



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

eir's 2013-2014 Universal Service Funding Application

Unfair burden assessment

Submissions to Consultation

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Submissions Received from Respondents

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alto

alternative operators in the communications market

Consultation: 2013 - 2014 Universal Service Funding Application - Unfair Burden Assessment - Ref: 25/11

Submission By ALTO

Date: April 9th 2025

ALTO is pleased to respond to the Consultation: Assessment of eir's 2013 – 2014; Universal Service Funding Application – Unfair Burden Assessment - Ref: 25/11.

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 2013 – 2014:

For the year 2013 to 2014 eir made a retrospective USO funding application to ComReg in the sum of **€11.25m** - Adjusted to **€10m**

Result: No Burden on assessment

Positive net cost for 2013 – 2014 was **€9.5m**

WACC of **10.21%** adjusted later to reduced WACC of **8.18%**

ROCE **12.59%**

CPI 2013 - 2014: 0.28%

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 - 74 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 2013-2014 (i.e. €€9,514,559) 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. 2013 – 2014: WACC 10.21% - ROCE 12.59% (2.38% 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 2013/2014 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 2013 – 2014 – Page 25:

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

“It shows that the ROCE of eir’s fixed-line business ROCE exceeded the WACC by 12.59% , exceeding the regulated WACC of 10.21% by 2.38 percentage points.

While this is a decrease relative to the year 2013/14, 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 1.51 percentage points;*

- *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 absolute profit (EBIT) for the fixed-line business would have to have been around 19% lower for the application period, 2013/14.²*

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.

ALTO

9 April 2025

² Oxera Report, pages 25 and 26 – Link: <https://www.comreg.ie/media/2025/02/Oxera-Unfair-Burden-Report-2013-14-NON-CONFIDENTIAL-VERSION.pdf>

BT Response to the ComReg Consultation: eir's 2013-2014 Universal Service Funding Application Unfair burden assessment

Issue 1: 9th April 2025

Not Confidential

1.0 Introduction

We welcome the opportunity to comment to the ComReg USO assessment for 2013-2014 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, 2011 – 2012 and 2012 – 2013 consultations we continue to support our earlier views but also address the issues within this consultation.

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 2013-2014 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 2013-2014 (i.e. €9,514,559) does not represent an unfair burden on eir? Please give reasons for your answer.

BT Response

1. 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 did not create an undue burden on Eircom and it still achieved a financial return higher than the WACC upper boundary. Eircom also maintained a steady ARPU and maintained its position as the main player in the market.
2. We agree with the Oxera financial analysis of the eir ROCE vs the WACC as demonstrated in Oxera figure 3.3 and note that during the period of the study the eir ROCE was above the maximum boundary of the WACC highlighting an over recovery compared to the expected efficient operator model for a regulated entity. i.e. within the WACC range. We also note Oxera's comment that the value of the WACC was reducing as it dropped to 8.21% after this period. We see this as one of the key indicators that eir was able to overachieve ROCE compared to the WACC regulatory rate and window.
3. We would also observe that eir launched Fibre To The Cabinet broadband services (commonly known as FTTC) in May 2013 which transformed the speed of broadband services in Ireland, hence it was clearly well able to invest in its network and grow this major investment. I.e. further supporting that the USO was not creating an undue burden on its business. We note ComReg document 13/23 - Response to Eircom's

request for a derogation on launch date for Wholesale NGA Services - evidence this launch period and eir were even pushing for an earlier launch date.

4. For 2013–2014 we welcome the clarity of the financial analysis and agree with ComReg’s preliminary view that the positive net cost of the provision of the USO in 2013-2014 does not represent an unfair burden on eir.

End



Virgin Media response to:

ComReg's unfair burden assessment of eir's 2013-14 Universal Service Funding Application.

Reference Submission re: ComReg 25/11.

Date of submission: 2 April 2025.

Non-confidential.

Executive Summary

This is the Virgin Media Ireland Limited (“Virgin Media”) response to ComReg’s unfair burden assessment of eir’s 2013-14 Universal Service Funding Application.

ComReg’s evaluation of the alleged “unfair burden” for eir discharging its obligations under the 2013/14 Universal Service Obligation (“USO”) is in the context of a legal challenge by eir, the decision for which was handed down by the Irish High Court in July 2023 (the High Court having referred a question of law to the Court of Justice of the European Union (“CJEU”) in February 2021 which the CJEU answered in its judgement of November 2022).

In its legal challenge eir alleged that ComReg had erred in a number of USO decisions by failing to recognise that the “true” costs on eir for discharging its obligations under the USO represented a so-called unfair burden, and that in consequence eir had not been adequately compensated and had in consequence been unfairly placed at a competitive disadvantage.

