



Commission for
Communications Regulation

Consultation on Price control obligations relating to Bundles

Further specification of the price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b)

Consultation and Draft Decision

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An Coimisiún um Rialáil Cumarsáide

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Additional Information

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Please note ComReg will publish all respondents' submissions with the Response to this Consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No 05/24.

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Redacted Information

Please note that this Consultation and Draft Decision document is a non-confidential version. Certain information has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol "X".

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1 Introduction

- 1.1 This consultation and draft decision ('Draft Decision') relates primarily to a further specification¹ (and with some amendments²) to the price control obligations and transparency obligations in relation to:
- The Wholesale Local Access at a fixed location ('WLA') market ('WLA Market') (also referred to as 'Market 3a' in the 2014 European Commission Markets Recommendation³ ('2014 Commission Recommendation')) as set out in Consultation Document 16/96⁴ (referred to throughout this document as the 'WLA/WCA Market Review').
 - The Wholesale Central Access ('WCA') for mass market products ('WCA Market') market (also referred to as 'Market 3b' in the 2014 Commission Recommendation) as set out in the WLA / WCA Market Review.
 - The Wholesale Fixed Voice Access and Call Origination ('FACO') market as set out in the Decision Document D05/15 (the 'FACO Decision')
- 1.2 The purpose of this Draft Decision is to set out and consult on ComReg's preliminary view of the structure and implementation of a bundles margin squeeze test ('MST').
- 1.3 In particular the Draft Decision is concerned with ensuring that Eircom Limited ('Eircom') cannot cause a margin squeeze between the price of the wholesale regulated services it offers/sells to Other Authorised Operators ('OAOs') and the price of an Eircom retail bundle of services - where those wholesale services are required as inputs by OAOs in order to replicate that Eircom retail bundle.
- 1.4 As a vertically-integrated operator Eircom sets two prices: a wholesale price for the input/access product and a retail price for the end-user product. A margin squeeze could occur where Eircom (as an operator designated with significant market power ('SMP')) sets wholesale prices such that, given the prevailing retail prices, it does not allow an OAO to cover its costs (e.g. sales, marketing, etc.). Equally, Eircom could set its downstream retail prices such that it may not cover the downstream retail costs incurred by an OAO after acquiring the essential wholesale inputs from Eircom's wholesale arm. Over the longer term if OAOs cannot profitably replicate Eircom retail offers they may exit the market — which would be to the long-term detriment of end-users. These types of potential problems could be caused by Eircom offering standalone or bundled products/services at the retail level.

¹In line with Regulation 8, Regulation 9, Regulation 13 and Regulation 18 of the Access Regulation (S.I. No 334 of 2011 European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011).

²In line with Regulation 8, Regulation 9, and 13 of the Access Regulation.

³Commission Recommendation of 9 October 2014 on relevant product and service markets (2014/710/EU) ('2014 Markets Recommendation').

⁴Consultation and Draft Decision: Market Reviews – Wholesale Local Access (WLA) provided at a Fixed Location and Wholesale Central Access (WCA) provided at a fixed location for Mass Market Products; dated 11 November 2016.

- 1.5 These issues are considered by competition law under Article 102 of the “Treaty on the Functioning of the European Union (**‘TFEU’**)”⁵ and in competition law are typically assessed on an ex-post basis by the relevant authorities and judicial courts. The purpose of ex-ante regulation is to prevent the possibility of such abuses and to promote competition by facilitating entry into the relevant markets. ComReg would note that it is neither necessary to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse. However, given that Eircom has been identified as having SMP in a number of upstream markets it has both the ability and incentive to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users.
- 1.6 Our objectives, in line with Section 12 of the Communications Regulation Act 2002 (as amended)⁶ (**‘the Communications Regulations Act’**) and Regulation 16 of the Framework Regulations⁷ are to promote competition, to contribute to the development of the internal market and to promote the interests of users within the Community. As such, where it is deemed appropriate, ComReg is required to design appropriate remedies (including price controls) which achieve those objectives.
- 1.7 Currently, a net revenue test (**‘NRT’**) is imposed in the Retail Narrowband Access (**‘RNA’**) market in accordance with the obligation not to unreasonably bundle and pursuant to Regulation 13(2)(d) of the Universal Service Regulations⁸. The obligation was imposed in 2014 following Eircom’s designation with SMP in the bundled lower level voice access (**‘LLVA’**) market and higher level voice access (**‘HLVA’**) market in the **Retail Access SMP Decision**⁹. The detail of the NRT is further specified in the separate **2013 Bundles Decision**¹⁰. In summary, the NRT is the price control remedy used to assess whether or not Eircom is covering its total costs when it offers/sells a bundle of services together (that contains LLVA or HLVA).

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102&from=EN>

⁶ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011). ComReg has also taken into account its functions, objectives and obligations under Regulation 6, 8 and 13 of the Access Regulations (European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the **‘Access Regulations’**), and Regulation 16 of the Framework Regulations (European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the **‘Framework Regulations’**).

⁷ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).

⁸ Regulation 13(2)(d) of the Universal Service Regulations. European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011)

⁹ ComReg, *Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers*, (**‘ComReg Decision D12/14’**).

¹⁰ <http://www.comreg.ie/fileupload/publications/ComReg1314.pdf>. To note, the NRT was initially imposed pursuant to Eircom’s designation with SMP in ComReg Decision D06/71 which was withdrawn and replaced by ComReg Decision D12/14/

- 1.8 In 2015 the **FACO Decision** imposed a wholesale obligation on Eircom not to cause a margin squeeze pursuant to Regulation 13 of the Access Regulations including with respect to single billing wholesale line rental (**'SB-WLR'**). It was also noted in the FACO Decision that ComReg would consider in a separate and subsequent consultation (i.e. this Draft Decision) whether the imposition of a specific margin squeeze test in the FACO Markets (and elsewhere) which, if effectively designed and implemented, could allow for the removal of the NRT.
- 1.9 The WLA/WCA Market Review has provisionally identified that, on a national basis, Eircom has SMP in the WLA Market. Eircom was also provisionally found to have SMP in the Regional WCA Market but not to have SMP in the Urban WCA Market. The proposed price control and obligations which will, subject to consultation, apply to standalone WLA and WCA wholesale inputs are being consulted upon separately in ComReg consultation document 17/26 (referred to throughout this document as the **'WLA/WCA Pricing Paper'**). In the WLA/WCA Market Review ComReg has proposed, pursuant to Regulation 13 of the Access Regulations, an obligation not to cause a margin/price squeeze in relation to both standalone and bundled products.
- 1.10 It should also be noted that this Draft Decision re-visits the contents of the Replicability Test Consultation and Draft Decision Document issued by ComReg in August 2014 (the **"2014 Consultation"**)¹¹. The Draft Decision also incorporates where relevant, responses provided to ComReg by stakeholders to the 2014 Consultation. The 2014 Consultation did not progress to a final decision due to a number of developments in the relevant markets (see below) and it was considered more appropriate to review the NRT in parallel with the WLA/WCA Market Review.
- 1.11 Respondents now have the opportunity to provide their views on the proposals set out in this Draft Decision. In addition and in light of the pricing proposals further specified in this Draft Decision, respondents can provide further views regarding the pricing proposals set out in the WLA/WCA Market Review and the WLA/WCA Pricing Paper in their response to this Draft Decision. The period of time provided by ComReg to respond to this Draft Decision takes this additional factor into consideration. It is intended that any final Decision regarding Consultation Document 16/96, Consultation Document 17/26 and this consultation will be published (and become effective) simultaneously.

Q. 1 Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA/WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.

- 1.12 ComReg has considered the views of its expert consultants Oxera Consulting (**'Oxera'**) in arriving at the Draft Decision¹².

- 1.13 This document is structured as follows:

¹¹ <https://www.comreg.ie/csv/downloads/ComReg1490.pdf>

¹² For information purposes only, their report was published as ComReg Document 17/51a. Oxera's views expressed are not necessarily the views of ComReg.

- **Chapter 2:** provides an executive summary of the main points of the consultation and ComReg's overall objectives;
- **Chapter 3:** sets out the competition issues associated with bundling;
- **Chapter 4:** provides an overview of the exchange areas;
- **Chapter 5:** discusses ComReg's preliminary view on the overall framework to ensure that Eircom cannot cause a margin squeeze where it sells wholesale inputs which are required by operators to replicate an Eircom retail Bundle (or portfolio as appropriate) and the various components of the Margin Squeeze Test;
- **Chapter 6:** discusses ComReg's preliminary view of the treatment of eir Sports;
- **Chapter 7:** sets out ComReg's preliminary view of the pre- and post-launch assessment of bundles;
- **Chapter 8:** sets out an analysis of the likely effect of the proposed further specification of the price control obligation not to cause a margin squeeze; and
- **Chapter 9:** provides the timelines for consultation response and how confidential information should be dealt with.
- **Annex 1:** sets out the legal basis for this consultation.
- **Annex 2:** provides the criteria used for assessing whether an exchange meets the criteria for inclusion to Regional Area 1.
- **Annex 3:** provides an illustration of how the weighted average wholesale network input is calculated.
- **Annex 4:** sets out the draft decision instrument associated with the further specification of the price control not to cause a margin squeeze in the Fixed Access and Call Origination Markets;
- **Annex 5:** sets out the draft decision instrument associated with the further specification of the price control not to cause a margin squeeze on bundles delivered by WLA in the footprint corresponding to the Urban Area ;
- **Annex 6:** sets out the draft decision instrument associated with the further specification of the price control not to cause a margin squeeze on bundles delivered by WCA in the Regional Market;
- **Annex 7:** provides the questions raised throughout the consultation document in one location for ease of reference.

Next steps:

- 1.14 ComReg welcomes the views of the industry regarding the proposals set out in this document. In that regard, responses to this consultation must arrive at ComReg by 5pm, Friday, 21 July 2017.
- 1.15 ComReg in making its final decision (if appropriate) will consider all the views of respondents to this consultation and in addition any further views provided by respondents regarding the pricing proposals in the WLA/WCA Market Review as noted at paragraph 1.11. We will also take utmost account of any comments from the European Commission in deciding on the appropriate price control for bundles.

2 Executive Summary

- 2.1 Telecommunication products/services such as telephone line rental, calls and broadband are, to a large extent, sold in bundles. Much of the competition in the fixed line market is based on bundles of such products. Consumers tend increasingly to buy bundles of telecommunications services rather than buying a service on its own or buying different services from different providers. Bundles of fixed line based telecommunication products/services are therefore important for both consumers and providers.
- 2.2 At a high level, ComReg is proposing a MST to ensure that Eircom cannot cause a margin squeeze between the price of the wholesale services it offers/sells to OAOs and the price of an Eircom retail bundle of services – where those wholesale services are required as inputs by OAOs in order to replicate that Eircom retail bundle. This test will replace the current net revenue test ('NRT').
- 2.3 As with telecommunications services at the product level, e.g. line rental or broadband, where Eircom has SMP in the wholesale market, a retail margin squeeze can occur when these products are bundled together or bundled with other products. This Draft Decision concerns what needs to be done through regulation to prevent such retail margin squeeze(s) in relation to bundles and the resulting damage to competition and consumer welfare.
- 2.4 Currently line rental, under the 2013 Bundles Decision, provides the basis on which bundles of services are regulated and tested for compliance with the NRT. With the increased importance of broadband and advances in broadband technology (e.g. the ability to provide TV and voice services over broadband) bundles based on broadband and excluding line rental also need to be catered for.

Background information

- 2.5 The NRT was imposed as a result of Eircom being designated with SMP in the Retail Narrowband Access (RNA) Markets. Without the NRT there is a significant risk that Eircom could cause a margin squeeze by pricing a bundle in a manner which would not allow an OAO to effectively compete with Eircom in the downstream market. This could result in the exit of OAOs from the relevant market and new entrants being deterred from entry – to the ultimate detriment of end-users.
- 2.6 ComReg indicated as part of the FACO Decision that if an appropriately designed MST was effectively implemented upstream it might permit the removal downstream of the current NRT in the RNA Markets. It is on this basis that ComReg is now proposing, in the context of the Draft Decision, that the NRT as set out in the 2013 Bundles Decision should be withdrawn as soon as the proposed MST comes into effect. ComReg also intends to review the appropriateness of the SMP designation in the RNA Markets and in particular the markets for LLVA and HLVA.

- 2.7 ComReg is therefore of the preliminary view that it is appropriate to further specify the existing obligation not to cause a margin squeeze in the FACO Market and the proposed obligations not to cause retail margin squeezes in the WLA/WCA Markets. This shall ensure that the existing and proposed wholesale price control obligations cannot be undermined by Eircom through the process of bundling.

Competition developments

- 2.8 Chapter 3 of this document explains the potential competition problems resulting from a margin squeeze by an operator with SMP in upstream markets for wholesale products used by other operators to sell bundles. It also reviews the current regulatory obligations concerning bundles. It then covers recent and potential forthcoming regulatory decisions that have or might have an impact on the regulation of bundles.

Geographic market changes

- 2.9 Chapter 4 of this document provides an overview of the developments in the competitive conditions across exchanges drawing on the analysis and preliminary findings of the WCAWLA Market Review.

Components of the Margin Squeeze Test

- 2.10 Chapter 5 of this document, details the proposed components and structure required for the bundles MST. The various inputs to the test are discussed along with the proposed cost standards which should be applied to the retail costs, wholesale inputs, and where appropriate how to assess a bundle which includes an unregulated service. This covers how the MST will vary from the Urban Area to Regional Area 1 and 2, and how bundles sold/offered for sale will be assessed in each area – e.g. on a bundle by bundle, or portfolio of bundles basis.

- 2.11 ComReg proposes that, in summary, the MST uses:

- (i) A portfolio test of all bundles offered/sold in the Urban Area. The portfolio test will use average total costs ('ATC') as the standard for retail costs.
- (ii) A two-step process whereby a bundle by bundle test will firstly be applied for bundles offered/sold in Regional Area 1. The bundle by bundle test will use long run incremental costs ('LRIC') as the standard for retail costs.

A portfolio test will also be applied in Regional Area 1 which uses ATC as the standard for retail costs.

- (iii) A bundle by bundle test using ATC as the standard for retail costs in Regional Area 2.

- 2.12 The average customer lifetime that is proposed to be used in the bundles MST is also discussed. Having analysed the market and the information available to ComReg (including inputs from operators on average customer lifetimes for customers joining a bundle) ComReg is proposing, subject to consultation, to remain with the current 42 month value.

- 2.13 Where unregulated services are included in a bundle, ComReg proposes that a cross-subsidy from regulated to unregulated services only is permissible, subject to a number of provisions as set out in Chapter 5.
- 2.14 Other issues such as case by case assessment of a bundle's reasonableness and retention promotions are also considered. ComReg is also of the preliminary view that where customers are re-contracting to a bundle then the MST should reflect the percentage of customers taking up the retention offer. Therefore, it is proposed that the cost of the retention offer should be spread over the period of the contract extension.

eir Sports

- 2.15 Chapter 6 of this document, discusses eir Sports. Its availability as an add-on at no cost to every Eircom retail broadband customer is a new development since the 2013 Bundles Decision. Our consultants, Oxera, have recommended that the incremental costs of including this service be included in the MST to ensure that a similar service can be replicated by OAOs.

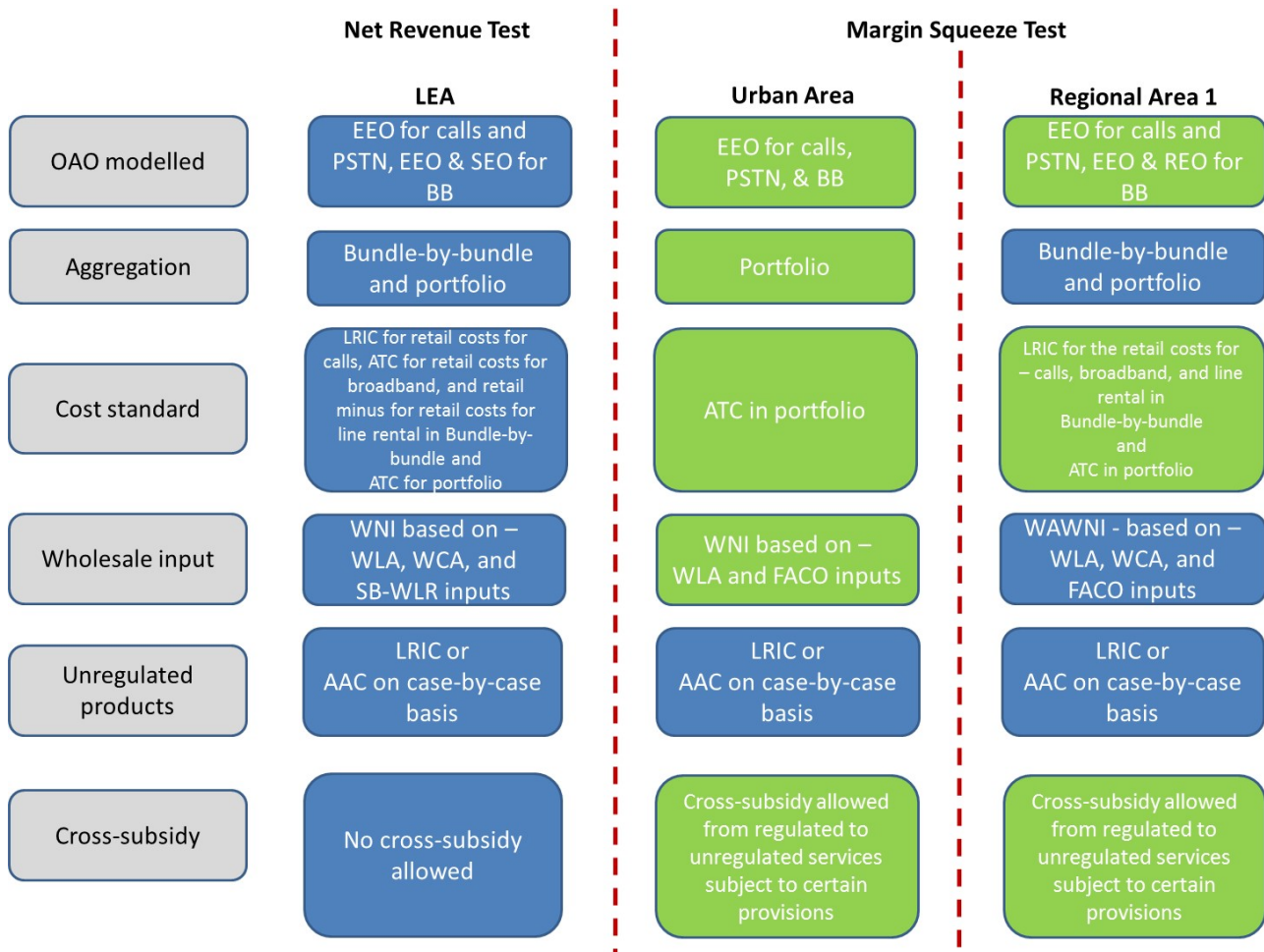
Administration of bundles

- 2.16 Chapter 7 of this document, outlines ComReg's proposals to maintain the pre-clearance required for the launch of new bundles or the amendment of existing bundles. ComReg is also proposing that Eircom produces a monitoring statement on a quarterly basis to show that it is meeting its MST obligations.

Graphical overview of proposed changes

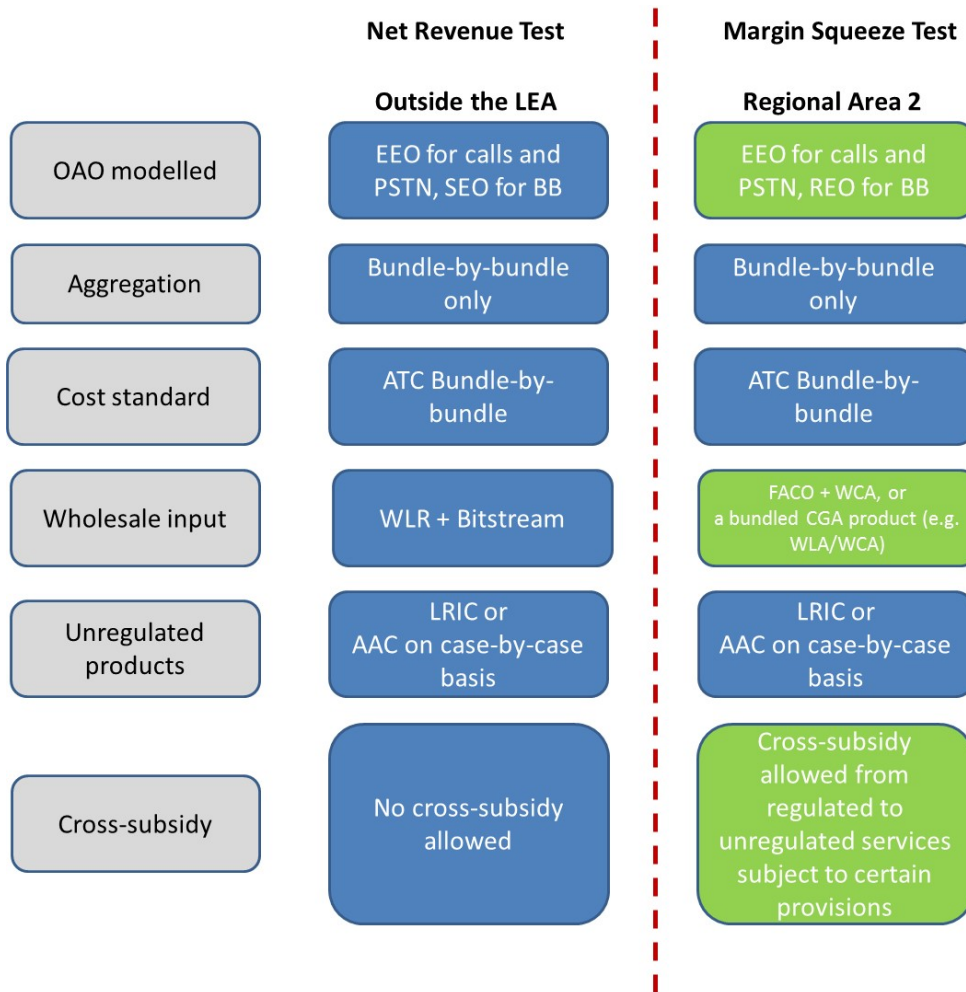
- 2.17 A high-level graphic overview of the components of the proposed MST in the Urban Area and Regional Area 1 compared to the existing NRT is presented below. The differences are highlighted in the green text boxes.

Figure 1: Components of the proposed MST in the Urban Area and Regional Area 1 versus the NRT for the LEA



2.18 A high-level graphic overview of the components of the proposed MST in Regional Area 2 and comparison with the existing NRT is presented below. The differences are highlighted in the green text boxes.

Figure 2: Components of the MST in Regional Area 2 versus the NRT for outside the LEA



3 Margin Squeeze and Regulatory Developments

3.1 Overview

- 3.1 This chapter discusses the potential competition problems in connection with a margin squeeze by an operator with SMP in upstream markets for wholesale inputs used by other operators to sell bundles.
- 3.2 The current regulatory position regarding bundles along with recent and forthcoming regulatory developments as they affect bundles is then discussed.

3.2 Margin Squeeze and bundles

- 3.3 A margin squeeze is the practice of a vertically integrated operator with market power that sets its relative upstream and downstream prices at levels where downstream competitors (dependent on the upstream inputs) of the vertically integrated firm may not be in a position to earn a sufficient margin between the two to cover their costs and trade profitably.
- 3.4 In 2014, the European Commission identified a number of markets as being susceptible to ex-ante regulation ('2014 Recommendations')¹³. Following market analysis undertaken by ComReg, Eircom currently has been found or prospectively has been found to have SMP in a number of markets including the following:

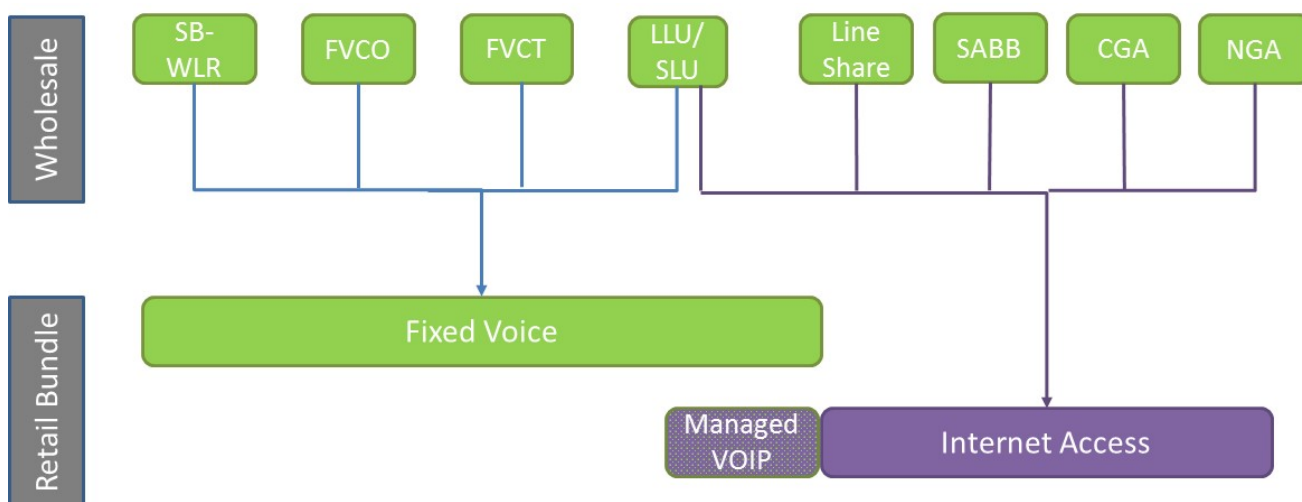
¹³ European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation (the '**2014 Recommendation**').

Figure 3: SMP - 2014 Recommendations

	Market	Title	Relevant document
Wholesale level	Market 1	Wholesale Call Termination on Individual Public Telephone Networks Provided at a Fixed Location	Market Review 2012: See ComReg D12/12
	Market 2	Wholesale Voice Call Termination on Individual Mobile Networks	Market Review 2012: See ComReg D02/16
	Market 3a	Wholesale Local Access Provided at a Fixed Location	Market Review 2016: See ComReg 16/96
	Market 3b	Wholesale Central Access Provided at a Fixed Location for Mass-market Products	Market Review 2016: See ComReg 16/96
	Market 4	Wholesale High-quality Access Provided at a Fixed Location	Market Review 2016: See ComReg 16/69
Retail level	FACO Markets	Retail Access to The Public Telephone Network at a Fixed Location	Market Review 2015: See ComReg D05/15

3.5 Eircom’s wholesale products/services (which are identified in the respective Markets above) are purchased by OAOs in order to provide downstream Retail Fixed Telephony Services (‘RFTS’ (e.g. line rental and calls)) and/or broadband to end-users. These downstream retail offerings compete with Eircom’s own downstream retail arm.

Figure 4: Wholesale inputs used to deliver services to end users



3.6 The retail practice of selling of telecommunications services in bundles including more than one service continues to grow in significance for most operators since 2014 (see Figure 9 in chapter 4). Bundling can have a number of consumer welfare enhancing benefits and can be an effective means for communication providers to realise various efficiencies and cost savings (which ultimately may be passed on to consumers through lower prices). However, *ex-ante* regulation of bundles may be required to ensure that the practice does not lead to anti-competitive effects. We next discuss, in paragraph 3.7, possible anti-competitive effects which may arise where an undertaking has SMP in a wholesale market, absent regulation. We then show how those anti-competitive effects may be achieved through margin squeezes from paragraph 3.9 - 3.26. We discuss margin squeezes on stand-alone products, bundles with regulated inputs only, and bundles with both regulated and unregulated inputs. We cover how margin squeezes can occur and the possible impacts they may have on competition and consumers.

General anti-competitive effects

3.7 Absent appropriate preventative remedies several related pricing-based competition problems may arise involving an undertaking having SMP in a wholesale market(s). This view is supported by Oxera (in section 2.2.1 of its paper which has been published in parallel). For example:

- An undertaking having SMP in a wholesale market may attempt to exploit its OAO wholesale customers by setting excessive wholesale charges. An OAO that relies on the wholesale input supplied by the SMP undertaking may attempt to pass on wholesale price increases to its retail customers to remain profitable. Due to this the OAO's retail offering, whether sold on a standalone basis or in a bundle with other services, may become uncompetitive. This has the potential to harm the development of effective competition in downstream markets;
- Similarly an undertaking having SMP in a wholesale market may attempt to "squeeze" its wholesale customers. The said undertaking may, in addition to increasing wholesale charges, also reduce the price it charges its own retail customers. Consequently OAOs would face increasing input costs and also tougher price competition downstream. In this way an undertaking having SMP in a wholesale market may squeeze the margins of OAOs with whom it competes in retail markets. Such a margin squeeze may occur in a standalone context or it may occur in the context of a bundle of services. In practice, whether an OAOs retail margin is squeezed as a result of increased wholesale charges, reduced retail prices or a combination of both, the essential point is that an undertaking having SMP in a wholesale market has the incentive and ability to squeeze the margins of OAOs, potentially harming the development of effective competition in downstream markets. The harm to competition may occur due to the exit or failure to expand of existing OAOs, or due to the chilling effect on entry that the risk of such conduct may have on potential entrant OAOs.

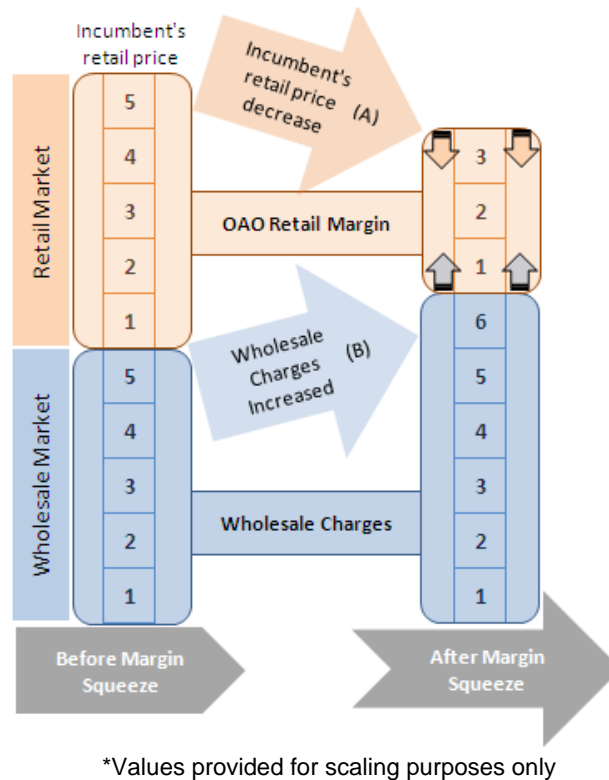
- An additional harm may occur in a context where there has been entry by OAOs at wholesale levels of the market. A margin squeeze, as just described may affect the competitive position of such wholesale OAOs (as opposed to retail OAOs). This may happen for instance if, as the result of the exclusionary effect of margin squeeze at the retail level of the market, as just described, a wholesale OAO's customers exits or fails to expand, thus undermining the wholesale OAOs business case, potentially damaging competition at the wholesale level of the market.
- 3.8 Different types of anti-competitive effect may be achieved through margin squeezes. Most straightforward is a margin squeeze on a stand-alone basis, that is, a margin squeeze involving a single wholesale input and a single downstream retail service. Here an SMP undertaking is said to engage in a vertical leverage. Analogous anticompetitive effects may occur in the context of bundles. Two situations can be distinguished, one where the undertaking has SMP in the supply of all wholesale inputs required to supply the bundle, and a second where at least one of the elements of bundle is unregulated at the wholesale level. This latter anticompetitive effect is sometimes described in terms of diagonal leverage as it involves the leveraging of upstream market power in downstream horizontally related markets (horizontal to the retail market). The mechanisms of the anticompetitive effects in each of these three scenarios are discussed in further detail below.

Margin squeeze and stand-alone products

- 3.9 On a stand-alone basis (i.e., not in a bundle), OAOs could face a margin-squeeze at the retail level as a result of Eircom lowering its retail price (illustrated by arrow A in Figure 5 below) such that an OAO's retail margins are not sufficient to cover its downstream retail costs. The same effect could also occur by Eircom increasing its charges at the wholesale level (illustrated by arrow B). As proposed in the WLA/WCA Market Review cost oriented prices should be applied to a number of wholesale inputs (e.g. FTTC based Virtual Unbundled Access ('VUA') in the WLA market and FTTC based Bitstream in the Regional WCA market, etc.). While a cost orientation obligation would prevent Eircom from unilaterally increasing its wholesale charges without approval from ComReg for these inputs, Eircom could, by reducing its retail prices for services using these inputs (e.g. standalone broadband) ensure that OAOs cannot match its retail prices and still earn sufficient margin to cover their own costs. In other words, a cost orientation remedy in the relevant wholesale market alone would not be sufficient to guard against price-based exclusionary conduct because Eircom, having freedom to set retail prices, could still effect a margin squeeze. OAOs may exit the market as a consequence of a margin squeeze pricing strategy and/or may be deterred from future entry where there is a threat that Eircom might repeat the margin squeeze (even when margins are restored to their pre-squeeze level).

3.10 Another potential motivation to cause a margin squeeze would be for Eircom to protect its market power upstream. As a potential entrant into the upstream market has to make significant sunk investments it must achieve sufficient downstream demand in order to recover/contribute towards those costs in the long-run. If Eircom instigated a margin squeeze it could exclude downstream rivals such that no current or potential competitor at the upstream level would find it profitable to enter/expand into the market (i.e. as the new entrant upstream (acting as a wholesaler) would have no downstream demand). Consequently, the margin squeeze could effectively not only foreclose competition downstream but could also protect Eircom's upstream market power.

Figure 5: The mechanics of a margin squeeze*



3.11 Such leveraging concerns are currently addressed, on a stand-alone basis, through a number of price control obligations. The FACO Decision (which has been further specified by the 2016 Access Pricing Decision¹⁴) imposed a cost orientation obligation for wholesale line rental ('WLR') combined with an obligation not to cause a margin/price squeeze between retail line rental services and WLR. Separately, the 2013 NGA Decision¹⁵ and the 2014 CGA Decision¹⁶ require Eircom not to cause a margin squeeze between *inter alia* the price of NGA and CGA retail product(s) and the price for NGA Bitstream and CGA Bitstream, respectively.

¹⁴ <https://www.comreg.ie/publication-download/pricing-of-eiras-wholesale-fixed-access-services-response-to-consultation-document-1567-and-final-decision>

¹⁵ <http://www.comreg.ie/fileupload/publications/ComReg1311.pdf>

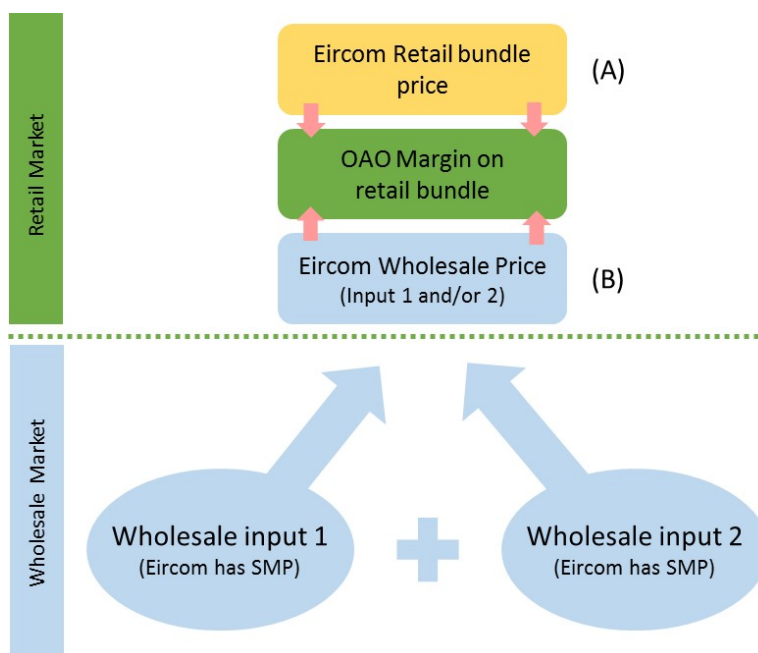
¹⁶ <http://www.comreg.ie/publication/wholesale-broadband-access-price-control-obligation-in-relation-to-current-generation-bitstream-2/>

- 3.12 As set out in the WLA/WCA Market Review, ComReg has now proposed that fibre to the cabinet ('FTTC') based WLA and WCA services should be subject to a cost orientation obligation combined with an obligation not to cause a margin/price squeeze. In relation to fibre to the home ('FTTH') based WLA and WCA services, ComReg has proposed to retain the obligation not to cause a margin/price squeeze.
- 3.13 The obligations contained in the WLA/WCA Market Review, as they relate to stand-alone services, have been further specified and are currently being consulted upon in the WLA/WCA Pricing Paper.

Margin squeeze and bundles of regulated services

- 3.14 The proposed obligations contained in the WLA/WCA Pricing Paper do not address the competition problems that may arise when individual services are combined into a retail bundle. A retail bundle is considered by ComReg to be a package of retail products/services sold or offered by Eircom consisting of more than one service. Absent a specific test of bundles prices, there would be no means of determining whether an Eircom bundle is replicable by an OAO that has purchased regulated wholesale inputs from Eircom given any downstream retail costs that they incur.
- 3.15 Due to the increasing prevalence of bundled services as noted above, not having oversight over how RFTS and retail broadband is sold when bundled would create a significant concern for ComReg. The proposed bundles MST contained in this Draft Decision aims to ensure that the wholesale measures contained in the WLA/WCA Market Review and FACO Decision are supported and not undermined through the provision of downstream services via bundles. The potential competition problems were explained in the WLA/WCA Market Review and the FACO Decision. We provide further detail in the following paragraphs.
- 3.16 Absent the proposed bundles MST, Eircom, as a vertically-integrated operator which competes downstream with bundled retail products could exert its upstream market power in those wholesale markets, where it has been found to have SMP, by causing a margin squeeze. Analogous to the stand-alone case, this could be done by decreasing the Eircom retail bundle price (illustrated by point A in Figure 6 below) and/or increasing one or more of the underlying wholesale prices (illustrated by point B) — to the extent that downstream retail margins are not sufficient to cover retail costs. As before OAOs' retail margins could be 'squeezed' as a result of either: a retail price decrease; a wholesale price increase; or a combination of both. The anticompetitive effect of conducting a bundles margin squeeze would be similar to the anticompetitive effect occurring in the context of a stand-alone margin squeeze, that is, Eircom could vertically leverage its SMP position in the wholesale markets to the retail market, leading to less choice for consumers, reduced incentives for those remaining to innovate, and price increases post exit of competitors.

Figure 6: Margin Squeeze on bundles in which Eircom has SMP in all relevant markets



3.17 Eircom could create a margin squeeze at the retail bundle level which prevents OAOs from profitably replicating Eircom retail bundles while at the same time meeting its obligation(s) on a stand-alone basis. For example Eircom could (subject to, where appropriate, the proposed cost orientation obligation) raise the wholesale price of a WLA input which may require (in accordance with the proposed stand-alone margin squeeze obligation) an increase in the stand-alone retail price. However, in this example, where WLA input is sold/offered as part of a bundle at the retail level, absent control over the retail price of the relevant bundle, there would be no corresponding retail price increase in relation to the single headline bundle retail price, raising the possibility that the bundle may not be replicable for an OAO. In other words, based on the individual prices of the wholesale inputs that the OAO is required to purchase from Eircom, which are subject to stand-alone margin squeeze tests, and its downstream retail costs (that the OAO must incur in order to sell/offer such a bundle at the retail level) the OAO may not be able to replicate the Eircom bundle profitably.

