on the sector and Three would urge ComReg to prioritise the completion of the outstanding assessments.

In broad terms Three supports ComReg's finding that the determined net cost of USO for the period 2011-2012 did not represent an unfair burden on eir.

2 Responses to Consultation Questions

Consultation Question 1

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

Three Response:

Three notes that part of ComReg's assessment involves estimation of the cost of administering any fund that might be established. Three further notes that ComReg's estimation is based on a process which has been consulted on but not "determined" by way of a formal Decision. The process consulted on did not explicitly take account of the very long interval between the determination of the quantum of any contribution by a specific authorised undertaking and the period to which the liability relates. In this regard Three is of the view that the proposed process for administration of any fund would require to be reconsulted upon and that the resulting final mechanism is likely to be more complex than that used by ComReg in its estimation. In this regard Three believes that ComReg's estimate of the cost of administering a fund is likely to be understated.

It is possible that a revised sharing mechanism would link contributions to market activity by contributors in the period to which the contribution related. If so, then it is not clear whether contributions which are unrecoverable due to market exit would be considered a cost related to the administration of the fund. In this scenario the cost of administering the fund would be further inflated.

The conditions for the establishment of a fund are cumulative:

1. There must be a positive net cost to the USP
2. The cost burden must be unfair to the USO

AND

3. The cost of administrating the fund must not be disproportionate to the net transfer to the USP

The cost of the administration of the fund must be balanced against the "*net transfers*" to the USP[1]. This **<u>transfer</u>** is different to the assessment of the net **<u>cost</u>** of meeting the USO obligation. Depending on the sharing mechanism, the net transfer to the USP could me much smaller than net cost of meeting the USO obligation.

While the Consultation sets out an estimated cost for the administration of any fund (and which Three believes to be a significant underestimate) Three notes that neither

[1] Table 2 of the Consultation Document Decision 38(iii)

ComReg or Oxera appear to have estimated the level of potential net **transfer** to the USP if a fund was established in respect of the period 2011-2012.

While Condition 1 above has been satisfied, the subject of this consultation is a finding that Condition 2 has not. This results in the cumulative requirements not having been met and no fund being established. This is the outcome irrespective of consideration of Condition 3.

As the consultation does not set out any estimate for the net transfer to the USP that would result from the establishment of a fund for the year under review it is impossible to assess whether the cost of administering the fund is disproportionate. Three does not believe that any finding or inference that Condition 3 has been satisfied is capable of being reached absent a more rigorous assessment of both the cost of administering the fund and the value of any net **transfer** to the USP.

Three is of the view that the primary focus of a full market analysis as provided for in Part 8 Chapter 3 of the Code Regulations is the assessment of whether an undertaking exercises Significant Market Power on the market. This is different to the assessment arising from the CJEU judgement which requires ComReg to examine the characteristics particular to that operator, taking account of its situation relative to that of its competitors in the relevant market.

Three agrees with the Oxera Report, which proposes to exclude Mobile from an assessment of the relevant market for the purposes of USO. Three notes that even under an expansive formulation of the relevant market as set out in Option 2 of the Oxera Report the net cost of USO does not represent an unfair burden on the USP. Three is of the view however that a narrower formulation of the market may be more appropriate. Three believes that if the assessment of unfair burden is finely balanced then a more in-depth exercise to define the relevant market would be required.

Notwithstanding the infirmities in the analysis these are either moot (in the case of the administrative burden of the fund) or operate in eir's favour or are neutral (in the case of the expansive scope of the market formulation) and do not affect the validity of the overall conclusion.

Subject to these caveats Three supports ComReg's proposed approach to the assessment of eir's situation relative to that of its competitors in the relevant market.

Consultation Question 2

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

Three Response:

Three agrees with ComReg's approach to information and information constraints. Three believes that the range of information available to be considered as part of the assessment is more than adequate to yield a valid assessment for the period under review especially where the result is unambiguous.

Consultation Question 3

Q. 3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2011-2012 did not represent an unfair burden on eir? Please give reasons for your answer.

Three Response:

Three agrees with ComReg's preliminary view that the positive net cost of the provision of the USO in 2011-2012 (i.e., €6,986,518) does not represent an unfair burden on eir.

Specifically Three agrees with the results of the assessments carried out pursuant to Decisions 40, 41 and 42 of ComReg Decision D04/11.

-End-

Vodafone Response to Consultation

<u>Eir's 2011-2012 Universal Service Funding Application</u>

Unfair Burden Assessment

Consultation

Reference: ComReg Doc 24/79

Version: Non-Confidential

Date: 5/11/24

Response to Consultation

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg's) further consultation on Eir's 2011 to 2012 Universal Service Funding Application and the draft determination on the unfair burden assessment.

Vodafone's position in relation to USO funding applications have been expressed as part of many consultations and in court proceedings to which Vodafone are notice parties. We do not propose to go into much further detail other than to say our position in response to this draft determination is consistent with that previously expressed.

SUMMARY OF POSITION

In summary our views

- Vodafone is satisfied with the draft determination that there is no USO unfair burden.
- The issues under consultation have been held over the sector for far too long bearing in mind publication of ComReg Decision D04/11 was almost 13 years ago.
- The fact remains that Eir continues to be hugely profitable with an EBITDA margin at 47%[1] which is funded to a large extent by wholesale charges.

We have provided answers to the consultation questions below.

[1] eir Group Results

CONSULTATION QUESTIONS

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

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

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

The passage of time is stark and the information constraints arising are not a surprise given the matters under consideration relate to services provided in 2011 to 2012.

Vodafone has been a participant in this process in the period leading up to ComReg decision D4/11 in May 2011. In the 13 years since publication Vodafone have invested in mobile infrastructure rollout and the delivery of fixed line services to Irish customers.

It is clear that the spectre of USO funding has now been held over industry for far too long. This draft determination reconfirms the ComReg position that there is no unfair burden for 2011-2012, and this now needs to come to a conclusion.

Q.3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2011-2012 did not represent an unfair burden on eir? Please give reasons for your answer.

Vodafone is satisfied with the findings that there is no USO unfair burden. It is very evident that not affected Eir profitability with EBITDA margin at 47%.

As stated in previous submissions, Eir remains extremely reliant on wholesale to maintain high profits and, against this backdrop, it seems clear that there is no unfair burden on Eir and that industry should not be required to contribute in the form of any universal service payment.

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

This could be evidenced when homes initially targeted for State Intervention under National Broadband Plan were subsequently removed from the subvention area and Eir made it clear it could rollout FTTH services on a commercial basis to these areas. It is highly probable that customers within that 340K footprint may be uneconomic however overall Eir has made a commercial call to service these areas. The removal of these homes from the NBP ensure that Eir remains the monopoly access provider in the 340K footprint.

ENDS