



Commission for
Communications Regulation

Decision Notice and Decision Instrument –
Assessment of the Three Criteria for *ex ante*
Regulation and Withdrawal of SMP Obligations

Market Analysis – Retail Fixed Calls Market Review

Decision No:	D07/07
Document No:	07/111
Date:	28 December 2007

Contents

1	Introduction	2
2	Background to Decision	5
3	Conclusions on Analysis.....	6
	MARKET DEFINITION	6
	ASSESSMENT OF THE THREE CRITERIA	7
	REMOVAL OF EXISTING SMP OBLIGATIONS.....	8
4	Response to consultation on the draft decision instrument.....	10
	RESPONSES TO CONSULTATION (DOCUMENT No. 07/84) AND COMREG’S POSITION..	10
	<i>Section 1: Market Definition</i>	10
	<i>Section 2: Decision</i>	11
	<i>Section 3: Withdrawal of existing SMP obligations</i>	12
	Appendix a – Decision Instrument	16

1 Introduction

1.1 The EU electronic communications regulatory framework requires that national regulatory authorities conduct market definition and market analysis on electronic communications service markets identified by the EU Commission in its Recommendation¹ as being susceptible to *ex ante* regulation. In order to be susceptible to *ex ante* regulation, electronic communications markets must first meet three cumulative criteria (i.e. all three must be met). The three criteria are:

1. **Whether a market is subject to high and non-transitory entry barriers.** To meet this criterion, there must be evidence of high and non-transitory barriers to entry to the market;
2. **Whether a market has characteristics such that it will not tend over time towards effective competition.** To meet this criterion, it must be shown that the market does not tend towards effective competition; and
3. **The sufficiency of competition law by itself (absent *ex ante* regulation).** To meet this criterion, it must be shown that competition law can not adequately address any potential market failure.

1.2 The markets for retail calls are markets that had previously been identified by the EU Commission as being susceptible to *ex ante* regulation.² However, as a result of recent amendments made by the EU Commission to the Recommendation, the retail calls markets are no longer considered by the EU Commission to warrant *ex ante* regulation.³ The Commission for Communications Regulation (“ComReg”) had already started to examine the case for the continuing *ex ante* regulation of these markets, when the EU Commission commenced its review of the Recommendation that resulted in the recent amendments. The following is a brief summary of events leading to the publication of this Decision Notice:

- On 1 September, 2004, ComReg published a national consultation⁴ on the markets for Retail Fixed Calls (ComReg Document 04/95) in accordance with its legal obligation to conduct market definition and market analysis on

¹ European Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

² These markets correspond to markets 3-6 of the Commission Recommendation 2003/311/EC of 11 February 2003.

³ EU Commission Recommendation of 16 November, 2007 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services. (Second Edition).

⁴ In accordance with Article 6 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”).

markets identified by the EU Commission in its Recommendation as being susceptible to *ex ante* regulation.

- On 22 March, 2005, ComReg notified the EU Commission of its response to consultation (ComReg Document 05/26). The notified measures were accepted by the EU Commission.⁵ ComReg did not publish a final decision on foot of the notified measures at that time.
- On 19 September, 2006, ComReg issued a call for input on an assessment of the three criteria in relation to the markets for Retail Fixed Calls.⁶ In this regard, ComReg determined that before issuing a final decision on foot of the measures notified to the EU Commission in 2005 that it was appropriate to review the findings of the market analysis in light of updated data and to take account of any market developments in the intervening period. In addition, as the EU Commission had commenced its review of the Recommendation and in light of its preliminary conclusions that the retail fixed calls markets should be removed from a new Recommendation, ComReg considered it appropriate to assess whether the markets for fixed calls still met the three criteria for *ex ante* regulation and whether *ex ante* regulation was still in fact warranted. This consultation ran until 31 October, 2006 and ComReg received 5 responses.
- Having considered the responses to the above consultation, ComReg notified its response to the consultation to the EU Commission on the 17 October, 2007.⁷ ComReg’s preliminary conclusions were to the effect that as one of the three criteria warranting *ex ante* regulation was no longer met, the retail calls markets should no longer be subject to *ex ante* regulation. The EU Commission has accepted ComReg’s preliminary findings and has no further comment on them.⁸
- On 16 November, 2007 the EU Commission formally adopted the second edition of the Recommendation. The retail calls markets are no longer included in the Recommendation and accordingly they are no longer recommended by the EU Commission as markets that should be susceptible to *ex ante* regulation.

⁵ Comments pursuant to Article 7(3) of the Framework Directive. Brussels, 25-04-2005.

⁶ ComReg Document 06/51.

⁷ ComReg Document No. 07/84 and notification registered under case number IE/2007/0697-0700: Retail calls market in Ireland.