- 3.18 A potential motivation to cause a margin squeeze is for Eircom to gain market power in downstream retail markets as previously discussed in paragraph 3.7. Eircom could implement a margin squeeze to the extent that OAOs could no longer profitably supply the bundled services in the long-run. In particular, as Eircom is a vertically-integrated operator the outlays between its retail and wholesale arms are inter-company transfers and could potentially be cash positive in aggregate (due to upstream profits and the presence of sunk costs). However, from an OAO's perspective this is a real cash outlay. OAOs' current and future business cases may not support continuing to offer or make available loss making retail bundles and therefore over the medium-to-long term they may exit the market. This would be to the long-term detriment of consumers (through lower service offerings, product choice and product innovation). Such a margin squeeze strategy could also act as a future deterrent to new entry in the downstream market (i.e., new entrants may not consider entering the retail market as they would consider that Eircom could potentially engage in such behaviour once they have entered the market thereby potentially rendering the investment unviable). Consequently, such a margin squeeze may distort effective competition in the medium-to-long-term to the detriment of end-users.
- 3.19 As described in paragraph 3.13 for standalone products another potential motivation to cause a bundle margin squeeze would be for Eircom to protect its market power upstream. As for standalone products such a margin squeeze could effectively not only foreclose competition downstream but could also protect Eircom's upstream market power.

Margin squeeze and bundles including unregulated services

- 3.20 Related competition issues may arise where an undertaking with SMP in wholesale market(s) includes products or services which are not subject to any price regulation in retail bundles together with regulated products. In other words, anticompetitive exclusionary effects may arise where Eircom includes unregulated services, in which it does not have market power, e.g. IPTV or mobile, in bundles with products or services which are subject to price controls on a stand-alone and bundles basis.
- 3.21 There are two potential anticompetitive effects which arise in a context where unregulated products or services are included as part of a bundle. The first involves Eircom potentially leveraging its upstream market power diagonally downstream into unregulated retail markets. The second effect arises due to the potential for the practice to undermine wholesale SMP remedies and any margin squeeze tests which only cover regulated services.

3.22 If Eircom is not required to include, in some fashion, the costs of providing unregulated components of a bundle as part of the proposed bundles MST, then Eircom could offer loss-making bundles thereby undermining the regulatory remedies imposed in those markets where Eircom has SMP. While this type of bundling may be pro-competitive and may entail a short-term benefit to consumers, ComReg is concerned that if that type of bundle is not replicable by OAOs then Eircom could foreclose downstream rivals in the telecommunications market — to the long-term detriment of consumers, and/or strategically be protecting its market position in the upstream telecommunications market. Therefore we propose that where unregulated services are included in a bundle, then the costs of providing those unregulated services are also included.

Conclusions on margin squeezes and bundles

- 3.23 For the reasons identified in paragraphs 3.7 - 3.22, absent effective remedies, Eircom could leverage its market power in wholesale markets, where it has been found to have SMP, either vertically or diagonally (due to bundling) into downstream retail markets or protect its positions in upstream markets where it has SMP. Consequently, ComReg considers that there is a need for an obligation to prevent bundling being used for anti-competitive purposes.
- 3.24 The European Regulators Group¹⁷ ('ERG') notes in its report on margin squeeze that: *"While competition law is intended to prevent margin squeeze as an exclusionary abuse, ex-ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets"*.¹⁸ As such, ComReg considers that the ex-post enforcement provided under competition law would be inadequate and consequently considers that the express imposition of ex-ante regulatory obligations would be more appropriate. Furthermore, given the identified risk of potential leverage arising from Eircom's SMP upstream, it is considered that identifying a margin squeeze only after it had occurred would not sufficiently protect against possible market foreclosure and the associated consumer harm.
- 3.25 ComReg is of the preliminary view that a further specification of both the (proposed) price control obligations not to cause a margin squeeze in the WLA/WCA markets and the current obligation in the FACO Market could address the anti-competitive bundling concerns. This view is supported by Oxera and discussed in section 2.2.1 of its paper. ComReg's views on these matters are discussed further in sections 3.4 - 3.7.
- 3.26 At the same time ComReg considers that the obligation on Eircom not to cause a margin squeeze should not protect inefficient competition. The margin squeeze test should be such that it protects efficient OAOs to ensure that competition is sustainable in the long-run. This is considered further in Chapter 5 of this document.

¹⁷ The European Regulators Group, replaced in 2009 by BEREC

¹⁸ ERG (09) 07 Report on the discussion of the application of margin squeeze tests to bundles, paragraph 6.

3.3 Update since the 2013 Bundles Decision

- 3.24 The NRT is the test undertaken pursuant to the 2013 Bundles Decision which ComReg uses to assess whether or not Eircom is covering its total costs when it offers/sells a bundle of services (that contain LLVA or HLVA) and therefore complying with the obligation not to unreasonably bundle services.
- 3.25 The 2014 Consultation sought to replace the NRT with a margin squeeze test between the price of the wholesale services Eircom offers/sells to OAOs and the price of an Eircom retail bundle of services – where those wholesale services are required by OAOs in order to replicate that Eircom retail bundle. As discussed in ComReg document 15/48¹⁹, ComReg considered that it was prudent to await the findings of the WLA/WCA Market Review, and the views expressed in response to the 2014 Consultation also suggested waiting upon the review.
- 3.26 A preliminary finding from the WLA/WCA Market Review is that in the WCA market, competition appears to be sufficiently developed for ComReg to remove wholesale regulatory obligations on WCA inputs in 88 exchanges (the ‘Urban WCA market’). This is discussed further below and in Chapter 4 of this Draft Decision.

3.4 Market 1: Retail Access to The Public Telephone Network at a Fixed Location

- 3.27 In the Retail Access SMP Decision ComReg defined three separate retail FVA markets (the Relevant FVA Market(s)) as follows:
- **Market 1a Standalone Lower Level Voice Access:** Standalone lower level voice access comprising access via a PSTN, ISDN BRA or analogous broadband connection²⁰ (cable, fibre, FWA or DSL), that is used to provide PSTN, ISDN voice or Managed VOIP service offered or sold on a standalone basis to End-Users or when offered or sold in a package with fixed voice calls to End-Users;
 - **Market 1b Bundled Lower Level Voice Access:** Bundled lower level voice access comprising access via PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA and DSL) used to provide PSTN, ISDN voice or Managed VOIP service that is sold or offered to End-Users in a product bundle which includes any of broadband, television or mobile services (and which product bundle may include fixed voice calls); and

¹⁹ <http://www.comreg.ie/csv/downloads/ComReg1548.pdf>

²⁰ Prospectively, a scenario may arise where an operator, in light of evolving access technologies, delivers a standalone managed voice service (i.e. managed VOIP over an IP /broadband access path) equivalent to a standalone narrowband PSTN voice service. For example, from a technical standpoint, it is possible that an operator could use a broadband access path to provide a standalone managed voice over IP/broadband as a product, but without also providing internet access. However, while this type of voice product is somewhat notional at this stage, to be technology neutral and noting the potential for this to emerge to one degree or another within the lifetime of this market review, ComReg includes them within the relevant market so that any future competitive constraints from such could be assessed. However, their inclusion at this point does not affect the SMP assessment later.

- **Market 1c Higher Level Voice Access:** Higher level voice access comprising access via ISDN FRA or ISDN PRA that is used to provide a voice service offered or sold to End-Users either on a standalone basis or in a package with fixed voice calls, or in a product bundle which includes any of broadband, television, or mobile services (and which product bundle may also include fixed voice calls).
- 3.28 The NRT ensures that Eircom is constrained from leveraging its market power from Market 1b and/or Market 1c into other more competitive retail markets (horizontal leverage) and/or reinforcing its market power upstream (vertical/diagonal leverage) in other wholesale markets which are required as inputs by OAOs to replicate the Eircom retail bundle which include RFNA.
- 3.29 As such, the NRT currently addresses the margin squeeze concerns identified in section 3.2. Furthermore, due to wholesale cost/price components used in the test, the NRT prevents Eircom leveraging its market power from the respective wholesale markets which are used by OAOs to replicate the Eircom retail bundle (which includes as part of that bundle the ability for end-users to make and receive calls on their fixed-telephone line) into the downstream retail market for RFNA and any other downstream retail markets which are included as part of the Eircom retail bundle (e.g., broadband). Put simply, the NRT ensures that Eircom is not able to leverage vertically or diagonally from the upstream market into the retail market when combining wholesale inputs which are sold/offered in a bundle at the retail level.
- 3.30 Therefore, continuing the existing NRT would mean that a further specification of a MST obligation (as proposed by this Draft Decision) would not be required as set out above for WLA/WCA and FACO markets. However, ComReg is of the preliminary view that if there were appropriate wholesale regulation upstream (as proposed by this Draft Decision and the 2014 FACO Decision Document) then the NRT would no longer be required at the retail level. As such, a well-defined MST at the wholesale level on an ex-ante basis could address the leveraging concerns which are currently addressed by the NRT.
- 3.31 A further proposal is that the definition of a bundle should be assessed through a wider scope than is currently the case under the NRT (i.e. narrowband access and calls with added services like mobile or broadband). A failure to widen the definition of a bundle beyond narrowband access as a sole anchor could give rise to a regulatory gap as more bundles are sold/offered in the retail market based on for example, the combination of NGA broadband and voice over broadband or IPTV. Under the current definition the bundles cited (e.g. broadband plus voice over broadband or IPTV) would not be subject to any bundles MST and therefore they would be without any regulatory oversight. The widening of the bundle definition to include bundles anchored in broadband should overcome this potential regulatory gap.

Q. 2 Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 (of 2007) if there was appropriate wholesale regulation upstream? Please justify your views.

3.5 FACO Market

- 3.32 ComReg as part of the FACO market review conducted a ‘three criteria test’ which identified that Eircom had SMP in the FACO market. ComReg indicated as part of the FACO Decision, that moving the WLR obligations to the most upstream market could, inter alia, facilitate the deregulation of downstream markets. This was to address the potential competition problems associated with price related behaviours including excessive pricing and margin squeeze (see Chapters 8 and 9 of the FACO Decision). The proposed MST in this consultation and draft decision document is a further specification of the price control obligation not to cause a margin squeeze. The proposed MST permits the removal of the obligation not to unreasonably bundle LLVA and HLVA.
- 3.33 In the 2014 FACO Consultation Document, ComReg consulted on its preliminary view that the obligation on Eircom to provide Wholesale Line Rental (‘WLR’) should instead be imposed in Market 2 rather than Market 1. As noted in ComReg 14/26, moving WLR obligations into the Fixed Voice Call Origination (‘FVCO’) market would, insofar as is possible, seek to address competition problems at the most upstream level and allow the potential de-regulation of downstream markets, either entirely or in part. The FACO Decision confirmed the repositioning of the access obligation for WLR to the upstream FACO Markets.
- 3.34 WLR enables OAOs to ‘rent’ the access line and then, combined with FVCO, to offer a combined retail line rental and calls service to end-users. Eircom provides a WLR and FVCO product called Single Billing-WLR (‘SB-WLR’). Some OAOs purchase SB-WLR services from Eircom to provide retail fixed telephony services directly to retail customers, while other OAOs do so for the purpose of re-selling services as part of a broader suite of their own wholesale services which are made available to other OAOs.
- 3.35 ComReg considers that WLR is currently an important wholesale input for OAOs to purchase from Eircom wholesale if they wish to replicate an Eircom retail bundle.
- 3.36 In terms of call services (including call origination, transit and termination rates – which would take into account the FACO market and Market 1 (2014) respectively) these wholesale prices are proposed to be included in the MST as cost inputs (see Chapter 5). The wholesale costs/prices of these services are taken into account to ensure that Eircom cannot cause a margin squeeze as identified in paragraph 3.3).

ComReg’s Preliminary view

- 3.37 ComReg is of the preliminary view that it is appropriate to further specify Eircom’s price control obligation in the Wholesale Fixed Access Call Origination not to cause a margin squeeze in relation to LLVA and HLVA.
- 3.38 ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze between the price(s) of the wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle”. Here Bundle means a package of services on offer or on sale by Eircom to end-users, consisting of Retail Line Rental and a Retail Broadband Product and which may also include one or more other retail products or services.

Q. 3 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself?. Please provide cogent reasoning to justify your views.

3.6 Market 3a: Wholesale Local Access

- 3.39 ComReg in the WLA/WCA Market Review²¹, assessed the current and likely extent of competition within the WLA Market, absent regulation. ComReg's preliminary view is that Eircom should be designated as having SMP in the WLA Market.
- 3.40 ComReg considers that infrastructure-based competition from OAOs has the most potential to offer sustainable competition to Eircom in the provision of broadband to the benefit of end-users. OAOs using their own infrastructure are better able to offer differentiated retail products and to set prices independently of Eircom as compared to those OAOs using WCA inputs and WLR. Therefore, it is important that regulation ensures that WLA based competition is encouraged where it is viable. This should ensure that investment is maximised and competition at the highest level of the 'investment ladder' is promoted to the benefit of end-users.
- 3.41 The WLA/WCA Market Review proposes the deregulation of WCA in the Urban WCA Market. Hence no MST can be imposed between retail prices for broadband and WCA inputs in that area. The proposed deregulation of the Urban WCA Market is based on the outcomes of the market analysis that was conducted in line with the Modified Greenfield Approach²². The proposed deregulation of the Urban WCA Market is conditional on the continued regulation of WLA inputs in the Urban WCA Market.
- 3.42 In Chapter 7 of the WLA/WCA Market Review ComReg has identified the competition problems associated with the WLA market which, in the absence of regulation, could lead to anti-competitive behaviours including: denial of access; excessive pricing; and vertical leveraging into downstream markets. The WLA/WCA Market Review proposes to geographically differentiate the pricing remedies in the WLA market. As discussed in Chapter 8 of the WLA/WCA Market Review, the proposals include applying a retail margin squeeze obligation on Eircom in those exchanges proposed to be deregulated on foot of the review of the Urban WCA area. This is being proposed as in the Urban WCA Market a number of OAOs rely on Eircom inputs to offer bundles of services including broadband. Without WLA regulation in this area, ComReg is concerned that Eircom could reduce the prices of its retail broadband bundles in such a way that it could foreclose other operators using WLA wholesale inputs through a margin squeeze, even with cost oriented WLA inputs.

²¹ <https://www.comreg.ie/publication/market-reviews-wholesale-local-access-wholesale-central-access/>

²² See pg. 8 of the Explanatory Note to the 2014 Recommendation. The Modified Greenfield Approach begins by looking at the retail market before working up the value chain to the wholesale market. The analysis of the competitive nature of these markets assumes that no SMP derived regulations are in place to avoid circularity in the analysis.

ComReg's Preliminary view

- 3.43 ComReg is of the preliminary view that it is appropriate to further specify Eircom's price control obligation in the WLA market not to cause a margin squeeze in those exchanges corresponding to the footprint of the Urban WCA Market.
- 3.44 ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail "Bundle" offer and the retail "Bundle" itself. Here Bundle means a package of services, consisting of retail broadband internet access (provided at a fixed location) and one or more other services, which is on offer or on sale by Eircom to end-users in the Urban WCA Market (discussed in Chapter 4 of this Draft Decision).

Q. 4 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.

3.7 Market 3b: Wholesale Central Access

- 3.45 ComReg in the WLA/WCA Market Review, has assessed the current and likely extent of competition within the WCA Market, absent regulation. ComReg's preliminary view is that Eircom has SMP in the Regional WCA Market, and that no service provider is likely to have SMP in the Urban WCA Market. These preliminary views have been consulted upon and form the basis of our proposals with regards to bundles using WCA inputs.
- 3.46 WCA is a wholesale input used in the provision of a range of retail products which are used by consumers for broadband internet access. WCA is a required wholesale input for OAOs that wish to replicate an Eircom retail bundle in the retail and other downstream markets corresponding to the Regional WCA Market.
- 3.47 ComReg identified as a part of the WCA Market Review the competition problems associated with the Regional WCA market which included Eircom's high and stable market share, control of infrastructure, the lack of existing and potential competition, and the absence of effective buyer power (see Chapter 11). The WCA Market Review Consultation proposes an obligation on Eircom not to cause a margin squeeze in the Regional WCA Market (see Chapter 13). Another preliminary finding from the review is that the Urban WCA market is prospectively competitive in the absence of regulation. This means that for those exchanges identified as being in the Urban WCA Market (currently 88) then ComReg will remove the existing regulatory obligations related to providing WCA inputs previously placed on Eircom in those exchanges.
- 3.48 In terms of the future potential for Voice over Broadband ('VoB') a margin is included in the cost stacks proposed for the MST (see Chapter 5 of this Draft Decision).

ComReg's Preliminary view

- 3.49 ComReg is of the preliminary view that it is appropriate to further specify Eircom's price control obligation in the Regional WCA market not to cause a margin squeeze.
- 3.50 ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze between the price(s) of the WCA components required by an OAO to replicate an Eircom retail "Bundle" offer and the retail "Bundle" itself. Here Bundle means a package of services, consisting of retail broadband internet access (provided at a fixed location) and one or more other services, which is on offer or on sale by Eircom to end-users.

Q. 5 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.

4 Exchange Areas

4.1 Overview

- 4.1 The purpose of this chapter is to provide an overview of the competitive conditions across exchanges and developments stemming from the preliminary findings for the WLA/WCA Market Review.
- 4.2 The 2011 WBA Market Decision²³ found evidence of structural change (operator presence and evolving market shares) arising in certain geographic areas where cable and LLU based broadband offerings overlapped. The 2013 Bundles Decision subsequently defined two areas with varying competitive conditions namely the Larger Exchange Area ('LEA') and Outside the LEA. The 2013 Bundles Decision set out the definition and relevant criteria for the LEA along with justification of same.
- 4.3 The 2015 FACO Decision confirmed that the competition problems which were previously identified in D04/07 (Interconnection Market Review Wholesale Call Origination and Transit Services) remained relevant.
- 4.4 ComReg has examined market developments across all exchange areas as part of the WLA/WCA Market Review. In terms of the SMP assessment, ComReg's preliminary findings are: Eircom has SMP in the WLA Market (a national market); no service provider has SMP in the Urban WCA Market; and Eircom has SMP in the Regional WCA Market.
- 4.5 Having identified that Eircom has SMP in the WLA Market, and the Regional WCA Market, remedies appropriate to these findings as they impact bundles are being proposed in this consultation and draft decision document. The finding of the Urban WCA Market as being competitive and therefore proposed for deregulation is dependent on the continuation of WLA regulation. For bundles the proposals contained in this paper and Oxera's paper (17/51a) reflect this deregulation.
- 4.6 While respondents to the 2014 Consultation outlined their position on developments in exchange areas, a number of responses went further than this and covered other matters including: a) definition/criteria for determining an exchange to be in the LEA; and b) the competitive dynamics which might arise based on the changes proposed in that consultation. These are discussed in section 4.3 of this chapter.

²³ <https://www.comreg.ie/publication-download/response-to-consultation-and-decision-market-review-wholesale-broadband-access>

- 4.7 To take account of the different structural changes arising in exchange areas ComReg proposes to continue to vary the implementation of the price control remedy by geographic areas (specifics of this treatment are discussed in Chapter 5). ComReg proposes to split the Regional WCA Market into two separate areas – Regional Area 1, and Regional Area 2, using the LEA criteria established under the 2013 Bundles Decision. ComReg proposes that Regional Area 1 corresponds closely to those exchanges which previously were identified as being in the LEA, less those exchanges which are now in the Urban WCA Market. Regional Area 2 corresponds to those exchanges which are in the more suburban, rural and remote areas of Ireland, and were previously identified as Outside the LEA from the 2013 Bundles Decision.
- 4.8 The main points that will be discussed in the remainder of this chapter are summarised under the following headings:
- Exchange area criteria;
 - Market developments in the LEA; and
 - Reflecting the 3a and 3b market review.

4.2 Exchange area criteria

- 4.9 In this section ComReg discusses the history of the LEA, outline and discuss the criteria used to identify exchanges as qualifying for addition to the LEA.

History of the LEA

- 4.10 The 2013 Bundles Decision, following supplementary consultation document ComReg 12/63 “Price regulation of bundled offers” considered that, with the prospect of more localised competition evolving over time, there may be merit in revising the parameters of the NRT. Another consideration was that competition could arise from VUA based competition (i.e., NGA), but viewed that these forms of competition were very likely to be restricted to more densely populated areas.
- 4.11 The 2013 Bundles Decision considered it appropriate to define the LEA to recognise that, while the relevant market (Market 1b and 1c – low level voice access and high level voice access respectively) was national in scope, different structural conditions appeared to be emerging, such that the possibility for competitive and behavioural change might differ in the future.
- 4.12 ComReg assessed the status of competition across all of Eircom’s exchanges on an exchange-by-exchange basis to assess the appropriateness of their inclusion in the LEA. In determining the actual exchanges which qualify under each criterion, a detailed database was constructed which allowed ComReg to assess the number of premises in exchange areas; the number of customers connected on the Eircom platform; the relative share of OAO customers on the Eircom platform i.e. through Line Share or LLU; the cable operators’ (Virgin Media) footprint; and the number of broadband customers in that exchange area.

LEA criteria

- 4.13 The 2013 Bundles Decision identified five non-cumulative criteria under which qualifying exchanges can be added to the LEA. These are summarised below (further information on them is in Annex 2 to this Draft Decision):
1. an alternative infrastructure provider (AIP), and at least one OAO (not being an AIP) using LLU/VUA are present; or
 2. at least two OAOs (not being an AIP) use LLU/VUA; or
 3. an AIP is present and Eircom provides broadband to less than 20% of premises; or
 4. NGA is enabled (with six months notification of NGA enablement to operators); or
 5. exceptionally, and subject to a case by case assessment the relevant exchange is-
 - a. surrounded by qualifying exchanges; or
 - b. has fewer than 500 residential premises, and is located next to or in reasonable proximity to qualifying exchange(s); or
 - c. determined to the satisfaction of ComReg to have an economic affinity with adjacent qualifying exchange(s).
- 4.14 ComReg considered that criteria 1, 2, and 3 take into account the different structural conditions and also the addressable markets in exchanges. Our approach to date has ensured that an exchange, to qualify as part of the LEA, requires an OAO to have reasonable coverage along with a reasonable market share (i.e. the OAO is not just present in the exchange area but is able to service a reasonable number of premises and also has a reasonable share of the addressable market).
- 4.15 The guiding principle of Criterion 4 is that the exchange is not just NGA-enabled, but that NGA products and processes are in place six months in advance of an exchange being labelled as NGA-enabled so that OAOs are able to replicate the services of Eir. A further aspect of including an exchange as LEA under this criterion is that NGA enabled cabinets in that exchange must cover a reasonable number of all lines in that exchange (Annex 3 Decision Instrument: Market 1 – 2.11 of the 2013 Bundles Decision). ComReg indicated in paragraph 4.95 of the 2013 Bundles Decision that a value of circa two-thirds of all lines in that exchange as being a reasonable number.
- 4.16 Criterion 5 contains three sub-criteria and looks at particular exchanges on a case by case basis. For the first instance, 5(a) is applied to those exchanges surrounded by the LEA, but not qualifying through other criteria. The aim of this sub-criterion is to avoid situations where for example a particular bundle may be available to one housing estate, but a neighbouring estate may not be able to avail of it. The second, 5(b), is for those exchanges which have less than 500 residential premises, but is next to or near a qualifying exchange. The aim of this Criterion is to be welfare enhancing for consumers in those exchanges. The final, 5(c), is where an exchange should be included due to economic affinity with qualifying exchanges next to it. In proposing exchanges for inclusion in the LEA under 5(c) the reasoning provided needs to be well justified, and the total number of residential premises which can qualify under this sub-criterion is limited to 5% of the total residential premises in the LEA (except for sub-criterion 5(b)).

4.17 While the criteria used to determine the LEA are well established, the boundaries of the LEA continue to expand, which in turn provides flexibility to Eircom in terms of pricing bundles. This assessment has been updated over time, and exchanges deemed to meet the LEA criteria at each review have been added to the LEA. ComReg expects that the following will add further exchanges to the LEA:

- Eircom’s NGA roll-out plan continues to expand outside the current LEA footprint;
- Virgin Media has announced plans to further expand their network footprint to more towns around the country;
- The national electricity network (ESB) has launched a joint venture, Siro, with Vodafone. Siro has entered the Irish broadband market and is leveraging the electricity access network; and
- The Government’s National Broadband Plan (NBP) which aims to ensure a minimum speed of 30Mbps across the country may well have an impact on the take-up of bundles, and enhance competition over the medium to longer term.

4.3 Market developments in the LEA

4.18 In this section ComReg discusses the current extent of the LEA, and how to treat the LEA criteria in the proposed bundles MST.

4.19 Since publication of the 2013 Bundles Decision, the LEA has continued to evolve and now comprises 369 exchange areas. While the growth in the number of exchanges in the LEA was previously driven by the roll-out of NGA (through Criterion 4), following the latest review (Q4 2015) 76 exchanges were added due to Criterion 5 (42 were added due to 5(c), 33 due to 5(b), and one due to 5(a)).

Table 4.1 Exchanges in the LEA

	2013	2014	2015
Criterion 1	67	67	67
Criterion 2	7	7	7
Criterion 3	2	2	2
Criterion 4	75	125	167
Criterion 5 a	8	8	9
Criterion 5 b	34	34	67
Criterion 5 c	8	8	50
LEA	201	251	369
Outside the LEA	1003	953	835
Change in PSTN lines in the LEA	-	+ 13%	+ 12%

4.20 ComReg does not consider that the requirements under the various criteria has hindered the development of competition as was raised by a respondent to the 2014 Consultation. Instead ComReg views the criteria as recognising the development of competition. Further, the presence of, and shift to, NGA wholesale inputs in the LEA by OAOs, and in a number of exchanges investment by OAOs in their own infrastructure enables OAOs to differentiate their offerings to end users (for example through offering VoB or IPTV or the speed of the service). This is also suggestive of their confidence in competing over the long term in the LEA. The categorisation of an exchange as being LEA or not under Criterion 5, and all other criteria is a result of data that is carefully analysed. Figure 5 presents the operators' share of fixed voice in a bundle with other services.

Figure 7: National operator market shares – fixed voice in bundle with other services

✂

Source: ComReg (2017). Quarterly Key Data Questionnaire – data as of Q4 2016²⁴.

4.21 Table 4.2 below shows the broadband market shares on the Eircom platform across all NGA-enabled exchanges which satisfy Criterion 4. ComReg considers that our approach to adding exchanges to the LEA through Criterion 4 does not hinder competition.

Table 4.2 Criterion 4

	Exchanges	Eircom	OAOs (excl. Virgin Media)
Number	167	✂	✂
Customer share	-	✂%	✂%

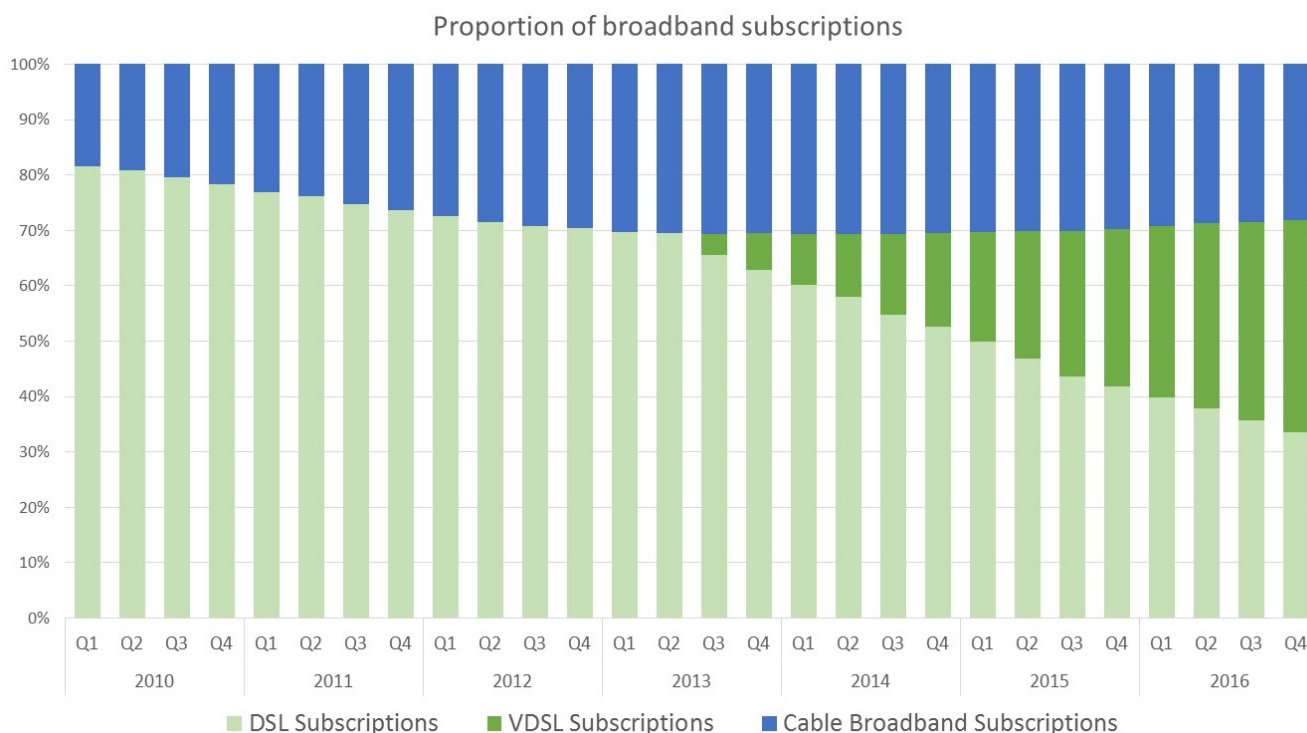
4.22 Nationally, DSL is the primary form of fixed broadband access, with 71% of fixed-line (i.e., excluding fixed wireless access and other broadband access²⁵) broadband subscriptions in Q4 2016.²⁶ The launch of VDSL appears to have halted the flow of subscribers from the Eircom network to cable since its launch in 2013. Figure 8 illustrates the trend in market shares of the two main platforms on a national basis since 2010 showing the decline in DSL up to Q3 2013, with a plateau until Q3 2014 due to the launch of VDSL, and thereafter an increase. Underneath this platform level view, the outcome is consistent with the market shares for retail broadband reviewed as part of the WLA/WCA Market Review.

²⁴ The data used in this Draft Decision has been derived from information provided to ComReg by operators through the Quarterly Key Data Questionnaire for publication in the Quarterly Key Data Report. Any inconsistencies that might arise between the Draft Decision and the Quarterly Key Data Report results from corrections that may have been made to certain Quarterly Key Data Questionnaire data, and are discussed in detail in those documents. The corrected data has been included in this Draft Decision, therefore any direct comparisons with previously published data is not guaranteed.

²⁵ Which together account for 4% of retail broadband subscribers.

²⁶ ComReg (2016), <http://www.comreg.ie/industry/electronic-communications/data-portal/tables/>

Figure 8: National fixed broadband shares by platform (xDSL, cable, %)

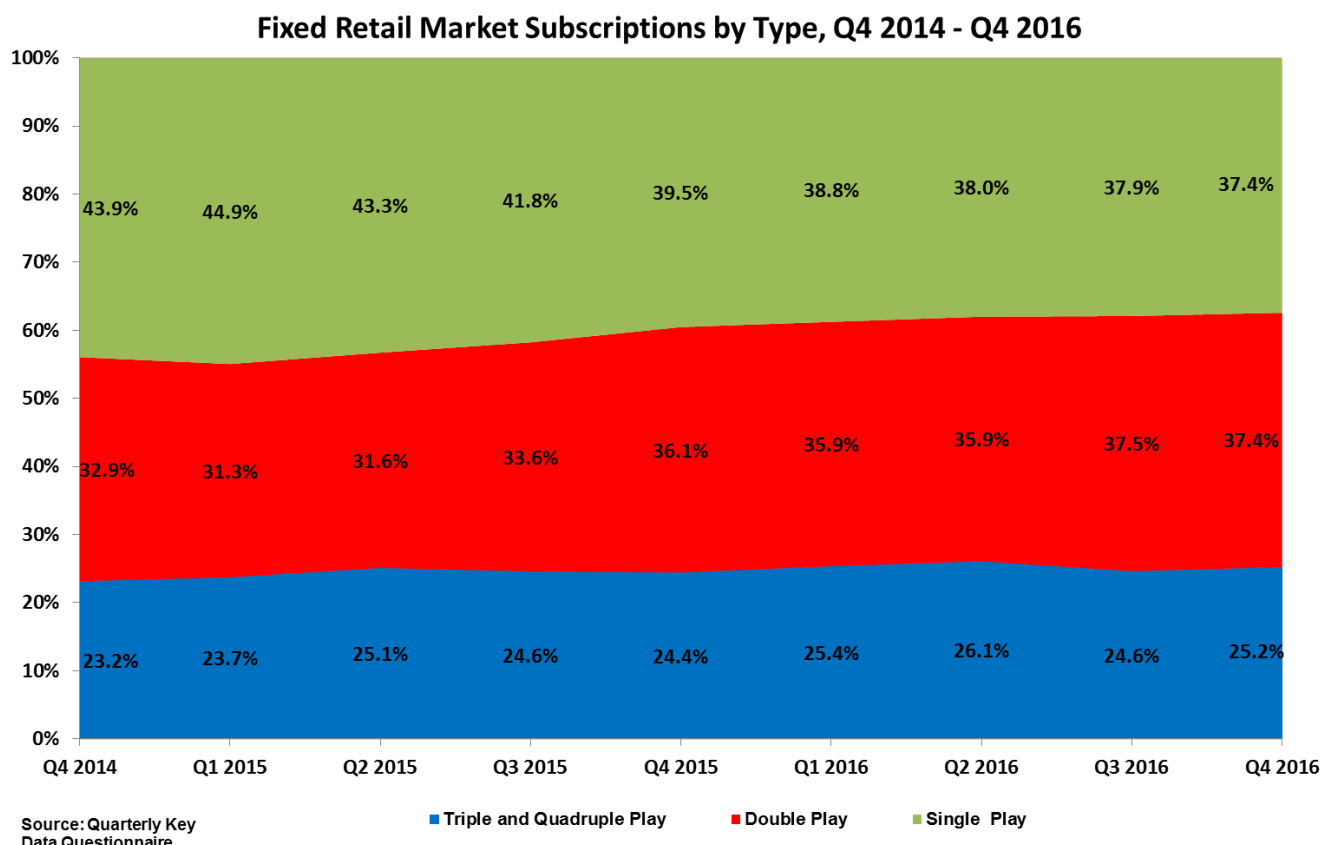


Source: ComReg (2017). Quarterly Key Data Questionnaire – data as of Q4 2016²⁷.

- 4.23 As identified in the 2015 FACO Decision, there has been a trend for the increased consumption of services in packages and bundles. As evidenced in Figure 9, these trends are continuing, with a decrease in the share of customers purchasing single services. Dual play services continue to be the most popular, followed by triple play, as can be seen in Figure 10 (which excludes single services). In addition to these more established bundles, the sale of quad-play bundles is increasing and should continue to grow following Virgin Media’s entry to the mobile market.
- 4.24 Competition between Eircom and OAOs utilising its wholesale inputs is more evident in the LEA where LLU footprints and Virgin Media are also largely present.
- 4.25 The 2014 Fixed Access & Call Origination market analysis consultation paper noted that *“there is some variance in competitive conditions within the State, in particular, competition from UPC within LEAs appears to be somewhat greater in certain product bundles involving RFTS, broadband and Pay TV services.”*

²⁷ Ibid footnote 29.

Figure 9: National proportional split of services – Q4 2016



Source: ComReg (2017). Quarterly Key Data Questionnaire – data as of Q4 2016²⁸.

Figure 10: Proportional split of bundles – Q4 2016



Source: ComReg (2017). Quarterly Key Data Questionnaire – data as of Q4 2016²⁹.

4.4 Reflecting the WLA/WCA Market Review

4.26 As part of the WLA/WCA Market Review ComReg assessed the current fixed broadband market shares based on data to the end of April 2016, and identified that there are differences in the level of competition in retail broadband services between urban and regional areas.

²⁸ Ibid footnote 29.

²⁹ Ibid footnote 29.

- 4.27 The market review has provisionally identified 88 exchanges deemed suitable for the deregulation of WCA inputs – the Urban WCA Market (hereafter the ‘Urban Area’). This consultation and draft decision document assume that the final decision will implement this finding, but will reflect the final decision coming from that review. The obligations proposed in this Draft Decision will, subject to consultation, apply for the duration of the final WLA/WCA Decision. In the WLA/WCA Decision ComReg is proposing to fix the scope of the relevant markets for the period of the market review.
- 4.28 From the WLA/WCA Market Review ComReg is of the preliminary view that Eircom should be designated as having SMP in the Regional WCA Market. Noting this preliminary view, and following further work in assessing the levels of competition on an exchange by exchange basis, ComReg proposes that the Regional WCA Market should be further subdivided into two areas - “Regional Area 1”, and “Regional Area 2”. The exchanges which remain in the LEA are now referred to as “Regional Area 1” exchanges, those which remain Outside the LEA are now referred to as “Regional Area 2” exchanges, and Table 4.3 presents this proposed split.

Table 4.3 Mapping exchanges

	Number of exchanges		
LEA	369	88	Urban Area
		285	Regional Area 1
Outside the LEA	835	831*	Regional Area 2

*Four exchanges moved from Outside the LEA to the Urban WCA as part of the WLA/WCA Market Review.

- 4.29 Similar to the practice established in the Bundles Decision, ComReg proposes that exchanges which over time meet the criteria for addition to Regional Area 1 continue to do so – i.e. move from being part of Regional Area 2 to Regional Area 1. This will ensure Eircom pricing flexibility in relation to bundles will reflect developments in exchanges over time. ComReg proposes to relabel the “LEA” criteria as the “Regional Area 1” criteria, the draft decision instruments have been amended to this end.
- 4.30 Our analysis identifies that Regional Area 1 is not as competitive as the Urban WCA area in terms of retail broadband. In Regional Area 1 ComReg found that, both in the presence and absence of WCA regulation, other operators (OAOs and Virgin Media) would still be able to compete in these exchanges (their retail broadband market shares with WLA but without WCA regulation and assuming that customers supplied over WCA products revert to Eircom at \approx %, would be reduced from the current \approx % with both WLA/WCA regulation).
- 4.31 In Regional Area 2 almost all broadband services (\approx %) are provided through CGA bitstream with WLR or SABB provided by Eircom. In the absence of WCA regulation the retail broadband market share of Eircom would be (\approx %).

Table 4.4 Current retail broadband market shares

	Number of exchanges	Number of broadband customers	Eir	OAOs (excl. Virgin Media)	Virgin Media
Urban Area	88	✂	✂%	✂%	✂%
Regional Area 1	285	✂	✂%	✂%	✂%
Regional Area 2	831	✂	✂%	✂%	✂%

4.32 Based on the available data and the competition concerns identified in Chapter 3, as shown in Table 4.4, ComReg considers that a MST is required in order to protect competition where OAOs need to use inputs from Eircom’s network. However, ComReg considers that there must also be appropriate flexibility so that Eircom retail is not unduly hindered by regulation — in particular in Regional Area 1 where competition appears to be more evolved than in Regional Area 2.

Market developments in Regional Area 2

4.33 As outlined earlier in this chapter, following the market analysis which has been undertaken our classification of exchanges has been amended. Regional Area 2 are those not included in the Urban Area, or in Regional Area 1. The exchanges in Regional Area 2 closely correspond to those previously identified as Outside the LEA.

4.34 Regional Area 2 corresponds to those exchanges which are in the more rural and remote areas of Ireland. This area has typically higher costs for potential entrants due to longer local loop lengths, greater distance to provide backhaul, and fewer economies of aggregation. Therefore in Regional Area 2 the prospects of entry by cable or LLU operators are limited. Bitstream is an important access medium in Regional Area 2. However, alternative Bitstream-based operators are almost entirely reliant on Bitstream from Eircom in order to provide their retail offering, with a negligible proportion of Bitstream-based subscribers using line share.

4.35 ComReg considers that entry prospects in Regional Area 2 are limited within the timescale applying to any decision arising from this consultation, largely due to the less favourable cost and scale characteristics. Therefore, currently in Regional Area 2 there is realistically only one fixed wholesale broadband provider, Eircom. While this may change depending on the winner as NBP related infrastructure is rolled out, it is too soon to factor in the likely impact of the NBP in this analysis. There is currently no indication that parallel infrastructures such as those of Virgin Media’s or Siro’s will address these geographic areas.

