



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Consultation

Guidelines on Voluntary Commitments by an SMP operator under the European Union (Electronic Communications Code) Regulations 2022 (SI 444 of 2022)

Consultation

Reference: ComReg 24/08

Version: Final

Date: 2 February 2024

An Coimisiún um Rialáil Cumarsáide

Commission for Communications Regulation

1 Lárcheantar na nDugaí, Sráid na nGildeanna, BÁC 1, Éire, D01 E4X0.

One Dockland Central, Guild Street, Dublin 1, Ireland, D01 E4X0.

Teil | Tel +353 1 804 9600 Suíomh | Web www.comreg.ie

1. In this Consultation, ComReg is making available for comment draft guidelines on voluntary commitments by Significant Market Power ('SMP') operators (the '**Guidelines**'). The Guidelines are attached at Annex 1.
2. ComReg welcomes submissions from Respondents on the Guidelines and any submissions should be emailed to Eric Tomkins, at eric.tomkins@comreg.ie by **no later than 5.30pm on 7 March 2024** and **entitled "Response to Consultation 24/08"**.
3. Respondents should be aware that all non-confidential responses will be published, subject to the provisions of ComReg's guidelines on the treatment of confidential information¹. Respondents should ensure that a non-confidential version of their response is also provided by the closing date above. Confidential elements of responses must be clearly marked as such and be set out in a separate document which must also be provided to ComReg by the closing date set out above. An explanation as to why each element is considered to be confidential must also be provided at the same time.
4. After the closing date and subject to any submissions received which necessitate changes to the Guidelines, the Guidelines will be adopted and published by ComReg.

¹ [ComReg's Guidelines on the treatment of confidential information, 22/03/2005](#).

Annex 1 Guidelines on voluntary commitments by Significant Market Power



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Draft Guidelines

**Guidelines on Voluntary Commitments by an
SMP operator under the European Union
(Electronic Communications Code) Regulations
2022 (SI 444 of 2022)**

Guidelines

Reference: ComReg 24/08

Version: Draft

Date: 2 February 2024

Content

Section	Page
1 Introduction	3
2 Offer of Voluntary Commitments	6
2.1 Scope	6
2.2 Voluntary offer of commitments.....	6
3 Assessment of Commitments	10
3.1 Preliminary assessment	10
3.2 Assessment Framework	12
3.3 Market Test	13
3.4 Preliminary Conclusions Statement	13
4 Making commitments binding and adjusting obligations	16
4.1 Overview	16
4.2 Offers of co-investment meeting the requirements of Regulation 58(2)	16
4.3 Voluntary separation commitments	17
4.4 Other commitments.....	18

