



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

eir's 2012-2013 Universal Service Funding Application

Unfair burden assessment

Submissions to Consultation 24/96

Reference: ComReg 25/14s

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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alto

alternative operators in the communications market

Consultation: 2012 - 2013 Universal Service Funding Application. Unfair Burden Assessment - Ref: 24/96.

Submission By ALTO

Date: January 17th 2025

ALTO is pleased to respond to the Consultation: Assessment of eir's 2012 – 2013; Universal Service Funding Application. Unfair Burden Assessment - Ref: 24/96.

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 uncertainty for all operators on the market. Nevertheless, we are aware of the fact of protracted litigation and that ComReg endeavoured to dispose of this issue through consultation in 2017. We agree with ComReg's conclusions that there should be no funding awarded to eir for the period in question.

Period 2012 – 2013:

For the year 2012 to 2013 eir made a retrospective USO funding application to ComReg in the sum of **€7.26m** - Adjusted to **€6.99m**

Result: No Burden on assessment

Positive net cost for 2012 – 2013 was €7.7m

WACC **10.21%**

ROCE **16.0%**

CPI 2012 - 2013: 0.28%

Average annual eir retail access lines: 961

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.

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 67 - 72 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 2012-2013 (i.e. €7,723,749) does 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 38:

"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. 2012 – 2013: WACC 10.21% - ROCE 16.0% (5.79% differential)

USO Assessment Rules

ALTO notes that ComReg set out a clear set of conditions for the USO in Decision D04/11¹ which 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.

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 2012/2013 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.

¹ <https://www.comreg.ie/publication/report-on-consultation-and-decision-on-the-costing-of-universal-service-obligations-principles-and-methodologies/>

Oxera Report Extract 2012 – 2013 – Page 28:

“It shows that the ROCE of eir’s fixed-line business ROCE exceeded the WACC by 16.0% , exceeding the regulated WACC of 10.21% by 5.79 percentage points.

While this is a decrease relative to the year 2011/12, it is important 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 4.92 percentage points;*
- for there to be no returns above the WACC, the net cost of the USO would have to have been around **13 times higher**; or, alternatively,*
- the absolute profit (EBIT) for the fixed-line business would have to have been around 36% lower for the application period, 2012/13.²”*

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 timing impediments if some form of burden was found – given the long passage of time.

² Oxera Report, page 28 – Link: <https://www.comreg.ie/media/2024/12/ComReg-2496a.pdf>

ALTO

17 January 2025

BT Response to the ComReg Consultation:

eir's 2012-2013 Universal Service Funding Application

Unfair burden assessment

Issue 1: 17th January 2025

Not Confidential

1.0 Introduction

We welcome the opportunity to comment to the ComReg USO assessment for 2012-2013 and provide our response to the questions below. We also welcome ComReg is working pragmatically and with due process to complete the process.

Given the similarities in process within this consultation to the earlier 2010 – 2011 and 2011 – 2012 consultations we continue to support our views but with minor adaptations in consideration of ComReg's published responses.

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 and the updates of the Irish and European courts.

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 2012-2013 assessment should have been concluded in a timely manner and that it took too long before the initial ComReg Decision on the Assessment was originally issued. 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.

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.

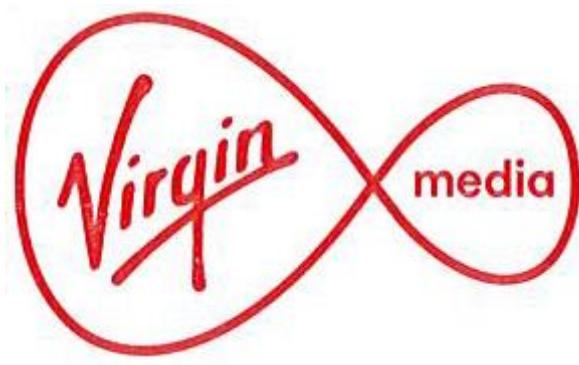
BT Response

Although there was limited availability of some data due to the passing of a significant number of 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 2012–2013 we agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2012-2013 does not represent an unfair burden on eir.

3.0 Editorial note to the Consultation.

We consider that there are two important editorial errors in clause 5.18 of the consultation and would seek for these to be addressed. The 1st typo relates to the text "USO in 2012-2012" and the second is we believe the word "not" is missing between "did" and "constitute".