4.36 We propose that the boundary between Regional Area 1 and Regional Area 2 be dynamic and that a mechanism exists to move an exchange from Regional Area 2 to Regional Area 1.

- 4.37 In Regional Area 2, at the end of April 2016, Eircom continues to have circa 80% of both the WLA/WCA markets while Eircom retail's share has decreased to circa 30% of the retail broadband market with the remainder being OAOs providing retail broadband via CGA Bitstream.
- 4.38 ComReg considers that the competition problems identified in the WLA/WCA Market Review are relevant for the bundles MST in Regional Area 2. Given that Eircom has little or no competition from alternative providers in Regional Area 2, ComReg considers that a MST is required for retail bundles in order to ensure that competition which requires the use of Eircom's network is possible. ComReg considers that it would not be appropriate to provide Eircom the flexibility of the MST proposed for in the Urban Area or Regional Area 1.

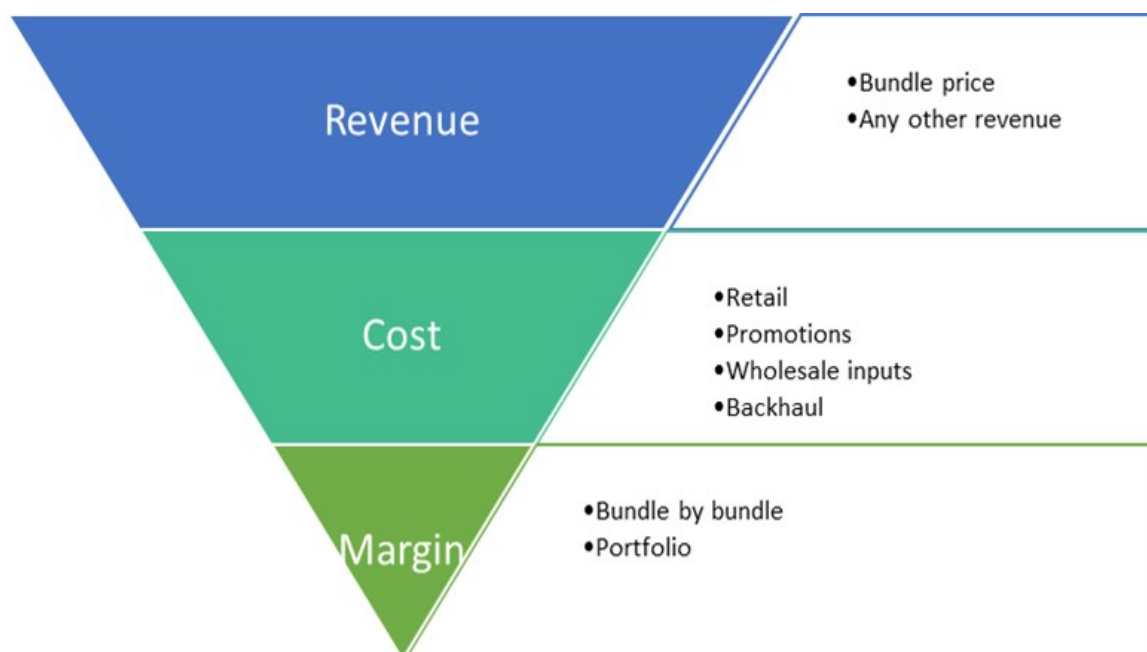
Q. 6 ComReg is interested in receiving views from interested parties on the Proposed Urban Area, Regional Area 1 and Regional Area 2 as they apply to bundles. Please provide detailed reasoning and supporting information (where available) to support your views.

5 Components of the Margin Squeeze Test model

5.1 Overview

5.1 This chapter details what ComReg views as necessary to ensure that Eircom is compliant with its obligations not to cause a margin squeeze (pursuant to the further specification of the margin squeeze obligations following a final decision subsequent to this Draft Decision). In general for any Eircom retail bundle or portfolio of bundles, as appropriate, the retail revenues must cover the sum of the wholesale costs of inputs including any relevant associated retail costs. These components are considered in depth in this chapter. The revenue and cost components can be illustrated graphically as follows:

Figure 11: Revenue and cost components



5.2 The revenues within the bundles margin squeeze test (MST) are based on the Eircom bundle prices as per the published price list and any additional revenues e.g. from calls.

- 5.3 The cost components within the proposed bundles MST are intended to reflect the costs that an OAO would incur if it were to replicate an Eircom bundle³⁰ or portfolio of bundles³¹. It is proposed that the costs will vary by exchange area e.g. in the Urban Area costs of an equally efficient operator (EEO) should be used to determine the appropriate retail costs for broadband, whereas in Regional Area 2 the costs of a reasonably efficient operator ('REO') costs should be used. The concepts of EEO and REO are discussed further in paragraphs 5.9 - 5.15 below. Therefore, in order for an Eircom bundle or portfolio, to be considered replicable it must cover the equivalent costs faced by an efficient OAO seeking to replicate the bundle or portfolio.
- 5.4 ComReg has taken utmost account of the ex-ante replicability test parameters as set out in Annex II of the European Commission's Recommendation on non-discrimination obligations and costing methodologies.³²

5.2 Revenues in the MST

- 5.5 ComReg considers that the retail revenue which should be taken into account in the MST is the Eircom retail monthly published price (for that bundle) together with any out of bundle revenue or associated revenues directly attributable to the bundle sold/offered at that fixed location.
- 5.6 For the avoidance of doubt, 'out of bundle revenue' includes those revenues that are incremental to the bundle and would not have been generated had it not been for the provision of the bundle being sold/offered at that fixed location (e.g. charges associated with excess broadband usage, etc.).³³

5.3 Costs in the MST

- 5.7 The cost components within the MST are intended to reflect those faced by an OAO seeking to replicate an Eircom bundle or portfolio. As noted below, ComReg considers that in a number of cases, OAOs, should be able to match Eircom's cost levels and that Eircom's costs can be used. ComReg considers that costs can broadly be categorised between:
- Retail Costs
 - Wholesale Input Costs.
- 5.8 ComReg considers that for the MST a distinction is merited between the cost benchmarks applied to the various retail costs (narrowband access, calls, and broadband) in the Urban Area, Regional Area 1 and Regional Area 2, this is discussed next.

³⁰ A bundle for these tests is comprised of a regulated input such as broadband/line rental plus another service e.g. mobile/IPTV etc.

³¹ A portfolio for these tests is comprised of a group of bundles.

³² http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

³³ Further details in relation to the specific components of the MST are contained in Table 5.1, Table 5.2, and Table 5.3 in Section 5.12.

Cost benchmarks

- 5.9 The NRT applies various cost benchmarks for retail costs. ComReg considers that there are three options for determining an operator's cost base to estimate retail costs for the MST:
- Equally efficient operator ('**EEO**')
 - Similarly efficient operator ('**SEO**')
 - Reasonably efficient operator ('**REO**').
- 5.10 The EEO benchmark is generally based on the incumbent's (i.e. Eircom) costs. The SEO benchmark is based on Eircom's costs adjusted for the fact that other operators do not yet enjoy the same economies of scale and scope as Eircom. The REO benchmark is based on a typical entrant operator's costs.
- 5.11 The EEO assumes efficient costs based on the volumes of Eircom. The EEO approach recognises that in a competitive situation, an effective alternative operator will be able to compete only if it is as efficient as the SMP operator. An MST using the EEO benchmark would generally result in a less strict MST (e.g. if Eircom's retail costs were €5, then €5 would be used rather than adjusting the €5 to say €7 under the SEO approach); consequently Eircom could pass these EEO retail costs on to its retail End-Users as a lower retail price without cutting wholesale prices if it chose to.
- 5.12 The SEO means an operator which shares the same basic cost function as Eircom but does not yet enjoy the same economies of scale and scope as Eircom in the provision of services. This may be due to OAOs serving fewer customers and/or offering fewer services, so that their unit retail costs may end up higher than Eircom's. The REO is similar to the SEO standard given that they both reflect the fact that OAOs have not achieved the same economies of scope and scale as Eircom and this needs to be reflected in the margin squeeze test.
- 5.13 In practice, accurate verifiable OAO data is difficult to obtain and to date we have estimated a hypothetically efficient operator's appropriate costs by taking Eircom's costs as a starting point. The information available to us based on Eircom's costs has been more reliable and robust, given Eircom's regulatory accounting obligations. Eircom's costs are then adjusted to reflect the lower level of economies of scale and scope available to a hypothetical entrant with a retail broadband market share of 25%. ComReg believes that there is no material difference between the value of cost inputs based on REO and SEO. Oxera, in section 5.2 of its report, also considers that the retail cost benchmark for REO is often similar to the SEO benchmark.
- 5.14 ComReg is considering the use of REO data, depending on reliable and robust costing data from OAOs. In the absence of such data, ComReg proposes to continue using the SEO benchmark. ComReg considers that this approach should be a good proxy for REO based estimates and would welcome respondents' views in this regard.

- 5.15 The choice of which cost benchmark to apply to the various retail costs in the MST, depends on the competitive state of the exchange area (e.g. infrastructural competition from other providers and OAOs) and competitive dynamics in the bundles market. This is discussed next.

Retail costs:

- 5.16 Retail costs are the downstream costs that an OAO must incur in order to sell/offer such a bundle at the retail level (these costs include billing, customer service, marketing, sales, etc.).

Narrowband voice access costs

- 5.17 In the NRT retail narrowband costs were originally based on a retail minus of at least 14%, so the retail costs for narrowband access were based on 14% of the retail line rental of Eircom. With the 2016 Fixed Access Pricing Decision³⁴, ComReg changed the price control for SB-WLR from retail minus to cost orientation.
- 5.18 The calculation of retail costs of line rental needs to reflect the change in the price control to cost orientation. The retail costs of line rental used in the MST is to be sourced from Eircom based on cost allocations from the latest set of its separated accounts which are subject to an external audit.
- 5.19 The NRT applies the EEO standard for voice access. Oxera notes the level of retail competition for voice services continues to increase (Section 5.2.2 of its report). This is reflected in the decrease in Eircom's market share in both the stand-alone and bundled voice markets. ComReg proposes, in line with Oxera's recommendation, that an EEO standard for voice access, like the current NRT, remains appropriate.

Call costs:

- 5.20 The retail costs of each call (e.g. to local, national, mobiles, international numbers etc.) are calculated by including the wholesale interconnection prices applicable in the market plus the latest audited average total retail costs (residential average total costs for a residential bundle, business average total cost for a business bundle) provided by Eircom. These total retail costs include relevant international out-payment and mobile termination costs and are included in the bundle costs.
- 5.21 The retail costs of calls used in the MST are to be sourced from Eircom based on cost allocations from the latest set of its separated accounts which are subject to an external audit.

³⁴ D03/16, document 16/39, "Pricing of Eircom's Wholesale Access Services: Response to Consultation Document 15/67 and Final Decision

5.22 The NRT applies the EEO standard for calls. As noted by Oxera (see Section 5.2.2 of its report) the level of retail competition for voice services continues to increase. This is reflected in the decrease in Eircom's market share in both the stand-alone and bundled voice markets. ComReg proposes, in line with Oxera's recommendation, that an EEO standard for calls, like the current NRT, remains appropriate.

Broadband costs:

5.23 A discounted cash flow ('DCF') model has been used to date, to calculate the retail costs for broadband, both in the context of the existing standalone retail margin squeeze assessment for the 2013 NGA Decision and for the 2014 CGA Decision. The costs categories used in the DCF model are as follows: sales costs, marketing/advertising, product management & development, help desk, billing, modems, order handling, and corporate overheads.

5.24 ComReg proposes to continue to match the approach for the standalone retail costs for broadband in the proposed MST (i.e. the same retail costs for broadband will be applied here as are in the WLA/WCA Pricing Paper).

5.25 The DCF model uses Eircom's costs — both historic which are based on Eircom's audited Regulated Accounts and Eircom's forecast of those costs — as a data source. These costs are then adjusted to reflect the costs that a new retail broadband market entrant would likely incur.

5.26 In both the 2013 NGA Decision and 2014 CGA Decision, ComReg considered that there are large operators in the LEA using Eircom's network (Vodafone, Sky) with an international presence who can take advantage of economies of scale and scope between their operations in Ireland and other countries in which they operate. ComReg considered with respect to marketing/advertising; billing; and product management costs that these are most susceptible to such scale/scope advantages especially in the context of bundle offers (with fixed voice, mobile voice, broadband, IPTV, etc.) which are more often sold in the LEA. Outside the LEA, ComReg considered that the margin squeeze test should be based on a SEO test given the number of smaller operators in this area with a low retail broadband market penetration ($\leq 10\%$ or less) in this area.

5.27 The current retail costs for broadband services³⁵ applied, pursuant to the 2013 Bundles Decision, in the NRT from the DCF model are:

- Inside the LEA – for both CGA and NGA – mixture of EEO and SEO
- Outside the LEA – for just CGA – SEO.

³⁵ In the NRT the retail costs for broadband are calculated on an average total cost basis. Revisions to this are discussed further in section 5.4.

5.28 ComReg, in both this Draft Decision, and the WLA/WCA Pricing Paper, is of the preliminary view that it is appropriate to continue using the DCF model to generate retail costs for broadband associated with CGA and NGA as relevant inputs into the MST and for assessing the replicability of CGA bundles and NGA bundles respectively. This would ensure that relevant downstream retail costs are included in the MST ensuring replicability and that Eircom could not foreclose competitors to the detriment of competition and, in the long-run, to the detriment of end-users. ComReg considers that the approach for inside the LEA should be used for Regional Area 1 and the approach for outside the LEA should be used for Regional Area 2.

5.29 Given the provisional findings (from the WLA/WCA market review) that retail broadband is competitive in the Urban Area (in the absence of WCA regulation but with WLA regulation), Oxera (Section 5.2.2 of their report) have recommended moving to EEO in the Urban Area. ComReg proposes, in line with Oxera’s recommendations, to use a mix of EEO and REO³⁶ in Regional Area 1, and for Regional Area 2, we propose to use REO. See paragraphs 5.9 - 5.15 for a discussion of the differences between the various cost benchmarks.

ComReg’s Preliminary view

5.30 ComReg is of the preliminary view that the appropriate cost benchmarks to apply for the various retail costs in the bundles MST, should be as per the following:

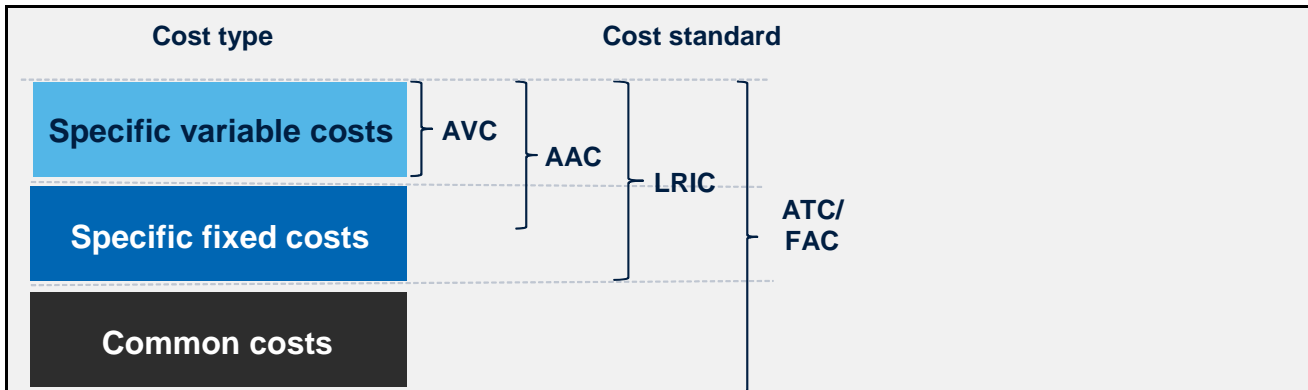
	Service	Current NRT	Proposed MST
All areas	Calls and narrowband voice access	EEO and retail minus	EEO
Urban Area	NGA Broadband CGA Broadband	Mix of EEO and SEO	EEO
Regional Area 1	NGA Broadband CGA Broadband	Mix of EEO and SEO	Mix of EEO and REO
Regional Area 2	CGA Broadband	SEO	REO

Q. 7 Do you agree with the proposed cost benchmarks for retail costs to be included in the bundles MST?

³⁶ In Regional Area 1 and Regional Area 2, where REO is not available, SEO should be used instead.

5.4 Standards for Retail Costs

5.31 ComReg considers that the appropriate cost standards which merit consideration for the MST are from the lower threshold of average variable cost ('AVC') toward the respectively higher thresholds of average avoidable cost ('AAC'), then Long Run Incremental Cost ('LRIC') and then Average Total Cost ('ATC') and Fully Allocated Costs ('FAC'). This can be presented graphically as follows and is discussed further below:



Source: Oxera.

- Average variable costs (AVCs)—these are costs that vary with output. They usually refer to small, short-term, discrete output changes.
- Average avoidable costs (AACs)—these are costs that can be avoided if production of an increment of a product ceases, usually in the short run. AACs may include a proportion of specific fixed costs if the increment is large.
- Long run incremental costs (LRIC)—these are costs that can be avoided in the long run if the provision of a given increment (e.g. calls) ceases. They include all fixed costs of the increment, and will include all costs avoided in the long run were the increment no longer to be produced. (Please see note below on ComReg's definition of common costs. This means that common costs are generally not included in LRIC).
- Average total costs (ATC)—these are similar to fully allocated costs (FAC). They would cover LRIC plus a larger proportion of common costs allocated to the product in question.

Source: European Commission (2009), 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'.

Note: ComReg regards common costs as costs incurred across the whole organisation regardless of product — so that the cost cannot be directly attributed to a particular product or service e.g., general finance function costs, personnel and administration costs, general corporate services costs, CEO salary, regulatory licence fees, redundancy costs/cost of voluntary leaving programmes. Similarly, ComReg considers that there may be additional common costs associated with certain product related cost categories such as billing and sales and marketing costs which may not be incremental to a specific Eircom product/service. However it would be necessary for Eircom to demonstrate why it considers such costs to be a common/ indirect cost rather than a direct cost on a case by case basis. ComReg regards fixed indirect costs as the indirect costs that do not change with an increase or decrease in output e.g., general IT depreciation and software licence costs (that do not vary by service volumes), building costs, pension provisions, exceptional items. (Source: 2016 Fixed Access Pricing Decision ComReg 16/39, Para 10.67).

- 5.32 AVC approximates the variable cost of producing an additional unit of output. AVC does not consider fixed costs, which are the major cost components faced by telecom operators. Therefore, ComReg believes that applying a cost standard on this basis could significantly constrain the potential for entry by efficient entrants. ComReg believes that to use such a cost standard could lead to a medium to long term exit of operators who cannot sustain an entry strategy that may for example not include recovery of their fixed costs. ComReg is of the preliminary view that AVC would not be an appropriate measure of cost to be applied as it is too low a cost standard.
- 5.33 The precise definition of AAC depends critically on its actual implementation. For example, AAC may include avoidable fixed cost elements in addition to variable costs, depending on the timescale over which AAC is assessed. Therefore, these timescales would need to be clearly defined if AAC was to be considered in the MST.
- 5.34 ComReg considers that AAC are the avoidable and incremental fixed costs of the additional sales of the product in question. The inclusion of fixed costs which would otherwise be avoided if the incremental output were no longer produced distinguishes AAC from AVC. Furthermore, the exclusion of a mark-up for overall fixed and common retail costs distinguish AAC from ATC. More specifically, AAC represents the avoidable costs of developing, launching, marketing and servicing each individual product element of the new bundled product. This means that general fixed and overhead costs are excluded, though not the fixed development, launch and any other costs directly attributable to the bundled products and which would be avoided should they cease to be provided.
- 5.35 As the AAC standard does not include provision for (non-avoidable) fixed costs and common costs, it could be argued that this provides the SMP operator with an advantage given the broad range of products and services over which it could conceivably recover such common costs. Entry/expansion by efficient OAOs, albeit with lower economies of scale and scope than Eircom, could thereby be impeded.

5.36 ComReg believes that ex-ante price controls should seek to ensure entry, and to maintain existing entrants until a sufficient number have achieved the potential to match Eircom's economies of scale and scope and hence, a costing methodology that includes common costs is warranted, as SMP operators will enjoy economies of scope that are not achievable by new entrants. Furthermore it is important to be cognisant of the level of sunk cost in Eircom's financial profile. This means that in the short run Eircom's cash outgoings may be lower than entrants paying monthly rentals to Eircom. Critically, ComReg believes that the decision to enter, and remain in, the market depends on the expectation that fixed and common costs will be recovered; not only additional avoidable costs incurred by the SMP operator. The reasoning behind this is that an entrant would enter a market only if it considered that it would be profitable to do so, taking into account all the costs that it would have to incur in order to enter the market and sustain a competitive position i.e., the fixed, common, joint and variable costs. Cost measures such as AAC do not ensure this as the total full costs of an operator are not covered. This view is supported by the ERG³⁷:

*"...Avoidable costs are typically employed in ex post predatory pricing cases and here, they are defined as costs that the vertically integrated SMP firm could avoid if it decided to close its downstream operations while continuing to provide the upstream input to third parties. However, avoidable costs are also subject to criticism. In the context of an ex-ante regulatory tool, they may provide too low a threshold for retail prices, constraining the potential for entry by efficient entrants when the avoidable cost standard does not guarantee the recovery of the fixed costs of entry. Similarly, pricing at the avoidable cost level could even mean that competitors who provide a competitive constraint could be excluded. This is especially so if there are common or joint costs between different downstream services. Accordingly, the use of fully allocated costs as a proxy for average total cost has also been put forward as an alternative cost measure to the LRIC calculation using a reasonable mark-up."*³⁸

5.37 ComReg is of the preliminary view that to apply an AAC cost rule in an ex-ante context could lead to sub-optimal entry/expansion conditions with little entry/expansion occurring. This would be to the detriment of competition and, in turn, consumers. Therefore, given ComReg's statutory objective to promote competition, as well as taking account of the current state of market development of retail fixed narrowband access and broadband in Ireland, ComReg is of the preliminary view that the use of an AAC test in this ex-ante context is not appropriate.

5.38 The European Commission in its 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'³⁹ stated:

³⁷ ERG – European Regulators Group, replaced in 2009 by BEREC

³⁸ At paragraph 60 & 61 of ERG 09(07) 'Report on the Discussion on the application of margin squeeze tests to bundles' dated March 2009

http://berec.europa.eu/doc/publications/2009/erg_09_07_report_on_the_discussion_of_the_application_of_margin_squeeze_tests_to_bundles.pdf

³⁹ European Commission "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", paragraph 26, footnote 2.

“Long-run average incremental cost (LRAIC) is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.”

- 5.39 The definition of LRAIC in the preceding paragraph corresponds to the definition of LRIC as used by BEREC⁴⁰. Our consultants, Oxera, use LRIC in their document to mean LRAIC as defined above. For the purposes of this document ComReg will use the term LRIC.
- 5.40 When applying the MST to individual bundles and where the promotion of efficient entry is a key ex-ante regulatory objective, ComReg considers that regulators may only have a choice between a LRIC or an ATC approach. In areas where competition is more developed regulators may opt for LRIC, in areas where competition is not mature or effective, regulators may opt for ATC. LRIC generally provides a higher cost benchmark than AAC but, as inter service common costs are not taken into account, provides a lower cost reference than ATC where multiple services are at issue.
- 5.41 ComReg considers that the use of ATC is appropriate in the context of a MST in light of ComReg’s statutory objectives under Section 12 of the Communications Regulation Act 2002 (as amended) to promote entry, competition and protect the interests of end-users.
- 5.42 In the context of an ex-ante regulatory tool to be applied by ComReg, ATC is the appropriate ex-ante cost basis to adopt as it enables a potential entrant to recover all its efficiently incurred costs. ATC requires an operator with SMP to price at levels that include correct amounts of variable, fixed and common costs, which is the equation faced by any operator when deciding to enter or expand. For example, an operator will consider the current and future potential competitive environment (including price) when formulating its business plan when deciding to enter or expand in the market. ComReg is of the preliminary view that this is the most suitable way to enable competition under regulation.

⁴⁰ See Glossary, page 120, in BEREC Report, Regulatory Accounting in Practice 2016, http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/6479-berec-report-regulatory-accounting-in-practice-2016

- 5.43 Under the present market circumstances in Ireland, ComReg believes that it is legitimate and appropriate for ComReg to use ATC as the base for calculating Eircom's retail costs in an ex-ante context assessment of bundles at the portfolio level, and for individual bundles in Regional Area 2. Looked at differently, ComReg believes that relying only on any other cost measure would exclude any assessment of common costs and would therefore ignore the market entry or expansion realities faced by OAOs and new entrants. ComReg considers that as long as sunk costs are necessary for entry it would not be appropriate to exclude them when considering the medium to long term evolution of the market. Therefore, ComReg is of the preliminary view that ATC is the appropriate measure of cost to be applied and this should be applied to the portfolio of bundles in the Urban Area, the portfolios of bundles in Regional Area 1, and for individual bundles in Regional Area 2.
- 5.44 As such, due to the proviso that the portfolio must cover its ATC costs, if an individual bundle will account for most of the sales within an aggregate of the portfolio of the bundles it must cover its ATC to ensure that the aggregate of the bundles passes ATC. In other words, if an individual bundle type is sold to the majority of Eircom customers within the portfolio it must cover all (or most) of its retail costs to ensure that the aggregate portfolio of the bundles passes ATC. If Eircom does not cover these costs then it is likely to incur losses in the medium to long run which is not desirable for either Eircom or the telecommunications sector where a race to the bottom can lead to damaging consequences with respect to future innovation, investment and overall general competitiveness.
- 5.45 However, ComReg is of the preliminary view that a lower cost standard — the Long Run Incremental Cost ('**LRIC**') — estimated by ComReg in this instance from Eircom's accounts as ATC less common costs and fixed indirect costs — could be used for retail costs associated with calls, line rental and broadband when bundles are assessed on a bundle-by-bundle basis. ComReg considers that this approach would be more consistent with that produced in competitive markets — where operators make decisions on single and marginal bundles based on the avoidable costs of that bundle / product. Since LRIC includes all costs related to the additional output it enables an analysis of incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle. However, on a global level an operator would not be able to use this cost standard to inform its business decision as the incremental revenue attained from such bundles on an aggregate basis may not make an adequate contribution towards fixed and common costs. Consequently, ComReg is proposing a LRIC standard for the retail costs associated with calls, line rental and broadband when assessed on a bundle-by-bundle basis.
- 5.46 For broadband the relative increment to determine which costs are appropriate to consider under the LRIC cost standard is the broadband product included in the retail bundle offer. For example, the retail broadband costs for an up-to 24 MB bundle under the LRIC cost standard would include all those retail costs that would be avoidable by Eircom were it not to sell/offer any up-to 24 MB in a bundle.

What are common and fixed indirect costs?

- 5.47 ComReg regards common costs as costs incurred across a number of products — so that the product does not directly benefit from the cost e.g., finance function costs, corporate services costs, CEO salary, regulatory affairs costs, etc. Similarly, ComReg considers that there may be additional common costs associated with certain cost categories such as sales and marketing costs which may not be incremental to a specific Eircom retail bundle.
- 5.48 ComReg regards fixed indirect costs as the indirect costs⁴¹ that do not change with an increase or decrease in output e.g., depreciation, software licence costs (that do not vary per unit), building costs, pension provisions, exceptional items.

5.5 Appropriate cost standards for the different areas

- 5.49 The current NRT is applied at different levels of product aggregation inside or outside the LEA. Inside the LEA there are tests both at the bundle and portfolio levels. Outside the LEA the test is at the bundle level only.
- 5.50 As per section 5.3.2 of Oxera's paper a case can be made to reflect the increased competition in the Urban Area by moving to a one-stage bundles portfolio level test based on ATC for all regulated products covering both CGA and NGA based wholesale inputs. This case is based on retail broadband services being competitive in the Urban Area without WCA regulation but with WLA regulation. This constrains Eircom's ability to use double play bundles to subsidise triple play bundles. As noted by Oxera, other operators, particularly those who have invested in their own infrastructure are in a strong position to supply differentiated bundles over this infrastructure.
- 5.51 In Regional Area 1 ComReg proposes that the MST continues with the same level of flexibility as per the NRT in the LEA – LRIC on a bundle by bundle basis, and ATC at the portfolio level. ComReg considers that a lower cost standard may be appropriate to apply on a bundle-by-bundle basis for bundles sold/offered in Regional Area 1. As set out in paragraphs 5.44 - 5.45, ComReg considers that this approach would be more consistent with that produced in competitive markets — as the LRIC cost standard enables incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle.
- 5.52 In Regional Area 1 OAOs who are as efficient as the incumbent and who offer similar bundles to the incumbent should be in a position to launch an individual bundle that does not recover common costs in that area. However, for the reasons set out in paragraphs 5.42 - 5.43, ComReg considers that it is appropriate that Eircom's aggregate of bundles in a portfolio must cover its ATC thereby ensuring comfort for OAOs that common costs will on aggregate need to be recovered.

⁴¹ As the product directly benefits from the total cost, ComReg regards indirect costs as a cost allocated to the particular product. These costs are not specific (direct) to one product but to a set of products e.g., general marketing & sales spend.

- 5.53 In Regional Area 2 competitive constraints do not appear to be as strong as those in the other areas. Consequently, any undue flexibility provided to Eircom in Regional Area 2 could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run and would not be consistent with ComReg's regulatory objective of promoting competition. Consequently, ComReg considers that for bundles sold/offered in Regional Area 2 it is appropriate for each bundle to pass its own ATC.
- 5.54 ComReg considers that the over-riding proviso that the ATC cost standard is implemented at the portfolio level in both the Urban Area and Regional Area 1, and on a bundle-by-bundle basis in Regional Area 2, allows the promotion of competition by OAOs as ATC includes the relevant amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand in the market.

ComReg's Preliminary view

- 5.55 ComReg is of the preliminary view that the appropriate cost standard is ATC at the overall portfolio level for the MST in the Urban Area.
- 5.56 ComReg is of the preliminary view that for an individual MST for bundles sold/offered in Regional Area 1 that on a bundle-by-bundle basis it is appropriate to allow a cost standard of LRIC for retail line rental, calls and broadband under the proviso that those bundles (i.e. Regional Area 1) when aggregated together into a portfolio must also pass that portfolio's ATC.
- 5.57 ComReg is of the preliminary view that for bundles sold/offered in Regional Area 2 each bundle must pass its own ATC.

Promotional and discount costs

- 5.58 Costs associated with promotions and discounts need to be included in the MST. Promotions and discounts are effectively a reduction in retail revenue.
- 5.59 The costs that Eircom incurs when it offers a promotion or discount on a bundle in one particular exchange/geographic area, should be recovered by the revenue generated by that bundle in that exchange area. For example, promotions/discounts offered on a bundle in Regional Area 1 should be covered from the revenues generated by this bundle, over its lifetime, in Regional Area 1.

5.6 Wholesale Input cost

- 5.60 The wholesale cost components within the MST are intended to reflect those an OAO would incur to replicate an Eircom bundle. Therefore, in order for a bundle not to cause a margin squeeze it must cover the costs faced by an OAO seeking to replicate the bundle.

- 5.61 ComReg considers that the cost of the wholesale network input in a bundle MST should reflect the actual usage of wholesale network inputs in the exchange area in which the MST is being applied. Currently the NRT uses weighted average wholesale network inputs (WAWNIs) in the LEA. A WAWNI is calculated based on the prices of wholesale network inputs weighted by the percentage usage of OAOs of those inputs in the exchange area in question. ComReg propose to continue the use of WAWNIs for both the Urban Area and Regional Area 1. In Regional Area 2, as in the current Outside the LEA area no weighting is proposed. This is explained later in this section in paragraphs 5.91 - 5.93.
- 5.62 ComReg proposes to continue with the calculation of separate WAWNIs for CGA and NGA services. This reflects the fact that different bundles are offered based on which of the two services is available and also reflects the price difference between the service inputs. Without separate NGA WAWNI(s), by virtue of the flexibility within the MST (in the Urban Area and Regional Area 1), Eircom could potentially price NGA bundles based on the wholesale access prices and costs of CGA wholesale access inputs. The use of a CGA WAWNI and separate NGA WAWNI(s) acknowledges that different retail products are supported by different underlying wholesale inputs. This ensures that Eircom's downstream retail arm is not provided undue pricing flexibility. It also ensures that the WAWNIs are reflective of the average wholesale input costs incurred by an "efficient" operator to replicate CGA and NGA bundles in these areas.

Current Generation Access WAWNI

- 5.63 For current generation services this is calculated separately for the Urban Area and Regional Area 1 based on the applicable monthly prices of those wholesale inputs available in that area (e.g. in the Urban Area there will be no WCA inputs included in the WAWNI calculation), plus all relevant wholesale costs⁴². This may include, depending on the area, the following inputs: Unbundled Local Metallic Path ('ULMP'); WLR/Line Share; WLR/Bitstream; and Standalone Broadband ('SABB') weighted by the use of those wholesale inputs by a hypothetical efficient OAO in each area- guided by the actual use of those wholesale inputs by OAOs. It is important to note that the relative cost stacks on which the weighting is based would include, as appropriate, a margin for VoB. This would be used in the case of ULMP and SABB.
- 5.64 For the treatment of data usage charges please refer to the discussion on Backhaul costs below.

⁴² In this context "all relevant wholesale costs" means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life (e.g., connection fees or co-location charges) plus b) other unavoidable non-retail costs which are necessary to provide a retail service (e.g., the cost of a line card, amortised over the relevant customer life). All costs are converted to a monthly average.

Next Generation Access WAWNI

- 5.65 For NGA services this is the applicable monthly prices plus all relevant wholesale costs of: POTS based VUA; NGA Bitstream+; Standalone VUA; and Standalone VUA + Voice network input costs in effect and where available in Regional Area 1 and the Urban Area (e.g. in the Urban Area there will be no WCA inputs included in the WAWNI calculation.) Note that POTS (Plain old telephone service) based VUA (virtual unbundled access) is a wholesale service consisting of an ordinary telephone line plus high speed broadband provided through fibre to the cabinet. NGA Bitstream+ is a wholesale high speed broadband service where the OAO does not have to build out a regional broadband network. Standalone VUA is a wholesale high speed broadband service with no telephone service i.e. a variety of SABB. Standalone VUA + Voice consists of standalone VUA plus an estimate for an OAO providing a VOB service.
- 5.66 Similarly, for NGA services where it becomes clear that OAOs will migrate from POTS based NGA services to NGA VoB services then the appropriate WAWNI will be based on the wholesale price of NGA bitstream including the appropriate margin for VoB.
- 5.67 The appropriate margin squeeze test for standalone VUA is subject to a separate Decision (see the WLA/WCA Pricing Paper). ComReg is cognisant that the SB-WLR-VUA cost stack may need to be adjusted for costs that are counted twice within the SB-WLR and VUA cost stack (e.g., faults, migration charges etc.).
- 5.68 For the treatment of data usage charges please refer to the discussion on Backhaul costs below.
- 5.69 ComReg considers that there is a blend of wholesale network access input costs that OAOs incur in replicating or competing with an Eircom bundle. However, the blend of wholesale inputs may vary across areas. Consequently, ComReg considers that the MST should be flexible to take into account the different competitive conditions across areas. These conditions are discussed in turn below:

The WAWNI in the Urban Area and Regional Area 1

- 5.70 For bundles sold in the Urban Area or Regional Area 1 ComReg proposes to use the same approach to construct WAWNIs as in the current NRT for the LEA. ComReg considers that it is appropriate for the WAWNI formula to account for changes in wholesale inputs used by OAOs, so these WAWNI values will reflect the proportion of those inputs being purchased by OAOs in the different areas (e.g. both the Urban Area and Regional Area 1 would have two WAWNIs - one for NGA, and another for CGA).
- 5.71 One difference between the Urban Area and Regional Area 1 is that for the Urban Area the WAWNI calculations will assume that the inputs these OAOs are using are WLA only i.e. VUA (in the case of NGA), and LLU (in the case of CGA). In all other aspects the same treatment will apply.

- 5.72 It is proposed that the WAWNI for the MST will be set by reference to the different Eircom wholesale access prices weighted by the relevant usage of each input by OAOs in each area. Consequently, as infrastructure-based competition increases the WAWNI could decrease as, by relative weighting, larger numbers of cheaper inputs would be used. Similarly if the prices of wholesale inputs were to increase then the value derived from the WAWNI would increase.
- 5.73 A lower WAWNI would give Eircom's downstream retail arm additional margin to use in its pricing strategy for bundles. As such, there is a direct link between increased competition and regulatory flexibility within the MST (e.g. as OAOs invest in and migrate their customers to full LLU or VUA Eircom can lower its retail prices due to the lower WAWNI in the MST). We are proposing to remove the downward only adjustment of the WAWNI in paragraphs 5.82 - 5.84 below. Given this proposal to remove the generally downward only adjustment, any increase in the price of those wholesale access network inputs, will proportionally increase the WAWNI – for example if one input price increased but the others stayed constant along with the proportional share of usage of these inputs then the resulting WAWNI will increase.
- 5.74 For Regional Area 1 the CGA WAWNI will be based on CGA wholesale access inputs and that WAWNI will be used in both the bundle-by-bundle assessment of individual CGA bundles and in the portfolio test. The second set of WAWNI(s) in Regional Area 1 will be computed based on NGA wholesale access inputs and those WAWNIs will be used in the bundle-by-bundle assessment of individual NGA bundles and in the portfolio test.
- 5.75 For the avoidance of doubt, the respective WAWNIs for bundles sold/offered within either area is an input to the MST for each area and is not a change to any published price.
- 5.76 There may be cases where it might not be appropriate to allow a downwards adjustment to the WAWNI. For example consider the scenario where OAOs acting as resellers lose significant customers in either area which has caused the WAWNI(s) to significantly decrease. As a simplified example, say in Regional Area 1 the 'efficient' hypothetical operator is found to purchase a 50:50 weighting of SB-WLR & Bitstream Managed Backhaul ('BMB') (costed at €20) and Full LLU (costed at €10). The resulting WAWNI in this example would be €15 (i.e., $50\% * €20 + 50\% * €10$). Now assume that OAOs acting as resellers lose all their customers in Regional Area 1, this would result in the weighting being only on Full LLU (i.e., SB-WLR and BMB is no longer purchased as a wholesale input due to market exit). In this scenario, the WAWNI would decrease to €10 (i.e., 100% Full LLU). Should a WAWNI indicate that OAOs are being squeezed (for example if their retail market share on Eircom's platform is declining or has reached an excessively low level) then ComReg will review the appropriateness of the WAWNI decreasing.

- 5.77 With respect to how the applicable weighted average of all the wholesale inputs to determine the WAWNI will be calculated, ComReg considers that it is important for this information to be timely. For ComReg to await the publication of its quarterly reports might result in a significant time lag for prices to be introduced to the market which reflect OAOs actual usage. ComReg considers that there are times where this could be an issue for known migrations in the forthcoming period, which, if not appropriately taken into account, would result in the WAWNI (and resulting prices) lagging behind actual OAOs usage in a particular month.
- 5.78 The WAWNI for both CGA and NGA will be calculated with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be informed by the actual usage of the various wholesale inputs used by OAOs in both areas (i.e. separate calculations will be undertaken for the Urban Area and Regional Area 1). For the avoidance of doubt, ComReg is not defining explicitly what the migration path of an 'efficient hypothetical' operator would be by introducing a glide path. Rather the test reflects the actual use of wholesale inputs. As such, ComReg considers that Eircom would be ideally positioned to give timely data to ComReg on OAOs' wholesale input usage. Independent of this though, ComReg will continue to monitor the causality of movements in the WAWNI, and from time to time may seek input from OAOs regarding their actual wholesale input usage in the exchange areas and their underlying commercial reasons for such usage.
- 5.79 Furthermore, in exceptional cases ComReg may take into account known future bulk migrations for the forthcoming period where Eircom can demonstrate to ComReg's satisfaction that those migrations will occur in the forthcoming period — the actual usage of the various wholesale inputs can reflect these changes. This situation is only likely to arise where there is a significant migration from i.e. Line Share to Full Unbundling or to NGA services and where those migrations can take place seamlessly for the OAO concerned. ComReg may bilaterally discuss certain migrations with OAOs to determine their reasonableness and ensure the timing of any orders is correct. Other one-off migrations or business as usual migrations will be taken into account immediately after the quarter in which they occurred and where Eircom confirms that the successful migrations actually occurred. In addition, ComReg will continue to monitor actual migrations and in circumstances where future bulk migrations persistently do not actually occur as envisaged, ComReg will review the appropriateness of allowing known future bulk migrations to be permitted in the WAWNI calculation.
- 5.80 It will be essential that any detailed information available to Eircom with regard to the number of OAO customers on the various platforms is not made available to Eircom's downstream retail arm prior to such information being available to the market generally — which is normally via the ComReg quarterly report. However, the outcome of this quarterly update for the OAO connections/migration and cessation information from Eircom to ComReg may give rise to a change to the WAWNI and Eircom's downstream retail arm will therefore be notified only in respect of the WAWNI monetary value (and not the underlying information) for the purposes of complying with the MST.