1 Introduction

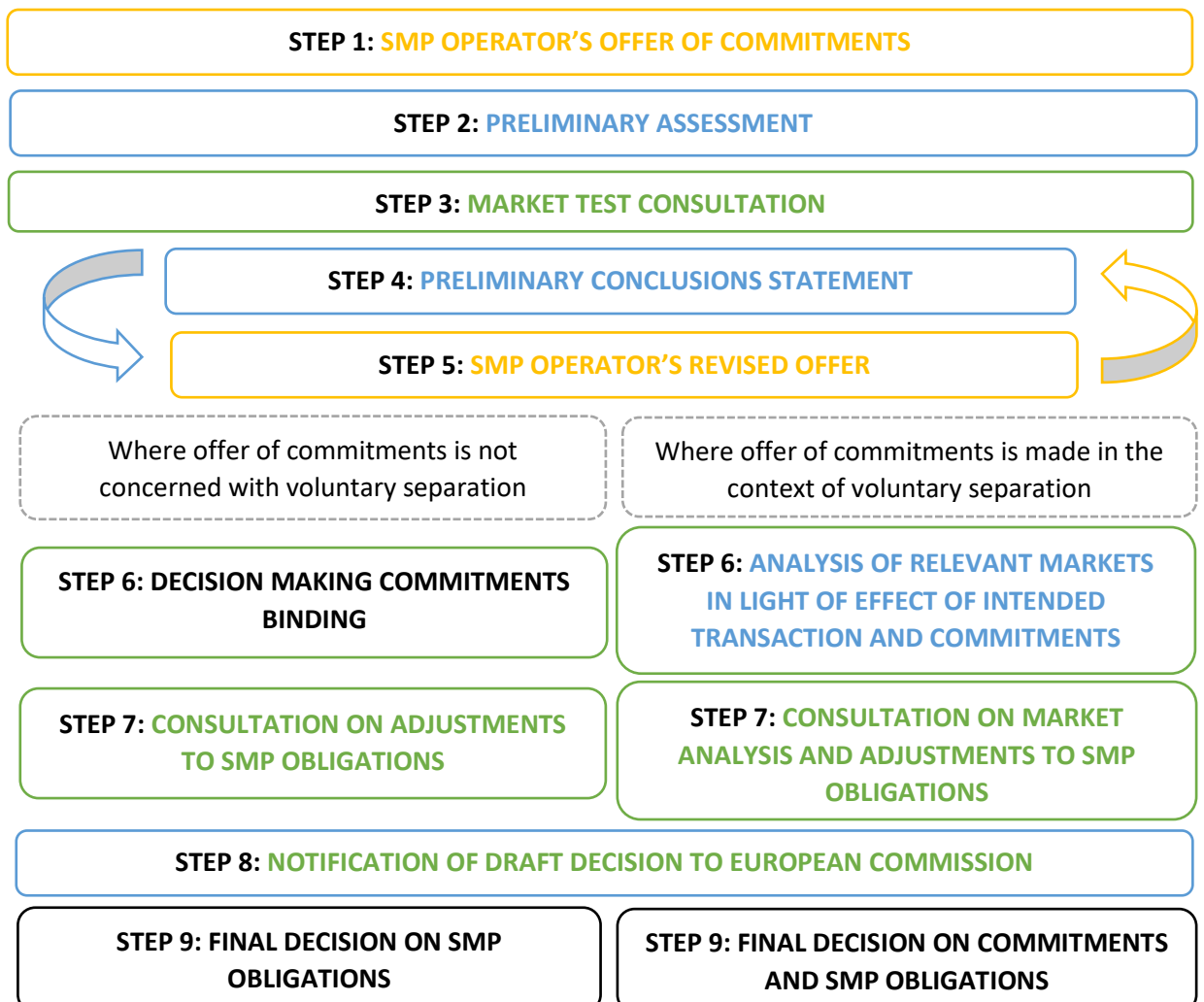
- 1.1 Regulation 61 of the European Union (Electronic Communications Code) Regulations 2022 (**ECC Regulations**)¹ sets out a procedure allowing an undertaking designated with Significant Market Power (**SMP**) (**SMP operator**) in one or several relevant markets², to offer to ComReg voluntary commitments. Such commitments can be offered in relation to conditions for access, co-investment, or both, applicable to the SMP operator's network, including commitments in the context of voluntary separation of its business providing SMP based access to other operators. ComReg may decide, and in a number of instances is required, to make such voluntary commitments binding and adjust, as appropriate, the scope and extent of the SMP operator's obligations in respect of the relevant markets.
- 1.2 Regulation 61 of the ECC Regulations transposes in Irish law Article 79 of the European Electronic Communications Code (Directive 2018/1972 of 11 December 2018) (**the Code**). As set out in Recital 205 of the Code, Article 79 recognises the practice in certain markets of the European Union whereby SMP operators may offer commitments which aim to address competition problems identified by the national regulatory authority and which the national regulatory authority may then take into account in deciding on the appropriate regulatory obligations. Article 79 harmonises the procedure to be followed by national regulatory authorities (**NRAs**) in assessing and making binding any voluntary commitments.
- 1.3 ComReg recognises that commitments offered by an SMP operator under Regulation 61 of the EEC Regulations may be a useful means of enhancing the effectiveness of regulation, including in particular the granting of transparent and non-discriminatory access to a network and in facilitating the roll-out of very high-capacity networks (**VHCN(s)**). This, however, will only be the case where the commitments are adequate to address the competition problems in the markets concerned, and/or complement existing obligations effectively. The timing of the offer and review of commitments in this respect is critical; and the offer of commitments should not delay or compromise ComReg's review of relevant markets within the timelines prescribed by the ECC Regulations. Additionally, market participants should have an adequate opportunity to review and comment on any commitments offered, and any implications for existing SMP regulatory obligations. ComReg sets out in these Guidelines the approach it will take to address these matters.

¹ Statutory Instrument [No. 444 of 2022](#). The ECC Regulations transpose with the European Electronic Communications Code (**Code**), ¹ [Directive \(EU\) 2018/1972](#).

² In accordance with Regulation 49 of the EEC Regulations.