⁸ The measures were notified to the EU Commission in accordance with Regulation 20 of the Framework Regulations and the provisions of the Article 7 Recommendation (Commission Recommendation of 23 July 2003 on notifications, time limits and consultation provided in Article 7 of Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services). They were registered by the EU Commission on 17 October, 2007. The notified measures were accepted by the European Commission, in correspondence to the Chairperson of ComReg dated 21 November, 2007. Pursuant to Article 7 (3) of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”). The EU Commission examined the notification and had no comments.

- 1.3 It should be noted that ComReg has not made a formal finding here, either in relation to market definition, or whether or not there is effective competition in the markets. Rather, the focus of ComReg's analysis has been to ascertain whether the three criteria are still met.
- 1.4 After careful analysis and consideration, ComReg has concluded that the first of the three criteria rendering a market susceptible to *ex ante* regulation in the markets for retail calls in Ireland is no longer met. This conclusion is based primarily on its own analysis, but also takes into account of the fact that the relevant markets are no longer referred to in the Recommendation. As all three criteria should be met, the relevant markets therefore fail the cumulative test. Accordingly, the markets for retail calls in Ireland are not considered susceptible to *ex ante* regulation and existing obligations imposed on Eircom relating to these markets will be withdrawn.

2 Background to Decision

- 2.1 This Decision Notice and Decision Instrument follows on from ComReg Document 07/84 (Retail fixed calls market review: response to consultation 06/51 and further consultation on the draft decision instrument) which was published on 17 October, 2007.
- 2.2 This decision is based on the working market definition, the assessment of the three criteria and reasoning conducted by ComReg in relation to the markets for fixed retail calls, as part of the consultation process arising from the ComReg documents entitled Retail calls Market Review – Call for Input on an Assessment of the Three Criteria, dated 19 September, 2006 (“Document No.06/51”) and Retail calls Market Review – Response to Consultation, dated 17 October, 2007 (“Document No.07/84”). This decision is based on the substantial body of empirical estimation and analysis contained in previously published documents where due consideration was given to the full range of issues covered.
- 2.3 In ComReg Document No 07/84, ComReg consulted upon its draft decision instrument and asked if respondents believed that the text of the draft decision instrument was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed. All comments in relation to Document No. 07/84 were carefully considered by ComReg. The final decision instrument is contained in the Annex to this document.

3 Conclusions on Analysis

Market Definition

3.1 In order to assess whether the three criteria warranting *ex ante* regulation are met, ComReg considered that it was necessary to have an appropriate working market definition of the markets in question. ComReg therefore used a working market definition which mirrored the four retail calls markets as identified in the Recommendation and which reflected the extent of market conditions in the Irish retail calls markets:

- Retail residential domestic calls from a fixed location;
- Retail residential international calls from a fixed location;
- Retail non-residential domestic calls from a fixed location; and
- Retail non-residential international calls from a fixed location.

3.2 The market definition applied in the assessment of the three criteria is based on that proposed by ComReg in the consultation document⁹ in light of consultation responses. The key change since the initial review relates to the identification of a split between residential and non-residential markets, in line with the Recommendation and the treatment of Voice over Broadband (“VoB”). On balance, ComReg is of the tentative view that it is appropriate to delineate between residential and non-residential customers, principally on the basis that there are some differences (in some cases non residential customers are allocated account managers, and certain large accounts are subject to tender procedures), price differences and limited switching between the residential and non residential offering of operators.

3.3 On the basis of the information it has received through the consultation process, ComReg is also of the tentative view that VoB should only be included in the non-residential market and that this differentiation is based on distinct levels of broadband penetration. Evidence would suggest that in terms of functionality only VoB calls are substitutable for fixed calls. Nevertheless, in view of significant switching costs, VoB may, at this stage, have a significant impact only on the non-residential market. However, ComReg makes no formal finding here with respect to these issues of market definition.

3.4 ComReg considers that the geographical scope of the retail calls markets is Ireland.

3.5 ComReg considers the proposed definition to be appropriate for the purposes of an assessment of the three criteria test. However it should be noted that it is considered unnecessary to draw final conclusions on market definition, because (as will be seen) the retail call markets do not meet the first criterion (i.e. they do not exhibit high and non-transitory barriers to entry).

⁹ ComReg Document 06/51.