As part of its conclusions, the High Court remitted five USO decisions back to ComReg and instructed it to re-evaluate them in line with the CJEU judgement. The court provided detailed guidance that ComReg was required to follow when undertaking the re-evaluations.

Virgin Media considers that ComReg has done a thorough and professional job in conducting the re-evaluation of the 2013/14 eir USO funding arrangements, and that the approach it has taken is in line with the instructions of the High Court. In particular, ComReg has been clear in articulating the methodology it has used in undertaking the unfair burden assessment of the 2013/14 USO and has clearly laid out the evidence relied upon to reach its draft conclusions. Where there have been gaps in the data (given the passage of time), this is clearly laid out in ComReg’s draft determination and an appropriate alternative approach to deal with this lacuna has been set out. As part of the unfair burden assessment ComReg engaged Oxera to conduct a detailed analysis and the Oxera report is also available to stakeholders.¹

The conclusions reached through this process are clear, with Oxera finding that “*..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.*”²

¹ See Oxera Unfair Burden report 2013/14.

² See Oxera Unfair Burden report paragraph 4.7.

Virgin Media agrees with the Ofera and ComReg assessments and considers that eir's contention that its costs for providing the USO in 2013/14 represented an unfair burden to be unfounded and contradicted by the best available evidence. Accordingly, Virgin Media considers that ComReg's draft finding that eir's costs for providing the USO in 2013/14 do not represent an unfair burden on eir should stand.

Response to ComReg's Questions

Question 1

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

Response

Virgin Media agrees with the approach taken by ComReg in conducting the unfair burden assessment.

ComReg has adopted an approach that is transparent, reasonable, apt to produce sound conclusions, and consistent with the decision and instructions handed down by the High Court.

ComReg has also engaged a credible and independent third party (Oxera) to conduct the unfair burden assessment. Both ComReg and Oxera have been open when historic data has been lacking and have set out their methodology and findings clearly – enabling stakeholders to understand the approach that has been followed, and the evidence relied upon to reach the (draft) conclusions.

For example, the Oxera report is clearly laid out, with good articulation of the approach taken, including why conclusions have been reached, and the evidence relied upon. Oxera notes the approach it takes, and the legislative framework being followed: *“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”*.³

By setting out in detail the method being relied upon to reach the draft conclusions should give confidence to stakeholders by allowing them to understand the precise basis for ComReg’s findings, how they relate to the relevant legal framework handed down by the High Court, and understand the approach taken in circumstances where information is not available.

³ See Oxera Unfair Burden report paragraph 3.1.

Question 2

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

Response

Virgin Media agrees with the approach taken by ComReg in dealing with information constraints.

The clarity of the methodological approach adopted in the ComReg and Oxera reports gives confidence that the assessment conducted is unbiased. For example, in conducting its assessment, Oxera is clear to articulate the method being taken to reach conclusions, including setting out where data has not been available, and in such circumstances what evidence has been relied upon to draw conclusions.

In the appendix to its report, Oxera helpfully sets out all of the data constraints encountered, the analysis conducted in such circumstances and the best available data relied upon. This approach gives stakeholders clear line of sight as to the method used to draw conclusions and the data employed to underpin the same, and gives confidence that those conclusions are based on sound assumptions.

For example, for Decision 42 (i) associated with changes in profitability, Oxera sets out the preferred analysis sought (which was not fully available), and describes the approach and data used to support its analysis in detail *"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 subproducts 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 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."*⁴

⁴ See Oxera Unfair Burden report Table A.2 ("Data Constraints"), Decision 42(i), page 70.

By providing this level of transparency as to the data / methodology used, including acknowledging where there were gaps in the data and the approach used in those circumstances is good regulatory practice and will help give stakeholders clarity on the basis for ComReg's decision. For Virgin Media this supports the view that ComReg's conclusions are consistent with its legal obligations, based on the best supportive evidence available and, in consequence, sound. The approach taken by ComReg will also enable eir to clearly understand the basis for ComReg's draft decisions and respond accordingly.

Question 3

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

Response

Virgin Media agrees with ComReg's preliminary view that the positive net cost of the provision of the USO in 2013-14 (which stands at €9,514,559) does not represent an unfair burden on eir.

In its preliminary assessment ComReg (supported by the independent assessment conducted by Oxera) clearly sets out the basis for its draft conclusion that the USO in 2013/14 does not represent an unfair burden on eir. In Virgin Media's view the preliminary conclusion reached by ComReg is based on sound evidence, consistent with the instructions handed down by the High Court, and inherently sound.