- 1.4 The extent of ComReg’s discretion, and the steps that ComReg is required to follow under the ECC Regulations for its assessment of the commitments and any adjustment to SMP obligations, depend in part on the nature of the commitments offered, and in particular, whether they involve an offer of co-investment, or they are made in the context of voluntary separation, or not. These Guidelines set out the process which ComReg intends on following in general terms, as well as where any specific requirements arise for offers of co-investment and offers of commitments in the context of voluntary separation by the SMP operator.
- 1.5 Regulation 61 effectively sets out a **9 step review** of commitments, summarised in Figure 1 below. After commitments are offered by an SMP operator (Regulation 61(1) and 61(2) (**step 1**)), and ComReg has conducted a preliminary assessment to determine that the commitments offered are not commitments that clearly do not fulfil one or more relevant conditions or criteria (Regulation 61(3) (**step 2**)), ComReg must perform a market test, in particular on the offered terms, by conducting a public consultation of interested parties, in particular third parties which are directly affected (Regulation 61(3) (**step 3**)).

Figure 1: 9 Step Review of Commitments Process



- 1.6 ComReg is then required to communicate to the SMP operator its preliminary conclusions (taking into account the submissions received from third parties in response to the step 3 market test consultation) as regards the commitments and the conditions under which the commitments could be made binding (Regulation 61(5) (**step 4**)). The SMP operator may revise its initial offer to take account of ComReg's preliminary conclusions (Regulation 61(6) (**step 5**)).
- 1.7 *Where the offer of commitments is not concerned with voluntary separation under Regulation 60*, ComReg may then issue a decision to make the commitments binding, wholly or in part under Regulation 61(7) (**step 6**). Where commitments are made binding, ComReg will assess the consequences for market developments and the appropriateness of SMP obligations it has imposed or would, absent those commitments, have considered imposing (Regulation 61(10)) and following consultation and notification to the European Commission, BEREC and other national regulatory authorities (**steps 7 and 8**), amend, as the case may be, the SMP obligation (**step 9**) having taken utmost account of any comments received from the European Commission.
- 1.8 *Where the offer of commitments is concerned with voluntary separation under Regulation 60*, following step 5, ComReg will assess the effect of the notified transaction together with the commitments offered on SMP obligations and for that purpose, conduct an analysis of the relevant markets concerned (**step 6**). On the basis of its analysis, ComReg may impose, maintain, amend or withdraw SMP obligations following consultation and notification to the European Commission, BEREC and other national regulatory authorities (**steps 7 and 8**). In its final decision (**step 9**), ComReg may make the commitments binding wholly or in part.
- 1.9 The Guidelines are structured as follows:
- (a) Chapter 2 considers the making of an offer of voluntary commitments including the information required by ComReg for its assessment;
 - (b) Chapter 3 sets out the steps involved in the assessment of an offer of voluntary commitments; and
 - (c) Chapter 4 considers the making of commitments binding and adjustments to SMP obligations.
- 1.10 These Guidelines are not intended to be a legally binding statement of how ComReg will exercise its discretion in a particular situation and should not be taken as such. The Guidelines may be reviewed from time to time, in which case amended guidelines will be published on ComReg's website.

2 Offer of Voluntary Commitments

2.1 Scope

- 2.1 Regulation 61 of the ECC Regulation envisages that an SMP operator may offer voluntary commitments in respect of the conditions for access, co-investment, or both, applicable to its networks in relation, *inter alia*, to:
- (a) Cooperative arrangements relevant to the assessment of appropriate and proportionate SMP obligations;
 - (b) Co-investment in very-high-capacity networks under Regulation 58; and
 - (c) The provision of effective and non-discriminatory access as part of the voluntary separation of a vertically integrated SMP operator under Regulation 60, both during an implementation period of voluntary separation and after the proposed form of separation is implemented.
- 2.2 Although Regulation 61 makes specific mention of cooperative arrangements and co-investment agreements in respect of very high-capacity networks and functional separation arrangements, there are no restrictions in respect of the circumstances in which an SMP operator may offer commitments as regards the conditions for access to its network. The circumstances in which commitments are offered, however, will be relevant to ComReg's assessment. This is considered in further detail in Chapter 3.