Virgin Media response to:

ComReg Consultation on “eir’s 2012-2013 Universal Service Funding Application - Unfair burden assessment” (ComReg Ref: 24/96 published on 6 December 2024)

Date of submission: 17 January 2025

Introduction

Virgin Media Ireland Limited ("**Virgin Media**") welcomes the opportunity to respond to the consultation published by the Commission for Communications Regulation ("**ComReg**") on 6 December 2024 titled "*eir's 2012-2013 Universal Service Funding Application - Unfair burden assessment*" (ComReg Ref: 24/96) ("**the Consultation**"). The terms used herein have the same meanings as in the Glossary in the Consultation. No part of this response to the Consultation is considered confidential.

Background

Eircom Limited ("**Eir**") submitted five applications for funding for what Eir claimed to be the net costs of meeting its universal service obligations ("**USO**"). Eir sought such USO funding for each of the following financial years - 2010-2011, 2011-2012, 2012-2013, 2013-2014, and 2014-2015. ComReg published five decisions on 18 April 2019 ("**the Decisions**"). In each Decision, ComReg determined the quantum of the net cost of the USO, for the financial year in question, and ComReg determined that the net cost did not represent an unfair burden on Eir.

Eir appealed all five Decisions on 15 May 2019. The High Court stayed the appeal proceedings on 19 February 2021, having referred a question on the unfair burden assessment to the Court of Justice of the European Union ("**CJEU**"). The CJEU delivered its judgment on 10 November 2022. The High Court, on 10 July 2023, directed that aspects of the Decisions be remitted to ComReg for review in accordance with the CJEU judgement. The substance of the CJEU judgment was that ComReg, in determining whether the net cost of the USO represents an unfair burden on Eir, is required to examine the characteristics particular to Eir taking account of Eir's situation relative to that of its competitors in the relevant market.

The Consultation concerns the unfair burden assessment for Eir's financial year 2012-2013. The relevant 2019 Decision (D07/19) determined the quantum of that net cost as €7,723,749 and this figure has not been reassessed and remains unchanged. The Consultation is thus solely concerned with assessing whether the determined net cost of €7,723,749, for the financial year 2012-2013, represents an unfair burden on Eir, taking account of the CJEU judgment. Virgin Media agrees with ComReg that it does not.

Responses to Consultation Questions

Our responses to the three questions in the Consultation are set out below.

Q. 1 Do you agree with ComReg's approach to the unfair burden assessment?

We agree with ComReg's approach to the unfair burden assessment noting that it was originally conducted in accordance with Regulation 11 of the Universal Service Regulations, as revoked and replaced by the Code Regulations in June 2023, and in accordance with D04/11 which continues in force as if it had been made under the Code Regulations.

We note that ComReg has adjusted D04/11 in light of the CJEU judgment by deleting the first ten words of Decision 41 (*"If the positive net cost significantly affects a USP's profitability ..."*). We also agree with ComReg that an assessment, as to whether a net cost is excessive, must be based on Eir's ability to bear it, taking account of Eir's characteristics, and when examining those characteristics account must be taken of Eir's situation relative to its competitors in the relevant market. This approach takes proper account of both the Base judgment and the CJEU judgment.

Q. 2 Do you agree with ComReg's approach to information and information constraints?

We agree with ComReg's approach to information and information constraints. ComReg observed that certain information constraints are inevitable when an unfair burden assessment for 2012-2013 is conducted in late 2024. ComReg instructed Oxera to address such constraints. Appendix A2 of Oxera's report identifies the information constraints, describes the analysis that would ideally have been carried out, and describes the analysis that was carried out given those constraints.

We note and agree with Oxera's overall conclusion, in para A2.1 of its report, that *"the preferred analysis, if followed, would be unlikely to reach a materially different conclusion to the analysis presented."* Such information constraints, as were identified, did not prevent Oxera from conducting a full assessment, by application of Decisions 38 to 42 of D04/11, and from concluding that the three cumulative conditions of Decision 38 were not met such that the net cost of the USO in 2012/2013 did not represent an unfair burden on Eir.

Q. 3 Do you agree with ComReg's preliminary view that the positive net cost of the provision of the USO in 2012-2013 (i.e. €7,723,749) does not represent an unfair burden on eir?

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

- End -



Vodafone Response to Consultation

Eir's 2012-2013 Universal Service Funding Application
Unfair Burden Assessment

Consultation

Reference: ComReg Doc 24/96

Version: Non-Confidential

Date: 17/01/25

Response to Consultation

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg's) further consultation on Eir's 2012 to 2013 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 13 years ago.
- The fact remains that Eir continues to be hugely profitable with an EBITDA margin at 46%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 2012 to 2013. ComReg do have sufficient information to inform its position.

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 2012-2013, 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 2012-2013 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 46%.

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 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