5.81 ComReg does not believe it is appropriate or necessary to publish the WAWNI monetary value as this could encourage price following and reduce the dynamism of the market.

Changes in wholesale inputs to the WAWNI

5.82 Under the current NRT WAWNIs should generally be downward adjusting only (i.e. could not increase). Previous arguments for this approach have included: fluctuating retail prices which could impact on end-users; incentives on OAOs to invest in their own infrastructure; and separate incentives on OAOs to alter the outcome for Eircom. This potentially could result in the WAWNI being lower than that actually incurred by OAOs.

5.83 Under the NRT ComReg reviews the causation of upwards adjustments to the WAWNI, however this is only after three consecutive periods (each period is three months) – and if this were to be done could result in increases to retail prices thereby impacting on end-users. Another factor to consider, is if the underlying input prices increase, the downward only adjustment requirement ignores this. Maintaining the current approach of waiting for three consecutive periods of three months allows Eircom to use a key cost input in the MST calculation at levels lower than OAOs face for a number of months before any alteration to Eircom’s prices.

5.84 Therefore, ComReg is of the preliminary view that maintaining this downward only adjustment is not justifiable – as it distances the concept of the WAWNI from how such a mechanism should operate – flexibly both up and downwards, and therefore propose to remove it.

Q. 8 Do you agree with our proposed removal of the downward only adjustment to the WAWNI? Please support your view with relevant data and evidence.

Backhaul costs

5.85 Broadband service costs and resulting tariffs are normally classified into port and throughput or traffic related costs. The former is a fixed cost per user whereas the latter is variable and increases with the level of traffic or throughput generated by the user.

5.86 The derivation of throughput or traffic costs for current generation wholesale broadband products, has been determined based on the approach of using a BU-LRAIC+ cost model known as the “NGN Core Model”, which is detailed in Chapter 8 of the WLAWCA Pricing Paper.

5.87 Equally the same process is used to derive the traffic costs for next generation broadband traffic for the NGA Bitstream Backhaul costs and for the calculation of the costs of some inputs to the cost base for VUA

5.88 Usage is charged based on aggregate traffic levels i.e. measurements are taken based on all broadband traffic for an access seeker. The 95th percentile value is divided by the number of ports to get an average usage per port. ComReg understands that Eircom is unable to measure or apportion with a reasonable degree of certainty the wholesale bandwidth at peak hour (95th percentile) for individual retail bundles.

- 5.89 As such, the usage charge is only quantifiable on an aggregate basis. While this is not ideal, similar to OAOs with an efficient profile mix of broadband peak hour usage the overall profitability of bundles is typically determined in aggregate. ComReg will continue to keep the appropriateness of this current measure under review. In particular, given the potential draw-backs of this approach on a bundle-by-bundle assessment basis, as a sense check, Eircom should apply the aggregate usage charge to individual bundles — while the margin (as a result of this calculation) on an individual bundle basis if negative will not cause a bundle to fail the MST, it may indicate to ComReg which bundles may require further analysis on an ongoing basis.
- 5.90 In all cases the underlying traffic speeds will need to be continuously monitored by Eircom and updated as appropriate to ensure their reasonableness and that the underlying traffic is reflective of the costs faced by an OAO.

Wholesale Inputs in Regional Area 2

- 5.91 ComReg considers that in Regional Area 2 the level of competition absent regulation would be very low and there is very limited competing infrastructure compared to the Urban Area or Regional Area 1.⁴³ Consequently, any excessive flexibility provided to Eircom in Regional Area 2 could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run and would not be consistent with ComReg's regulatory objective of promoting competition. As a consequence ComReg considers that the flexibility provided by the tests for bundles sold/offered by Eircom in the Urban Area and Regional Area 1 exchanges is not appropriate.
- 5.92 OAOs in Regional Area 2 are currently relying on wholesale inputs (SB-WLR and CGA bitstream) for the most part, and their business models are based on the prevailing wholesale prices. As previously noted the cost components within the MST are intended to reflect those an OAO would incur to replicate an Eircom bundle. Consequently, ComReg considers that it is appropriate that the flexibility provided by the WAWNI is not applied in the bundle-by-bundle assessment in Regional Area 2.
- 5.93 ComReg is of the preliminary view that in Regional Area 2, the MST is based on the wholesale prices faced by an OAO to replicate Eircom's bundle — and is based in the assumption that all OAOs use either WLR and CGA bitstream, or for bundles without WLR a CGA product exclusively.

Other Wholesale costs

- 5.94 In relation to other wholesale costs, such as interconnection costs, mobile termination rates ('MTRs'), out-payment costs (e.g., international out-payments) etc., ComReg is of the preliminary view that the MST should reflect all applicable wholesale input costs that are applicable to an Eircom retail bundle.

⁴³ See 2013 Bundles Decision.

5.95 ComReg considers it appropriate to allow known future changes to be used in the MST where new bundles are being proposed for release, or cost reductions or special offers are being proposed for existing bundles. ComReg considers the absence of such an approach could result in an artificially higher cost stack than an OAO would incur in replicating the Eircom bundle or price changes. ComReg is of the opinion that this is an equitable approach and ensures that end-users benefit from reductions to input costs when the reductions occur. This would require retrospective monitoring to ensure that the cost reductions occurred. One example of a future change is where there are planned future reductions in MTRs. Bundles would still have to pass the MST based on actual costs.

Mailbox costs:

5.96 ComReg considers that, as applicable, it is appropriate to include the cost associated with the mailbox service. It is unclear whether OAOs can replicate the relevant ancillary services available with the Eircom WLR product, however as technology evolves this will be kept under review and where there is evidence that OAOs can replicate these voice services to a sufficient scale, ComReg may revise the cost stack to include the costs of this replication.

5.97 Where the bundle includes free mailbox, the wholesale monthly price of the mailbox (as per the regulated cost oriented price control as published in Eircom's Reference Interconnect Offer Price List) must be taken to ensure an operator can replicate the offer.

5.98 Consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here.

Costs of Unregulated services

5.99 For the purposes of this paper an unregulated service is a retail product or service, where the upstream inputs required to replicate such a retail product or service are not regulated at the wholesale level.

5.100 For unregulated services in a bundle (irrespective of where the bundle is sold/offered for sale), ComReg considers that as these unregulated services represent markets where competition has evolved sufficiently that an approach similar to competition law is warranted. Consequently, ComReg considers that LRIC is the most appropriate cost standard when assessing the costs which need to be covered by the revenue for these services when sold in a bundle/portfolio. Please see section 5.4 of this paper for further information on LRIC's composition.

5.101 Where mobile services are offered in a bundle, the LRIC cost standard is based on the assumption that the increment in the mobile service is for those services only, i.e. assuming the network was built for those services only.

5.102 However, ComReg could consider, on a case-by-case basis, the use of AAC for unregulated products and services where it is clear that competition in the market generally would not be harmed and that this measure would not create material distortions to competition through anti-competitive practices stemming from SMP products and services.

5.103 The computation of AAC is discussed in section 5.4 of this paper. In the context of predatory pricing, unlike LRIC, AAC omits all fixed costs that were already sunk before the time of infringement. Furthermore, the European Commission's guidance on Article 102 proposes that prices below AAC indicate that the dominant company is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. As such, the AAC establishes the price floor for the provision of a good or service to a "*targeted group of customers for a limited period of time*"⁴⁴. Consequently, ComReg's preliminary view is that the use of this cost standard would only occur in exceptional circumstances as is currently the case in the NRT.

5.104 For the avoidance of doubt, in all cases, the onus is on Eircom to ensure that it is compliant with the required cost standard based on information available to it. While ComReg does have a cost model for mobile termination services it does not for other unregulated products and services. However, ComReg would be able to request from Eircom Additional Financial Statements ('AFS') to prove that Eircom is covering the costs related to providing unregulated products and services. Where necessary ComReg will use available information to build cost models for unregulated services to ensure the bundles MST remains robust.

5.105 With respect to the level of aggregation of the MST which includes unregulated service(s) please refer to paragraphs 5.119 - 5.128 below.

5.7 Bundle-by-bundle versus Portfolio

5.106 The MST can be conducted on:

- A single bundle offered by the SMP operator; and/or
- A number of bundles as a whole i.e., a portfolio of bundles.

5.107 ComReg considers that there are a number of reasons supporting the use of a bundle-by-bundle MST:

- It may not be realistic to require a new entrant to replicate all, or a large part, of Eircom's retail product mix or, at the extreme, its entire product portfolio;
- Carrying out the margin squeeze analysis at the individual bundle level provides for a range of competitive outcomes; and

⁴⁴ Niels G., Jenkins H. Kavanagh J. (2011), 'Economics for competition lawyers', Oxford University Press, pp. 192-193.

- A bundle-by-bundle approach may be appropriate when there might be “a new offer giving rise to a margin squeeze, which is currently subsidised by other profitable offers but whose volumes could increase substantially in the future, subsequently leading to an overall negative margin in the future.”⁴⁵

5.108 From an economic perspective, ComReg recognises that there are efficiency gains that could be achieved through a portfolio assessment approach:

- A welfare-maximising pricing structure of a multi-product firm with market power is one where common costs are recovered such that there is an inverse relationship between prices and elasticities of demand. This would suggest that as long as the overall portfolio passes the MST the aggregate approach would be beneficial for consumer welfare; and
- As an entrant gains market share, its decision-making process entails an assessment of the profitability of its investment over the entire range of products it will offer in the market — which suggests that the aggregate test should be applied.

5.109 Furthermore, ComReg considers that a review of OAOs’ retail bundled offers shows that OAOs do offer broad portfolios of services, rather than focusing on a particular product specification, or indeed a narrow customer segment generally.

5.110 ComReg considers that a portfolio approach would allow Eircom greater retail pricing flexibility. ComReg considers that the portfolio approach may be reasonable given that Eircom retail is facing prospectively greater competition from other operators in the Urban Area and Regional Area 1.

5.111 A MST can be conducted on a bundle-by-bundle basis only or on a portfolio basis only. We refer to these as one-stage MSTs. A MST can also consist first of testing at the bundle level and then the portfolio level where both sets of tests have to be passed. We refer to this as a two-stage MST.

5.112 In the Urban Area ComReg is of the preliminary view that the MST be a one-stage portfolio test based on ATC for all regulated products covering both CGA and NGA based wholesale inputs. This takes into account the preliminary finding that the WCA Market is competitive in the Urban Area. It also takes into account the level of retail competition in the Urban Area. These items are discussed in further detail in the Oxera Report in section 5.3.2.

5.113 ComReg does not consider that a one-stage portfolio MST is appropriate for Regional Areas 1 or 2. As noted in paragraph 5.92, and highlighted in the Oxera Report (section 5.3.2):

⁴⁵ European Commission (2007), ‘Wanadoo España vs. Telefónica’, Case COMP/38.784, paragraph 387, p.109.

“even though the take-up of double-play bundles is decreasing and the take-up of triple-play bundles is increasing, double-play bundles are still the most popular bundles in the Irish market. A move to a one-stage portfolio test (for all double- and triple-play bundles) in Zones 2 [Regional Area 1] and 3 [Regional Area 2] at the present time is thus likely to allow Eircom to use double-play bundles to cross-subsidise triple-play bundles (or vice versa). As a result, other operators who do not offer the same range of service bundles may be disadvantaged and find it difficult to compete effectively for customers in the provision of double- and/or triple-play services.”

- 5.114 Consequently, a possible way forward which combines the advantages of both approaches might be to apply a test both at a portfolio level and at an individual bundle level.
- 5.115 ComReg proposes that the MST in Regional Area 1 should be based on a two-stage combinatorial test; namely a bundle-by-bundle stage and a portfolio stage. This is the approach currently taken for the LEA. The costs for the bundle-by-bundle MST would be on a LRIC basis while those for the portfolio MST would be on an ATC basis. This gives Eircom more pricing flexibility for its individual bundles while at the same time ensuring that an OAO could profitably duplicate Eircom’s bundles at the overall portfolio level in Regional Area 1.
- 5.116 As there are proposed to be multiple WAWNIs (see paragraph 5.62), ComReg considers that it would be appropriate that the portfolio approach also recognise the different wholesale inputs for CGA and NGA bundles in the Urban Area and Regional Area 1. The proposed portfolio level test will be conducted separately in the Urban Area, and Regional Area 1, and will be based on the weighted average (by customer number) of revenues and costs of individual bundles. Hence the portfolio test will contain the correct weighting of NGA and CGA costs leading to an accurate calculation of average portfolio margin.
- 5.117 ComReg will continue to review the competitive dynamics in Regional Area 1, while ComReg believes it is currently not appropriate to assess the MST solely on a portfolio basis there may be merit in moving to such an approach in future.
- 5.118 ComReg considers that in Regional Area 2 the bundle-by-bundle approach should be continued. ComReg considers that in Regional Area 2 the prospective competitive conditions are not as evident as those in the Urban Area or Regional Area 1. The majority of competitors in Regional Area 2 rely on CGA Bitstream from Eircom to provide bundles with broadband. As such, the added flexibility (of a portfolio approach) is not appropriate in Regional Area 2.

Bundles containing unregulated products

5.119 ComReg recognises that the addition of unregulated services to a bundle may be welfare enhancing for consumers if cross subsidies are permitted from the regulated elements of the bundle. A positive margin on the regulated element(s) of a bundle may cross-subsidise the unregulated products/services in the bundle. For the avoidance of doubt, the amount of cross-subsidy available will be limited to the margin available from only the regulated element(s) of the bundle, and also limited to the number of consumers availing of the bundle. For example a Dual-Play broadband and voice bundle with 100 customers and an average margin of €5, but with only 10 of those customers electing to add an unregulated service then the amount of the cross-subsidy will be limited to €50 (10 X €5) not €500 (100 X €5) for those customers adding the unregulated service to the bundle.

5.120 Under this proposed approach:

- a. The bundle (excluding any revenues or costs associated with the unregulated service) would be assessed as proposed in paragraph 5.110 i.e., a one-stage portfolio test for bundles sold in the Urban Area, a combinatorial test on a bundle-by-bundle and portfolio basis for bundles in Regional Area 1 and on a bundle-by-bundle basis for those bundles in Regional Area 2 (see paragraph 5.113); and
- b. the unregulated service would then be assessed separately on a LRIC cost basis (see paragraphs 5.99 - 5.104).

5.121 Where the unregulated service which is to be included in the portfolio is below the LRIC cost standard, (as calculated by part b above) then for the:

- Urban Area: the portfolio margin (as calculated by part a above) may be used to cross-subsidise the unregulated service margin;
- Regional Area 1: the bundle margin (as calculated by part a above) available for those specific bundles which include the unregulated service may be used to cross-subsidise that specific unregulated service margin; and
- Regional Area 2: the individual bundle margin (as calculated per part a above) available may be used to cross-subsidise that specific unregulated service margin.

5.122 Therefore, the flexibility provided by this approach is based on the proviso that:

1. on aggregate those bundles which include the unregulated service(s) are replicable as demonstrated by the MST at all times; and
2. excluding the revenues and costs of the unregulated services that the bundle is replicable as demonstrated by the bundle-by-bundle test (see paragraphs 5.115 and 5.118).

- 5.123 Under this proposed approach ComReg considers that while certain OAOs may be excluded from certain narrow bundle types (which include unregulated services as part of that bundle) it ensures that overall the Eircom retail offer is not anti-competitive (as the portfolio is replicable in the Urban Area, the portfolios are replicable in Regional Area 1, and that in Regional Area 2 the bundle-by-bundle is replicable). ComReg considers that as Eircom's position may not be as strong with respect to new services such as mobile voice, television, etc., that requiring each bundle to pass a MST in the Urban Area and Regional Area 1 may be a form of entry assistance (for OAOs) into an unregulated market which is already competitive.
- 5.124 As noted in the executive summary of the Oxera Report: *“We also propose that the bundles MST requires that the cost of the bundle including the total service LRIC (or AAC in exceptional circumstances) of the unregulated service on a stand-alone basis should be covered by the retail revenues of the bundle including the unregulated service. In other words, the additional margin, if available, from the retail service(s) based on regulated wholesale input(s) for bundles including the unregulated service may be used to cover (part or all of) the costs of the unregulated service in the same bundle. This may enhance consumer welfare by providing a greater variety of bundles and/or lower prices for these bundles.”*
- 5.125 In the Urban Area, Eircom need to monitor the relevant take-up of unregulated services and its overall portfolio margin to ensure it remains compliant with its obligations at all times.
- 5.126 In Regional Area 1 Eircom need to monitor the relevant take-up of these types of bundles to ensure it remains compliant with its obligations at all times. In addition, the portfolio approach in Regional Area 1 ensures that OAOs would not be excluded from a large portion of the market for bundles which include certain unregulated services.
- 5.127 In Regional Area 2, ComReg considers that the prospective competitive conditions are not as evident as those in the Urban Area and Regional Area 1. As such, ComReg considers that while cross-subsidisation may be consumer welfare enhancing for those bundles which include an unregulated service — that it would only be appropriate to allow this on a bundle-by-bundle basis. In Regional Area 2 as Eircom retail has a large incumbent customer base the portfolio approach may provide undue pricing flexibility due to the relative weighting of CGA bundles types. ComReg considers that any undue pricing flexibility in Regional Area 2 could force OAOs onto a loss making trajectory to the long-term detriment of consumers.
- 5.128 For the avoidance of doubt, any positive margin from the LRIC of unregulated services may not cross-subsidise any margin assessment (which excludes the revenues and costs associated with the unregulated service) of the Dual-Play assessment (see paragraphs 5.55 - 5.57).
- 5.129 Given the proposal to allow a cross-subsidy, ComReg will monitor and may from time to time review how competition is developing in relation to unregulated services, and for bundles which include unregulated services.

5.8 ComReg's Preliminary View

5.130 For the portfolio sold/offered within the Urban Area, in order to pass the MST:

1. the Average Monthly Urban Area Revenue per customer (Reference R5) shall be equal to or exceed the Average Monthly Urban Area Portfolio Cost per customer (Reference C8);
2. when the portfolio includes unregulated retail services, compliance with the MST (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled "Unregulated Retail Services Assessment".

Note: The component references R5 and C8 including their computation is detailed in Table 5.1 below.

5.131 For bundles sold/offered within Regional Area 1, in order to pass the MST:

3. as regards every Portfolio, the Average Monthly Regional Area 1 Portfolio Revenue per customer (Reference R5) shall be equal to or exceed the Average Monthly Regional Area 1 Portfolio Cost (Reference C12);
4. as regards each individual bundle, the Average Monthly Regional Area 1 bundle Revenue per customer (Reference R4) shall be equal to or exceed the Average Monthly Regional Area 1 Adjusted bundle Cost (Reference C11);
5. when a given bundle includes unregulated retail services, compliance with the MST (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled "Unregulated Retail Services Assessment".

Note: The component references R4, R5, C11 and C12 including their computation is detailed in Table 5.2 below.

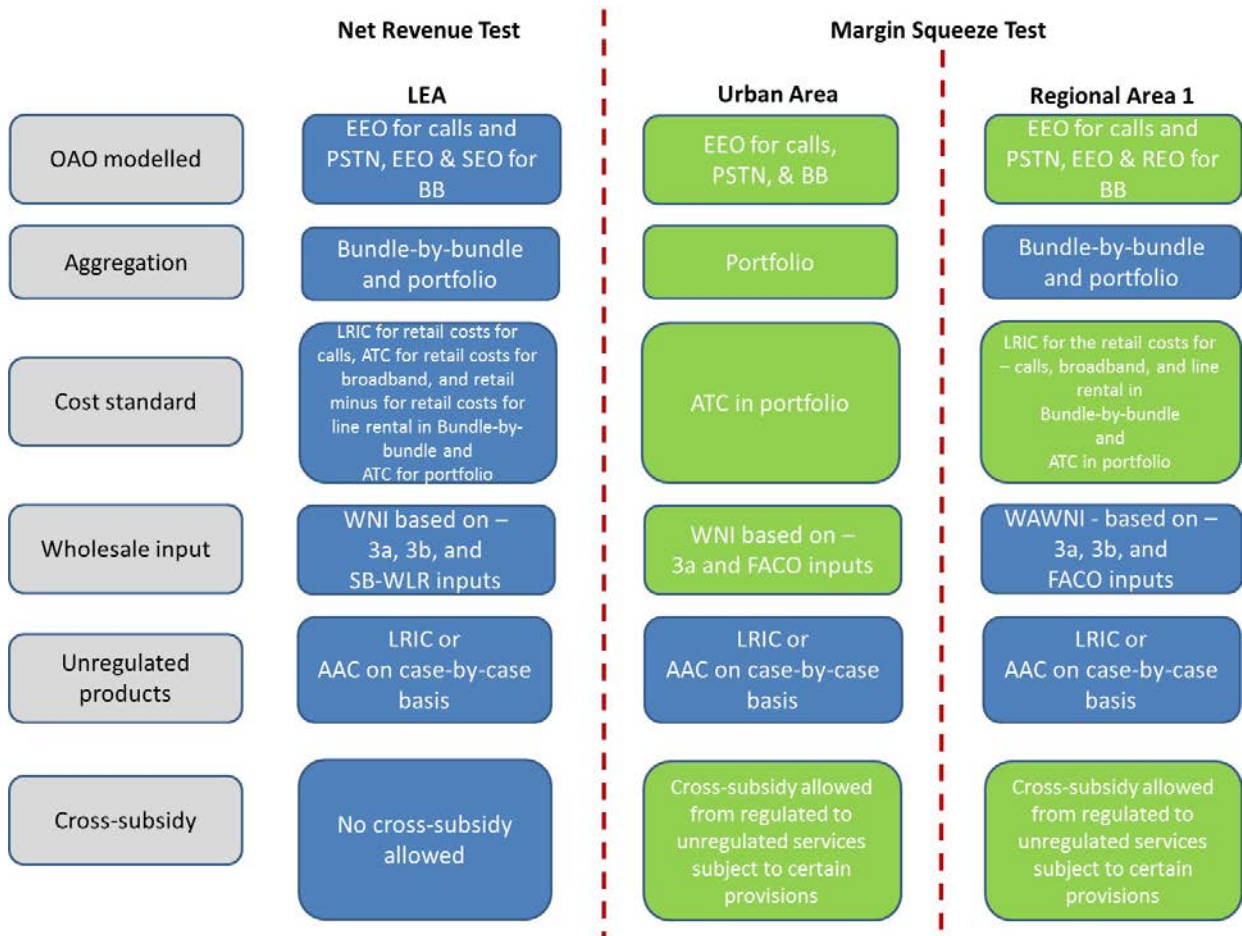
5.132 For bundles sold/offered in Regional Area 2, in order to pass the MST:

6. as regards each individual bundle, the Average Monthly Regional Area 2 bundle Revenue per customer (Reference R(iv)) shall be equal to or exceed the Average Monthly Regional Area 2 bundle Cost (C(vii));
7. when a given bundle includes unregulated retail services, compliance with the MST (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled "Unregulated Retail Services Assessment".

Note: The component references R(iv), C(vii), including their computation is detailed in Table 5.3 below.

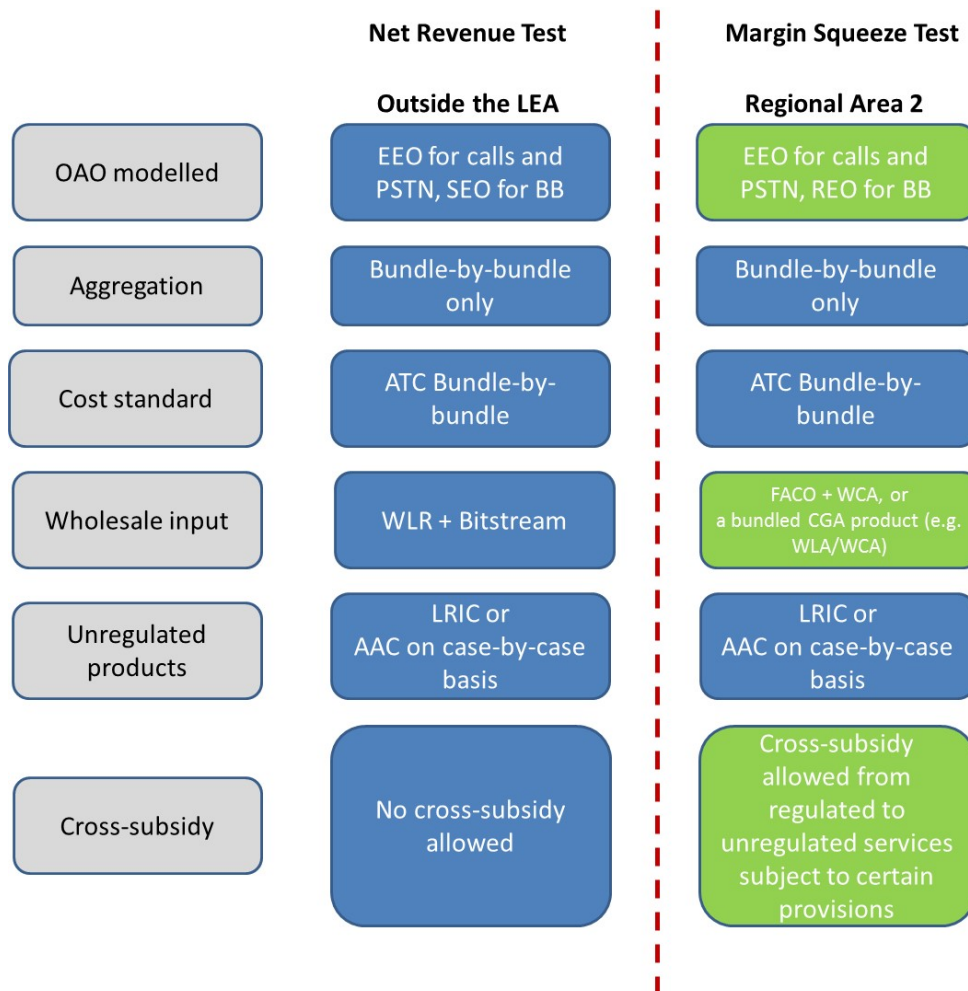
5.133 A high-level graphic overview of the components of the proposed MST in the Urban Area and Regional Area 1 compared to the existing NRT is presented below. The differences are highlighted in the green text boxes.

Figure 12: Components of the proposed MST in the Urban Area and Regional Area 1 versus the NRT for the LEA



5.134 A high-level graphic overview of the components of the proposed MST in Regional Area 2 and comparison with the existing NRT is presented below. The differences are highlighted in the green text boxes.

Figure 13: Components of the proposed MST in Regional Area 2 versus the NRT for outside the LEA



5.9 Details of MST

Portfolio sold/offered in the Urban Area

Table 5.1 Portfolio sold/offered in the Urban Area

Revenue:		
REF	ITEM (all ex VAT)	Description
R1	Monthly bundle Price	This is the full monthly price of a bundle.
R2	Average Monthly out-of-bundle Calls Revenue per Customer	This is the average call revenue per customer per month for calls not included in the bundle. This may be based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment). For post-launch assessment the revenue for each call type is taken from the Eircom billing information for calls for customers on that

Revenue:		
REF	ITEM (all ex VAT)	Description
		bundle in that billing month. Eircom bills out-of-bundle calls based on a call set up fee and a fee per minute of call time with any partial minute rounded up to the next minute. This total revenue for the call type outside the bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component.
R3	Average Monthly out-of-bundle Other Revenue per customer	This is the average of any other monthly out of bundle revenue (e.g. excess broadband usage or mailbox costs not included in a bundle).
R4	Average Monthly Urban Area bundle Revenue per customer	This is the sum of the Monthly bundle Price (R1) <i>plus</i> Monthly out-of-bundle Calls Revenue (R2) <i>plus</i> Monthly out-of-bundle Other Revenue (R3) divided by the number of customers on that bundle.
R5	Average Monthly Urban Area Portfolio Revenue per customer	This is a weighted Average of Monthly Urban Area bundle Revenue (R4) based on the actual volumes of each bundle sold/offered in the Urban Area (in the case of post-launch assessment) or the forecast volumes for each bundle sold/offered in the Urban Area (in the case of pre-launch assessment)

Costs:		
REF	ITEM (all ex VAT)	Description
C1	Weighted Average Wholesale Network Input Cost per Bundle	<p>As the WCA Market has been preliminary found to be competitive in the Urban Area the relevant wholesale inputs for the Urban Area are WLA inputs. The retail bundle determines the wholesale inputs required. The costs per bundle will vary depending on the underlying technology required. An NGA based retail bundle might require inputs for FTTC, or FTTH. A CGA based retail bundle would require CGA wholesale inputs.</p> <p>For NGA services these are the applicable monthly prices plus all relevant wholesale costs of POTS based VUA, Standalone VUA and Standalone VUA + Voice network input cost in effect in the Urban Area. For CGA services these are the applicable monthly prices plus</p>

Costs:		
REF	ITEM (all ex VAT)	Description
		<p>all relevant wholesale costs of ULMP, WLR/LS, and SABB in the Urban Area.</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life.⁴⁶ plus b) other unavoidable non-retail costs which are necessary to provide a retail service.⁴⁷. All costs are converted to a monthly average.</p> <p>If seeking to replicate an Eircom bundle an OAO has a range of wholesale inputs to choose from – described above. For each type of technology ComReg proposes to use a Weighted Average Wholesale Network Input (WAWNI). This represents a weighted average price based on the weighted average use of those wholesale inputs by a hypothetical efficient OAO in this area (which will be guided by the actual use of OAOs of those wholesale inputs in this area). Note that if different technology becomes available with different costs then a WAWNI would need to be determined for those.</p> <p>Broadband usage costs will be based on the prices as detailed in Chapter 8 of the WLA/WCA Pricing Paper. Actual usage will be based on Eircom usage. Eircom is required to update the usage/throughput rate (based on Kbps peak hour usage) for current generation and next generation products to ensure continued compliance with its cost orientation and price setting obligations.</p>
C2	Average Retail Costs Associated with Retail Line Rental per customer	These are the retail costs associated with line rental derived from Eircom’s regulatory accounts.
C3	Average bundle Mailbox cost per customer	Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as published in Eircom’s Reference Interconnect Offer Price List will be used as an input cost. Consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. Retail costs as derived from Eircom’s regulated accounts will also be considered here.

⁴⁶ For example, connection fees or co-location charges.

⁴⁷ For example, the cost of a line card, amortised over the relevant customer life.

Costs:		
REF	ITEM (all ex VAT)	Description
C4	Average Cost of Calls per bundle per customer	These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common costs. Costs are based on wholesale prices and Eircom's retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.
C5	Average Retail Costs Associated with Retail Broadband per customer	These are the monthly operating costs as derived from the DCF model for WLA inputs as discussed in Chapter 10 of the WLA/WCA Pricing Paper.
C6	Average Promotion Costs per customer	These are the costs associated with promotions and promotional discounts provided to End Users, spread over the average customer lifetime or where suitable a shorter period (e.g. for retention promotions).
C7	Average Monthly Urban Area bundle Cost per customer	This is the Weighted Average Wholesale Network Input Cost per bundle (C1) <i>plus</i> Average Retail Costs Associated with Retail Line Rental per customer (C2) <i>plus</i> Average Retail Costs Associated with Retail Broadband per customer (C5) <i>plus</i> Average Cost of Calls per bundle per customer (C4) <i>plus</i> Average Mailbox Cost per customer (C3) where applicable.
C8	Average Monthly Urban Area Portfolio Cost per customer	This is the weighted average by customers of Urban Area bundle Cost (C7).

Unregulated Retail Services Assessment

This applies to those retail services that are unregulated.⁴⁸

There may be cross-subsidisation from the regulated services to the unregulated services within the Urban Area portfolio, subject to the provisions that 1) the portfolio assessment demonstrates that when excluding the unregulated service(s) the portfolio is profitably replicable (i.e., that the Average Monthly Urban Area portfolio Revenue (Reference R5) shall be equal to or exceed the Average Monthly Adjusted Urban Area portfolio Cost (Reference C8) excluding any revenues

⁴⁸ For the purposes of this paper an unregulated service is a retail product or service, where the upstream inputs required to replicate such a retail product or service are not regulated at the wholesale level.

or costs associated with the unregulated service) and 2) the portfolio is also margin positive with the addition of the unregulated services.

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

Q. 9 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the Urban Area? Please give a detailed response with supporting data where appropriate to support your view.

Bundles/portfolios in Regional Area 1

Table 5.2 Bundles sold/offered in Regional Area 1

Revenue:		
REF	ITEM (all ex VAT)	Description
R1	Monthly bundle Price	This is the full monthly price of a bundle.
R2	Average Monthly out of bundle Calls Revenue per Customer	<p>This is the average call revenue per customer per month for calls not included in the bundle. This may be based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment).</p> <p>For post-launch assessment the revenue for each call type is taken from the Eircom billing information for calls for customers on that bundle in that billing month. Eircom bills out of bundle calls based on a call set up fee and a fee per minute of call time with any partial minute rounded up to the next minute. This total revenue for the call type outside the bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component.</p>
R3	Average Monthly Out of bundle Other Revenue per customer	This is the average of any other monthly out of bundle revenue.
R4	Average Monthly Regional Area 1 bundle	This is the sum of the Monthly bundle Price (R1) <i>plus</i> Monthly Out of bundle Calls Revenue (R2) <i>plus</i> Monthly Out of bundle Other Revenue (R3) divided by the number of customers on the bundle.

	Revenue per customer	
R5	Average Monthly Regional Area 1 Portfolio Revenue per customer	This is a weighted average of Monthly Regional Area 1 bundle Revenue (R4) based on the number of customers on each bundle.

Costs:		
REF	ITEM (all ex VAT)	Description
C1	Weighted Average Wholesale Network Input Cost per Bundle	<p>The retail bundle determines the wholesale inputs required. An NGA based retail bundle might require inputs for FTTC, or FTTH. A CGA based retail bundle would require CGA wholesale inputs. The costs per bundle will vary depending on the underlying technology required.</p> <p>For NGA services these are the applicable monthly prices plus all relevant wholesale costs of POTS based VUA, NGA Bitstream+, Standalone VUA and Standalone VUA + Voice network input cost in effect in Regional Area 1. For CGA services these are the applicable monthly prices plus all relevant wholesale costs of ULMP, WLR/LS, WLR/Bitstream and SABB in Regional Area 1.</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life⁴⁹ plus b) other unavoidable non-retail costs which are necessary to provide a retail service⁵⁰. All costs are converted to a monthly average.</p> <p>If seeking to replicate an Eircom bundle an OAO has a range of wholesale inputs to choose from – described above. For each type of technology described above ComReg proposes to use a Weighted Average Wholesale Network Input (WAWNI). This represents a weighted average price based on the weighted average use of those wholesale inputs by a hypothetical efficient OAO in Regional Area 1 (which will be guided by the actual use of OAOs of those wholesale inputs in Regional Area 1). Note that if different technology becomes available with different costs then a WAWNI would need to be determined for those.</p>

⁴⁹ For example, co-location charges.

⁵⁰ For example, the cost of a line card, amortised over the relevant customer life.

Costs:		
REF	ITEM (all ex VAT)	Description
		Broadband usage costs will be based on the prices as detailed in Chapter 8 of The WLA/WCA Pricing Paper. Actual usage will be based on Eircom usage. Eircom is required to update the usage/throughput rate (based on Kbps peak hour usage) for current generation and next generation products to ensure continued compliance with its cost orientation and price setting obligations.
C2	Average Retail Costs Associated with Retail Line Rental per customer	These are the retail costs associated with line rental derived from Eircom's regulatory accounts.
C3	Total Adjusted Retail Costs Associated with Retail Line Rental per customer	These are the retail costs associated with retail line rental (C2) less common costs less fixed indirect costs associated with the line rental included in the retail bundle offer and not the individual bundle itself (i.e., the LRIC of the retail costs of line rental).
C4	Average bundle Mailbox cost per customer	Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as published in Eircom's Reference Interconnect Offer Price List will be used as an input cost. Consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. Retail costs as derived from eircom regulated accounts will also be considered here.
C5	Average Cost of Calls per bundle per customer	These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common cost. Costs are based on wholesale prices and Eircom's retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.
C6	Adjusted Cost of Calls per bundle per customer	This is based on the estimated/actual costs of calls on that bundle divided by the number of customers on the bundles. The cost base is taken from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs (i.e., the LRIC of retail calls).
C7	Average Retail Costs associated with Retail	These are the monthly operating costs as derived from the DCF model for WLA, and WCA inputs as respectively discussed in Chapter 10, and 11 of the WLA/WCA Pricing Paper.

Costs:		
REF	ITEM (all ex VAT)	Description
	Broadband per customer	
C8	Total Adjusted Retail Costs Associated with Retail Broadband per customer	These are the retail costs associated with retail broadband (C7) less common costs less fixed indirect costs associated the broadband product included in the retail bundle offer and not the individual bundle itself (i.e., the LRIC of retail costs of a broadband product).
C9	Average Promotion Costs	These are the costs associated with promotions and promotional discounts provided to End Users, spread over the average customer lifetime or where suitable a shorter period (e.g. for retention promotions).
C10	Average Monthly Regional Area 1 bundle Cost per customer	This is the averaged: Wholesale Access Input Cost (C1) <i>plus</i> Retail Costs Associated with Retail Line Rental (C2) <i>plus</i> Retail Costs Associated with Retail Broadband (C7) <i>plus</i> Average Cost of Calls (C5) <i>plus</i> Mailbox Cost (C4) <i>plus</i> Promotion Costs (C9) where applicable.
C11	Average Monthly Regional Area 1 Adjusted bundle Cost	This is the averaged: Wholesale Access Input Cost (C1) <i>plus</i> Retail Costs Associated with Retail Line Rental (C2) <i>plus</i> Adjusted Cost of Calls (C6) <i>plus</i> Adjusted Retail Costs Associated with Retail Broadband (C8) <i>plus</i> Mailbox Cost (C4) <i>plus</i> Promotion Costs (C9) where applicable.
C12	Average Monthly Regional Area 1 Portfolio Cost	This is the weighted average by customer of Average Monthly Regional Area 1 bundles Cost (C10).

Unregulated Retail Services Assessment

This applies to those retail services that are unregulated.⁵¹

There may be cross-subsidisation between the regulated services and unregulated services within that specific bundle's "portfolio" (where the "portfolio" in this instance is defined as a specific bundle which includes the unregulated service e.g. a triple-play bundle not a dual-play bundle which does not include the unregulated service), subject to the provisions that 1) for the bundle-by-bundle assessment, the bundle demonstrates that when excluding the unregulated service(s) the bundle is profitably replicable (i.e., that the Average Monthly Regional Area 1 bundle Revenue (Reference R4) shall be equal to or exceed the Average Monthly Adjusted Regional Area 1 bundle Cost (Reference C11) excluding any revenues or costs associated with

⁵¹ For the purposes of this paper an unregulated service is a retail product or service, where the upstream inputs required to replicate such a retail product or service are not regulated at the wholesale level.

the unregulated service) and 2) that the bundle including the unregulated service(s) covers its costs. For the avoidance of doubt the cross-subsidy in Regional Area 1 is only available on a bundle basis and not across the portfolio of all bundles sold/offered for sale in Regional Area 1. The entire portfolio needs to cover its costs, see C12 above.