2.2 Voluntary offer of commitments

2.2.1 Submission to ComReg

- 2.3 Regulation 61(2) of the ECC Regulations requires that the offer of commitments by an SMP operator is sufficiently detailed, including as to the timing and scope of their implementation and their duration, in order to allow ComReg to undertake its assessment pursuant to Regulation 61(3).
- 2.4 Where ComReg is not satisfied that it has sufficient details as regards the commitments, ComReg will engage with the SMP operator to identify and obtain the missing information.
- 2.5 An offer of commitments should at a minimum include the following:
- (a) A description of the commitments and the markets and of the SMP obligations concerned, and how the voluntary commitments seek to resolve the competition problems addressed by the SMP obligations;

- (b) A description of the regulatory relief sought (e.g., withdrawal or amendment of SMP obligations) and the reasons therefor having regard to the competition problems identified in the market analysis and, as applicable, relevant conditions under Regulation 58 or Regulation 60 of the ECC Regulations;
- (c) The minimum period that the commitments will apply;
- (d) A description of the manner in which compliance with the commitments will be effectively ensured and can be monitored, and any proposed measure within the commitments that is designed to facilitate compliance and monitoring; this may include provision to ComReg and publication of a report on a regular basis (e.g., annual) setting out the results of its monitoring programme in relation to adherence to the commitments.
- (e) As applicable:
 - (i) A copy of the terms and conditions proposed to be offered to access seekers, clearly identifying the changes proposed to any relevant Reference Offer, including contractual terms and prices, product descriptions, Industry Process Manuals etc;
 - (ii) In respect of commitments concerned with an offer of cooperative arrangements, a description of the cooperation being contemplated and associated legal documentation;
 - (iii) In respect of commitments concerned with co-investment in a very high-capacity network: -
 - A description of the network concerned, in particular a description of the very high-capacity network elements concerned with the co-investment offer;
 - A copy of the co-ownership or long-term risk sharing arrangements including any co-financing or purchase agreements being offered, including the legal form of the co-investment agreement and any other agreements and where relevant the heads of term of the governance rules of the co-investment vehicle;
 - Details of the timing for the deployment of the network concerned by the co-investment arrangements; and
 - Details of the arrangements for publication of the co-investment offer including timing.
 - (iv) In respect of commitments concerned with voluntary separation:
 - A detailed description of the intended transaction;

- Details of the timing of implementation and duration of the separation process; and
- A copy of the terms and conditions proposed to be offered to access seekers after the separation, clearly identifying the changes proposed to any relevant Reference Offer, including contractual terms, product descriptions, Industry Process Manuals etc.

2.6 Where there is any conditionality associated with the commitments, such that their implementation depends on a third party's agreement, clear evidence of the third party's agreement or that party's willingness to agree should be provided together as part of the SMP operator's offer of commitments.

2.7 Generally speaking, given the requirement that a public consultation is conducted except where the commitments clearly do not fulfil one or more relevant conditions or criteria, ComReg will not accept any claims of confidentiality as regards the contents of the submission which is to be market tested. Any requests that certain matters within an offer of commitments be treated on a confidential basis or market tested with a limited number of interested parties should clearly identify the information concerned and provide clear and compelling reasons as to why the information is confidential. For the same reason, commitments will only be considered by ComReg under Regulation 61 where they are made on an "open basis" with no "without prejudice" privilege attached to the making of the offer of commitments.

2.2.2 Timing

2.8 There are no restrictions under Regulation 61 of the ECC Regulations as to when an SMP operator may offer commitments. This means that an SMP operator may offer commitments at any point during the lifetime of a market review.

2.9 Where commitments are offered at a time when a market review is ongoing and ComReg's SMP decision is subject to public consultation or pending final approval, ComReg will normally not delay completion of the market review and the adoption of a final decision.

2.10 In particular, unless commitments are offered more than six months³ in advance of a planned consultation or planned decision (as the case may be),⁴ the commitments review process could lead to a delay in the market analysis. ComReg does not believe that reviewing commitments should take precedence over completing a market analysis in accordance with the timelines set out in

³ The circumstance of each individual case will need to be considered.

⁴ ComReg publishes details on the timing of its public consultation in its action plan on its website <https://www.comreg.ie/about/what-we-do/corporate-governance/>.

Regulation 49(9)(a) of the ECC Regulations.⁵ ComReg accordingly may, at its discretion, continue with its market analysis process and proceed in parallel with its review of the commitments in accordance with these Guidelines. While this may result in ComReg amending a decision in respect of a market analysis only recently completed, ComReg considers that this is the most appropriate way of dealing with offers of commitments and avoids the risk that offers of commitments could delay completion of a market analysis and the imposition of new SMP obligations including e.g., a price control resulting in a price decrease.

- 2.11 Where commitments are offered in respect of SMP obligations which ComReg has proposed to impose in a draft decision already put to consultation, the SMP operator's offer of commitments should make reference to the competition problems described in the draft decision the subject of public consultation, rather than those set out under any existing market analysis decisions. The submission should clearly explain how the commitments address the competition problems identified in the draft decision consultation, including by comparison with the proposed obligations.
- 2.12 ComReg notes that the SMP operator may decide at any time during the process to withdraw an offer of commitments before they are made binding. While withdrawn commitments will not be opposable and bind in any way the SMP operator who has offered them, ComReg reserves the right to refer to any such offer of commitments, and the position expressed by an SMP operator as part of the offer, in subsequent market reviews or as appropriate.