Confidence in the approach taken by ComReg is supported in particular through (i) ComReg clearly laying out the methodology used and how this relates to its obligations pursuant to the directions of the High Court based on the ruling by the CJEU; (ii) the use of a credible and independent third party to conduct the relevant analysis; and (iii) being clear and open when the "ideal" information was not available, and the approach taken in such circumstances (see also the response to question 2, above).

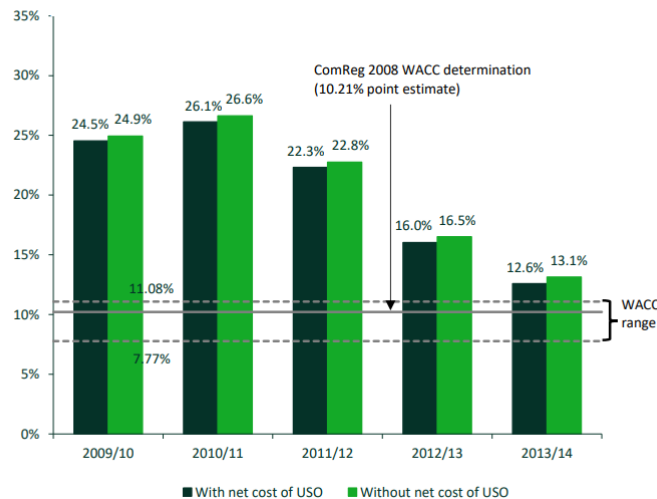
Virgin Media further notes that in its submission, Oxera shows that eir's assertion that the USO represents an unfair burden to be unsupported based on a variety of different and relevant evidence points. For example, Oxera sets out that *"..for there to be no returns above the WACC, the net cost of the USO would have to have been around **5.3 times higher** or, alternatively, the 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"⁵* (emphasis added). These data points alone are strong evidence that the assertion by eir of the USO representing an unfair burden to be wide of the mark to a material degree.

Oxera goes on to set out the ROCE of eir's fixed line business (which is as good a proxy for the USO as has been put forward to date) is consistently healthy, and at levels above regulated

⁵ See Oxera Unfair Burden report paragraph 3.44.

returns (see figure 3.3 below, taken from the Oxera report). This is wholly inconsistent with eir's assertion that the USO represents an unfair burden.

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



Oxera goes on to show that, while eir has been through periods where its financial performance has declined or been under some pressure, there is no credible causal link between those periods and eir's obligations under the USO / the costs thereof. As noted by Oxera in its report, the financial difficulties that were experienced by eir from time to time did not appear to have been caused or exacerbated by the effects of the USO at all, but rather were due to other factors of eir's own making: *"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. 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."*⁶

Oxera further notes that the High Court itself drew a similar conclusion saying: *"..As part of its assessment, the High Court attributed eir's indebtedness to the multiple changes in ownership since eir's privatisation."*⁷

⁶ See Oxera Unfair Burden report paragraph 3.60.

⁷ See Oxera Unfair Burden report paragraph 3.72.

Having conducted a detailed and well-articulated analysis, in line with the directions of the High Court based on the judgement of the CJEU, and using the most appropriate data available, Oxera concludes by saying that: “*..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.*”⁸

Virgin Media agrees with this assessment. Overall, the weight of evidence strongly supports a conclusion that eir did NOT face an unfair burden in discharging its obligations under the 2013/14 USO. In reality, and as found by ComReg and supported in detail by the analysis (based on the best available information) conducted by ComReg and Oxera, eircom was a business whose financial performance (good and bad) had very little to do with its costs associated with the USO. There is no evidence at all to show that the costs borne by eir in the USO put it at a competitive disadvantage. Where eir did experience periods of relatively worse financial performance, the available evidence points to this being due to decisions made by eir and its owner(s), i.e. not in any way a consequence of meeting the obligations / costs associated with the USO.

Based on the evidence presented, which appears to rely on sound methodology and the best information available (given the passage of time), Virgin Media strongly supports ComReg’s overall approach and draft conclusions. ComReg should adopt the same conclusions in its final statement.

⁸ See Oxera Unfair Burden report conclusion paragraph 4.7.



Vodafone Response to Consultation

Eir's 2013-2014 Universal Service Funding Application
Unfair Burden Assessment

Consultation

Reference: ComReg Doc 25/11

Version: Non-Confidential

Date: 09/04/25

Response to Consultation

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg's) further consultation on Eir's 2013 to 2014 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 close to 14 years ago.
- The fact remains that Eir continues to be hugely profitable with an EBITDA margin at 48%¹ which is funded to a large extent by wholesale charges.

We have provided answers to the consultation questions below.

¹eir Group Results (Q4 2024) presented 11th March 2024

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 2013 to 2014. 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 close to 14 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 2013-2014, 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 2013-2014 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 48% at the end of Q4 2024.

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