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

Unreasonable bundle Assessment/Complementary Competitive Assessment

If a bundle does not pass the Margin Squeeze Test, as outlined in Section 4.3 of the Decision Instruments, ComReg will carry out a general assessment of the reasonableness of the bundle and may conclude that, notwithstanding the fact that the bundle fails the Margin Squeeze Test, the offer for sale by Eircom of that bundle does not constitute a breach of the obligation under [...].

For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant bundle. ComReg will also consider the impact of the bundle on competition, including by reference to the promotion of sustainable competition in the medium to long term and the likelihood of any potential foreclosure and associated consumer harm.

Q. 10 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 1? Please give a detailed response with supporting data where appropriate to support your view.

Bundles/portfolios in Regional Area 2

Table 5.3: bundles sold/offered in Regional Area 2

Revenue:		
REF	ITEM (all ex VAT)	Description
R(i)	Monthly bundle Price	This is the full monthly price of a bundle.
R(ii)	Average Monthly out of bundle Calls Revenue per Customer	<p>This is the average call revenue per customer per month for calls not included in the bundle. This may be based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre- launch assessment).</p> <p>For post-launch assessment the revenue for each call type is taken from the Eircom billing information for calls for customers on that bundle in that billing month. Eircom bills out of bundle calls based on a call set up fee and a fee per minute of call time with any partial minute rounded up to the next minute. This total revenue for the call type outside the bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component.</p>
R(iii)	Average Monthly Out of bundle Other Revenue per customer	This is the average of any other monthly out of bundle revenue.
R(iv)	Average Monthly Regional Area 2 bundle Revenue per customer	This is the sum of the Monthly bundle Price (R(i)) <i>plus</i> Monthly Out of bundle Calls Revenue (R(ii)) <i>plus</i> Monthly Out of bundle Other Revenue (R(iii)) divided by the number of customers.

Costs:		
REF	ITEM (all ex VAT)	Description
C(i)	Wholesale Access Input Cost per customer	<p>Where relevant, this is the sum of the monthly prices of FACO and CGA, or the wholesale input cost of a bundled CGA product, plus the monthly average of all relevant wholesale costs levied by Eircom.</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life⁵² plus b) other unavoidable non-retail costs which are necessary to provide a retail service.⁵³. All costs are converted to a monthly average.</p> <p>In respect of the wholesale input for the CGA underlying usage charge this will be based on the bitstream managed backhaul prices as published by Eircom.</p>
C(ii)	Average Retail Costs Associated with Retail Line Rental per customer	These are the retail costs associated with line rental derived from Eircom regulatory accounts.
C(iii)	Average bundle Mailbox cost per customer	Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as published in Eircom’s Reference Interconnect Offer Price List will be used as an input cost. Consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. Retail costs as derived from Eircom regulated accounts will also be considered here.
C(iv)	Average Promotion Costs	These are the costs associated with promotions and promotional discounts provided to End Users, spread over the average customer lifetime or where suitable a shorter period (e.g. for retention promotions).
C(v)	Average Cost of Calls per bundle per customer	<p>These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common cost.</p> <p>Costs are based on wholesale prices and Eircom’s retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.</p>

⁵² For example, connection fees or co-location charges.

⁵³ For example, the cost of a line card amortised over the relevant customer life.

Costs:		
REF	ITEM (all ex VAT)	Description
C(vi)	Average Retail Costs Associated with Retail Broadband per customer	These are the monthly operating costs as derived from the DCF model for WLA, and WCA inputs as respectively discussed in Chapter 10, and 11 of the WLA/WCA Pricing Paper.
C(vii)	Average Monthly Regional Area 2 bundle Cost	This is the averaged: Wholesale Access Input Cost (C(i)) <i>plus</i> Retail Costs Associated with Retail Line Rental (C(ii)) <i>plus</i> Retail Costs Associated with Retail Broadband (C(v)) <i>plus</i> Cost of Calls (C(iv)) <i>plus</i> Mailbox Cost (C(iii)) <i>plus</i> Promotion Costs (C(vii)) where applicable.

Unregulated Retail Services Assessment

This applies to those retail services that are unregulated.⁵⁴ There may be cross-subsidisation between the regulated services and unregulated services included as part of the bundle, subject to the provisions that 1) the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the bundle is profitably replicable (i.e., that the Average Monthly Regional Area 2 bundle Revenue (Reference R (iv)) shall be equal to or exceed the Average Monthly Regional Area 2 bundle Cost (Reference C (vii)) excluding any revenues or costs associated with the unregulated service) and 2) the bundle including unregulated service(s) covers its costs.

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

Unreasonable bundle Assessment/Complementary Competitive Assessment

If a bundle does not pass the Margin Squeeze Test, as outlined in Section 4.3 of the Decision Instruments, ComReg will carry out a general assessment of the reasonableness of the bundle and may conclude that, notwithstanding the fact that the bundle fails the Margin Squeeze Test, the offer for sale by Eircom of that bundle does not constitute a breach of the obligation under [...].

For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant bundle. ComReg will also consider the impact of the bundle on competition, including by reference to the promotion of sustainable competition in the medium to long term and the likelihood of any potential foreclosure and associated consumer harm.

⁵⁴ For the purposes of this paper an unregulated service is a retail product or service, where the upstream inputs required to replicate such a retail product or service are not regulated at the wholesale level.

Q. 11 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to support your view.

5.10 Average customer life

- 5.135 The average customer life (ACL) on a bundle is used as the time period over which to amortise costs such as promotional discounts when providing a bundle. The ACL is not how long a customer stays with a particular operator, but rather how long they remain on a specific bundle. It is also used in the calculation of the retail costs for CGA and NGA standalone and bundled broadband services.
- 5.136 A further aspect and one which is essential to understand is that discounts/promotions offered on a bundle under the NRT are assessed against the bundle covering any discounts/promotions provided over the ACL. As some customers may not remain on the bundle for the full ACL period, Eircom should be mindful of the potential risk arising that promotional costs may not be recovered over a bundle – Eircom’s obligations in this regard are discussed in Chapter 7.
- 5.137 The MST is a test of whether an efficient OAO would be able to duplicate profitably an Eircom bundle or not; the ACL is a key component of this test. Since the last bundles consultation that led to ComReg decision D04/13 a number of operators have shared their views on the most appropriate value to use – between the contract duration or 24 - 30 months. For this consultation ComReg examined whether there was a justification for altering the current ACL.
- 5.138 ComReg reviewed the data available to it and found it unsuitable for the purpose of determining an updated ACL. To understand what was needed to update the ACL, a number of questions arose: method to use; data availability; and level to assess the data. In choosing a method to follow, a number of factors needed to be considered, which included the time period chosen, the granularity and availability of data sought, and the burden these would place on operators. To better understand these three methods were outlined to industry participants.
- 5.139 The first made use of the quarterly report data on bundles as a starting point and reconciled this through the gross additions and losses on a quarterly basis across the different services sold; the second option focused on just new joiners – when they joined, what service they availed of (e.g. dual play bundle), and when they left (if they did), and the final option was open so that an operator could fill in how they monitor lifetimes internally.
- 5.140 Following feedback from operators, ComReg chose to use the first option. Each company had data in this format already and was not viewed as taxing as the second option, only one operator suggested that the third option be advanced.

- 5.141 ComReg issued a data request pursuant to Section 13D of the Communications Regulation Act 2002 (as amended) for the gross number of subscribers lost and added per quarter from Q2 2014 to Q2 2016, across the main bundle providers⁵⁵ in Ireland (covering the vast majority of bundles sold). The data request was structured to match the quarterly report information – subscriber numbers were separated based on whether they were business or residential, and by the types of services they were availing of (e.g. a single service such as fixed broadband, a dual play bundle such as fixed voice and mobile, etc.).
- 5.142 The method chosen provided an ACL value, by taking the quarterly churn data and dividing the total number of subscribers by the gross number of subscribers lost and then converting this to a monthly value by multiplying the result by three. To verify this approach a comparison was done with the method used by Ofcom in their VULA margin decision⁵⁶ (which used a logarithmic function and the churn rate instead) the results were almost identical. Given the available data and the potential cuts by bundles or service, we investigated each of these views individually, and across operators, and also aggregating into generic service/bundle types and operators.
- 5.143 We found that the ACL varied significantly by: operator; bundles/services being sold by an operator; and over time. For example across dual play bundles, for one operator their maximum ACL was \times times longer than their minimum.
- 5.144 In reviewing the data, and deciding on which particular cut to take, there were a number of aspects which needed to be investigated. The first investigation was whether or not to include Eircom in the data being assessed⁵⁷. The argument being that – Eircom as the incumbent telecoms operator would have a large base of legacy customers who have not switched operator thereby inflating their ACL, so therefore we should exclude Eircom from the calculations for the ACL. The following paragraph explains why Eircom data was included in the calculations of the ACL.
- 5.145 ComReg considered excluding Eircom but found the following:
- some operators have only recently started offering bundles – and if low numbers were churning off these operators this would have the effect of increasing the average customer lifetime;
 - similarly not all operators offer the same bundle types (e.g. triple/quad play bundles or could provide data in that manner) so the resulting ACL value for those which did would be used in assessing the replicability of these bundle types so the ACL to apply in this instance for Eircom would be it's only competitor's; and

⁵⁵ These operators were: Eircom; Digiweb; Sky; Virgin Media; and Vodafone which represent \times % of all bundles provided.

⁵⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0015/72420/vula_margin_final_statement.pdf

⁵⁷ Ofcom did not include BT data in their ACL for the VULA margin decision as they found that there was evidence of a material difference in the ACL between BT and other operators

- finally, overall the bundles landscape is increasingly competitive with three operators (excluding Eircom) having a bundles market share of over 80% since Q2 2014 (Figure 3.5 Oxera report) so holding Eircom to a competitor-only derived ACL might be unnecessarily constricting Eircom's ability to compete, which could lead to consumer detriment in the short to medium term by reducing inducements to switch to Eircom.
 - Therefore we chose to generate industry ACL values where the data was available rather than just ones based on non-Eircom data.
- 5.146 A concern in calculating the ACL at a total level was the potential for inflating the ACL through including services considered legacy such as fixed voice where customers may never have switched provider from Eircom. We found that including fixed voice actually reduced the ACL as customers have been moving from this service.
- 5.147 A further consideration in reviewing the data was what level to aggregate to and whether any sufficiently different values could justify this (i.e. should we focus on the most popular bundle types/services – dual and triple play bundles and standalone broadband), rather than aggregating the data to a total level. While this was done in the review, we are mindful of the practical implications of having many ACL values. For example in the retail broadband cost model it might be possible to have multiple ACLs for the various variants of broadband but depending on whether the broadband was sold in a bundle or not, it would have a different ACL period attributed to it even though the underlying broadband is the same product. This could lead to confusion and errors in modelling. We found the results based on the data provided are strikingly consistent to suggest that no benefit would be gained from having different ACLs. This included cuts across standalone broadband, and the aggregated dual and triple play bundles for residential and business subscribers, and those first two combined, and the total across all bundles and services (with and without business subscribers).
- 5.148 Having reviewed the data and considered all of the issues above and based on the data provided we propose that the ACL on a bundle should be set, subject to consultation, at 42 months. However, noting Oxera's advice and recognising the increasing prevalence of bundling we intend during the consultation phase and thereafter to engage further with industry to gauge if an alternative method is superior or indeed possible to derive an appropriate ACL.

ComReg's Preliminary View

- 5.149 ComReg is of the preliminary view that the average customer life should be kept at 42 months.
- 5.150 We are interested in stakeholder views on both the approach we adopted, and indeed if other methods may be more suitable. Given the importance of this metric and its use in areas unrelated to bundles (e.g. standalone broadband, etc.) we intend to engage further with industry to develop regular reporting on this topic to ensure that for future reviews a solid base of data is available.

Q. 12 Do you agree or disagree with our provisional view that the average customer life should be 42 months? Please give a detailed response with well justified supporting data where appropriate to support your view.

5.11 Case-by-case assessment of a bundles reasonableness

- 5.151 Where a bundle does not pass the relevant test, ComReg considers it proportionate to undertake a case-by-case assessment of the bundle to determine the cause of the bundle failing the MST. While failing the MST provides a useful measure to highlight which bundles require further investigation, ComReg considers that it is more proportionate to consider the causality of that bundle failing the MST and whether there are additional considerations which need to be taken into account.
- 5.152 In undertaking this assessment, ComReg considers that it is appropriate to consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling in order to determine whether the bundle complies with the obligation not to cause a margin squeeze.
- 5.153 For the avoidance of doubt, ComReg has the power to intervene in all cases, but might not if the impact is immaterial. ComReg believes that it might be excessive to prohibit all offers in all circumstances and that some flexibility is needed — and it is in this context the case-by-case assessment is carried out.
- 5.154 Therefore, ComReg considers that just because a bundle fails the MST, it does not automatically lead to that bundle being considered as causing a margin squeeze, ComReg might in exceptional circumstances assess other factors – retail efficiencies; bundle specific customer lifetimes, and competitive assessment, which are discussed below.

Retail efficiencies

- 5.155 For the purposes of applying the MST, ComReg accepts that, in principle, it is appropriate to have regard to retail efficiencies and related savings, subject to the existence and/or quantum of such being demonstrated to ComReg's satisfaction, with robust supporting evidence, by Eircom. For example, such retail efficiencies could relate to cost savings derived from reduced billing and customer service costs to the extent that such savings could also be replicated by equally efficient entrants.
- 5.156 The retail costs for line rental (via the Additional Financial Statements) and broadband (via the DCF model) are updated annually and therefore over time reflects retail costs experienced in the market. However, at a particular point in time (i.e., in between updates) the DCF model for retail broadband costs in particular may not reflect certain retail efficiencies. Consequently, in circumstances where a bundle fails the MST, ComReg considers that as a proportionate measure it is appropriate to consider any retail efficiencies that may have occurred — as the failing bundle may in effect pass once the model is updated — to take account of the lower costs experienced in the market (e.g., the reduction of billing costs due to electronic mailing or change in bill cycles).

ComReg's Preliminary View

5.157 ComReg is of the preliminary view that it is appropriate that retail efficiencies, once supported by robust evidence, be considered in determining whether a bundle, which fails the MST, is nonetheless compliant with Eircom's obligation not to cause a margin squeeze.

Bundle specific customer lifetime

5.158 In circumstances where a particular bundle fails the MST ComReg will consider, whether as a result of increased customer lifetimes due to this bundle's characteristics such a bundle is nonetheless compliant with Eircom's obligation not to cause a margin squeeze. Such an increase would need to be supported by robust evidence of increased customer lifetimes for that bundle.

5.159 ComReg has to take into account that the MST is a test of whether an OAO would be able to duplicate profitably an Eircom bundle or not. Hence the customer lifetimes of most interest are those of OAOs.

ComReg's Preliminary View

5.160 ComReg is of the preliminary view that where a particular bundle fails the MST, ComReg will consider, whether as a result of increased customer lifetimes such a bundle is nonetheless compliant with Eircom's obligation not to cause a margin squeeze. Such an increase would need to be supported by robust evidence of increased customer lifetimes for that bundle.

Competitive assessment

5.161 ComReg considers that there are a number of aspects that are appropriate to take into account when assessing each bundle in its competitive context. These aspects will include commercial or strategic reasons for the bundled offer; the duration and scope of the bundled offer; whether the pricing of the bundle in question is likely to have an appreciable effect on existing competitors and potential market entrants; and medium-to-longer term implications for retail pricing and consumers.

5.162 As part of that competitive assessment, ComReg will consider the number of customers on the bundle and the importance of that bundle to the market. In addition, ComReg will consider all available information to hand in order to assess the impact of below cost selling of a bundle on competing operators and the ability of entrants to enter/remain in the market(s) and promote sustainable competition in the medium-to-long term.

ComReg's Preliminary View

5.163 ComReg considers that it is proportionate to undertake a competitive assessment before a bundle is found to be in breach of the obligation not to cause a margin squeeze.

Q. 13 Do you agree or disagree with ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness in section 5.11? Please give a detailed response with supporting data where appropriate to support your view.

5.12 Other possible options for revisions to the MST

5.164 ComReg has considered a number of potential scenarios which may impact whether the MST needs to be revised. Each of these scenarios/circumstances is discussed in turn below including ComReg's preliminary views on each:

When the bundle is in response to a competitor's bundle

5.165 ComReg believes that if entrants knew that Eircom could respond to entry by dropping prices below efficient cost, this would increase the risk that the entrant would not be able to recover its fixed costs, and might therefore preclude or deter efficient entry. Furthermore, as noted in paragraph 5.43, ComReg does not consider it appropriate to exclude sunk costs from the MST.

5.166 The MST has a clear underlying logic: if Eircom's pricing does not cover its ATC (at the portfolio level in the Urban Area and Regional Area 1 and at the bundle-by-bundle level in Regional Area 2) it is reasonable to assume, subject to the outcome of the complementary competitive assessment, that an efficient rival would also not be covering its full costs — since Eircom has economies of scale and scope within the fixed sector that others are unlikely to be able to match. Other operators' ability to compete with Eircom would therefore be constrained, their incentives to enter would be weakened, and their ability to establish themselves as sustainable retail competitors in the longer term could also be hampered.

ComReg's Preliminary View

5.167 ComReg considers that the MST should not change when a bundle is claimed to be a response to a competitor's bundle. However, the complementary competitive assessment would consider the impact of the bundle on competition that would include the promotion of sustainable competition and the likelihood of any potential foreclosure and associated consumer harm.

A different test for when a bundle is found unreasonable post launch

5.168 ComReg considers that a different test should not apply post-launch if a bundle is found to be unreasonable. ComReg considers it more proportionate to undertake a case-by-case assessment of the bundle to determine the cause of the bundle failing the MST (see paragraphs 5.151 - 5.163). As such, ComReg considers that a competitive assessment is most appropriate. If it is believed following this competitive assessment that no competitive harm will come from allowing Eircom to continue to offer the bundle, e.g., if consumer demand for the bundled offer is particularly weak relative to the standalone components, ComReg would likely not find the bundle to be unreasonable even though it is below cost.

ComReg's Preliminary View

5.169 ComReg is of the preliminary view that a different test should not apply post-launch if a bundle is found to be unreasonable.

The ability to 'bank' / carry forward past margins to use as future

discounts

- 5.170 ComReg does not consider it appropriate that Eircom be allowed to carry forward past margins on bundles, such that future bundles could avail of a discount using those 'banked' margins.
- 5.171 ComReg considers that to allow Eircom to do so could distort competition in the market. Eircom could build a defensive bank of available margins for a bundle which Eircom could then use when a competing operator tried to make a competing offer to that bundle. ComReg considers that the bundle should be reasonable at all times.
- 5.172 ComReg proposes that the assessment of bundles should be on a case-by-case basis and consider the likely future impact; consequently, taking into account past performance and profitability may not be a useful indicator of likely anti-competitive effects. ComReg notes that its approach is consistent with ex-post competition law where previously "banked" margins would not be considered as part of an assessment for a given specific financial period.

ComReg's Preliminary View

- 5.173 ComReg is of the preliminary view that margins cannot be "banked"/carried forward.

Promotions and promotional discounts

- 5.174 ComReg believes that a bundle should be reasonable at all times. In ComReg's view it would not make sense for promotions not to be subject to full regulatory controls. ComReg is of the opinion that just because a bundle is offered for a promotional period only does not automatically demonstrate that there is no potential harm to efficient competitors.
- 5.175 ComReg considers that the obligation not to cause a margin squeeze and all its facets still apply even if a bundle is only planned to be offered for a limited promotional period.
- 5.176 ComReg considers that a promotional discount could be considered to be reasonable if the cost of the promotional discount is covered over the average bundle customer lifetime. An alternative to this would be that the discount would need to be covered over the contract lifetime e.g. 12 month contracts for re-contracting customers.

ComReg's Preliminary View

- 5.177 ComReg is of the preliminary view that a bundle must be reasonable at all times and a promotional discount is considered reasonable if the cost of the promotional discount is covered over the average customer lifetime or the life of the contract.

Discretionary promotions/opt-ins

- 5.178 In relation to a bundle that allows new customers to avail of a discretionary/opt-in offer/discount, ComReg considers that it is proportionate to take into account the expected take-up of such bundles in the MST.

- 5.179 ComReg considers this approach to be reflective of the underlying replicability of the bundle — where it is anticipated that only a small percentage of new customers would actually avail of the offer — that the MST reflect the proportionate cost of that opt-in promotion. ComReg considers that this approach is consistent with that of a commercial operator, where a cost assessment of discretionary promotions may be offered to end-users which may have various degrees of take-up and therefore may not impact the overall profitability of that type of bundle.
- 5.180 However, it should be noted that the onus is on Eircom to ensure that a bundle at all times does not cause a margin squeeze and therefore Eircom should be mindful of its requirement not to cause a margin squeeze where the actual opt-in of customers is higher than anticipated (i.e., that the bundle after the actual cost of promotion is taken into account remains positive).

ComReg's Preliminary View

- 5.181 ComReg is of the preliminary view where it is anticipated that not all customers would actually avail of the offer that the MST reflect the proportionate cost of that opt-in promotion.

Q. 14 Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.

5.13 Retention offers/opt-ins

- 5.182 When a customer comes to the end of a fixed-term contract that customer is free to move to a different bundle or another service provider. However, the service provider may choose to offer the customer an incentive to remain on that bundle. While the service provider incurs a cost (or reduction in revenue) in making the retention offer it is generally recognised that the cost of keeping a customer is less than the cost of winning a new one. A retention or opt-in offer is an offer (i.e. discount) made by the service provider to a customer to stay on a bundle in return for extending its contract.
- 5.183 Retention offers are typically not used for all remaining customers on a bundle. Their chief use is for customers engaging with their supplier and the wider market to seek a better offer than they might currently be on. The cost of a retention offer incurred by Eircom needs to be included in the MST.
- 5.184 ComReg has considered two methods to gauge the costs of retention offers, the first being as and when the retention offers are made (e.g. an “*as and when*” method). The second being an up-front method which estimates the expected retention offer costs when a bundle is being planned for launch. We consider the two methods in turn in the following paragraphs.

Costing retention offers as they occur

- 5.185 The first option to cost retention offers is as they occur. Under this method, the average retention cost per customer per month is the cost of the retention offer multiplied by the proportion of customers on the bundle forecast to take up the retention offer divided by the new minimum contracted period in months. The formula to calculate the cost of retention offer would therefore be [(cost of the retention offer) x (proportion of customers on the bundle forecast to take up the offer)] / new minimum contracted period in months. The cost of this retention offer would be included with the other costs relevant to this bundle as calculated for the MST. This is similar to the existing approach, except that the period used as the divisor can be 42 months currently.
- 5.186 So, for example if 20% of the existing customers take up a retention offer (which costs Eircom €50 per customer) in return for extending their contracts by 12 months the monthly cost of the retention offer to be added to the other costs of the bundle would be $€50 * 0.20 / 12 = €0.83$. In this case 12 months after the end of the retention promotion the cost of the retention offer made to that group of customers would have been covered and would then fall out of the MST.

Costing retention offers at time of bundle launch

- 5.187 A second option to cost retention offers is to include estimated costs for this activity upfront at the pre-launch stage of the bundle's assessment. As part of the business plan for launching a new bundle an operator could estimate the probability of making a retention offer at some stage in the bundle life. These potential retention offers might then be costed and included in the business case pre-launch to determine if over the lifetime of the bundle the expected net present value of the proposed bundle is positive (i.e. that the bundle is viable). This would require Eircom to estimate retention offers and build these potential costs into bundles before they are launched. Eircom would then be free to make retention offers provided they are consistent with the original estimates and provided that bundles or portfolios, as required, are margin positive.
- 5.188 One difficulty with this approach is that retention offers tend to be made on an as-needed basis so it may be problematic to estimate their actual usage and take-up. Another point to consider is that it would assign possible future costs to the present. This might put an extra burden on Eircom when a bundle is launched and disproportionately restrict its pricing freedom and ability to compete.
- 5.189 It should be noted that the onus is on Eircom to ensure that a bundle at all times does not cause a margin squeeze. Therefore, Eircom should be mindful of its requirement not to cause a margin squeeze where the actual opt-in of customers is higher than anticipated and the cost of retaining those customers must be covered by revenue earned (i.e. that the bundle remains positive after the actual cost of promotion is taken into account). In this regard, Eircom must notify ComReg immediately if it believes that any bundle may not be so compliant.

ComReg's Preliminary View

5.190 ComReg is of the preliminary view that when a retention offer is proposed the MST should reflect the forecasted percentage of customers taking up the offer and it should be spread over the period of the contract extension (i.e. the “*as and when*” method). ComReg consider that this approach accurately reflects the underlying replicability of the bundle — where it is anticipated that only a certain percentage of customers would actually avail of the retention offer. By adopting this method the MST will reflect the forecasted cost for the relevant bundles on which retention offers are made, rather than applying an estimated cost that may not occur to all bundles at their launch.

Q. 15 Do you agree or disagree with ComReg's proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data where appropriate to support your view.

6 eir Sports

- 6.1 eir Sports (formerly Setanta Sports) is an unregulated service which offers sports content through a number of media to subscribers (Eir Vision, online, via an application, through Sky's set-top box, etc.). eir Sports has been made available for free to all Eircom retail fixed broadband subscribers including those in bundles, therefore we consider it an integral part of the broadband cost stack. For the avoidance of doubt, where eir Sports is included at no extra charge with standalone broadband, the combination is then considered a bundle. eir Sports has also been made free to eircom customers on select eir Mobile plans. We consider how this should be handled in section 6.4 on the appropriate subscriber base.
- 6.2 As bundles including broadband have to pass the NRT (and prospectively the MST) ComReg currently includes and proposes continuing to include the cost of eir Sports in its calculations. This applies to broadband sold singly as well. As noted by Oxera, "*the incremental costs of including this service should capture appropriate costs to ensure that a similar service can be replicated by OAOs.*"

6.1 Costs of eir Sports

- 6.3 ComReg considers that there are two methods to determine the appropriate costs of eir Sports to be included in the proposed MST assessment. The first is the wholesale price of eir Sports which Eircom charges other retailers, and the second is the 'net costs' (i.e. the total revenue generated by the service minus the cost incurred in providing the service).
- 6.4 A wholesale price could be inferred for access to eir Sports from Eircom's commercial agreements with other retailers. The wholesale price for eir Sports is driven by commercial negotiations between Eircom and the other retailers, with the outcome that there could well be varying wholesale prices. If another operator purchased eir Sports then they would be able to supply similar bundles to those offered by Eircom, this would ensure replicability. This approach while having a clear rationale, does present a number of practical and conceptual issues which dissuade ComReg from proposing to adopt this method.
- 6.5 On the practical side ComReg would need to gain sight of these commercial prices and the amount of subscribers availing of eir Sports across each retailer to generate a single wholesale price. The outcome would be a weighted average wholesale price. On average this price would ensure replicability however, for those other retailers whose negotiated price is above this level then absolute replicability would not be achievable. Another issue is what type of access has been arranged with each retailer – e.g. is it based on paying for access to all of that retailer's subscribers, or on a per subscriber basis, or is it a minimum threshold of subscribers.

- 6.6 The other consideration is that eir Sports is not a regulated service. In January 2016, the Competition and Consumer Protection Commission ('CCPC') cleared the acquisition by Eircom of Setanta Sports Channel Ireland Limited and certain assets and the business of Setanta Sports Hibernia S.à.r.l., from Setanta Sports Broadcasting Limited⁵⁸. It was the CCPC's view that the acquisition would not substantially lessen competition in any of the affected markets. Including a wholesale price for eir Sports in the products / bundles which Eircom offer would therefore needlessly increase the price which subscribers have to pay, and reduce Eircom's ability to compete even though Eircom has no SMP in this market. Finally and as noted by Oxera (section 5.5.2 of its report), OAOs may not need to replicate the exact bundle offered by Eircom to compete in the retail market. OAOs may instead choose to differentiate their offers both bundled and unbundled with other content – e.g. Netflix, Spotify, sports highlights, or other aspects of service.
- 6.7 The 'net costs' method determines the costs to be included by subtracting the total revenue generated from this service from the total costs incurred by Eircom in providing this service.
- 6.8 The residual amount (the net costs) is then recovered from the margin available from those Eircom subscribers (e.g. Eircom retail customers who are purchasing qualifying bundles/products with broadband). This method is similar to the approach adopted by Ofcom when including the costs of BT Sports in the VULA margin squeeze test⁵⁹. ComReg's preliminary view is that a 'net costs' approach should be adopted in respect of how eir Sports should be treated and it is on this basis that the remainder of this chapter is drafted.
- 6.9 As Oxera states (section 5.5.2 of their report) the costs of including eir Sports with Eircom retail broadband "*is equal to the total costs of eir Sports less the revenues earned from other sources i.e. the 'net costs' and can be thought of as a proxy for the incremental costs incurred by Eircom to supply eir Sports in bundles*". With the inclusion of eir Sports' net costs in Eircom bundles containing broadband ComReg is concerned that these bundles will continue to pass the proposed Margin Squeeze Test, and therefore be replicable by OAOs.
- 6.10 ComReg has identified the following two sets of costs which need to be considered:
- 1) Acquisition cost of Setanta Sports; and
 - 2) On-going costs, in particular sports rights (content)
- 6.11 ComReg views these categories of costs as being sufficiently dissimilar to merit different treatment, which is discussed in more detail later in this chapter.
- 6.12 Without purchasing Setanta Sports Eircom would not have incurred the associated acquisition costs. As the reason for the acquisition was to make Eircom broadband more attractive to subscribers of that service, then the acquisition costs need to be recovered from Eircom broadband margins.

⁵⁸ <http://ccpc.ie/enforcement/mergers/merger-notices/m15074-eir-setanta>

⁵⁹ Ofcom, 'Fixed Access Market Reviews: Approach to the VULA margin', 19 March 2015.

6.13 On-going costs are all other costs incurred in providing this service. These costs equally apply to both Eircom broadband customers and other non-Eircom broadband customers. In its report Oxera says the “*net cost approach takes into account various commercial agreements that Eircom has to supply eir Sports.*” Commercial agreements may change over time e.g. the revenue from these subscribers may go up as well as down. This needs to be taken account of in determining the costs of eir Sports to be covered by Eircom broadband.

6.2 Appropriate time period to recover costs

6.14 ComReg wants to ensure that the net acquisition costs of eir Sports are recovered in full. A number of potential recovery periods are possible, Oxera consider that the acquisition costs be recovered over the lifetime of the rights which Eircom inherited when it bought Setanta Sports, on the assumption that the main driver of the acquisition was those exclusive rights. However, Oxera recognise that a period similar to that used by Ofcom for BT Sports (60 months)⁶⁰ may also be valid but note that Eircom bought an existing platform and did not have to establish a platform as BT did.

6.15 Eircom has suggested a number of options to derive a recovery period for the acquisition to ComReg, including using their payback period, or taking the excess margins on broadband products and bundles with broadband could be used against the acquisition costs to shorten the recovery period.

6.16 ComReg notes that a period of 96 months is used in the retail margin squeeze DCF model for CGA and NGA broadband (e.g. the 2013 NGA Decision), which is used to determine the payback period needed for new entrants to the broadband market.

6.17 ComReg’s initial view at the time of the inclusion of eir Sports for free in qualifying bundles/products (May 2016), was to assess the acquisition costs over the lifetime of the contents which were novated to Eircom at the time of the acquisition – as ComReg viewed the access to content as the largest part of the acquisition costs. However, this approach places little value on other assets which Eircom also acquired – fixed assets, customer contracts, customer database, management expertise, etc. Eircom disagreed with our approach, its view was that Setanta was bought as a going concern and provided Eircom with a platform to provide content over the long-term. Eircom subsequently informed ComReg that content rights are negotiated more frequently than was initially understood to be the case.

6.18 Given the various options which are available, ComReg is interested in receiving feedback from stakeholders, on what is considered an appropriate period to recover the acquisition costs as part of this consultation, noting that content is an unregulated service. This is addressed in more detail in the next section - 6.3 below.

⁶⁰ https://www.ofcom.org.uk/_data/assets/pdf_file/0015/72420/vula_margin_final_statement.pdf

- 6.19 For on-going costs, these are the incremental costs that could be avoided if eir Sports losses were no longer to be covered by eir broadband. These include content costs. Content licences, particularly in sports, have a limited life. ComReg proposes that content costs should be associated with the time period in which the content has value. In effect this means that the cost of access to content over one season e.g. the hurling league would be recovered over that period, multi-year content rights would be spread over the period for which those rights are held.

Q. 16 What are your views on the period over which Eircom needs to recover the on-going content costs of eir Sports, should the period be limited to the duration of the rights?

6.3 Recovery of acquisition cost

- 6.20 The acquisition cost of eir Sports is known to ComReg. Based on current Eircom retail broadband subscriber numbers the acquisition cost on a 'per broadband customer per month' basis can be calculated. A mechanism to deal with changes in the number of Eircom broadband customers is discussed later.
- 6.21 Eircom has supplied ComReg with a model (an Excel spreadsheet) for calculating the amount required per broadband customer per month to recover the acquisition costs of eir Sports over various periods.
- 6.22 The first approach identifies the maximum payback period needed based on the original Setanta Sports projected earnings before interest, taxes, depreciation and amortisation for 2017. For each month until the maximum period (∞ months) is reached then this cost will be included in the model (therefore part of the relevant bundle/product's cost stack).
- 6.23 A second approach could be based on accumulating margins from relevant qualifying bundles/products, which would be added together annually. So if the acquisition cost was €10 million, and the accumulated margin was €5 million in the first year, and €5 million in the first six months of year two, then the acquisition cost would be considered paid back, and not part of the model after that period.
- 6.24 Under both approaches the model calculates the net present value of the acquisition based on net cost and cash equivalent paid, adjusted for projected cash earnings or outgoings discounted as appropriate. It then calculates a payment amount required per Eircom broadband customer per month to recover that value over an entire period.
- 6.25 For retail notifications, which contain eir Sports, submitted under the Bundles Decision, the maximum payback period is currently used. Presently, our preference is to continue using a defined period for the clarity and consistency it provides.

- 6.26 The second option would require significant monitoring and a reconciliation with the amount of margin available from only those qualifying bundles/products on a monthly basis, as any other promotions/discounts offered in the period for those qualifying bundles/products will reduce this margin. The proposal in Chapter 7 for a regular monitoring statement could alleviate concerns in this regard, and make this second approach as acceptable as the defined period approach. The counter-factual of what may have occurred had the content not been offered may also need to be considered in such a calculation which would be a difficult task to undertake.
- 6.27 More fundamentally, while the second option (accumulated margins) may work in the Urban Area, and in Regional Area 1 under their portfolio tests this approach may not work with the proposed bundle by bundle assessments in Regional Area 1 and 2 (outlined in Chapter 5 of this Draft Decision). This approach may also potentially allow subsidies to be transferred between areas e.g. from Regional Area 2 to the Urban Area or Regional Area 1 or vice versa. Therefore, the inclusion of qualifying bundles into a total national portfolio would disregard the proposed separate assessments – i.e. in Regional Area 2 this approach could avoid the bundle including the full cost stack relevant to bundles offered there. Therefore for consistency across the MST assessment of bundles (as well as noting that in Chapter 5 ComReg again maintains its view that Eircom should not be allowed to carry forward “banked” margins) ComReg is not proposing to use this method.
- 6.28 ComReg therefore proposes to use the maximum payback period as the appropriate period for recovery of the acquisition cost. ComReg is of the preliminary view that a reasonable range for the maximum payback period which is between 60 months (as per Ofcom) and 96 months (the DCF model) as discussed in section 6.2.

Q. 17 What are your views on the period over which Eircom needs to recover the acquisition costs of eir Sports? Should this be a set period or should Eircom be allowed to use excess broadband margins, if available, to shorten the set period?

6.4 Appropriate subscriber base

- 6.29 The appropriate subscriber base is an important factor in determining the ‘per month’ cost of eir Sports to include in relevant bundles. ComReg has considered the following options: only those subscribers who use or have used eir Sports; all Eircom retail broadband subscribers; including subscribers on mobile plans to whom eir Sports has also been made available in addition to Eircom retail broadband subscribers.
- 6.30 The user option would assign the costs of eir Sports to a particular bundle based on the subscribers (and possibly their usage) on that bundle who have accessed it. This method would need to overcome certain practical issues which include the availability of robust usage data over time on a bundle basis. The available content which would more than likely vary from month to month, may also lead to highly variable user (and usage) numbers across the relevant bundles, and this could lead to those bundles switching from being compliant to not under the bundles MST. This volatility may be reduced somewhat through the use of less frequent review of user (and usage) numbers.

- 6.31 On an interim basis, the subscriber base used to determine the ‘per month’ cost to include in relevant bundles has been the total number of all Eircom retail broadband subscribers in that month who can access eir Sports. ComReg is not aware of any technical restriction on Eircom broadband subscribers receiving eir Sports. As Oxera notes (section 5.5.2 of their report) *“Recovering the costs over the entire broadband base would be consistent with the idea that eircom’s investment in eir Sport has been made to support its broadband base”*, and conclude by recommending that they *“consider that it is appropriate to recover the net costs of eir Sport from all eircom broadband subscribers, who, technically, can access eir Sport using eircom’s broadband service.”*
- 6.32 ComReg agrees with the recommendation of Oxera that the relevant subscriber base over which to spread the net costs of eir Sports is all Eircom retail fixed broadband subscribers who can technically get access to eir Sports (bundled and standalone subscribers).
- 6.33 Recently, eir Sports at no extra charge has been extended to subscribers on selected unregulated mobile plans (i.e. not in bundles). This extension of eir Sports availability has not led to a change in the net costs of eir Sports as no revenue is being generated by the addition of these subscribers. Potentially an argument could be made that these non-broadband subscribers should be included in the denominator for the net costs. This would spread the costs of eir Sports over a bigger base and therefore reduce the cost to be included on relevant bundles.
- 6.34 ComReg is of the preliminary view that to allow mobile subscribers to be added to the denominator would in effect be a cross-subsidy from an unregulated service to a regulated one (into Eircom retail fixed broadband), as this would reduce the net costs to be recovered from both bundled and standalone broadband subscribers. ComReg is of this view, as the addition of these mobile subscribers would increase the divisor (e.g. the amount of subscribers) which in turn would decrease the costs which need to be recovered from bundled and standalone broadband subscribers.

ComReg’s Preliminary View

- 6.35 ComReg is of the preliminary view that allowing mobile subscribers to be included in the divisor would not be appropriate as it would allow a cross-subsidy from an unregulated service to a regulated one. With regards to the user option, ComReg is of the preliminary view that advancing this method has a number of limitations to it which could make the practical implementation difficult. Therefore, ComReg is of the preliminary view that the appropriate subscriber base over which to recover eir Sports are all Eircom retail fixed broadband subscribers.

Q. 18 What are your views on the appropriate subscriber base over which Eircom needs to recover the costs of eir Sports? Are there any methods which you view as being more suitable than ComReg’s preliminary view? In your response please outline any practical issues which should be considered if such a method were to be implemented.

6.5 Recovery of on-going costs (including content)

- 6.31 There are various methods of ensuring that the on-going costs incurred by Eircom retail broadband from eir Sports are recovered. One method would be to include content and other on-going costs in the discounted cash flow / monthly payment model being proposed for the eir Sports acquisition costs. Another option is to base the costs to be recovered from Eircom retail broadband subscribers in any year on the on-going costs (including content) and number of subscribers in that year.
- 6.32 ComReg's preference is to use the in-year on-going costs and the number of subscribers in that year. ComReg's current view is that the in-year approach is aligned with a content driven service and secondly would be more practical to review/update for ComReg and Eircom.

6.6 Annual review of eir Sports costs

- 6.33 There are several variables that affect the costs of eir Sports that need to be borne by Eircom retail broadband bundles / products. These include the number of subscribers to Eircom retail broadband, the costs of content, other on-going costs, the contribution from non-Eircom subscribers of eir Sports and the weighted average cost of capital (WACC) to be used in discounted cash flow and monthly payment calculations.
- 6.34 ComReg is aware of the need to ensure that the costs of eir Sports for qualifying Eircom broadband bundles/products are covered and allow replicability while Eircom has a need to have some certainty for the monthly costs it needs to apply in the proposed MST calculations.
- 6.35 ComReg is therefore proposing, for the foreseeable future, an annual review of eir Sports costs with updates being made to the monthly acquisition and on-going costs per Eircom broadband subscriber being made. This would ensure that changes in the number of Eircom broadband subscribers, changes in the cost of content, and changes in other on-going costs are taken account of. Similarly, if a major event occurs at any time, such as a large investment in new content or changes to Eircom's commercial arrangements, an update to the cost model could be made to reflect the changed circumstances.