⁵ Under Regulation 49(9), ComReg is required to notify the European Commission of its new market analysis within 5 years from the adoption of a previous measure.

3 Assessment of Commitments

3.1 Preliminary assessment

- 3.1 Regulation 61(3) provides that “...in order to assess any commitment (...) [ComReg] shall, except where commitments clearly do not fulfil one or more relevant conditions or criteria, perform a market test, in particular on the offered terms, by conducting a public consultation of interested parties, in particular third parties which are directly affected. Potential co-investors or access seekers may provide views on the compliance of the commitments with the conditions provided, as applicable, in Regulations 50, 58 or 60 and may propose changes”.
- 3.2 ComReg on receiving a complete, sufficiently detailed, offer of commitments will conduct a preliminary assessment to determine whether the commitments clearly do not fulfil one or more of the relevant conditions or criteria. The scope and extent of the preliminary assessment will depend on the nature of the commitments offered.

3.1.1 General

- 3.3 In all cases, ComReg will seek to confirm that the commitments, on their face, are made in good faith and:
- (a) Are not of an unfair or unreasonable character;
 - (b) Are open to all market participants;
 - (c) Do not exclude the provision of timely availability of access under fair, reasonable and non-discriminatory conditions before the launch of related retail services; and
 - (d) Are capable of enabling sustainable competition on downstream markets and facilitating cooperative deployment and take-up of very high capacity networks in the interest of end-users.

3.1.2 Offers of Co-Investment

- 3.4 Where the commitments are concerned with co-investment in very high capacity network elements, ComReg, in addition to the matters set out in section 3.1.1, will seek to establish that on its face, the offer of commitments meets the conditions set out in Regulation 58 of the ECC Regulations, namely:
- (a) the offer is to open the deployment of a new very-high-capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment,

- (b) the co-investment is open at any moment during the lifetime of the network to any provider of electronic communications networks or services;
- (c) the offer of co-investment does not exclude the possibility that other co-investors which are providers of electronic communications networks or services may compete effectively and sustainably in the long term in downstream markets in which the SMP operator is active, on the basis that the terms of co-investment *prima facie*:
 - (i) Allow access to the full capacity of the parts of the network subject to co-investment;
 - (ii) Provide for flexibility in terms of the value and timing of the participation of each co-investor;
 - (iii) Allow for the possibility to increase such participation in the future;
 - (iv) Provide for the award of reciprocal rights to the co-investors after the deployment of the co-invested infrastructure; and
 - (v) Include a mechanism of adaptation over time for participation in the co-investment.

3.1.3 Process

- 3.5 As noted above, upon receiving an offer of commitments that is sufficiently detailed, including as to the timing and scope of the commitments' implementation and their duration, ComReg will review the offer and conduct a preliminary review to determine whether the commitments clearly do not fulfil one or more relevant conditions or criteria.
- 3.6 ComReg will inform the SMP operator of its preliminary assessment's conclusion. Where ComReg considers that the offer of commitment clearly does not meet one or more of the relevant conditions and criteria, ComReg will reject the commitments at the outset, and not assess them in further detail. Where ComReg is satisfied that it may proceed to the next step, ComReg will confirm same to the SMP operator and normally will give an indication as to when it intends to perform a market test consultation.
- 3.7 For the avoidance of doubt, the fact that ComReg, following its preliminary assessment, decides to proceed to the next step and perform a market test of the commitments, does not mean that ComReg has made a finding that the commitments fulfil the criteria or conditions set out in Regulations 58, 60 and 61 of the ECC Regulations.

3.2 Assessment Framework

3.8 Where ComReg does not find in its preliminary assessment that the commitments clearly do not fulfil one or more criteria or condition, ComReg will proceed to assess the commitments in accordance with the framework set out in Regulation 61 of the ECC Regulations. In particular, prior to making any commitments binding and adjusting any SMP obligations where appropriate, ComReg is required, under Regulation 61 of the ECC Regulations, to seek the views of interested parties likely to be affected by the commitments, before putting its preliminary assessment to the SMP operator and allowing it to make any changes to the commitments.