Assessment of the three criteria

- 3.6 In view of the EU Commission’s consultations on the review of the Recommendation and its preliminary conclusions on the removal of the retail calls markets from the new Recommendation, ComReg conducted an analysis and consultation to assess whether the markets for fixed retail calls meet the three criteria test, and thus decide whether *ex ante* regulation is warranted.
- 3.7 With regard to the first criterion (high and non-transitory barriers to entry), ComReg considers that there are few, or no legal or regulatory barriers to ComReg which would constitute a high, or non-transitory barrier to entry to the retail calls markets. ComReg assessed factors relating to structural barriers:
- Level of sunk costs required for entry;
 - Economies of scale, scope and density;
 - Control of infrastructure not easily duplicated;
 - Technological advantages or superiority; and
 - Barriers to switching for customers
- 3.8 Having regard to the above, ComReg considers that existing wholesale regulation has significantly reduced the high barriers to entry on this market. Regulatory obligations for the provision of wholesale indirect access inputs such as carrier selection (“CS”) carrier pre-selection (“CPS”) and wholesale line rental (“SB-WLR”) enable market entry to retail calls market, with relatively low sunk costs. In addition, the availability of wholesale interconnection inputs, as a result of significant market power (“SMP”) obligations imposed by ComReg in the interconnection markets, also make it feasible for alternative operators to enter the market without incurring high upfront or sunk costs, and to make incremental investments as they move up the value chain.
- 3.9 With regard to economies of scope, scale and density, the largest competing operators offer a similar range of services as Eircom and hence, regulation on the wholesale side has reduced the extent to which economies of scope create a barrier to entry for alternative operators. In addition, the future development of broadband acts as a driver for opportunities for the use of VoB for voice calling in the future, lowering barriers to entry in the provision of VoB services over an existing broadband connections.
- 3.10 In view of existing wholesale regulation and in the absence of high barriers to switching, ComReg concludes that the first criterion, that of high and non-transitory barriers to entry, is not met in the markets for retail calls. Since the three criteria must be met cumulatively, a determination on the remaining two criteria is unnecessary in light of the finding that the first criterion is not met. Notwithstanding this, ComReg has examined the remaining two criteria.

3.11 In relation to the second criterion (tendency towards effective competition) ComReg assessed:

- Market shares;
- Existing competition;
- Price developments; and
- Barriers to expansion.

3.12 Having regard to the above, ComReg is of the view that of the four markets outlined in the definition, only one, that of non-residential international retail calls clearly tends towards effective competition. In relation to the remaining three markets, (domestic residential, domestic non residential and international calls) ComReg is of the view that it is unclear whether these markets tend towards effective competition. As discussed in detail in previous consultations, Eircom retains a sufficiently high market share in the remaining three markets, which could well be consistent with a finding of SMP. On the other hand, ComReg's analysis suggests that there is some evidence of competitive price pressure within the calls markets. In view of the finding that the first criterion is not met however, a final determination on the second criterion is unnecessary.

3.13 ComReg is of the view that there remains scope for potential anti-competitive behaviour in these markets (via possible excessive pricing, predatory pricing and price squeeze strategies) by Eircom which is dominant in the interconnection markets. ComReg considers however that on balance, competition law ought to be sufficient in addressing market failure within markets for retail calls.¹⁰ In any case, no final determination is necessary on this criterion in view, of ComReg's finding on the first criterion. ComReg will continue to closely monitor developments in these markets and will take action under competition law, if deemed necessary.

3.14 ComReg concludes that the retail calls markets as defined in the working definition used for the purposes of this assessment do not pass the three criteria test as the first criterion (high and non-transitory barriers to entry) is not met. Accordingly, ComReg concludes that as the markets for retail calls do not cumulatively fulfil the three criteria test, they should not continue to be subject to specific *ex ante* regulation.

Removal of Existing SMP Obligations

3.15 ComReg is required to withdraw existing obligations where a market is found not to have an operator with SMP on it. While ComReg's analysis has not focused on the existence or not of SMP (as that is not required) SMP obligations where the three criteria are no longer met, should not be maintained that given that the market is in the first instance, no longer susceptible to *ex ante* regulation. In view of ComReg's finding that the markets for retail calls fail to meet all three criteria required for *ex ante* regulation, ComReg has therefore decided to withdraw all existing SMP

¹⁰ ComReg itself now enjoys "concurrent" competition law powers since the enactment of the Communications Regulation (Amendment) Act, 2007.

obligations imposed on Eircom in the fixed calls markets. These SMP obligations are:¹¹

- Cost Orientation;
- Undue Preference;
- Transparency;
- Not to unreasonably bundle; and
- Cost accounting and accounting separation (CAS and AS).

3.16 Where a SMP analysis reveals that there is no operator with SMP Article 16(3) of the Framework Directive provides:¹²

“In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.” (Emphasis added).