ComReg's Preliminary View

- 6.36 In the Urban Area, Regional Area 1, and Regional Area 2, ComReg proposes that the acquisition and on-going costs for eir Sports should be included in all bundle by bundle and portfolio tests.

Q. 19 Do you agree with ComReg's proposed treatment of eir Sports in the Margin Squeeze Test? If you consider another method would be more suitable can you please give details of such a method whilst being aware that content is an unregulated service.

7 Pre-launch and post-launch assessment of Bundles

7.1 Overview

7.1 ComReg considered in the 2013 Bundles Decision that the requirement on Eircom to obtain pre-clearance⁶¹ from ComReg prior to launching any new or revised bundles containing Retail Fixed Network Access was necessary in order to minimise the risk of non-compliant bundles entering the market. Consequently, pursuant to the Bundles Decision:

- Eircom must notify and obtain approval (see paragraph 4.6 of Decision Instrument: Market 1 in the Bundles Decision) for all new and revised bundles that include RFNA at least five working days before launch; and
- Where a bundle fails the NRT and where ComReg considers that bundle to be non-compliant with the obligation not to unreasonably bundle services (as further specified in the present Decision), Eircom must notify ComReg within ten working days as to whether it proposes to withdraw/modify that bundle. Once it is informed of ComReg's preliminary view that a particular bundle is non-compliant, Eircom must not add any customers to the relevant bundle until further notice by ComReg. Where Eircom fails to notify ComReg of proposals to modify or withdraw the relevant bundle(s) within the stipulated ten-day period, or where proposals submitted are considered by ComReg to be insufficient to remedy the non-compliance, ComReg may decide to use its existing statutory enforcement powers for the purposes of enforcing compliance with the obligation not to unreasonably bundle services.

7.2 An important consideration in applying a MST is whether such pre-notification and post-launch requirements continue to be required.

7.2 Notification and pre-clearance considerations

7.3 Since publication of the 2013 Bundles Decision, Eircom notified ComReg of approximately 40 retail amendments per year — these covered a range of offers of multi-play bundle combinations for residential and business customers. Based on the notifications submitted to date and continued monitoring of margins of selected bundles post launch, it appears that Eircom is sufficiently aware of its requirements/obligations in relation to retail amendments. While the proposed MST has slightly different nuances to the current NRT, ComReg considers that from a regulatory burden perspective they are both relatively similar in order for Eircom to demonstrate compliance.

7.4 ComReg notes that respondents to the 2014 Consultation were largely in favour of the pre-notification requirement currently set out in the 2013 Bundles Decision for the NRT. ComReg considers that such a pre-notification period may minimise the risk of non-compliant bundles entering the market.

⁶¹ See paragraph 3.19 of the 2013 Bundles Decision.

- 7.5 Under this approach prior to making a new or revised bundle available for offer or sale, Eircom must furnish ComReg with a detailed written submission demonstrating the bundle's compliance with the obligation not to cause a margin squeeze.
- 7.6 Upon receipt of the submission, ComReg will review the submission and within five working days communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised bundle — such approval will not be unreasonably withheld by ComReg, subject to the submission being to the standard required by ComReg. Where the submission is not to the required standard, ComReg will restart the review period once the submission has been provided to the standard required (which at the very least is that the paperwork and model are in agreement, e.g. the value of the promotion in the model matches that in the paperwork). Eircom will not be permitted to launch any new or revised bundle without having received such prior approval from ComReg⁶². For the avoidance of doubt, it should be noted that the making available of a promotion or discount to end-users which affects an existing bundle, or any other change to the price or components of an existing bundle, shall be deemed to constitute the making available of a “revised” bundle.
- 7.7 The granting of approval does not amount to a definitive finding by ComReg that a particular bundle is compliant, or will remain compliant in the future, with the MST — in particular given that the actual outturn of a specific bundle may ultimately be different from that initially envisaged, such that the relevant bundle may not in fact pass the MST.
- 7.8 Eircom is required to ensure that all bundles remain compliant with its obligation not to cause a margin squeeze at all times (pursuant to a final decision, if appropriate, following this consultation). ComReg proposes to introduce a requirement for Eircom to submit a monitoring statement on a quarterly basis, this is discussed in detail later in this chapter.
- 7.9 It should be noted that by ComReg providing Eircom with prima facie approval it is strictly without prejudice to ComReg's right to take action (whether pursuant to a final decision and/or pursuant to any of its relevant statutory enforcement powers) in respect of any bundle that it believes may be non-compliant with Eircom's regulatory or competition law obligations.
- 7.10 Any submission made to ComReg shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised bundle complies with the obligation not to cause a margin squeeze, in particular, with the MST set out in the Decision Instrument. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The MST Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a promotion or discount to End-Users which affects an existing bundle, or any other change to the price or components of an existing bundle, shall

⁶² For the avoidance of doubt, it should be noted that the making available of a promotion or discount to end-users which affects an existing bundle, or any other change to the price or components of an existing bundle, shall be deemed to constitute the making available of a “revised” bundle.

constitute the making available of a revised bundle within the meaning of the Decision Instrument.

7.11 For bundles in the market, it should be noted, for the avoidance of doubt, that Eircom is under an ongoing obligation to ensure at all times that it meets its regulatory obligation not to cause a margin squeeze. Eircom must notify ComReg immediately, together with supporting evidence, if it believes an existing bundle may be causing a margin squeeze. Also, if requested by ComReg at any time, Eircom must provide such data as may be requested by ComReg for the purpose of verifying Eircom's ongoing compliance with the obligation not to cause a margin squeeze. In this submission, Eircom should also provide any other relevant information it believes is required so that ComReg can make an informed decision as to whether the bundle is compliant with Eircom's regulatory obligations, in particular its obligation not to cause a margin squeeze.

7.12 As outlined in ComReg the 2014 Consultation an alternative approach, "self-certification" of new or revised bundles was considered. Under this alternative approach Eircom would be obliged to demonstrate that it has undertaken a form of self-compliance to ensure, ahead of launching a new or revised bundle, it meets Eircom's obligations not to cause a margin squeeze.

7.13 Respondents were not supportive of this option, and Eircom was indifferent to it as either way the same amount of work would be undertaken by Eircom. ComReg is interested in receiving views from stakeholders on whether this approach should be implemented.

7.14 ComReg considers that in light of the factors set out in paragraph 7.3 that it may be sufficient to require Eircom to simply notify ComReg of new or revised bundles. In other words, Eircom would be required to provide the details of the retail amendment (e.g., relevant bundle name, promotions details, etc.) of the new or revised bundle to ComReg. Such notifications would not require ComReg's pre-clearance for launch. However, notifications would need to include a unique reference such that the bundle could be monitored ex-post.

7.15 For self-certification, ComReg proposes that Eircom would be required to demonstrate its ongoing compliance in respect of at least one retail amendment (chosen by ComReg) every three months. Where there appears to be issues with such retail amendments, subject to the process outlined in paragraphs 7.19 - 7.20, ComReg may require Eircom to revert to a five-day pre-notification and pre-clearance requirement.

7.16 For the avoidance of doubt, Eircom would be required to maintain records which demonstrated that a MST was undertaken prior to launch and that based on the reasonableness of the assumptions used that no margin squeeze issues were raised.

7.17 Under a self-certification approach paragraphs 7.10 - 7.11 would still apply.

ComReg's Preliminary View

7.18 ComReg is of the preliminary view that the pre-clearance requirement is appropriate. Eircom must notify ComReg of all new and revised bundles at least five working days before launch and obtain prima facie approval from ComReg for their launch. ComReg would also welcome views on the alternative self-certification approach.

Q. 20 Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised bundle? Please provide detailed reasoning to support your view. ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance.

7.3 Post-launch considerations

- 7.19 Where, through its ongoing compliance with the obligation not to cause a margin squeeze, a bundle is found to not be compliant with the MST post-launch, Eircom shall notify ComReg immediately of such an occurrence. If requested by ComReg, Eircom shall provide such data as may be required by ComReg to make an informed decision as to whether Eircom is maintaining its ongoing compliance with the obligation not to cause a margin squeeze or not.
- 7.20 ComReg may decide to use its existing statutory enforcement powers (or other relevant statutory powers) for the purposes of ensuring compliance with the obligation not to cause a margin squeeze. For example, and without prejudice to ComReg's power to use whatever approach it deems appropriate in a particular case, this could potentially involve civil enforcement under Regulation 19 of the Access Regulations, criminal enforcement under Regulations 13 and/or 19 of the same Regulations, and/or the issuing of urgent directions under Regulation 18 of the Access Regulations (in conjunction with Regulations 12(2) and 13(8) of the Framework Regulations).

ComReg's Preliminary View

- 7.21 ComReg is of the preliminary view that where a bundle fails the MST and where Eircom considers that bundle to be non-compliant with the obligation not to cause a margin squeeze (as further specified by a final decision following this consultation, if appropriate), Eircom must notify ComReg immediately of such an occurrence. ComReg may decide to use its existing statutory enforcement powers for the purposes of enforcing compliance with the obligation not to cause a margin squeeze.

Q. 21 Do you agree or disagree with ComReg's proposed approach where an Eircom bundle is considered to be non-compliant with its obligation not to cause a margin squeeze? Please explain your response and provide detailed information to support your view.

7.4 Monitoring statement

- 7.22 Eircom is under an obligation to monitor the margins on the bundles which they are supplying or offering for sale in the market. Currently bundles are updated with more recent information on an ad-hoc basis, or when a promotional offer or discount is being proposed through the retail notification process. Other than these occurrences ComReg does not have sight of the performance of most bundles on a regular basis. Further to this, ComReg's pre-launch assessment of retail notifications is based on Eircom's forecast estimates of take-up,

margins and the base of customers to spread promotions over. The eventual outcome for these may vary compared to Eircom's forecasts.

- 7.23 To understand the margin performance of bundles on an on-going basis, ComReg proposes that Eircom provide ComReg with a quarterly bundle monitoring statement for actual performance compared to the original projections provided. The purpose of this statement is to provide sufficient visibility to show that bundles are covering their costs over their lifetime.
- 7.24 ComReg views that this frequency of update strikes a balance between not placing too high a regulatory burden on Eircom and ensuring that actual bundle performance is being updated with sufficient regularity.

ComReg's Preliminary View

- 7.25 ComReg is of the preliminary view that the introduction of this monitoring statement will ensure that a complete picture of quarterly bundle performance is available to ComReg, and that over the lifetime of a bundle the bundle covers its costs.

Q. 22 Do you agree or disagree with ComReg's proposed approach to introduce a monitoring statement? Do you agree or disagree with ComReg's proposed approach to require this statement on a quarterly basis? Please explain your response and provide detailed information to support your view.

8 Regulatory Impact Assessment

8.1 Introduction

- 8.1 A Regulatory Impact Assessment ('**RIA**') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy and analyses the impact of regulatory options on different stakeholders.
- 8.2 ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 and 07/56a. Our approach to conducting a RIA, takes into account the RIA Guidelines⁶³ issued by the Department of An Taoiseach in June 2009 under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002 (as amended) requires ComReg to comply with Ministerial Policy Directions. The Policy Direction issued in February 2003⁶⁴ requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.
- 8.3 In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions e.g., imposing obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. Our ultimate aim in conducting a RIA is to ensure that all measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. Preliminary decisions are likely to vary in terms of their impact. If a preliminary decision appears to have relatively low impact upon initial investigation then ComReg may carry out a lighter RIA in respect of that decision.

8.2 Steps for assessing regulatory options

- 8.4 In assessing the available regulatory options, ComReg's approach to the RIA follows five steps:

- Step 1: describe the policy issue and identify the objectives;
- Step 2: identify and describe the regulatory options;
- Step 3: determine the likely impacts on stakeholders;
- Step 4: determine the likely impacts on competition; and
- Step 5: assess the likely impacts and choose the best option.

⁶³ See "Revised RIA Guidelines How to Conduct a Regulatory Impact Analysis", June 2009. http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf

⁶⁴ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

8.5 The principles applied when assessing and selecting remedies are:

- Does current regulation achieve objectives as effectively as possible?;
- Are changes to regulation required to improve regulation in these markets?;
- The impact of the proposed changes; and
- Assessing the impacts and choosing the best option.

8.3 Step 1 - Describe the policy issue and identify the objectives

8.6 As the FACO, WLA, and WCA Markets already provide for price control obligations for the avoidance of a margin squeeze the available regulatory options in the current RIA relate to further specification of that obligation and further specifying the transparency obligations. The WCA Market Analysis identified exchanges (those in the Urban WCA Market) which prospectively should no longer be subject to regulation.

8.7 In setting out its Draft Decision, ComReg has had regard to its relevant statutory functions, objectives and obligations, as set out in section 12 of the Communications Regulation Act 2002 (as amended), Regulation 16 of the Framework Regulations⁶⁵ and in Regulations 8 and 13 of the Access Regulations⁶⁶, which are discussed in detail below.

8.3.1 Regulation 8 of the Access Regulations

8.8 Regulation 8(6) of the Access Regulations provides that:
Any obligations imposed in accordance with this Regulation shall –

- be based on the nature of the problem identified,*
- be proportionate and justified in light of the objectives laid down in section 12 of the Communications Regulation Act of 2002 (as amended) and Regulation 16 of the Framework Regulations, and*
- only be imposed following consultation in accordance with Regulation 12 and 13 of the Framework Regulations.*

Based on the nature of the problem identified:

8.9 There is a significant risk that Eircom could cause a margin squeeze such that the space between the retail prices of Eircom bundles and the prices of the underlying wholesale inputs that OAOs rely on for their bundles could be too narrow for efficient OAOs to operate profitably. If this occurred, it is quite likely that OAOs would not be in a position to match or replicate Eircom's retail bundle offers. This could prevent OAOs competing effectively to the detriment of consumers in the long-run.

8.10 See paragraphs 3.1 - 3.50 for a further discussion of the points above.

⁶⁵<http://www.comreg.ie/fileupload/File/S.I.%20No.%20333%20of%202011%20Framework%20Regs%20Final.pdf>

⁶⁶<http://www.comreg.ie/fileupload/File/S.I.%20No.%20334%20of%202011%20Access%20Regs%20Final.pdf>

Proportionate and justified:

8.11 ComReg considers that effective upstream regulation will permit the removal downstream of the current NRT in the retail Fixed Voice Access market.

8.12 See paragraphs 3.1 - 3.50 for a further discussion of the point above.

8.3.2 Section 12 of the Communications Regulation Act 2002 (as amended)

8.13 ComReg's objectives in relation to the provision of electronic communications networks, electronic communications services and associated facilities, as set out in Section 12 of the Communications Regulation Act 2002 (as amended), are:

- (i) to promote competition;*
- (ii) to contribute to the development of the internal market; and*
- (iii) to promote the interests of users within the Community*

8.14 In particular, in relation to this RIA, in so far as the promotion of competition is concerned, ComReg shall take all reasonable measures:

- *ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;*
- *ensuring that there is no distortion or restriction of competition in the electronic communications sector; and*
- *encouraging efficient investment in infrastructure and promoting innovation.*

Promote competition:

8.15 Eircom as a vertically-integrated operator which competes downstream with bundled retail products could exert its upstream SMP by causing a margin squeeze by decreasing the Eircom retail bundle price or increasing one or some of the underlying wholesale costs — to the extent that an OAO's margin would not be sufficient to cover its costs.. Such a margin squeeze could be used by Eircom to reinforce its SMP upstream and/or foreclose competition downstream. Eircom could implement a margin squeeze to the extent that OAOs could no longer profitably supply the bundled service in the long-run.

8.16 The MST is designed to ensure that Eircom is not able to leverage vertically or diagonally from the upstream market into the retail market when combining wholesale inputs which are sold/offered in a bundle at the retail level. This should provide comfort to OAOs (who purchase wholesale inputs from Eircom) in making commercial decisions regarding launching and promoting their own retail bundles.

Encouraging efficient investment in infrastructure and promoting innovation:

- 8.17 In both the Urban Area and Regional Area 1 one of the components of the MST reflects the actual use (updated quarterly) by OAOs of Eircom's wholesale inputs (i.e., the WAWNI) in these areas. A lower WAWNI allows Eircom to reduce the retail price of its bundles as it effectively has more margin in the MST. This could result in overall cheaper bundles to the benefit of end-users. This in turn should encourage Eircom to promote the use of LLU/VUA by OAOs in order to further reduce the WAWNI. The use of separate WAWNI values will more accurately reflect the choice made by OAOs in serving customers in the Urban Area and Regional Area 1.
- 8.18 In Regional Area 2 (i.e. outside the Urban Area and Regional Area 1), the MST is based on FACO and WCA or a bundled WLA/WCA product. OAOs in Regional Area 2 are currently relying on FACO and WCA inputs to a notable extent.. This would also allow for the emergent use of LLU as those areas will not be included in the Regional Area 1 until OAOs satisfy the Regional Area 1 criteria (provided in Annex 2) for inclusion in Regional Area 1. This would not occur until OAOs (or an OAO) using LLU have reasonable coverage (i.e. they must be capable of serving a reasonable number of premises in that exchange area) and have a reasonable market share of those customers.
- 8.19 In particular, in relation to this RIA, in so far as the promotion of the interests of users within the community is concerned, ComReg shall take all reasonable measures:
- encouraging access to the internet at reasonable cost to users
- 8.20 ComReg's proposals on promoting competition should result in bundles prices (including internet access) being competitive and therefore more likely to be of reasonable costs to user.

Promoting the interests of users within the Community:

- 8.21 Safeguarding efficient competitors from a possible margin squeeze by the SMP operator in respect of where wholesale inputs are required by OAOs in order to replicate an Eircom retail bundle should help to facilitate greater regulatory certainty for longer-term competitive entry and expansion. This should have a positive impact on the price, choice and quality of services ultimately delivered to end-users.

8.3.3 Regulation 13 of the Access Regulations

- 8.22 Regulation 13(1) of the Access Regulations provides that ComReg may:

impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end-users.

8.23 The requirements set out in Regulation 13(1) of the Access Regulations have been addressed in the WLA/WCA Consultation Document. This includes an obligation on Eircom not to cause a margin (price) squeeze.

8.24 Regulation 13(3) of the Access Regulations provides that:

The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it imposes under this Regulation serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard, the Regulator may also take account of prices available in comparable competitive markets.

8.25 Each of these key objectives outlined in Regulation 13(3) are discussed briefly below.

Promote efficiency:

8.26 Efficiency can be thought of in a number of ways including:

- Allocative efficiency: where prices of different products result in an optimum allocation of resources to consumers;
- Productive efficiency: the cost of producing the products is minimised; and
- Dynamic efficiency: the efficiency of investor and customer behaviour over time.

8.27 The MST provides certainty for OAOs that Eircom cannot engage in a margin squeeze. The provision of the MST ensures that Eircom and OAOs competing in the market will focus on productive and dynamic efficiencies in order to attain a competitive advantage. Firms striving for competitive advantage should ensure that in the long-run consumers benefit. Such benefits can take the form of lower prices, greater choice and product innovation.

8.28 The MST can take into account known future changes in wholesale/retail costs where these can be adequately verified (i.e., dynamic efficiency). As such, it allows Eircom to reflect in its pricing known future changes in prices/costs which are supported by robust evidence which should ultimately be to the benefit of the consumer. OAOs/entrants should also be able to factor known future changes in prices into their pricing decisions which should be to the benefit of end-users.

Promote sustainable competition:

8.29 Please refer to paragraphs 8.15 - 8.16 above for a detailed discussion on the impacts on competition.

Maximise consumer benefits:

8.30 Please refer to paragraph 8.21 above for a detailed discussion with regard to the benefits to end-users.

8.3.4 Regulation 16 of the Framework Regulations

8.31 While some of the main requirements/objectives of Regulation 16 of the Framework Regulations have already been addressed above as part of the discussion on Regulation 8 of the Access Regulations, Section 12 of the Communications Regulation Act 2002 (as amended) and/or Regulation 13 of the Access Regulations, set out below are some other key requirements associated with Regulation 16 which have not been addressed so far as part of those discussions.

Contributing to the development of the internal market (BEREC and European Union):

- 8.32 Once we receive responses to the consultation and we have considered our position in regard to those responses the draft measures contained in this document and the reasoning which the measures are based on will be notified to the European Commission. ComReg will take utmost account of any comments from the European Commission.
- 8.33 Further to Regulations 13 and 14 of the Framework Regulations, the draft measures will also be made accessible to the Body of European Regulators for Electronic Communications (“BEREC”) as well as other national regulatory authorities (“NRAs”) in other EU Member States.

Promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods:

- 8.34 The Net Revenue Test (‘NRT’) which was imposed pursuant to ComReg Decision D04/13 is used to assess whether or not Eircom is covering its total costs when it sells a bundle of services. ComReg considers that if there is appropriate wholesale regulation upstream that the NRT would no longer be required at the retail level. A well-defined MST at the wholesale level on an ex-ante basis could address the leveraging concerns which are currently addressed by the NRT. It is on this basis that ComReg is proposing to withdraw the obligations contained in D04/13, when the proposed obligation in this Draft Decision comes into effect.
- 8.35 This should ensure regulatory consistency and predictability following the coming into force of any decisions arising from this consultation.

Taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State:

- 8.36 As set out in detail in Chapter 4 of this document, we recognise that there may be different structural and competitive conditions between the Urban Area, Regional Area 1, and Regional Area 2. This differentiated treatment by areas that have different structural and competitive conditions was established in ComReg D04/13. Our proposed approach for the MST takes into account a differentiation of the price control between the various areas in order to address the relevant competition problem(s) in the particular areas.

8.4 Step 2 - Identify and describe the regulatory options

8.37 In relation to the further specification of the price control obligation not to cause a margin squeeze, the possible specification options for the MST, as an ex-ante MST include the following:

- Option 1: No MST for bundles is implemented;
- Option 2: The MST takes into account that Eircom including OAOs using its wholesale platform are facing more competition in certain areas;
- Option 3: The MST is conducted on various bases (i.e., a bundle-by-bundle and/or a portfolio test);
- Option 4: A lower cost standard for calls, line rental, and broadband retail costs and the overall appropriate cost standard for the MST;
- Option 5: The MST reflects a weighted average cost of the applicable wholesale input;
- Option 6 Allow on a case-by-case basis known future reductions in cost e.g., Mobile Termination Rates;
- Option 7 That the MST should use different cost standards for retail costs for broadband in the various areas;
- Option 8 Unregulated products and services will be included at LRIC cost standard. Cross-subsidisation is allowed from the regulated product/services to the unregulated services;
- Option 9a New/revised bundles must be pre-notified and pre-cleared with ComReg;
- Option 9b Eircom self-certifies that a new/revised bundle meets its obligation not to cause a margin squeeze;
- Option 10 If and when a bundle is causing a margin squeeze;
- Option 11a The net costs of Eir Sports should be included in qualifying bundles; and
- Option 11b The inferred wholesale charges for Eir Sports should be included in qualifying bundles.

8.5 Step 3 - Likely impacts on stakeholders

Option 1: No MST for bundles is implemented

8.38 Impact on Eircom:

- No impact on bundles including line rental; the net revenue test (i.e., the NRT) would continue to be required pursuant to RNA (Market 1b and 1c) as there would not be sufficient wholesale regulation to permit the removal downstream of the current NRT.

- Absent the NRT and assuming that a MST was not implemented, Eircom would be subject to the obligation not to margin/price squeeze only under competition law.

8.39 Impact on OAOs:

- In the absence of the NRT and assuming that the MST was not implemented an ex-post assessment would be required after any alleged anti-competitive practice had occurred and therefore such an assessment could be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair.

8.40 Impact on Consumers:

- No impact on bundles including line rental as the NRT would continue to be required pursuant to RNA (Market 1b and 1c).
- In the absence of the NRT and assuming that a MST was not implemented consumers could lose over the medium-to-long term due to potentially higher prices and reduced innovation following OAO exit.

Option 2: The MST takes into account that Eircom including OAOs using its wholesale platform are facing more competition in certain areas

8.41 Impact on Eircom:

- It would allow Eircom more pricing flexibility in certain qualifying exchanges (i.e., the Urban Area, and Regional Area 1) in recognition of the greater competition in those areas. See paragraphs 4.1 - 4.32 for further information.

8.42 Impact on OAOs:

- Eircom could have more price flexibility within the Urban Area and Regional Area 1. More flexibility in retail pricing of bundles for Eircom should result in greater competition for OAOs.
- In Regional Area 2, the proposed application of the MST takes into account the prospective continuation of low levels of competition at the wholesale level. The MST in this area ensures that OAOs can compete at a bundle level with Eircom.

8.43 Impact on Consumers:

- Providing pricing flexibility in both the Urban Area and Regional Area 1 to Eircom should increase the level of competition in those areas. This should result in lower prices and more choice for consumers.
- In Regional Area 2, where the existence of alternative infrastructure-based competition from OAOs is almost non-existent, the MST allows the promotion of sustainable competition by OAOs/entrants to the benefit of consumers in terms of price, choice and quality of services available over the medium to longer-term.

Option 3: The MST is conducted on various bases (i.e., a bundle-by-bundle

and/or a portfolio test)

8.44 Impact on Eircom:

- In the Urban Area, a single stage portfolio test is reflective of the increased competition in that area and therefore allows Eircom flexibility to price differentiate individual bundles within the aggregate of bundles offered in that area which should ultimately benefit End-Users (see paragraphs 5.106 - 5.115).
- In Regional Area 1, the combinatorial test allows the incumbent flexibility to price differentiate individual bundles within the aggregate of the bundles offered in that area which ultimately should benefit consumers (see paragraphs 5.106 - 5.115).
- In Regional Area 2, the flexibility provided by the portfolio approach (if it were to be allowed in this area) could allow Eircom to lower bundles' prices in those areas — potentially due to the relative weighting and margins from bundles sold/offered in the other areas. This could result in Eircom foreclosing competition from OAOs and leveraging its SMP unduly in Regional Area 2.
- Additional regulatory compliance will be required due to the different tests across the three areas. However, the revised approach creates a balance between allowing the incumbent pricing flexibility (thereby promoting competition) and ensuring efficient infrastructure investment is protected.

8.45 Impact on OAOs:

- In the Urban Area, the single portfolio approach recognises that in these exchanges OAOs, in the presence of upstream regulation, are in a strong market position to compete with Eircom bundles through their own infrastructure. The portfolio approach also ensures that OAOs who are dependent on Eircom wholesale inputs have sufficient margin to compete across their own portfolio of bundles.
- In Regional Area 1, the bundle by bundle test on a LRIC basis ensures that OAOs can compete on a marginal cost approach. The portfolio approach, where ATC must be recovered, ensures that on an overall business basis OAOs can compete profitably in the area (see also paragraphs 5.49 - 5.52).
- In Regional Area 2, the bundle by bundle approach on an ATC basis ensures that competition from OAOs is not foreclosed. See paragraphs 5.91 - 5.93.

8.46 Impact on Consumers:

- In the Urban Area and Regional Area 1, the flexibility of the MST ensures that consumers benefit from increased competition and will not have to face the consequences of Eircom foreclosing competitors from the market.
- In Regional Area 1, see bullets 2 and 3 paragraph 8.43.

Option 4: A lower cost standard for calls, line rental, and broadband retail costs

and the overall appropriate cost standard for the MST

8.47 Impact on Eircom:

- The LRIC cost standard for calls, line rental, and broadband retail costs (see paragraphs 5.44 - 5.45) allows flexibility to the incumbent to offer an individual bundle that does not recover common costs in Regional Area 1.
- No impact in the Urban Area as the portfolio test will be conducted on an ATC basis.
- No further impact in Regional Area 2 as the bundle by bundle test will be conducted on an ATC basis.

8.48 Impact on OAOs:

- There is no bundle by bundle test in the Urban Area and hence no lower cost standard at the bundle level.
- In Regional Area 1 OAOs may face greater competition at the bundle level, however, the portfolio test will be conducted on an ATC basis.
- No further impact on Regional Area 2 as the MST there does not have a lower retail costs standard. See paragraph 5.53.

8.49 Impact on Consumers:

- The use of the LRIC cost standard for calls, line rental, and broadband retail costs for the bundle-by-bundle test in Regional Area 1 allows the promotion of efficient competition (as competition is prospectively greater for bundles sold/offered inside these areas) to the benefit of consumers.
- In the Urban Area, and Regional Area 2, there is no impact as these lower cost standards do not apply in those areas.

Option 5 The MST reflects a weighted average cost of the applicable wholesale input

8.50 Impact on Eircom:

- In both the Urban Area, and Regional Area 1 the approach reflecting actual use by OAOs of Eircom's wholesale inputs (i.e. the WAWNI) in these areas ensures that the costs used in the MST reflect those that OAOs have to bear. It thereby allows Eircom pricing flexibility in line with the wholesale input costs of OAOs.

- In the Urban Area WAWNIs are calculated based on WLA inputs. In Regional Area 1 WAWNIs are calculated based on both WLA and WCA inputs. In both areas separate WAWNIs are calculated for the use of CGA and NGA technology. Without this Eircom could have potentially priced NGA based bundles using the wholesale access prices and costs of CGA. See paragraphs 5.62, and 5.65 - 5.67. The use of separate CGA and NGA WAWNIs acknowledges that different retail products are supported by different underlying wholesale inputs and ensures that Eircom retail is not provided undue pricing flexibility and ensures that the WAWNI is reflective of the average wholesale input costs incurred by an “efficient” operator to replicate CGA and NGA bundles in the Urban Area and Regional Area 1.
- In Regional Area 2 the MST is based on FACO and CGA or bundled CGA products — it is assumed that in order for a bundle to be replicable by an OAO that all OAOs use FACO and / or CGA (WLA/WCA) exclusively in order to reflect emergent use of LLU.

8.51 Impact on OAOs:

- The Urban Area, and Regional Area 1 predominantly reflect those areas where infrastructural investment by OAOs has occurred (see Chapter 4). The WAWNI reflects the weighted average use of wholesale inputs by OAOs in the Urban Area and separately Regional Area 1. Those OAOs who remain on resale wholesale inputs only will find it harder to be competitive as VUA/LLU uptake grows. This approach should encourage OAOs to invest in infrastructure to avail of VUA/LLU inputs.
- Eircom could have more price flexibility within the Urban Area, and Regional Area 1. However, the greater flexibility within the MST is directly linked to increased competition — as such, under the status quo there is little impact on OAOs. As competition increases in the Urban Area and Regional Area 1 the greater the pricing flexibility for Eircom retail which is weighted (see paragraphs 5.60 - 5.61) relative to OAOs development/progression in those areas.
- In the Urban Area and Regional Area 1, without a separate NGA WAWNI by virtue of the flexibility within the MST (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of CGA wholesale access inputs used by OAOs. See paragraph 5.62, and 5.65 - 5.67. This could result in undue flexibility to Eircom and could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run. However, the use of a CGA WAWNI and separate NGA WAWNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom retail is not provided undue pricing flexibility and ensures that the WNI is reflective of the average wholesale input costs incurred by an “efficient” operator to replicate CGA and NGA bundles in the Urban Area, and Regional Area 1.
- There is no impact in Regional Area 2 as there is no WAWNI for this area.

8.52 Impact on Consumers:

- In both the Urban Area and Regional Area 1, customers should benefit from lower priced bundles and product innovation/differentiation in those areas where VUA/LLU competition is encouraged. OAOs that use Eircom's VUA/LLU product may be able to offer a more sustainable source of infrastructure-based competition in addition to any alternative platform competitors, e.g., Cable/Wi-Max which may further contribute potential competitive constraints to the benefit of consumers.
- In both the Urban Area and Regional Area 1, without a separate NGA WAWNI by virtue of the flexibility within the MST, Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of CGA wholesale access inputs used by OAOs. See paragraphs 5.62, and 5.65 - 5.67. Consumers may benefit initially from lower priced bundles from the incumbent in certain areas. Where those low priced bundles are priced anti-competitively, consumers will lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit.
- In Regional Area 2, no additional impact on customers as bundles currently offered to customers in these areas reflects that OAOs can only offer competing bundles in those areas based on different inputs provided by Eircom (i.e., there is no flexibility in the MST in this area).
- Regional Area 2, see also bullets 2 and 3 paragraph 8.43.

Option 6 Allow on a case-by-case basis, known future reductions in cost e.g., Mobile Termination Rates

8.53 Impact on Eircom:

- Where new bundles are being proposed, or where cost reductions / special offers are being proposed, not allowing Eircom to reflect in its pricing known future changes in costs (which are supported by robust evidence), could lead to a situation where its cost stack is artificially higher than it needs to be.

8.54 Impact on OAOs:

- OAOs/entrants should also be able to factor known future changes in prices into their pricing decisions which will be to the benefit of end-users.

8.55 Impact on Consumers:

- Consumers should benefit from lower prices now based on known future decreases in operator input costs.

Option 7 That the MST should use different cost standards for retail costs for broadband in the various areas

8.56 Impact on Eircom:

- In the Urban Area, the EEO cost standard for retail broadband costs reflects the level of competition that Eircom faces. This allows Eircom to price products to meet this competition.

- In Regional Area 1, the REO/EEO approach ensures a higher margin for OAOs to cover downstream retail costs (compared to one based purely on EEO). Where REO is not readily available SEO will be used instead (see 5.29).
- This approach takes account of the fact that there are large operators in certain parts of the country i.e., Regional Area 1, with an international presence who can take advantage of economies of scale and scope between their operations in Ireland and other countries in which they operate. There are certain retail costs which are more susceptible to such scale / scope advantages especially in the context of bundle offers (with fixed voice, mobile voice, broadband, IPTV, etc.). These costs include advertising and product management.
- In Regional Area 2, the REO assumes higher costs (compared to EEO) for OAOs so reducing the margin for Eircom to reduce prices of bundles. Where REO is not readily available SEO will be used instead.

8.57 Impact on OAOs:

- In the Urban Area the EEO approach takes account of the findings from the WLA/WCA Market Review which found that Eircom was not the largest provider of broadband services in this area, and that, with deregulation of WCA inputs (and continuing WLA input regulation), OAOs were unlikely to be excluded or exploited. OAOs are likely to face greater price competition from Eircom where the EEO approach is used compared to the previous EEO/SEO approach.
- In Regional Area 1, the EEO/REO approach reduces the pricing competition from Eircom compared to use of pure EEO.
- In Regional Area 2, the REO approach should encourage entry to and competition in the retail broadband market, by giving rise to a greater space between retail prices and Eircom wholesale costs.

8.58 Impact on Consumers:

- In the Urban Area the use of EEO in the MST should allow more competition by Eircom leading to lower prices and greater choice for consumers.
- In Regional Area 1 the use of an EEO/REO approach is a continuation of what is currently being used in the LEA. It takes into account certain start-up costs for new entrants utilising broadband thus encouraging entry and continued competition. This should result in lower prices and continued choice for consumers.
- In Regional Area 2 the use of an REO cost base may result in the medium/long-term (marginally) lower retail prices and more choice, due to higher levels of competition from OAOs, compared to an EEO or EEO/REO approach.

Option 8 Unregulated products and services will be included at LRIC cost standard. Cross subsidisation is allowed from the regulated product/services to the unregulated services

8.59 Impact on Eircom:

- Will enable incumbent to include unregulated products and services in bundles at competitive prices. See paragraphs 5.119 - 5.128.

8.60 Impact on OAOs:

- OAOs are likely to face greater competition in bundles including unregulated services. See paragraphs 5.119 - 5.128.

8.61 Impact on Consumers:

- Consumers are likely to have lower prices for bundles that include unregulated services. It may also result in more choice and innovation with bundles.

Option 9a New/revised bundles must be pre-notified and pre-cleared with ComReg

8.62 Impact on Eircom:

- Eircom is currently subject to a pre-notification and pre-clearance requirement pursuant to ComReg D04/13. As we are not proposing changing this Eircom would not be subject to an additional regulatory burden to its existing obligations. The impact on Eircom would be that it would not be able to react as quickly to competitor moves in the market as it would like.

8.63 Impact on OAOs:

- The proposed approach will give OAOs legal certainty that there will be regulatory assessment of bundles provided by the SMP operator prior to their launch.

8.64 Impact on Consumers:

- Ensures a transparent regulatory environment which monitors bundles at risk of being anti-competitive and which may have long-term negative impacts for consumer choice.

Option 9b Eircom self certifies that a new/revised bundle meets its obligation not to cause a margin squeeze

8.65 Impact on Eircom:

- Eircom would be able to react more quickly to competitive developments in the market place. Eircom would not need to get pre-clearance from ComReg when it wishes to launch a new/revised bundle. Eircom would only need to notify ComReg of the details of the new/revised bundle.
- Eircom would be required to maintain records which demonstrated that a MST was undertaken prior to launch and that based on the assumptions used that no margin squeeze issues were raised.

8.66 Impact on OAOs:

- OAOs may have doubts as to whether a bundle launched by Eircom met its obligation not to cause a margin squeeze. However, as Eircom would be required to demonstrate its ongoing compliance in respect of at least one retail amendment (chosen by ComReg) every three months, OAOs would have some re-assurance as a result of this continued regulatory monitoring. If the self-certification were not done properly then OAOs might suffer on a competitive basis.

8.67 Impact on Consumers:

- This may promote greater competition in the market leading to benefits for consumers in the short term. If the self-certification were not done properly it could have negative medium to long-term impacts on consumer choice.

Option 10 If and when a bundle is causing a margin squeeze

8.68 Impact on Eircom:

- Where a bundle is found to be non-compliant with the obligation not to cause a margin squeeze, Eircom must notify ComReg immediately of such an occurrence. ComReg may then intervene pursuant to its relevant statutory enforcement powers. As previously experienced the continuation of non-compliant bundles can have very significant consequences on Eircom, OAOs and consumers and should be avoided⁶⁷.

8.69 Impact on OAOs:

- Where bundles are found to be non-compliant OAOs can be confident that they will be dealt with in a timely manner to mitigate any negative effects.

8.70 Impact on Consumers:

- The longer a non-compliant bundle remains in the market the more customers are likely to have signed up for that bundle. These customers could be faced with changes to the bundle they signed up to which can cause confusion and annoyance. Therefore this should be mitigated by swift and timely action by Eircom to ensure such difficulties are minimised.

Option 11a The net costs of eir Sports should be included in qualifying bundles/products

8.71 Impact on Eircom:

- Eircom is currently including the net costs of eir Sports in qualifying broadband bundles/products. Therefore, no additional regulatory burden.

8.72 Impact on OAOs:

⁶⁷ ComReg notes in this regard that certain October 2008 bundles were launched by Eircom despite concerns raised by ComReg pre-launch in relation to the assumptions made by Eircom in relation to free calls to Meteor. ComReg believes that the market was damaged as a result of Eircom launching the bundles in question and, in particular, as a result of the period of time it took to remedy the non-compliant bundles due to a legal challenge from Eircom.

- OAOs are currently competing with Eircom bundles/products which include these costs. Including the net costs of eir Sports ensures that were an OAO to have duplicated Eircom's purchase of Setanta with a similar purchase it would still be able to compete using Eircom regulated inputs.

8.73 Impact on Consumers:

- Consumers are likely to benefit from this content and the competitive pressure that it presents to other operators may also result in encouraging more choice and innovation within the retail market.

Option 11b The inferred wholesale charge for eir Sports should be included in qualifying bundles

8.74 Impact on Eircom:

- Would require incumbent to include an inferred wholesale charge for eir Sports in their bundles/products based on the outcome of various commercial negotiations with other operators that purchase eir Sports.

8.75 Impact on OAOs:

- OAOs are likely to face less competition in bundles from Eircom which include an inferred wholesale charge for eir Sports.

8.76 Impact on Consumers:

- Consumers are likely to face higher prices for bundles/products from Eircom that include eir Sports. It may also lessen competition across the retail market by removing the impetus for diversification through other content offers or aspects of service.