3.9 As set out in paragraph 1.5, Regulation 61 of the ECC Regulations envisages the following steps:

- (a) A market test consultation, in particular on the offered terms but also on the compliance of the commitments offered with the conditions provided, as applicable, in Regulation 50, 58 and 60, by way of a public consultation of interested parties, in particular third parties which are directly affected;
- (b) Communication by ComReg to the SMP operator of its preliminary conclusions (taking into account the submissions received from third parties) as regards the commitments and the conditions under which the commitments could be made binding;
- (c) Revision by the SMP operator, at its election, of its initial offer to take account of ComReg's preliminary conclusions;
- (d) Decision by ComReg to make the commitments binding, wholly or in part under Regulation 61(7) of the ECC Regulations;
- (e) Assessment by ComReg of the consequences for market developments and the appropriateness of existing SMP obligations and amendment to existing SMP obligations following notification to the European Commission.

(The steps are slightly different where the offer of commitments is concerned with voluntary separation (Regulation 60). In that case the decision to make the commitments binding is done in the context of the market analysis decision and any amendments to SMP obligations, rather than separately.)

3.10 ComReg sets out below further detail of the process that it will follow for the assessment of an offer of commitments. The process reflects ComReg's expectation that an offer of commitments will likely be made on the understanding that SMP obligations may be amended or withdrawn where commitments are made binding. In particular the process sets out below involves taking a number of the steps listed in para 3.9 above concurrently.

3.3 Market Test

- 3.11 Where ComReg does not find that the commitments clearly do not meet one or more criteria or conditions as set out in Section 3.1 above, ComReg will proceed with a market test of the offer of commitments by publishing the Submission referred to in Section 2.2.1 above on its website and seeking comments on the offer of commitments from interested parties, as provided for under Regulation 61(3). ComReg may also where circumstances so justify contact specific parties, e.g., potential co-investors in the case of co-investment commitments, for their views.
- 3.12 Depending on the content and type of the commitment offer, ComReg may when consulting on the offer, seek interested parties' views generally, or seek interested parties' views both generally and in respect of specific aspects of the offer of commitments, including any proposed changes that the interested parties believe are required. ComReg may for instance seek views in respect of aspects of the offer that are particularly relevant to its assessment having regard to the competition problems which the SMP obligations sought to address; or in the context of co-investment offers, ComReg may seek views in respect of whether some or all of the conditions set out in Regulation 58(2) and Schedule 3 of the ECC Regulations are met.
- 3.13 ComReg may also seek views from interested parties on the impact of the offer on existing SMP obligations and for that purpose, may set out some preliminary observations.
- 3.14 ComReg will normally allow a period of at least 30 calendar days for the market test consultation and follow, unless there are good reasons not to, its public consultation guidelines⁶ and its confidentiality guidelines⁷ as may apply from time to time. This means that submissions by interested parties will be published save where necessary to protect valid claims of confidentiality in accordance with ComReg's confidentiality guidelines as applicable at the time.

3.4 Preliminary Conclusions Statement

- 3.15 ComReg will consider and take into account any submissions in response to the market test consultation as part of its overall assessment of the commitments, having regard also as to which views are representative of different stakeholders. ComReg's assessment will be recorded in a 'Preliminary Conclusions Statement' which will be shared with the SMP operator for its comments in accordance with the requirement of Regulation 61(5).

⁶ ComReg's Consultation Procedures, ComReg Document 11/34.

⁷ Guidelines on the treatment of confidential information, ComReg Document 05/24.

3.4.1 Suitability of the commitments

- 3.16 The Preliminary Conclusions Statement will take into account all the views expressed in the market test consultation but will not separately respond specifically to each submission received as part of the market test consultation process. The Preliminary Conclusions Statement will set out ComReg's assessment of the suitability of the commitments offered by the SMP operator having particular regard to the matters listed in Regulation 61(4), namely:
- (a) Evidence regarding the fair and reasonable character of the commitments offered;
 - (b) The openness of the commitments to all market participants;
 - (c) The timely availability of access under fair, reasonable and non-discriminatory conditions, including to very high-capacity networks, before the launch of related retail services; and
 - (d) The overall adequacy of the commitments offered to enable sustainable competition on downstream markets and to facilitate cooperative deployment and take up of very high capacity networks in the interest of end-users.
- 3.17 For the purpose of reaching any preliminary conclusions on these matters, in addition to the submissions received as part of the market test consultation, ComReg will take account of the nature of the commitments offered.
- 3.18 For instance, any positive preliminary conclusion as regards an offer of co-investment which falls within the scope of Regulation 58 of the ECC Regulations will depend on each of the criteria set out in Regulation 58(2) and Schedule 3 of the ECC Regulations being met, and in reaching any such preliminary conclusion, ComReg will have utmost regard to the BEREC VHCN Guidelines and other relevant guidelines as may be in place from time to time.⁸ In other cases, ComReg's assessment will have as its reference point the competition problems which were identified during the market analysis, and where the offer of commitments is made in the context of voluntary separation within the meaning of Regulation 60, ComReg will have particular regard to the commitments' ability to ensure effective and non-discriminatory access by third parties.
- 3.19 This will allow ComReg in turn to identify any amendments to the offer of commitments, as the case may be, and any conditions that may be required, in order that ComReg makes the commitments binding. ComReg will normally also identify in the Preliminary Conclusions Statement the amendments that ComReg

⁸ BEREC Guidelines on Very High Capacity Networks, BoR (23) 164, October 2023.

would propose be made to the obligations imposed under the relevant SMP Decision(s).

- 3.20 In accordance with Regulation 61(5), ComReg will provide its Statement of Preliminary Conclusions to the SMP operator; ComReg will normally not publish the Preliminary Conclusion Statement until the offer of voluntary commitments is final (see section 3.4.2 below) and the decision has been made whether or not to make the commitments binding (see section 4.4.1 below).

3.4.2 SMP operator's revised offer

- 3.21 In accordance with Regulation 61(6) of the ECC Regulations, following receipt of a Preliminary Conclusions Statement, the SMP operator may revise its initial offer of commitments to take account of ComReg's preliminary conclusions. ComReg will also welcome any submissions that the SMP operator may wish to make in terms of ComReg's intention as regards proposing amendments or withdrawal of SMP obligations were the commitments to be made binding. ComReg will normally set a period of at least 30 calendar days for the SMP operator to confirm its position as regards the Statement of Preliminary Conclusions and any amendments that it may wish to offer.
- 3.22 If the SMP operator revises its initial offer of commitments ComReg will reconsider the offer and communicate its further preliminary conclusions via a subsequent Preliminary Conclusions Statement as regards the amended offer and any impact on the conditions under which it may consider making the commitments binding. If the SMP operator offers revised commitments that include significant changes, ComReg may allow another opportunity for those who are likely to be affected by them to express their views on the revised commitments via a further market test consultation.
- 3.23 This stage will conclude when the SMP operator confirms in writing to ComReg what constitutes its final offer of commitments including any amendments made in light of ComReg's initial and subsequent, as the case may be, Preliminary Conclusions Statements.

4 Making commitments binding and adjusting obligations

4.1 Overview

- 4.1 Once a final offer of commitments has been received from the SMP operator following ComReg's Preliminary Conclusions Statement, ComReg will determine whether it is appropriate to make the commitments binding. Where ComReg determines that the final offer of commitments should be made binding ComReg will, as required by Regulation 61(10), assess the consequences of that decision for market developments and the appropriateness of any obligation that it has imposed or would, absent the commitments, have considered imposing as SMP remedies. This means in general terms that a decision which makes commitments binding may have as a consequence an adjustment of relevant SMP obligations, including obligations not yet in place but which ComReg had or would have otherwise proposed in the absence of commitments.
- 4.2 ComReg's assessment of whether to make commitments binding, and the process to follow to adopt a decision making the commitments binding will depend in part on the nature of the commitments, including whether they concern offers of co-investment, or voluntary separation or others. This is considered in further detail below. In all cases ComReg's assessment will include an assessment of whether any conditions identified in the Preliminary Conclusions Statement(s) to making the offer of commitments binding have been met.
- 4.3 Save as regards commitments in connection with voluntary separation, where the decision to make commitments binding is taken at the same time as a decision to amend SMP obligations (Regulation 60(4)(c)), ComReg will ensure that a decision making binding commitments that are at odds or otherwise create issues of compliance with existing SMP obligations, does not come into effect until the decision amending the SMP obligations has been adopted and is in effect.
- 4.4 According to Regulation 61(12), commitments which ComReg has made binding are enforceable by ComReg in the same way that regulatory obligations are.

4.2 Offers of co-investment meeting the requirements of Regulation 58(2)

- 4.5 Where the offer of commitments is an offer of co-investment, and ComReg finds that the co-investment offer meets the conditions set out in Regulation 58(2) of the ECC Regulations, ComReg is required under Regulation 58(3) to make the

commitments binding, and under Regulation 58(8) to make them binding for at least seven years.