8.6 Step 4 - Assess the likely impact on competition:

8.77 This is discussed under the relevant headings of "Impact on Eircom" and "Impact on OAOs" at paragraphs 8.38 - 8.75.

8.7 Step 5 - Assess the impacts and choose the best option

8.78 Having reviewed the options above (1 – 11b), ComReg proposes that:

8.79 It is proportionate and justified to implement a MST for bundles. Failure to do otherwise – i.e. without a NRT or MST could have negative impacts on consumers and competitors over the medium-to-longer term. Maintaining the NRT in its current form (Market 1b and 1C) would not be reflective of the growth in broadband and broadband dependent services (e.g. IPTV or VoB) and the changes in the composition of bundles (e.g. bundles not containing WLR).

- 8.80 It is proportionate and justified that the MST should be applied more flexibly in certain areas (e.g. the Urban Area and Regional Area 1). ComReg considers that the Urban Area, given the findings of the WLA/WCA Market Review, should be the most flexible in terms of the MST. For Regional Area 1, the MST should reflect those areas where the uptake of unbundled services, whether LLU and/or VUA in NGA, is likely to be viable, which prospectively are more likely to permit a greater degree of competition and where regulation should be responsive to any prospective changes.
- 8.81 It is proportionate and justified to apply the MST on different bases to reflect the various areas. For bundles sold/offered in the Urban Area, there will be a single portfolio ex-ante MST. In Regional Area 1 for bundles sold/offered in that area a two-part ex-ante MST test will be conducted (bundle by bundle and portfolio). Both tests must be passed. For bundles sold/offered in Regional Area 2 the bundles are assessed on an individual bundle basis (i.e., bundle-by-bundle) only.
- 8.82 It is proportionate and justified to allow pricing below ATC for the retail costs for calls, line rental, and broadband in an individual bundle (with common and fixed indirect costs excluded for calls, line rental, and broadband) for bundles sold/offered inside Regional Area 1 only (subject to the proviso that the portfolio of bundles inside Regional Area 1 passes its ATC). ComReg considers that ATC is the appropriate basis of cost in an ex-ante context for the portfolio of bundles sold in the Urban Area and in Regional Area 1, and the bundle-by-bundle test in Regional Area 2. In the context of an ex-ante regulatory tool to be applied by ComReg, ATC is the appropriate ex-ante cost basis to adopt as it should enable a potential entrant to recover all its efficiently incurred costs. ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ATC is the correct cost standard for the MST in light of ComReg's statutory objectives to promote competition and protect the interests of end-users. ComReg believes that, under the present market conditions in Ireland, ATC as a cost measure, is the most appropriate to promote competition under regulation.
- 8.83 It is proportionate and justified in Regional Area 2 that the applicable wholesale inputs in the MST are SB-WLR and CGA bitstream, or the wholesale input cost of a bundled CGA product. For the Urban Area and Regional Area 1, it is legitimate and appropriate to use weighted averages of the applicable wholesale inputs used by OAOs in these areas, as this reflects the actual usage of different wholesale inputs by OAOs. ComReg believes that otherwise consumers may not be in a position to avail of lower prices for high speed broadband in these areas, in particular where this is as a result of high unit costs driven by the national average cost of the copper access network. Thus the proposed approach recognises the importance of facilitating the development of efficient competition and the delivery of relevant competitive benefits to consumers.
- 8.84 It is proportionate and justified to allow known future reductions in costs (e.g., Mobile Termination Rates, etc.) be included in the MST where these can be supported. ComReg believes that this will allow end-customers to benefit from future known reductions in costs now.

- 8.85 It is proportionate and justified to allow Eircom use retail costs for broadband based on the EEO cost standard for the Urban Area, however in Regional Area 1 or 2 ComReg does not believe that competition is sufficiently developed at this time to consider the use of EEO on its own for the retail costs of broadband in these areas.
- 8.86 It is proportionate and justified that for unregulated products and services included in a bundle/portfolio these will be assessed on a LRIC cost standard, and some form of cross-subsidisation be allowed:
- In the Urban Area, ComReg considers that provided that the portfolio of bundles which includes unregulated services is profitably replicable as demonstrated by the MST that it may be appropriate for some form of cross-subsidisation. However, this is subject to the proviso that the portfolio assessment demonstrates that excluding the unregulated service(s) that the bundle is profitably replicable. On a case-by-case basis, where there is unlikely to be medium-to-long-term harm to competition, ComReg will consider AAC as opposed to LRIC for the unregulated product/service.
 - In Regional Area 1 ComReg considers that provided that the portfolio of bundles which includes unregulated services is profitably replicable as demonstrated by the MST that it may be appropriate for some form of cross-subsidisation. However, this is subject to the proviso that the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the bundle is profitably replicable. While certain OAOs may be excluded from certain narrow bundle types (which include unregulated services as part of that bundle) it ensures that overall the Eircom retail offer is not anti-competitive (as the portfolio is replicable). ComReg considers that as Eircom's position may not be strong with respect to new services such as mobile voice, television etc., that requiring each bundle to pass a MST may be a form of entry assistance (for OAOs) into a market which is already competitive. On a case-by-case basis, where there is unlikely to be medium to long term harm on competition, ComReg will consider AAC as opposed to LRIC for the unregulated product and service.
 - Similarly, in Regional Area 2 ComReg considers that provided that the bundle-by-bundle test which includes those specific unregulated service is profitably replicable as demonstrated by the MST that it may be appropriate for some form of cross-subsidisation. However, this is subject to the proviso that the assessment demonstrates that the bundle is profitably replicable excluding the unregulated service(s). While certain OAOs may be excluded from certain narrow bundle types (which include unregulated services as part of that bundle) it ensures that overall the Eircom retail offer is not anti-competitive (as the bundle is replicable).
- 8.87 It is proportionate and justified that a pre-notification and pre-clearance requirement be continued. This should ensure that new/revised Eircom bundles are compliant with its obligations not to cause a margin squeeze.
- 8.88 It is proportionate and justified that where bundles are found to be non-compliant with the obligation not to cause a margin squeeze, then Eircom must notify ComReg immediately of such an occurrence. Compliance with the obligation not to cause a margin squeeze may be pursued through ComReg's statutory enforcement powers.

8.89 It is proportionate and justified that the relevant costs for eir Sports should be the net costs option. ComReg considers that the inclusion of eir Sports on an inferred wholesale charge basis may not be appropriate as eir Sports is an unregulated service where Eircom do not have SMP. If a wholesale charge was included then Eircom customers would be paying more for their bundle/product, and other operators would face less incentives to enhance/differentiate their offers for their customers, thereby leading to less innovation in the retail market. The inclusion of eir Sports' net costs in bundles/products amounts to ensuring that on aggregate the costs of eir Sports are covered overall, which if another operator had purchased Setanta would be the calculus they would face.

Q. 23 Do you have any views on the Regulatory Impact Assessment above and are there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

9 Submitting comments

- 9.1 All comments are welcome to the consultation, however it would make the task of analysing responses easier if comments were referenced to the relevant question number from this document.
- 9.2 The consultation will run from 09 June 2017 to 21 July 2017 during which time ComReg welcomes written comments on any of the issues raised.
- 9.3 Having analysed and considered the comments received, ComReg will review the main proposals set out in the consultation, amend if necessary in light of representations received and will then notify the draft measure to the European Commission, the NRAs and BEREC pursuant to Article 7 of the Framework Directive⁶⁸. ComReg will take utmost account of any comments received from the European Commission and will adopt and publish the final decision.
- 9.4 In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No. 05/24. We would request that electronic submissions be submitted in an-unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.

Please Note:

- 9.5 ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful.
- 9.6 As it is ComReg's policy to make all responses available on its website and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response.

⁶⁸ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC ("the Framework Directive").

Annex: 1 Legal basis

Obligations relating to the market for wholesale local access provided at a fixed location

A 1.1 By ComReg Document No. 16/96, and pursuant to Regulations 25 and 26 of the Framework Regulations, Section 5 of the Draft Decision Instrument contained in Appendix 14 proposes to designate Eircom as having significant market power (“SMP”) on the market wholesale local access (the “WLA” market).

A 1.2 Under Sections 10 and 12 of the WLA Draft Decision Instrument annexed to ComReg Document No. 16/96, and pursuant to Regulations 9 and 13 of the Access Regulations, ComReg is proposing to impose obligations relating to transparency and price control on Eircom and in particular the obligation not to cause a margin squeeze.

A 1.3 Pursuant to Regulation 18 of the Access Regulations, ComReg proposes in this Draft Decision to further specify the obligations relating to transparency and price control contained in Sections 10 and 12 of the WLA Draft Decision Instrument annexed to ComReg Document No 16/96.

Obligations relating to the market for wholesale central access provided at a fixed location

A 1.4 By ComReg Document No. 16/96, and pursuant to Regulations 25 and 26 of the Framework Regulations, Section 5 of the Draft Decision Instrument contained in Appendix 15 proposes to designate Eircom as having significant market power (“SMP”) on the regional market for wholesale central access (the “Regional WCA” market).

A 1.5 Under Sections 10 and 12 of the WCA Draft Decision Instrument annexed to ComReg Document No. 16/96, and pursuant to Regulations 9 and 13 of the Access Regulations, ComReg is proposing to impose obligations relating to transparency and price control on Eircom and in particular the obligation not to cause a margin squeeze.

A 1.6 Pursuant to Regulation 18 of the Access Regulations, ComReg proposes in this Draft Decision to further specify the obligations relating to transparency and price control contained in Sections 10 and 12 of the WCA Draft Decision Instrument annexed to ComReg Document No 16/96.

Obligations relating to the market for fixed access and call origination provided at a fixed location

A 1.7 By ComReg Decision D05/15 (SMP FACO Decision), and pursuant to Regulations 25 and 26 of the Framework Regulations, ComReg designated Eircom as having SMP on the market for call origination on the public telephone network provide at a fixed location (the “FACO” market).

A 1.8 Under Sections 10 and 12 of the Decision Instrument annexed to ComReg Decision D05/15, and pursuant to Regulations 9 and 13 of the Access Regulations, ComReg is proposing to impose obligations relating to transparency and price control on Eircom and in particular the obligation not to cause a margin squeeze.

A 1.9 Pursuant to Regulation 18 of the Access Regulations, ComReg proposes in this Draft Decision to further specify the obligations relating to transparency and price control contained in Sections 10 and 12 of the Decision Instrument annexed to ComReg Decision D05/15.

Consultation requirements:

A 1.10 Regulation 12(3) of the Framework Regulations provides that, except in cases falling within Regulation 13(8) (i.e. exceptional cases involving urgency), before taking a measure which has a significant impact on a relevant market, ComReg must publish the text of the proposed measure, give the reasons for it, including information as to which of ComReg's statutory powers gives rise to the measure, and specify the period within which submissions relating to the proposal may be made by interested parties. Regulation 12(4) states that ComReg, having considered any representations received under Regulation 12(3), may take the measure with or without amendment. Regulation 12 implements Article 6 of the Framework Directive.

A 1.11 Regulation 13(3) of the Framework Regulations provides that, upon completion of the consultation provided for in Regulation 12, where ComReg intends to take a measure which falls within the scope of Regulation 26 or 27 of the Framework Regulations, or Regulation 6 or 8 of the Access Regulations, and which would affect trade between Member States, it shall make the draft measure accessible to the European Commission, BEREC and the NRAs in other Member States at the same time, together with the reasoning on which the measure is based. Regulation 13 implements Article 7 of the Framework Directive.

Annex: 2 Regional Area 1

- A 2.1 As discussed in Chapter 4 of this document, ComReg considers that the conditions of competition continue to vary across exchanges. For the purposes of clarity in relation to the values used to qualify an exchange as part of Regional Area 1, this Annex provides explains the rationale behind the criteria and these values.
- A 2.2 ComReg considers that Criterion 1; Criterion 2 and Criterion 3 take into account the different prospective structural conditions of certain exchanges. In addition, each of these criteria recognises the addressable market of specific exchanges and thus the competitive structural conditions of a specific exchange. As such, in determining whether an exchange qualifies for inclusion into the Regional Area 1 under Criteria 1-3, ComReg shall as part of its determination consider: the exchange size, the addressable market in the exchange (e.g., PSTN and DSL penetration), the competitive structural presence of OAOs and their relative market share of the addressable market. As such, for an exchange to be included in Regional Area 1 under Criteria 1-3, an OAO must have a reasonable coverage (i.e., it must be capable of serving a reasonable number of premises in that exchange area) and must have a reasonable market share of those customers (i.e., the OAO is simply not just present in that exchange but has a reasonable number of customers relative to the addressable market in that exchange).
- A 2.3 Indicatively for Criterion 1, ComReg considers that as part of its determination (as described in paragraph A 2.2) whether an exchange should be included in Regional Area 1, that the minimum combined market share of the AIP and the LLU / VUA provider of all broadband customers in that exchange should be at least ca. 25% - 30%. As RFNA is typically sold/offered with broadband by Eircom (which would constitute a bundle) this criterion provides that at least ca. 25% - 30% of all customers that have fixed or high-speed broadband are with an OAO. ComReg considers it appropriate that as this criterion requires the physical presence of competitive infrastructure that their market shares are combined. ComReg considers that to require a separate specified market share of individual OAOs could mask the competitive dynamics evident in the exchange — in particular where one OAO is significantly gaining market share at the expense of the other.
- A 2.4 Criterion 2 recognises that where at least two operators are present in an exchange with reasonable coverage and market presence that the prospective competitive conditions in that exchange would not be dissimilar to that evident in Qualifying Exchanges under Criterion 1.
- A 2.5 Indicatively for Criterion 2, ComReg considers that as part of its determination (as described in paragraph A 2.2) whether an exchange should be included in Regional Area 1, that Line Share as a percentage of broadband customers on Eircom's DSL platform should at least be ca. 20%. As Line Share is provided over Eircom's DSL platform it ensures that at least ca. 20% of all customers that have fixed-broadband are with an OAO.

A 2.6 Criterion 3 seeks to provide Eircom with appropriate flexibility in those exchanges where it is likely that an AIP (i.e., Virgin Media) has a significant presence. Assuming a reasonable national average broadband penetration of 60% in exchanges, this criterion provides that for an Eircom exchange to be included in Regional Area 1 its DSL market share is 33% or less (i.e., Eircom wholesale supports broadband to fewer than 20% of the premises served in that exchange).

A 2.7 Indicatively for Criterion 3, ComReg considers that as part of its determination (as described in paragraph A 2.2) whether an exchange should be included in Regional Area 1, in addition to that outlined in paragraph A 2.66, that the market share of an AIP (or AIPs) as a percentage of all broadband customers in that exchange should be at least ca. 25% - 30%. As RFNA is typically sold/offered with broadband by Eircom (which would constitute a bundle) this criterion provides that at least ca. 25% - 30% of all customers that have fixed or high-speed broadband⁶⁹ are with an OAO. At present, this criterion only applies to the presence of Virgin Media providing retail telecommunications services in that exchange area. In the future, similar to Criterion 1, where there is an alternative AIP in addition to Virgin Media (or another AIP) that market share will be the minimum combined market share. Where there is only Virgin Media or just an AIP, ComReg considers that it is appropriate that the minimum market share that the OAO would have is ca. 25% - 30%, so as not to provide Eircom undue pricing flexibility in exchanges where the competitive pressure from OAOs is only relatively nascent.

⁶⁹ With regard to what constitutes high-speed broadband, ComReg will be guided by the speeds on offer in the market generally and public documents from local Government and Europe such as the Digital Agenda for Europe (<http://ec.europa.eu/digital-agenda/>) and the national broadband strategy (<http://www.dcenr.gov.ie/Communications/Communications+Policy/Next+Generation+Broadband/>)

A 2.8 With respect to Criterion 4, ComReg considers that the relative competitive dynamics of these exchanges would prospectively not be dissimilar to those evident in Qualifying Exchanges under Criteria 1, 2 or 3. Namely, that they generally have high population densities, that typically an AIP provides telecommunications services at the retail level in those exchange areas and represent exchanges which have already been unbundled. In addition, NGA products and processes will be in place at least six months⁷⁰ in advance to ensure OAOs are in a position to replicate the services of Eircom. Furthermore, ComReg considers, as noted by Eircom's submission, *"that where NGA and VUA are deployed in a given exchange, there will be strong prospect of competitive OAO entry, which will act as a constraint on Eircom's retail pricing"*.⁷¹ As such, ComReg considers that it is appropriate to include such exchanges in Regional Area 1 to reflect those areas which prospectively are more likely to permit a greater degree of competition. In addition, (as noted in paragraph 4.68 [2013 Bundles Decision]), it is only when the actual use of LLU or virtual unbundling in NGA by OAOs increases, that the WNI could decrease for Eircom retail — which should act as an incentive for Eircom to encourage OAOs to use LLU or VUA. Consequently, ComReg considers that the inclusion of NGA exchanges into Regional Area 1 is consistent with ComReg's regulatory objectives. ComReg will continue to monitor the competitive conditions within such exchanges as the use of NGA services evolves over time.

A 2.9 Indicatively, for Criterion 4 ComReg considers that for an exchange to qualify under this criterion, that the six months notification pertaining to the cabinets that will be NGA-enabled in that relevant exchange, that those cabinets must cover a reasonable number of all lines in that exchange. ComReg considers that for this purpose that it is appropriate that ca. two-thirds of all lines in that exchange should be served by those proposed NGA-enabled cabinets before that exchange is included in Regional Area 1 under this criterion.

A 2.10 ComReg considers that it is appropriate to consider on a case-by-case basis the inclusion of a limited number of additional exchanges which would not meet any of the criteria above. ComReg is cognisant that 'islands' or 'pockets' of exchanges could be created where exchanges are completely surrounded by Qualifying Exchanges. Consequently, ComReg considers it appropriate that 'island' or 'pocket' exchanges (per Criterion 5 (a)) be included in Regional Area 1 on a case-by-case basis. Island or pocket exchanges can occur particularly in inner-city or suburban areas due to the network architecture. ComReg considers that it would be inconsistent to have a 'pocket' of customers where a bundle offering / price may not be available but is available in neighbouring housing estates or streets.

⁷⁰ See 2013 NGA Decision.

⁷¹ Eir. "Response on behalf of Eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers", 29 August 2012, page 10.

A 2.11 ComReg considers that from a practical commercial perspective (to avoid marketing black-spots), and to avoid the social exclusion of consumers (in particular as the infrastructure is already in place to provide these bundles to these ‘pocket’ exchanges); it would be appropriate to include those exchanges that are completely surrounded by Qualifying Exchanges in Regional Area 1. In addition, ComReg considers that due to the benefits of a contiguous network, the fact that these ‘pocket’ exchanges are surrounded by Qualifying Exchanges may increase the future roll-out of infrastructure-based investment in those exchanges. ComReg considers that while there are appropriate reasons for including certain exchanges which are ‘islands’ in Regional Area 1 (e.g., it would ultimately be consumer welfare enhancing), these must be assessed on a case-by-case basis. Consequently, ComReg will consider, amongst others, the actual number of homes and premises in that exchange (area), the actual number of customers connected on the Eircom wholesale platform to mitigate against the inclusion of inappropriate exchanges into Regional Area 1 — as such exchanges will not be included by default, which was the concern raised by a number of respondents to ComReg Consultation 12/63.

A 2.12 Similarly, ComReg considers that Criterion 5 (b) (i.e., the exchange has fewer than 500 residential homes and is located either adjacent to, or, in reasonable proximity to, Qualifying Exchange(s)), would prevent inappropriate regulatory outcomes, i.e., where a bundle offering / price may not be available in neighbouring estates. ComReg considers that the inclusion of such exchanges in Regional Area 1 is consumer welfare enhancing and that the competitive dynamics of these exchanges would not be unduly impacted. In addition, the relative addressable market of these exchanges may be too small to justify commercial investments by OAOs, although the barriers to unbundling such exchanges are likely to be low.

A 2.13 Furthermore, ComReg considers that it is appropriate for it to determine on a case-by-case basis the inclusion of a limited number of additional exchanges which would not meet any of the criterion above but for economic affinity reasons should be included in Regional Area 1 (i.e., Criterion 5 (c)). Eircom will be required to demonstrate to the satisfaction of ComReg that the inclusion of such an exchange will not impact the competitive dynamics of that exchange and through cogent reasoning demonstrate that it is appropriate that the additional exchange should be included in Regional Area 1. ComReg considers that it is appropriate to cap the number of Qualifying Exchanges under Criterion 5 (c) so that appropriate incentives are maintained on Eircom to encourage infrastructure-based competition in Regional Area 2 exchanges or incentivise NGA roll-out.

A 2.14 For the avoidance of doubt, ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange. Where the inclusion of any particular exchange in Regional Area 1 is likely to lead to anti-competitive outcomes and where long-term benefits of consumers is likely to be negatively impacted ComReg will not allow that exchange into Regional Area 1.

A 2.15 In addition, in order to provide retail certainty for all operators including Eircom retail, once an exchange is included in Regional Area 1 it will remain so. However, Eircom's retail market share in those Qualifying Exchanges will continue to be monitored by ComReg and should it indicate that OAOs are being squeezed (for example if their retail market share on Eircom's platform is declining or has reached an excessively low level) then ComReg will review the appropriateness for the continued inclusion of that exchange in Regional Area 1.

Annex: 3 Illustrative calculation of WAWNI

Figure 14: Illustration of the WAWNI

Cost Stack		NGB Products			
		WLR+Bitstream Stack	WLR+LS Stack	ULMP Stack	SABB
WLR Rental	Monthly €	15.91	15.91		
ULUMP Rental	Monthly €			9.34	
Line Share Rental	Monthly €		0.77		
Standalone NGB Rental	Monthly €				18.62
Standalone VUA Rental	Monthly €				
POTs Based VUA Rental	Monthly €				
ULMP Faults	Monthly €			✂	
LS Faults	Monthly €		✂		
DSLAMs	Monthly €		✂	✂	
Connection / disconnection fees not in DCF					
Connection Charge Bitstream	Monthly €				
Connection Charge ULMP	Monthly €			✂	
Connection Charge LS	Monthly €		✂		
Conn chg SB_WLR transfer	Monthly €	✂	✂		
Connection Charge VUA	Monthly €				
Connection Charge SABB	Monthly €				✂
Disconnection Charge Bitstream	Monthly €				
Disconnection charge ULMP	Monthly €			✂	
Disconnection charge LS	Monthly €		✂		
Disconnection Charge VUA	Monthly €				
Bitstream Port	Monthly €	✂			
Voice MEA	Monthly €			✂	✂
Total (excluding usage)	Monthly €	21.30	19.25	14.10	20.00

A 3.1 The WAWNI is a calculation of the weighted average of wholesale network inputs used by OAOs to supply broadband plus a voice service in an area. WAWNIs are calculated separately for NGB and NGA based inputs.

A 3.2 Using the illustrative cost stack information above and assuming for this example that OAOs actual usage of the various wholesale access inputs in the LEA indicates that the average 'typical efficient' OAO would use a blend of 50% WLR+Bitstream, 30% WLR+LS, 10% ULMP and 10% SABB, this would result in a WNI for legacy bundles in the MST for the bundle-by-bundle assessment and portfolio assessment of €19.84 (50% WLR+Bitstream @ €21.30, 40% WLR+LS @ €19.25, 10% ULMP @ €14.10 and 10% SABB @ €20.00).

A 3.3 As set out in paragraph 5.88, the usage charge is applied at the portfolio level in the MST.

Annex: 4 Draft Decision Instrument – Fixed Access and Call Origination Market(s)

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

- 1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for call origination on the public telephone network provided at a fixed location, as defined by ComReg in ComReg Decision D05/15 which satisfies the Three Criteria Test as set out in ComReg Decision D05/15, as required by the European Commission in the 2014 Recommendation. This Decision Instrument relates to further specification and amendment of the price control and transparency obligations imposed by ComReg under Sections 10 and 12 of the Decision Instrument annexed to ComReg Decision D05/15.
- 1.2 This Decision Instrument is made:
- (i) Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations;
 - (ii) Pursuant to, and having regard to, the significant market power (SMP) designation of Eircom as provided for in Section 5 of the Decision Instrument annexed to ComReg Decision D05/15;
 - (iii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended); Regulation 6(1) of the Access Regulations, Regulation 16 of the Framework Regulations, Regulation 8(6) of the Access Regulations and Regulation 13(2) of the Access Regulations;
 - (iv) Having, pursuant to Section 13 of the Communications Regulation Act 2002 (as amended), complied with Ministerial Policy Directions where applicable;
 - (v) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken account of any comments made by these parties;
 - (vi) Having had regard to the analysis and reasoning set out in ComReg Decision D05/15;

- (vii) Having had regard to the analysis and reasoning set out in ComReg Document No. 17/51 (***Bundles Consultation Document***) and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
- (viii) Having had regard to the analysis and reasoning set out in ComReg Decision D[XX/YY] (***Bundles Final Decision***).
- 1.3 The provisions of ComReg Decision D05/15, ComReg Document No. 17/51 (***Bundles Consultation Document***) and ComReg Decision [XX/YY] (***Bundles Final Decision***) (this Decision) shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date and this Decision Instrument, this Decision Instrument shall prevail.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 3 OF THE DECISION INSTRUMENT)

2 DEFINITIONS

- 2.1 In this Decision Instrument, unless the context otherwise suggests:

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“**Access Path**” means the connection from the NTU/ONT in the End-User’s premises to the Point of Handover. The Points of Handover for physical unbundling are the MDF (for metallic) and the ODF (for fibre) in the Exchange, and the Point of Handover for non-physical unbundling (virtual access) is the Wholesale Ethernet Interconnection Link at the serving Aggregation Node for the End-User i.e. at the MPoP;

“**Access Regulations**” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

“**Aggregation Node**” or “**Agg Node**” means a network concentration point for Access Paths;

“**Alternative Infrastructure Provider (AIP)**” means an Undertaking providing retail broadband services to End-Users at a fixed location by means of alternative infrastructure. For the purposes of this definition, services are deemed to be provided by means of “alternative infrastructure” when the relevant AIP does not rely on any wholesale access inputs from Eircom in respect of the Local Loop (e.g. including Wholesale Line Rental (WLR), VUA or LLU) in order to provide services to End-Users in a particular Exchange area;

“Associated Facilities” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Average Total Cost” or **“ATC”** means a cost standard which reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs;

“Average Monthly Regional Area 1 Adjusted bundle Cost” shall be construed in accordance with Reference C11 in Table 5.2 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Regional Area 1 bundle Revenue per customer” shall be construed in accordance with Reference R4 in Table 5.2 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Regional Area 1 Portfolio Cost” shall be construed in accordance with Reference C12 in Table 5.2 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Regional Area 1 Portfolio Revenue per customer” shall be construed in accordance with Reference R5 in Table 5.2 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Regional Area 2 Bundle Cost” shall be construed in accordance with Reference C(vii) in Table 5.3 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Regional Area 2 Bundle Revenue per customer” shall be construed in accordance with Reference R(iv) in Table 5.3 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Urban Area Portfolio Revenue per customer” shall be construed in accordance with Reference R5 in Table 5.1 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“Average Monthly Urban Area Portfolio Cost per customer” shall be construed in accordance with Reference C8 in Table 5.1 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Bundle” means a package of services, consisting of Retail Line Rental and a Retail Broadband Product and may also include one or more other retail products or services which is on offer or on sale by Eircom to End-Users.

“Communications Regulation Act 2002” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

“ComReg” means the Commission for Communications Regulation, established under the Communications Regulation Act 2002;

“ComReg Decision D04/13” means ComReg Document 13/14 ComReg Decision D04/13 entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4”, dated 8 February 2013;

“ComReg Decision D05/15” means ComReg Document 15/82 ComReg Decision D05/15 entitled “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, dated 24 July 2015;

“ComReg Decision D[...]” means ComReg Document [●] ComReg Decision D[...] entitled “Price control obligation relating to Bundles”, dated [●];

“Current Generation Retail Broadband Product” means a Retail Broadband Product which uses Eircom’s network equipment to transmit data signals and includes existing current generation retail products and new current generation retail products;

“Decision Instrument” means this direction and decision instrument which is made pursuant to inter alia Regulations 8, 9, 13 and 18 of the Access Regulations;

“Discount” means an offer or sale of a product at less than its standard price, for example a price reduction, including a volume related price reduction, a rebate, a reimbursement, a refund, a set-off and any other similar words or expressions;

“Effective Date” means the date set out in Section 10 of this Decision Instrument;

“Eircom” means Eircom Limited (with the company registration numbers of 98789 and 907674), and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Decision Instrument, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014 (as may be amended from time to time);

“End-User(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available

electronic communications services to other End-Users and who is not acting as an Undertaking;

“Exchange” means an Eircom network premises or equivalent facility used to house network and associated equipment and includes a Remote Subscriber Unit (RSU). The Exchange sometimes, but not always, houses the Metropolitan Point of Presence (MPoP);

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“Local Loop” shall have the same meaning as under Regulation 2(2) of the Access Regulations, as may be amended from time to time;

“Local Loop Unbundling” or **“LLU”** means local loop unbundling. The local loop is the final section of Eircom’s access network that provides access into premises (whether residential, business or other premises). It runs between the local Exchange and the relevant customer premises. LLU occurs where an OAO rents access to the local loop and uses it to supply services to its customers either on a wholesale or retail basis;

“Margin Squeeze Test” means the Margin Squeeze Test set out in Section 4.3 of this Decision Instrument;

“Margin Squeeze Test Model” is the model used by Eircom to demonstrate whether a particular Bundle complies with the Margin Squeeze Test;

“Metropolitan Point of Presence” or **“MPoP”** means the point of interconnection between the access and core networks of an Undertaking;

“MDF” means main distribution frame;

“Market” means the Relevant Market(s) defined in section 4 of the Decision Instrument contained in Annex H to ComReg Decision D05/15;

“Network Termination Unit” or **“NTU”** means the physical interface which provides the service demarcation point or Point of Handover of the wholesale service within the End-User’s premises;

“Next Generation Access” or **“NGA”** means Access provided over Eircom’s wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access networks;

“Next Generation Retail Broadband Product” means a Retail Broadband Product which uses next generation access network infrastructure and its Associated Facilities, and includes Access Paths that are either exclusively fibre or a combination of fibre and copper;

“ODF” means optical distribution frame;

“ONT” or **“Optical Network Terminal”** means the device that terminates the fibre Access Path at the End-User’s premises;

“Other Authorised Operators” or **“OAOs”** means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“Point of Handover” means the physical point at which two networks are interconnected to allow traffic between these networks;

“Portfolio” means the aggregation of Bundles as defined in this Decision Instrument within either the Urban Area or Regional Area 1 as appropriate;

“Promotion” means an offer in respect of a product which is available for a finite period of time and which offers a tariff reduction;

“Qualifying Exchange” means an Exchange that has been determined by ComReg to satisfy at least one of the criteria contained in the definition of Regional Area 1. ComReg shall have the sole and absolute discretion to determine whether an Exchange constitutes a Qualifying Exchange for the purposes of this Decision Instrument. The list of Exchanges determined by ComReg to constitute Qualifying Exchanges are contained in Annex [X] to ComReg Decision D[**Bundles Decision**] and may be amended by ComReg from time to time where amendments will be made available to interested parties upon request;

“Regional WCA Market” means the market as defined in Section 4.2ii of the Decision Instrument contained in Annex [X - WCA] of ComReg Decision D [**SMP Decision**];

“Regional Area 1” means the total geographic area that is delineated by the Regional WCA Market comprising individual Exchange areas each of which satisfies at least one of the following criteria:

- (i) Criterion 1: An Exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users

from the relevant Exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),

subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant Exchange area;

(ii) Criterion 2: An Exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant Exchange using LLU or VUA (either by means of direct provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA) - subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant Exchange area;

(iii) Criterion 3: An Exchange area in which:

(a) at least one AIP is providing telecommunications services at the retail level to End-Users; and

(b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that Exchange area,

subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant Exchange area;

(iv) Criterion 4: An Exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available wholesale website (in accordance with Section 10 of the Decision Instrument contained in Annex [X - WLA] of ComReg Decision D[**SMP Decision**]) and as set out in Annex [2] entitled "Regional Area 1" of ComReg Decision D[**Bundles Decision**];) regarding the launch of NGA services by Eircom in cabinets in the relevant Exchange area, subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that Exchange area;

- (v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an Exchange area in which the relevant Exchange:
- (a) Is surrounded by Qualifying Exchanges; or
 - (b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s);
or
 - (c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

For the purposes of this definition of “Regional Area 1”, ComReg will construe “reasonable market share and reasonable market coverage” and “reasonable number of lines” in accordance with the relevant factors identified in Annex [2] of ComReg Decision D[**Bundles Decision**] entitled “Regional Area 1”;

“**Regional Area 2**” comprises that part of the Regional WCA Market which does not meet the criteria to be included in Regional Area 1

“**Retail Broadband Product**” for the purposes of this Decision Instrument, means any Eircom Current Generation Retail Broadband Product or Next Generation Retail Broadband Product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated at the wholesale level in the Market in accordance with Annex [X - WLA] and Annex [Y - WCA] of ComReg Decision D[SMP Decision];

“**Retail Line Rental**”, means an Eircom retail line rental product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated in the Market;

“**Remote Subscriber Unit**” or “**RSU**” means a subordinate type of Exchange that is attached to an upstream primary Exchange;

“**Urban WCA Market**” means the market as defined in Section 4.2 of the Decision Instrument contained in Appendix 15 of ComReg Decision [*];

“**Urban Area**” means the geographic area that is delineated by the Urban WCA Market;

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Virtual Unbundled Access (VUA)” means the wholesale active access product proposed by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End-Users’ connections at the MPoP. It allows a level of control to the Undertaking similar to that afforded to the Undertaking connecting their own equipment to an unbundled Local Loop.

“week” means 5 working days;

“Wholesale Ethernet Interconnection Link” or **“WEIL”** is the interconnection service provided by Eircom which provides a handover for various wholesale products including its NGA and Next Generation Network wholesale products;

“Wholesale Line Rental” or **“WLR”** means the wholesale service that allows an OAO to rent an Access Path(s) from Eircom which in turn enables that OAO to offer or provide services over such an Access Path(s) to either an End-User or another OAO;

“Wholesale Local Access” means wholesale local access provided at a fixed location.

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.2 This Decision Instrument relates to a further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision D05/15.

PART II - FURTHER SPECIFICATION OF OBLIGATIONS RELATING TO PRICE CONTROL (SECTION 4 OF THE DECISION INSTRUMENT)

4 MARGIN SQUEEZE OBLIGATIONS

- 4.1 Section 12.8 of the Decision Instrument contained in Appendix H of ComReg Decision D05/15 imposed an obligation on Eircom not to cause a margin squeeze in the Market. For the purpose of further specifying requirements to be complied with relating to that obligation, and pursuant to Regulation 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).
- 4.2 Eircom shall use the Margin Squeeze Test Model to demonstrate whether a particular Bundle complies with the Margin Squeeze Test. Eircom will keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.
- 4.3 In order to comply with the Margin Squeeze Test:

4.3.1 Insofar as the Portfolio sold or offered within the Urban Area is concerned, in accordance with Table 5.1 in Chapter 5 of ComReg Decision [**Bundles Decision**]:

- (i) the Average Monthly Urban Area Portfolio Revenue per customer (Reference R5) shall be equal to or exceed the Average Monthly Urban Area Portfolio Cost per customer (Reference C8); and
- (ii) when the Portfolio includes a retail product(s) or service(s), the upstream inputs of which, or the upstream inputs required to, replicate such a retail product(s) or service(s), are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall also be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 5.1 in Chapter 5 of ComReg Decision [**Bundles Decision**].

4.3.2 Insofar as Bundles sold or offered within Regional Area 1 are concerned in accordance with Table 5.2 in Chapter 5 of ComReg Decision [**Bundles Decision**]:

- (i) as regards the Portfolio, the Average Monthly Regional Area 1 Portfolio Revenue per customer (Reference R5) shall be equal to or exceed the Average Monthly Regional Area 1 Portfolio Cost (Reference C12); and
- (ii) as regards each Bundle, the Average Monthly Regional Area 1 Bundle Revenue per customer (Reference R4) shall be equal to or exceed the Average Monthly Regional Area 1 Adjusted Bundle Cost (Reference C11); and
- (iii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall also be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 5.2 in Chapter 5 of ComReg Decision [●].

4.3.3 Insofar as Bundles sold or offered within Regional Area 2 are concerned in accordance with Table 5.3 in Chapter 5 of ComReg Decision [**Bundles Decision**]:

- (i) as regards each Bundle, the Average Monthly Regional Area 2 Bundle Revenue per customer (Reference R(iv)) shall be equal to or exceed the Average Monthly Regional Area 2 Bundle Cost (Reference C(vii)); and

- (ii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall also be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 5.3 in Chapter 5 of ComReg Decision D[●].
- 4.4 If a Bundle or where relevant Portfolio complies with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, it will be deemed to comply with the obligation contained in Section 12.8 of the Decision Instrument contained in Appendix H of ComReg Decision D05/15 not to cause a margin squeeze. If a Bundle or where relevant Portfolio does not comply with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, ComReg will carry out a general assessment of the reasonableness of the Bundle or where relevant Portfolio and may conclude that, notwithstanding the fact that the Bundle fails the Margin Squeeze Test, the offer or sale by Eircom of that Bundle does not constitute a breach of the obligation contained in Section 12.8 of the Decision Instrument contained in Appendix H of ComReg Decision D05/15 not to cause a margin squeeze. For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle or where relevant Portfolio. ComReg will also consider the impact of the Bundle or where relevant Portfolio on competition in the Market or in other relevant markets, including by reference to the promotion of sustainable competition in the medium to long term and the ability of entrants to enter and/or remain in the market(s) in question.
- 4.5 For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the relevant Bundles or where relevant Portfolio to its audited separated (regulatory) accounts in accordance with ComReg Decision D08/10.

Pre-launch assessment of Bundles

- 4.6 Prior to making a proposed new or revised Bundle available for offer or sale to End-Users, Eircom shall furnish ComReg with a detailed written submission demonstrating that the proposed new or revised Bundle complies with the obligation contained in Appendix H of ComReg Decision D05/15 not to cause a margin squeeze and, in particular, with the Margin Squeeze Test. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the Margin Squeeze Test. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The Margin Squeeze Test Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a Promotion or Discount to End-Users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.
- 4.7 Upon receipt of the submission, ComReg shall review the submission and, within five (5) working days, communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised Bundle without having received such prima facie approval from ComReg. Prior to the expiry of the five working day period, ComReg may seek further information from Eircom to inform its decision as to whether prima facie approval to launch should be given or withheld. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, prima facie approval to launch the proposed new or revised Bundle shall be withheld pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed to make a decision as to whether prima facie approval for launch of the new or revised Bundle should be granted or withheld.

Post-launch assessment of Bundles / assessment of existing Bundles

- 4.8 Once a new or revised Bundle is made available for offer or for sale to End-Users, Eircom must at all times ensure it meets its obligation under Appendix H of ComReg Decision D05/15 and not cause a margin squeeze and, in particular, ensure that it complies with the relevant Margin Squeeze Test. Eircom shall notify ComReg immediately if it believes that any Bundle may not be so compliant.

- 4.9 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation under Appendix H of ComReg Decision D05/15 not to cause a margin squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test. Eircom shall also provide any other relevant information required so that ComReg can make an informed decision as to whether Eircom is meeting its regulatory obligations including, in particular, its obligation not to cause a margin squeeze.
- 4.10 Pursuant to Regulations 8, 9 and 13 Eircom shall submit to ComReg on a quarterly basis a written statement with supporting documentation that adequately demonstrates its compliance with its regulatory obligations as set out in Section 4.3 of this Decision Instrument.

PART III – OPERATION AND EFFECTIVE DATE (SECTIONS 5 TO 10 OF THE DECISION INSTRUMENT)

5 STATUTORY POWERS NOT AFFECTED

- 5.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation in force prior to or after the Effective Date of this Decision Instrument.

6 MAINTENANCE OF OBLIGATIONS

- 6.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument continue in force and Eircom shall comply with same.

7 CONFLICT

- 7.1 For the avoidance of doubt to the extent that there is any conflict between a ComReg Decision Instrument or ComReg document dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg .

8 SEVERANCE

- 8.1 If any Section(s), clause(s) or provision(s), or portion(s) thereof, contained in this Decision Instrument is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s), or portion(s) thereof, shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s), or portion(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

9 WITHDRAWAL OF SMP OBLIGATIONS

- 9.1 Pursuant to Regulations 8, 13 and 18 of the Access Regulations:
- (i) Annex 3 of ComReg Decision D04/13 “Decision Instrument: Market 1” is withdrawn when the Decision Instruments contained in Annex [B - WCA] and Annex [C - WLA] of ComReg Decision D[...] “XYZ”, and this Decision Instrument contained in Annex A of ComReg Decision D[...] “123”, shall together take effect.
 - (ii) Section 8 of the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA of ComReg Decision D12/14, is withdrawn when the Decision Instruments contained in Annex [B - WCA] and Annex [C - WLA] of ComReg Decision D[...] “XYZ”, and this Decision Instrument contained in Annex A of ComReg Decision D[...] “123”, shall together take effect.
 - (iii) Section 8 of the Decision Instrument contained in Appendix 8 Market 1c: HLVA of ComReg Decision D12/14, is withdrawn when the Decision Instruments contained in Annex [B - WCA] and Annex [C - WLA] of ComReg Decision D[...] “XYZ”, and this Decision Instrument contained in Annex A of ComReg Decision D[...] “123”, shall together take effect.

10 EFFECTIVE DATE

- 10.1 The Effective Date of this Decision Instrument shall be the date of its notification to Eircom and it shall remain in force until further notice by ComReg.

GERRY FAHY

COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [...] DAY OF [...] 201[...]

Q. 24 Do you believe that the draft text of the proposed Decision Instrument for the FACO Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Annex: 5 Draft Decision Instrument – Wholesale Local Access Market

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

- 1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for wholesale local access provided at a fixed location as identified by the European Commission in the 2014 Recommendation and analysed by ComReg in the ComReg SMP Decision [●]. This Decision Instrument relates to further specification of the price control and transparency obligations imposed by ComReg in the ComReg Pricing Decision [●].
- 1.2 This Decision Instrument is made:
- (i) Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations;
 - (ii) Pursuant to, and having regard to, the significant market power (SMP) designation of Eircom as provided for in Section X of the Decision Instrument annexed to the ComReg SMP Decision [●];
 - (iii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended); Regulation 16 of the Framework Regulations; and Regulations 6(1), 8(6) and 13(2) of the Access Regulations;
 - (iv) Having, pursuant to Section 13 of the Communications Regulation Act 2002 (as amended), complied with Ministerial Policy Directions where applicable;
 - (v) Having taken utmost account of the European Commission’s Recommendation of 11 September 2013 on non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment and the European Commission’s Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks;
 - (vi) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken account of any comments made by these parties;
 - (vii) Having regard to the analysis and reasoning set out in the ComReg SMP Decision [●] and having taken account of the submissions received from interested parties in response thereto following public consultations pursuant to Regulation 12 of the Framework Regulations;

- (viii) Having had regard to the analysis and reasoning set out in the ComReg Pricing Consultation Document No. 17/51 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
 - (ix) Having had regard to the analysis and reasoning set out in the ComReg Pricing Decision [●].
- 1.3 The provisions of the ComReg SMP Consultation Document 16/96 and the ComReg SMP Decision [●] as well as the ComReg Pricing Consultation Document 17/26 and the ComReg Pricing Decision [●] shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of this Decision Instrument) and this Decision Instrument, this Decision Instrument should prevail.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 3 OF THE DECISION INSTRUMENT)

2 DEFINITIONS

- 2.1 In this Decision Instrument, unless the context otherwise suggests:

“Access” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“**Access Path**” means the connection from the NTU/ONT in the End-User’s premises to the Point of Handover. The Points of Handover for physical unbundling are the MDF (for metallic) and the ODF (for fibre) in the Exchange, and the Point of Handover for non-physical unbundling (virtual access) is the Wholesale Ethernet Interconnection Link at the serving Aggregation Node for the End-User i.e. at the MPoP;

“**Access Reference Offer**” or “**ARO**” is the latest version of the offer of contract by Eircom to Undertakings in relation to WLA (but which may from time to time be amended or supplemented). For the avoidance of doubt the ARO includes the documents which are expressly referred to as being part of the ARO. To the extent that there is any conflict between the ARO and Eircom’s obligations now set out herein, it is the latter which shall prevail;

“**Access Regulations**” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

“**Aggregation Node**” or “**Agg Node**” means a network concentration point for Access Paths;

“Alternative Infrastructure Provider (AIP)” means an Undertaking providing retail broadband services to End-Users at a fixed location by means of alternative infrastructure. For the purposes of this definition, services are deemed to be provided by means of “alternative infrastructure” when the relevant AIP does not rely on any wholesale access inputs from Eircom in respect of the Local Loop (e.g. including Wholesale Line Rental (WLR), Bitstream, VUA or LLU) in order to provide services to End-Users in a particular Exchange area;

“Associated Facilities” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

“Average Total Cost” or **“ATC”** means a cost standard which reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs;

“Average Monthly Urban Area Portfolio Cost per customer” shall be construed in accordance with Reference C8 in Table 5.1 in Chapter 5 of ComReg Decision D[**Bundles Decision**];

“Average Monthly Urban Area Portfolio Revenue per customer” shall be construed in accordance with Reference R5 in Table 5.1 in Chapter 5 of ComReg Decision D[**Bundles Decision**];

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Bundle” means a package of services consisting of Retail Broadband Product and one or more other retail products or services which is on offer or on sale by Eircom to End-Users;

“Communications Regulation Act 2002” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

“ComReg” means the Commission for Communications Regulation, established under the Communications Regulation Act 2002;

“ComReg Decision D04/13” means ComReg Document No. 13/14 entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4”, dated 8 February 2013;

“ComReg Decision D08/10” means ComReg Document No. 10/67 entitled “Response to Consultation Document and Final Direction and Decision, Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited”, dated 31 August 2010;

“ComReg Decision D05/15” means ComReg Document 15/82 ComReg Decision D05/15 entitled “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, dated 24 July 2015;

“ComReg Decision D[...]” means ComReg Document [●] ComReg Decision D[...] entitled “Price control obligation relating to Bundles” dated [●];

“Current Generation Retail Broadband Product” means a Retail Broadband Product which uses Eircom’s network equipment to transmit data signals and includes existing current generation retail products and new current generation retail products;

“Decision Instrument” means this direction and decision instrument which is made pursuant to *inter alia* Regulations 8, 9, 13 and 18 of the Access Regulations;

“Discount” means an offer or sale of a product at less than its standard price, for example a price reduction, including a volume related price reduction, a rebate, a reimbursement, a refund, a set-off and any other similar words or expressions;

“DSL” means digital subscriber line;

“Effective Date” means the date set out in Section 10 of this Decision Instrument;

“Eircom” means Eircom Limited (with the company registration numbers of 98789 and 907674), and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Decision Instrument, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014 (as may be amended from time to time);

“End-User(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Undertaking;

“**Exchange**” means an Eircom network premises or equivalent facility used to house network and associated equipment, and includes a Remote Subscriber Unit (RSU). The Exchange sometimes, but not always, houses the Metropolitan Point of Presence (MPoP);

“**Framework Regulations**” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“**Full Unbundled Access to the Local Loop**” shall have the same meaning as in the Schedule to the Access Regulations;

“**FWA**” means fixed wireless access;

“**ISDN**” means Integrated Services Digital Network and includes ISDN BRA; ISDN FRA and ISDN PRA;

“**ISDN BRA**” means ISDN basic rate access;

“**ISDN FRA**” means ISDN fractional primary rate access;

“**ISDN PRA**” means ISDN primary rate access;

“**Local Loop**” shall have the same meaning as under Regulation 2(2) of the Access Regulations;

“**Local Loop Unbundling (LLU)**” means local loop unbundling. The local loop is the final section of Eircom’s access network that provides access into premises (whether residential, business or other premises). It runs between the local Exchange and the relevant customer premises. LLU occurs where an OAO rents access to the local loop and uses it to supply services to its customers either on a wholesale or retail basis;

“**Margin Squeeze Test**” means the Margin Squeeze Test set out in Section 4.3 of this Decision Instrument;

“**Margin Squeeze Test Model**” is the model used by Eircom to demonstrate whether a particular Bundle complies with the Margin Squeeze Test;

“**Market**” means the Relevant Market(s) defined in section 4 of the Decision Instrument contained in Annex [X] to ComReg Decision D [**SMP Decision**], and is synonymous with the term WLA (Wholesale Local Access);

“**Metropolitan Point of Presence**” or “**MPoP**” means the point of interconnection between the access and core networks of an Undertaking;

“**MDF**” means main distribution frame;

“Next Generation Access” or **“NGA”** means Access provided over Eircom’s wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access networks;

“Next Generation Retail Broadband Product” means a Retail Broadband Product which uses next generation access network infrastructure and its Associated Facilities, and includes Access Paths that are either exclusively fibre or a combination of fibre and copper;

“Network Termination Unit” or **“NTU”** means the physical interface which provides the service demarcation point or Point of Handover of the wholesale service within the End-User’s premises;

“Next Generation Wholesale Local Access” or **“Next Generation WLA”** means Wholesale Local Access provided over NGA and its Associated Facilities (including self-supply by Eircom for the purpose of serving its downstream markets).

“ODF” means optical distribution frame;

“ONT” or **“Optical Network Terminal”** means the device that terminates the fibre Access Path at the End-User’s premises;

“Other Authorised Operators (OAOs)” means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“Point of Handover” means the physical point at which two networks are interconnected to allow traffic between these networks;

“Portfolio” means the aggregation of Bundles as defined in this Decision within the Urban Area

“Promotion” means an offer in respect of a product which is available for a finite period of time and which offers a tariff reduction;

“PSTN” means public service telephone network;;

“Retail Broadband Product” for the purposes of this Decision Instrument, means any Eircom Current Retail Broadband Product or Next Generation Retail Broadband Product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated at the wholesale level in the Market in accordance with the Decision

Instrument contained in Annex [X - WLA] of ComReg Decision D[**SMP Decision**];

“Retail Line Rental”, means an Eircom retail line rental product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated in the market for fixed access and call origination as defined in section 4 of the Decision Instrument contained in Annex H to ComReg Decision D05/15;

“Remote Subscriber Unit” or **“RSU”** means a subordinate type of Exchange that is attached to an upstream primary Exchange;

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Urban Area” means the geographic area of the Urban WCA Market;

“Urban WCA Market” means the market as defined in Section 4.2(i) of the Decision Instrument annexed to ComReg Decision D[**SMP Decision**];

“Virtual Unbundled Access (VUA)” means the wholesale active access product proposed by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End-Users’ connections at the MPoP. It allows a level of control to Undertaking similar to that afforded to the Undertaking connecting their own equipment to an unbundled Local Loop.

“Week” means 5 working days; and

“Wholesale Ethernet Interconnection Link” or **“WEIL”** is the interconnection service provided by Eircom and which provides a handover for various wholesale products including its NGA and Next Generation Network wholesale products; and

“Wholesale Line Rental” or **“WLR”** means the wholesale service that allows an OAO to rent an Access Path(s) from Eircom which in turn enables that OAO to offer or provide services over such an Access Path(s) to either an End-User or another OAO.

“(the) 2014 Recommendation” means the European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 295, 11.10.2014, p. 79);

“(the) 2013 Recommendation” means the European Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (C(2013) 5671 final);

“(the) **2010 Recommendation**” means the European Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (2010/572/EU).

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.2 This Decision Instrument relates to a further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision [●].

PART II - FURTHER SPECIFICATION OF OBLIGATIONS RELATING TO PRICE CONTROL (SECTION 4 OF THE DECISION INSTRUMENT)

4 MARGIN SQUEEZE OBLIGATIONS

- 4.1 Section 12.4 and Section 12.16 of the Decision Instrument on Wholesale Local Access contained in Annex 14 of ComReg Decision D[**SMP Decision**] imposed an obligation on Eircom not to cause a margin squeeze against Bundles in the footprint corresponding to the Urban WCA Market. For the purpose of further specifying requirements to be complied with relating to that obligation, and pursuant to Regulation 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).
- 4.2 Eircom shall use the Margin Squeeze Test Model to demonstrate whether the particular Portfolio in the Urban Area complies with the Margin Squeeze Test. Eircom will keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.
- 4.3 In order to comply with the Margin Squeeze Test:
 - 4.3.1 Insofar as the Portfolio sold or offered within the Urban Area are concerned in accordance with Table 5.1 in Chapter 5 of ComReg Decision [**Bundles Decision**]:
 - (i) the Average Monthly Urban Area Portfolio Revenue per customer (Reference R5) shall be equal to or exceed the Average Monthly Urban Area Portfolio Cost per customer (Reference C8); and
 - (ii) when the Portfolio includes a retail product(s) or service(s), the upstream inputs of which, or the upstream inputs required to replicate such a retail product(s) or service(s), are not regulated at the wholesale level in any market, then the compliance with the Margin Squeeze Test shall also be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 5.1 in Chapter 5 of ComReg Decision D[**Bundles Decision**].

- 4.4 If the Portfolio complies with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, it will be deemed to comply with the obligation contained in Section 12.4 and Section 12.16 of the Decision Instrument contained in Annex 14 of ComReg Decision D[**SMP Decision**] not to cause a margin/price squeeze. If the Portfolio does not comply with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, ComReg will carry out a general assessment of the reasonableness of the Portfolio and may conclude that, notwithstanding the fact that the Portfolio fails the Margin Squeeze Test, the offer or sale by Eircom of the Portfolio does not constitute a breach of the obligation contained in Section 12.4 and Section 12.16 of the Decision Instrument contained in Annex 14 of ComReg Decision [SMP Decision] not to cause a margin/price squeeze. For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the Portfolio. ComReg will also consider the impact of the Bundle on competition in the Market or in other relevant markets, including by reference to the promotion of sustainable competition in the medium to long term and the ability of entrants to enter and/or remain in the market(s) in question.
- 4.5 For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the Portfolio to its audited separated (regulatory) accounts in accordance with ComReg Decision D08/10.

Pre-launch assessment of Bundles

- 4.6 Prior to making a proposed new or revised Bundle available for offer or sale to End-Users, Eircom shall furnish ComReg with a detailed written submission demonstrating that the proposed new or revised Bundle, will not affect the ability of the Portfolio to continue complying with the obligation contained in Section 12.4 and Section 12.16 of the Decision Instrument contained in Annex 14 of ComReg Decision [SMP Decision] not to cause a margin/price squeeze and, in particular, with the Margin Squeeze Test. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the obligation not to cause a margin squeeze and, in particular, with the Margin Squeeze Test set out in this Decision Instrument. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The Margin Squeeze Test Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a Promotion or Discount to End-Users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.

- 4.7 Upon receipt of the submission, ComReg shall review the submission and, within five (5) working days, communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised Bundle without having received such prima facie approval from ComReg. Prior to the expiry of the five working day period, ComReg may seek further information from Eircom to inform its decision as to whether prima facie approval to launch should be given or withheld. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, prima facie approval to launch the proposed new or revised Bundle shall be withheld pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed to make a decision as to whether prima facie approval for launch of the new or revised Bundle should be granted or withheld.

Post-launch assessment of Bundles / assessment of existing Bundles

- 4.8 Once a new or revised Bundle is made available for offer or for sale to End-Users, Eircom must at all times ensure that the Portfolio in the Urban Area meets its obligation under Annex [X] of ComReg Decision [SMP Decision] and not cause a margin/price squeeze and, in particular, ensure that it complies with the relevant Margin Squeeze Test. Eircom shall notify ComReg immediately if it believes that any Bundle may not be so compliant.
- 4.9 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation under Annex [X] of ComReg Decision [SMP Decision] not to cause a margin/price squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test. Eircom shall also provide any other relevant information required so that ComReg can make an informed decision as to whether Eircom is meeting its regulatory obligations including, in particular, its obligation not to cause a margin squeeze.
- 4.10 Pursuant to Regulations 8, 9 and 13 Eircom shall submit to ComReg on a quarterly basis a written statement with supporting documentation that adequately demonstrates its compliance with its regulatory obligations as set out in Section 4.3 of this Decision Instrument.

PART III – OPERATION AND EFFECTIVE DATE (SECTIONS 5 TO 10 OF THE

DECISION INSTRUMENT)

5 STATUTORY POWERS NOT AFFECTED

- 5.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation in force prior to or after the Effective Date of this Decision Instrument.

6 MAINTENANCE OF OBLIGATIONS

- 6.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, continue in force and Eircom shall comply with same.

7 CONFLICT

- 7.1 For the avoidance of doubt to the extent that there is any conflict between a ComReg Decision Instrument or ComReg document dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

8 SEVERANCE

- 8.1 If any Section(s), clause(s) or provision(s), or portion(s) thereof, contained in this Decision Instrument, is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s), or portion(s) thereof, shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s), or portion(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

9 WITHDRAWAL OF SMP OBLIGATIONS

- 9.1 Pursuant to Regulations 8, 13 and 18 of the Access Regulations:
- (i) Annex 3 of ComReg Decision D04/13 "Decision Instrument: Market 1" is withdrawn when the Decision Instruments contained in [A - FACO] Annex and Annex [B - WCA] of ComReg Decision D[●] "●", and this Decision Instrument contained in Annex C of ComReg Decision D[●] "●", shall together take effect.
 - (ii) Section 8 of the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA of ComReg Decision D12/14, is withdrawn when the Decision Instruments contained in [A - FACO] Annex and Annex [B - WCA] of ComReg Decision D[●] "●", and this Decision Instrument contained in Annex C of ComReg Decision D[●] "●", shall together take effect.

(iii) Section 8 of the Decision Instrument contained in Appendix 8 Market 1c: HLVA of ComReg Decision D12/14, is withdrawn when the Decision Instruments contained in [A - FACO] Annex and Annex [B - WCA] of ComReg Decision D[●] “●”, and this Decision Instrument contained in Annex C of ComReg Decision D[●] “●”, shall together take effect.

9.2 Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations, the obligations set out in Section 4 of this Decision Instrument shall only come into effect when all of the obligations set out in Sections 4 to 13 (inclusive) of the Decision Instrument contained in Annex [●] of ComReg Decision [●] (i.e. the WLA Decision Instrument) come into effect.

10 EFFECTIVE DATE

10.1 The Effective Date of this Decision Instrument shall be the date of its notification to Eircom and it shall remain in force until further notice by ComReg.

GERRY FAHY

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [●] DAY OF [●] 20YY

Q. 25 Do you believe that the draft text of the proposed Decision Instrument for the WLA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Annex: 6 Draft Decision Instrument – Wholesale Central Access Market

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for wholesale central access for mass market products provided at a fixed location as identified by the European Commission in the 2014 Recommendation and analysed by ComReg in ComReg Decision [●]. This Decision Instrument relates to further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision [●].

1.2 This Decision Instrument is made:

- (ix) Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations;
- (x) Pursuant to, and having regard to, the significant market power (SMP) designation of Eircom as provided for in Section X of the Decision Instrument annexed to ComReg Decision [●];
- (xi) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended); Regulation 16 of the Framework Regulations; and Regulations 6(1) 8(6) and 13(2) of the Access Regulations;
- (xii) Having, pursuant to Section 13 of the Communications Regulation Act 2002 (as amended) complied with Ministerial Policy Directions, where applicable;
- (xiii) Having taken utmost account of the European Commission’s Recommendation of 11 September 2013 on non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment;
- (xiv) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken account of any comments made by these parties;
- (xv) Having had regard to the analysis and reasoning set out in ComReg Document No. [●] and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
- (xvi) Having had regard to the analysis and reasoning set out in ComReg Decision D[●].

- 1.3 The provisions of ComReg Document [●], ComReg Decision [●] and ComReg Decision [●] shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of this Decision Instrument) and this Decision Instrument, this Decision Instrument should prevail.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 3 OF THE DECISION INSTRUMENT)

2 DEFINITIONS

2.1 In this Decision Instrument, unless the context otherwise suggests:

“Access” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“Access Path” means the connection from the NTU/ONT in the End-User’s premises to the Point of Handover. The Points of Handover for physical unbundling are the MDF (for metallic) and the ODF (for fibre) in the Exchange, and the Point of Handover for non-physical unbundling (virtual access) is the Wholesale Ethernet Interconnection Link at the serving Aggregation Node for the End-User i.e. at the MPoP;

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

“Aggregation Node” or **“Agg Node”** means a network concentration point for Access Paths;

“Alternative Infrastructure Provider (AIP)” means an Undertaking providing retail broadband services to End-Users at a fixed location by means of alternative infrastructure. For the purposes of this definition, services are deemed to be provided by means of “alternative infrastructure” when the relevant AIP does not rely on any wholesale access inputs from Eircom in respect of the Local Loop (e.g. including Wholesale Line Rental (WLR), Bitstream, VUA or LLU) in order to provide services to End-Users in a particular Exchange area;

“Associated Facilities” “shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Average Total Cost” or **“ATC”** means a cost standard which reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs;

“**Average Monthly Regional Area 1 Adjusted bundle Cost**” shall be construed in accordance with Reference C11 in Table 5.2 in Chapter 5 of ComReg Decision D[•];

“**Average Monthly Regional Area 1 bundle Revenue per customer**” shall be construed in accordance with Reference R4 in Table 5.2 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“**Average Monthly Regional Area 1 Portfolio Cost**” shall be construed in accordance with Reference C12 in Table 5.2 in Chapter 5 of ComReg Decision D[•];

“**Average Monthly Regional Area 1 Portfolio Revenue per customer**” shall be construed in accordance with Reference R5 in Table 5.2 in Chapter 5 of ComReg Decision D[*Bundles Decision*];

“**Average Monthly Regional Area 2 bundle Revenue per customer**” shall be construed in accordance with Reference R(iv) in Table 5.3 in Chapter 5 of ComReg Decision D[•];

“**Average Monthly Regional Area 2 bundle Cost**” shall be construed in accordance with Reference C(vii) in Table 5.3 in Chapter 5 of ComReg Decision D[•];

“**BEREC**” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“**Bundle**” means a package of services, consisting of a Retail Broadband Product and one or more other retail products or services which is on offer or on sale by Eircom to End-Users;

“**Communications Regulation Act 2002**” means the Communications Regulation Act 2002 (No. 20 of 2002);

“**ComReg**” means the Commission for Communications Regulation, established under the Communications Regulation Act 2002 (as amended);

“**ComReg Decision D04/13**” means ComReg Document 13/14 ComReg Decision D04/13 entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4”, dated 8 February 2013;

“**ComReg Decision D08/10**” means ComReg Document No. 10/67 entitled “Response to Consultation Document and Final Direction and Decision, Response to Consultation Document No. 09/75 and Final Direction and

Decision: Accounting Separation and Cost Accounting Review of Eircom Limited”, dated 31 August 2010;

“**ComReg Decision D[●]**” means ComReg Document [●] ComReg Decision D[●] entitled “Price control obligation relating to Bundles”, dated [●];

“**Current Generation Retail Broadband Product**” means a Retail Broadband Product which uses Eircom’s network equipment to transmit data signals and includes existing current generation retail products and new current generation retail products;

“**Decision Instrument**” means this direction and decision instrument which is made pursuant to *inter alia* Regulations 8, 9, 13 and 18 of the Access Regulations;

“**Discount**” means an offer or sale of a product at less than its standard price, for example a price reduction, including a volume related price reduction, a rebate, a reimbursement, a refund, a set-off and any other similar words or expressions;

“**DSL**” means digital subscriber line;

“**Effective Date**” means the date set out in Section 10 of this Decision Instrument;

“**Eircom**” means Eircom Limited (with the company registration numbers of 98789 and 907674), and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Decision Instrument, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014;

“**End-User(s)**” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Undertaking;

“**Exchange**” means an Eircom premises or equivalent facility used to house network and associated equipment, and includes a Remote Subscriber Unit (RSU). The Exchange sometimes, but not always, houses the Metropolitan Point of Presence (MPoP);

“**FWA**” means fixed wireless access;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“Full Unbundled Access to the Local Loop” shall have the same meaning as in the Schedule to the Access Regulations;

“ISDN” means Integrated Services Digital Network and includes ISDN BRA; ISDN FRA and ISDN PRA;

“ISDN BRA” means ISDN basic rate access;

“ISDN FRA” means ISDN fractional primary rate access;

“ISDN PRA” means ISDN primary rate access;

“Local Loop” shall have the same meaning as under Regulation 2(2) of the Access Regulations;

“Local Loop Unbundling (LLU)” means local loop unbundling. The local loop is the final section of Eircom’s access network that provides access into premises (whether residential, business or other premises). It runs between the local Exchange and the relevant customer premises. LLU occurs where an OAO rents access to the local loop and uses it to supply services to its customers either on a wholesale or retail basis;

“Margin Squeeze Test” means the Margin Squeeze Test set out in Section 4.3 of this Decision Instrument;

“Margin Squeeze Test Model” is the model used by Eircom to demonstrate whether a particular Bundle complies with the Margin Squeeze Test;

“Market” means the Relevant Market(s) defined in section 4 of the Decision Instrument contained in Annex [●] to ComReg Decision D [**SMP Decision**], and is synonymous with the term WCA (Wholesale Central Access);

“Metropolitan Point of Presence” or **“MPoP”** means the point of interconnection between the access and core networks of an Undertaking;

“MDF” means main distribution frame;

“Next Generation Access” or **“(NGA)”** means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access networks;

“Next Generation Retail Broadband Product” means a Retail Broadband Product which uses next generation access network infrastructure and its Associated Facilities, and includes Access Paths that are either exclusively fibre or a combination of fibre and copper;

“Network Termination Unit” or **“NTU”** means the physical interface which provides the service demarcation point or Point of Handover of the wholesale service within the End-User’s premises;

“ODF” means **optical distribution frame**;

“ONT” or **“Optical Network Terminal”** means the device that terminates the fibre Access Path at the End-User’s premises;

“Other Authorised Operators (OAOs)” means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“Point of Handover” means the physical point at which two networks are interconnected to allow traffic between these networks;

“Portfolio” means the aggregation of Bundles as defined in this Decision Instrument within either Regional Area 1

“Promotion” means an offer in respect of a product which is available for a finite period of time and which offers a tariff reduction;

“Qualifying Exchange” means an Exchange that has been determined by ComReg to satisfy at least one of the criteria contained in the definition of Regional Area 1. ComReg shall have the sole and absolute discretion to determine whether an Exchange constitutes a Qualifying Exchange for the purposes of this Decision Instrument. The list of Exchanges determined by ComReg to constitute Qualifying Exchanges are contained in Annex [X] to ComReg Decision D[**Bundles Decision**] and may be amended by ComReg from time to time where amendments will be made available to interested parties upon request;

“Regional Area 1” means the total geographic area of the Regional WCA Market comprising individual Exchange areas each of which satisfies at least one of the following criteria:

- (i) Criterion 1: An Exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant Exchange using

LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),

subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant Exchange area;

(ii) Criterion 2: An Exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant Exchange using LLU or VUA (either by means of direct provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA) - subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant Exchange area;

(iii) Criterion 3: An Exchange area in which:

(a) at least one AIP is providing telecommunications services at the retail level to End-Users; and

(b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that Exchange area,

subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant Exchange area;

(iv) Criterion 4: An Exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available wholesale website (in accordance with Section [10] of the Decision Instrument contained in Appendix 14 [**WLA**] of ComReg Decision D[**SMP Decision**] and as set out in Annex [2] entitled "Regional Area 1" of ComReg Decision D[**Bundles Decision**]) regarding the launch of NGA services by Eircom in cabinets in the relevant Exchange area, subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that Exchange area;

(v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an Exchange area in which the relevant Exchange:

(a) Is surrounded by Qualifying Exchanges; or

- (b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s); or
- (c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

For the purposes of this definition of “Regional Area 1”, ComReg will construe “reasonable market share and reasonable market coverage” and “reasonable number of lines” in accordance with the relevant factors identified in Annex [●] of ComReg Decision D[●] entitled “Regional Area 1”;

“**Regional Area 2**” comprises that part of the Regional WCA Market which does not meet the criteria to be included in Regional Area 1

“**Retail Broadband Product**” for the purposes of this Decision Instrument, means any Eircom Current Generation Retail Broadband Product or Next Generation Retail Broadband Product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated at the wholesale level in the Market in accordance with Annex [X - WLA] and [Y - WCA] of ComReg Decision [**XX SMP Decision**];

“**Remote Subscriber Unit**” or “**RSU**” means a subordinate type of Exchange that is attached to an upstream primary Exchange;

“**Undertaking**” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“**Urban area**” means the geographic area of the Urban WCA Market;

“**Urban WCA Market**” means the market as defined in Section 4.2(i) of the Decision Instrument annexed to ComReg Decision [●];

“**Virtual Unbundled Access (VUA)**” means the wholesale active access product proposed by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End-Users’ connections at the MPoP. It allows a level of control to Undertaking similar to that afforded to the Undertaking connecting their own equipment to an unbundled Local Loop.

“**Week**” means 5 working days; and

“**Wholesale Ethernet Interconnection Link**” or “**WEIL**” is the interconnection service provided by Eircom and which provides a handover for various wholesale products including its NGA and Next Generation Network wholesale products;

“**Wholesale Line Rental**” or “**WLR**” means the wholesale service that allows an OAO to rent an Access Path(s) from Eircom which in turn enables that OAO to offer or provide services over such an Access Path(s) to either an End-User or another OAO;

“(the) **2013 Recommendation**” means the European Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and **costing** methodologies to promote competition and enhance the broadband investment environment (C(2013) 5671 final); and

“(the) **2014 Recommendation**” means the European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 295, 11.10.2014, p. 97).

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.2 This Decision Instrument relates to a further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision [●].

PART II - FURTHER SPECIFICATION OF OBLIGATIONS RELATING TO PRICE CONTROL (SECTION 4 OF THE DECISION INSTRUMENT)

4 MARGIN/PRICE SQUEEZE OBLIGATIONS

- 4.1 Section 12.4 and Sections 12.10 to 12.13 inclusive of the Decision Instrument on Wholesale Central Access contained in Appendix 15 of ComReg Decision [SMP Decision] imposed an obligation on Eircom not to cause a margin squeeze against bundles in the footprint corresponding to the Regional Market. For the purpose of further specifying requirements to be complied with relating to that obligation, and pursuant to Regulation 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).
- 4.2 Eircom shall use the Margin Squeeze Test Model to demonstrate whether a particular Bundle complies with the Margin Squeeze Test. Eircom will keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.
- 4.3 In order to comply with the Margin Squeeze Test:

4.3.1 Insofar as Bundles sold or offered within Regional Area 1 are concerned in accordance with Table 5.2 in Chapter 5 of ComReg Decision [**Bundles Decision**]:

- (i) as regards the Portfolio, the Average Monthly Regional Area 1 Portfolio Revenue per customer (Reference R5) shall be equal to or exceed the Average Monthly Regional Area 1 Portfolio Cost (Reference C12); and
- (ii) as regards each Bundle, the Average Monthly Regional Area 1 Bundle Revenue (Reference R4) shall be equal to or exceed the Average Monthly Regional Area 1 Adjusted Bundle Cost (Reference C11).
- (iii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall also be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 5.2 in Chapter 5 of ComReg Decision D[...].

4.3.2 Insofar as Bundles sold or offered in Regional Area 2 are concerned in accordance with Table 5.3 in Chapter 5 of ComReg Decision [**Bundles Decision**]:

- (i) as regards each Bundle, the Average Monthly Regional Area 2 bundle Revenue per customer (Reference R(iv)) shall be equal to or exceed the Average Monthly Regional Area 2 bundle Cost (Reference C(vii)); and
- (ii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall also be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 5.3 in Chapter 5 of ComReg Decision D[...].

- 4.4 If a Bundle or where relevant Portfolio complies with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, it will be deemed to comply with the obligation set out in the Decision Instrument on Wholesale Central Access contained in Appendix 15 of ComReg Decision [SMP Decision] not to cause a margin/price squeeze. If a Bundle or where relevant Portfolio does not comply with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, ComReg will carry out a general assessment of the reasonableness of the Bundle or where relevant Portfolio and may conclude that, notwithstanding the fact that the Bundle or where relevant Portfolio fails the Margin Squeeze Test, the offer or sale by Eircom of that Bundle or where relevant Portfolio does not constitute a breach of the obligation set out in the Decision Instrument on Wholesale Central Access contained in Appendix 15 of ComReg Decision [SMP Decision] not to cause a margin/price squeeze. For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle or where relevant Portfolio. ComReg will also consider the impact of the Bundle or where relevant Portfolio on competition in the Market or in other relevant markets, including by reference to the promotion of sustainable competition in the medium to long term and the ability of entrants to enter and/or remain in the market(s) in question.
- 4.5 For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the relevant Bundles or where relevant Portfolio to its audited separated (regulatory) accounts in accordance with ComReg Decision D08/10.

Pre-launch assessment of Bundles

- 4.6 Prior to making a proposed new or revised Bundle available for offer or sale to End-Users, Eircom shall furnish ComReg with a detailed written submission demonstrating that the proposed new or revised Bundle complies with the obligation set out in the Decision Instrument on Wholesale Central Access contained in Appendix 15 of ComReg Decision [SMP Decision] not to cause a margin/price squeeze and, in particular, with the Margin Squeeze Test. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the obligation not to cause a margin/price squeeze and, in particular, with the Margin Squeeze Test. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The Margin Squeeze Test Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a Promotion or Discount to End-Users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.
- 4.7 Upon receipt of the submission, ComReg shall review the submission and, within five (5) working days, communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised Bundle without having received such prima facie approval from ComReg. Prior to the expiry of the five working day period, ComReg may seek further information from Eircom to inform its decision as to whether prima facie approval to launch should be given or withheld. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, prima facie approval to launch the proposed new or revised Bundle shall be withheld pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed to make a decision as to whether prima facie approval for launch of the new or revised Bundle should be granted or withheld.

Post-launch assessment of Bundles / assessment of existing Bundles

- 4.8 Once a new or revised Bundle is made available for offer or for sale to End-Users, Eircom must at all times ensure it meets its obligation set out in the Decision Instrument on Wholesale Central Access contained in Appendix 15 of ComReg Decision [SMP Decision] and not cause a margin/price squeeze and, in particular, ensure that it complies with the relevant Margin Squeeze Test. Eircom shall notify ComReg immediately if it believes that any Bundle may not be so compliant.

- 4.9 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation under Annex [X] of ComReg Decision [SMP Decision] not to cause a margin/price squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test. Eircom shall also provide any other relevant information required so that ComReg can make an informed decision as to whether Eircom is meeting its regulatory obligations including, in particular, its obligation not to cause a margin/price squeeze.
- 4.10 Pursuant to Regulations 8, 9 and 13 Eircom shall submit to ComReg on a quarterly basis a written statement with supporting documentation that adequately demonstrates its compliance with its regulatory obligations as set out in Section 4.3 of this Decision Instrument.

PART III – OPERATION AND EFFECTIVE DATE (SECTIONS 5 TO 10 OF THE DECISION INSTRUMENT)

5 STATUTORY POWERS NOT AFFECTED

- 5.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation in force prior to or after the Effective Date of this Decision Instrument.

6 MAINTENANCE OF OBLIGATIONS

- 6.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, continue in force and Eircom shall comply with same.

7 CONFLICT

- 7.1 For the avoidance of doubt to the extent that there is any conflict between a ComReg Decision Instrument or ComReg document dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

8 SEVERANCE

- 8.1 If any Section(s), clause(s) or provision(s), or portion(s) thereof, contained in this Decision Instrument, is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s), or portion(s) thereof, shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s), or portion(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

9 WITHDRAWAL OF SMP OBLIGATIONS

- 9.1 Pursuant to Regulations 8, 13 and 18 of the Access Regulations:

- (i) Annex 3 of ComReg Decision D04/13 “Decision Instrument: Market 1” is withdrawn when the Decision Instruments contained in [A - FACO] Annex and Annex [C - WLA] of ComReg Decision D[...], and this Decision Instrument contained in Annex B of ComReg Decision D[...], shall together take effect.
- (ii) Section 8 of the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA of ComReg Decision D12/14, is withdrawn when the Decision Instruments contained in [A - FACO] Annex and Annex [C - WLA] of ComReg Decision D[...], and this Decision Instrument contained in Annex B of ComReg Decision D[...], shall together take effect.
- (iii) Section 8 of the Decision Instrument contained in Appendix 8 Market 1c: HLVA of ComReg Decision D12/14, is withdrawn when the Decision Instruments contained in Annex [A - FACO] and Annex [C – WLA] of ComReg Decision D[...], and this Decision Instrument contained in Annex B of ComReg Decision D[...], shall together take effect.

- 9.2 Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations, the obligations set out in Section 4 of this Decision Instrument shall only come into effect when all of the obligations set out in Sections 4 to 13 (inclusive) of the Decision Instrument contained in Annex [●] of ComReg Decision [●] (i.e. the WLA Decision Instrument) come into effect.

10 EFFECTIVE DATE

- 10.1 The Effective Date of this Decision Instrument shall be the date of its notification to Eircom and it shall remain in force until further notice by ComReg.

GERRY FAHY

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [•] DAY OF [•] 20YY

Q. 26 Do you believe that the draft text of the proposed Decision Instrument for WCA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Annex: 7 Questions

Chapter	#	Question
1	1	Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA/WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.
3	2	Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 (of 2007) if there was appropriate wholesale regulation upstream? Please justify your views.
3	3	Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself?. Please provide cogent reasoning to justify your views.
3	4	Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.
3	5	Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.
4	6	ComReg is interested in receiving views from interested parties on the Proposed Urban Area, Regional Area 1 and Regional Area 2 as they apply to bundles. Please provide detailed reasoning and supporting information (where available) to support your views.
5	7	Do you agree with the proposed cost benchmarks for retail costs to be included in the bundles MST?
5	8	Do you agree with our proposed removal of the downward only adjustment to the WAWNI? Please support your view with relevant data and evidence.
5	9	Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the Urban Area? Please give a detailed response with supporting data where appropriate to support your view.
5	10	Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 1? Please give a detailed response with supporting data where appropriate to support your view.

5	11	Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to support your view.
5	12	Do you agree or disagree with our provisional view that the average customer life should be 42 months? Please give a detailed response with well justified supporting data where appropriate to support your view.
5	13	Do you agree or disagree with ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness in section 5.11? Please give a detailed response with supporting data where appropriate to support your view.
5	14	Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.
5	15	Do you agree or disagree with ComReg's proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data where appropriate to support your view
6	16	What are your views on the period over which Eircom needs to recover the on-going content costs of eir Sports, should the period be limited to the duration of the rights?
6	17	What are your views on the period over which Eircom needs to recover the acquisition costs of eir Sports? Should this be a set period or should Eircom be allowed to use excess broadband margins, if available, to shorten the set period?
6	18	What are your views on the appropriate subscriber base over which Eircom needs to recover the costs of eir Sports? Are there any methods which you view as being more suitable than ComReg's preliminary view? In your response please outline any practical issues which should be considered if such a method were to be implemented.
6	19	Do you agree with ComReg's proposed treatment of eir Sports in the Margin Squeeze Test? If you consider another method would be more suitable can you please give details of such a method whilst being aware that content is an unregulated service.
6	20	Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised bundle? Please provide detailed reasoning to support your view. ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance.
7	21	Do you agree or disagree with ComReg's proposed approach where an Eircom bundle is considered to be non-compliant with its obligation not to cause a margin squeeze? Please explain your response and provide detailed information to support your view.
7	22	Do you agree or disagree with ComReg's proposed approach to introduce a monitoring statement? Do you agree or disagree with ComReg's proposed approach to require this statement on a quarterly

		basis? Please explain your response and provide detailed information to support your view.
8	23	Do you have any views on the Regulatory Impact Assessment above and are there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.
A4	24	Do you believe that the draft text of the proposed Decision Instrument for the FACO Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.
A5	25	Do you believe that the draft text of the proposed Decision Instrument for the WLA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.
A6	26	Do you believe that the draft text of the proposed Decision Instrument for WCA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.