- 4.6 ComReg is also required in that case to refrain from imposing any SMP obligations as regards the elements of the new very high-capacity network that are subject to the commitments, if at least one potential co-investor has entered into a co-investment agreement with the SMP operator.
- 4.7 Accordingly, where a decision making an offer of co-investment binding is made by ComReg, ComReg will generally also publish at the same time, where necessary, a draft decision for the withdrawal and/or amendment of any relevant SMP obligations that would otherwise apply to the elements of the new very high capacity network that are subject to the commitments, from the time that ComReg is notified by the SMP operator that a co-investment agreement has been concluded. That decision will be adopted once (and subject to) the consultation and notification process described in section 4.4 below has concluded.

4.3 Voluntary separation commitments

- 4.8 Where there is an offer of commitments in the context of voluntary separation by an SMP operator within the meaning of Regulation 60(1),⁹ ComReg will, in accordance with Regulation 60(4) of the ECC Regulations and following the market test consultation, assess the commitments offered as part of its assessment of the intended voluntary separation transaction.
- 4.9 In accordance with Regulation 60(4), ComReg is to assess the effects of the intended voluntary separation transaction using the market analysis procedure provided for under Regulation 49. As such ComReg will consider whether to make the commitments binding, in whole or in part, or not, as part of its market analysis decision, and put to consultation a draft decision setting out the following:
- (a) the market analysis;
 - (b) the assessment of the commitments and their impact on any existing SMP obligations or SMP obligations that would otherwise have been required;
 - (c) the decision to make some or all of the commitments binding or not.
- 4.10 Upon conclusion of the consultation process, ComReg will notify to the European Commission, BEREC and other national regulatory authorities its draft decision, amended as the case may be to take into account the submissions received.

⁹ That is, the SMP operator has notified its intention to transfer its local access network assets or substantial part thereof to a separate legal entity under different ownership or to establish a separate business entity in order to provide all retail providers with fully equivalent access products.

4.4 Other commitments

- 4.11 Where the commitments are not offered in respect of voluntary separation, or are not concerned with a co-investment offer, or the co-investment offer is not a co-investment offer that meets the requirements of Regulation 58(2), ComReg will follow the two step process set out below, dealing in turn with the decision making commitments binding, and then any adjustments to the SMP obligations as may be appropriate and justified.

4.4.1 Decision making commitments binding

- 4.12 In accordance with Regulation 61(8), ComReg may at its discretion decide to make some or all commitments binding for a specific period, which may be the entire period for which they are offered. In considering whether to make commitments binding, and the duration for which they should be binding, ComReg will take into account all relevant submissions received as part of the market test consultation from the SMP operator and other interested parties.
- 4.13 The decision making the commitments binding will be communicated to the SMP operator and published.
- 4.14 Where ComReg proposes to withdraw or make amendments to existing SMP obligations or not to impose certain SMP obligations in the presence of binding commitments, it may provide in the decision making the commitments binding that the decision will take effect on the same day that the relevant SMP obligations have been withdrawn or amended, or that the decision stating ComReg's decision not to impose SMP obligations in the presence of binding commitments takes effect, once the pre-notification requirements including notification to the European Commission, discussed below, have been completed.

4.4.2 Adjustment to SMP obligations

- 4.15 In accordance with Regulation 61(10) of the ECC Regulations, where commitments are made binding, ComReg will then set out in a draft decision proposed amendments or withdrawal of existing SMP obligations, or proposals not to impose certain SMP obligations on the SMP operator concerned, as applicable and where appropriate and justified. In doing so, ComReg will have regard to the expected impact of the commitments on market development, the conditions attached to the commitments and any submissions made by the SMP operator and other interested parties during the market test consultation in respect of the consequences of the commitments for existing or forthcoming obligations. Where the commitments offered are insufficient to meet ComReg's statutory objectives, ComReg may impose or maintain on the SMP operator such

obligations as it considers appropriate in order to achieve ComReg's statutory objectives.

- 4.16 The draft decision will be put to public consultation as required by Regulation 50(5) of the ECC Regulations, before being notified to the European Commission, BEREC and other national regulatory authorities in other Member States in accordance with Regulation 17, as provided for by Regulation 61.
- 4.17 As noted above, where commitments are not offered in a timely manner relative to an ongoing market analysis, the offer of commitments will be dealt with separately from the market analysis process in order to avoid delays, including as the case may be, in order to ensure completion of the market analysis within statutory deadlines. Where they are received in sufficient time that they can be integrated within the market analysis, ComReg will include as part of the market review consultation and notification, any decision making commitments binding as set out in paragraph 4.12 above.
- 4.18 ComReg's final decision regarding SMP obligations will be adopted and published in the normal way upon completion of the consultation and notification processes.