3.17 While ComReg’s analysis has not focused on the existence or not of SMP in these markets, it considers that the withdrawal of all existing SMP obligations from the calls market should nonetheless be subject to an appropriate notice period. The purpose of this is to maintain commercial confidence in the retails calls markets (and closely associated markets) and to allow operators sufficient time to (amongst other things) make appropriate alterations to their current contractual and commercial arrangements.

3.18 In document 07/84, ComReg consulted upon the draft decision instrument formally removing exiting obligations imposed on Eircom, subject to an appropriate notice period and asked if respondents believed that the draft text of the decision instrument adequately reflected ComReg’s preliminary findings on the markets for retail calls. ComReg also solicited comments on an appropriate notice period and timeframe for the removal of obligations and on the likely impact of the removal of the regulation. Respondents were also asked whether the draft decision instrument was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics proposed.

3.19 The comments of respondents were carefully considered in finalizing the decision instrument set out in the Annex to this document.

¹¹ These obligations derived from the European Communities (Voice Telephony and Universal Service) Regulations, 1999 and/ or the general telecommunications licence and applied to Eircom by virtue of it having SMP.

¹² The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

4 Response to consultation on the draft decision instrument

- 4.1 Two responses were received in relation to the consultation on the specific text of the draft decision instrument contained in Document No. 07/84. These responses were received from Eircom and BT Ireland Ltd. ComReg would like to thank both respondents for their submissions. ComReg has taken all their comments into account in arriving at its final conclusions.
- 4.2 ComReg received no comments on the draft measure from the EU Commission. ComReg would note that the amendments to the decision instrument are not substantive changes in nature. The text does not therefore materially depart from that proposed in Document No. 07/84.
- 4.3 This section sets out the main issues raised by the respondents and ComReg's responses to comments received on foot of Document No 07/84. Having considered the issues further and the views expressed by the respondents and the EU Commission, the final decision instrument withdraws existing SMP obligations imposed on Eircom in relation to the markets for retail calls in accordance with the notice period referred to in section 3 of the Decision Instrument.

Responses to Consultation (Document No. 07/84) and ComReg's Position

- 4.4 The views of respondents were mixed in relation to the removal of existing *ex ante* obligations on the fixed retail calls markets. While one respondent welcomes the withdrawal of obligations, the other respondent believes that, at this stage in the development of the market, withdrawal of regulation is inappropriate as there would be loss of pricing transparency and the relationship between retail and wholesale prices, mainly due to the presence of bundling at the retail level. According to the respondent, until such time as concerns in relation to these issues, as well as Eircom's "win-back" campaigns, are resolved, it would not be in the benefit of consumers, competition and innovation to withdraw regulation from these markets.
- 4.5 A second respondent made a submission describing certain aspects of the draft decision instrument, which they considered required clarification and in some instances, further assessment and amendment. These comments in relation to the relevant sections of the draft decision instrument are set out below and are, followed by ComReg's conclusions on whether or not the proposed changes are justified and warranted and should be adopted. In each case, the section numbers refer to those in the draft decision instrument contained in Document No. 07/84.

Section 1: Market Definition

- 4.6 One respondent believed the draft decision instrument to be imprecise in the absence of specifying a precise product market definition and a definition of VoB. The respondent suggested that it was unclear as to how ComReg came to the view that it was appropriate to define separate retail access or calls markets in terms of user type (i.e. separate markets for residential and for non-residential users). The respondent notes that this conclusion is counter to that made and notified to the EU Commission in March, 2005 and believes that ComReg's treatment of this issue does not

constitute an adequate fact-based analysis on which to base the above-mentioned conclusion. Finally, the respondent believes that the inclusion of voice over internet protocol (“VoIP”) calls in the “non-residential” calls markets is not justified.

ComReg’s conclusions

- 4.7 In relation to the issue of market definition, ComReg is of the view that it is unnecessary to draw final conclusions on market definition given that the market for retail calls does not meet the first criterion (high and non-transitory barriers to entry). As outlined in ComReg Document No. 06/51 and in view of the responses received on foot of that consultation, the market definition applied in the assessment of the three criteria test was a working market definition. ComReg remains of the view that the market definition adopted is appropriate for an assessment of the three criteria. This is on the basis that it reflects the extent of market conditions in the Irish retail calls markets and is consistent with the approach set out in the Recommendation.
- 4.8 In Document Nos. 06/51 and 07/84,¹³ ComReg clearly sets out why it may be appropriate to delineate separate markets for residential and business customers in respect of retail call services owing to detailed information received following various data directions to operators. There are some differences (in some cases non-residential customers are allocated account managers, and certain large accounts are subject to tender procedures), price differences and limited switching between the residential and non residential offering of operators. As noted above, ComReg has adopted a market definition which mirrors the four retail calls markets as identified in the Recommendation.
- 4.9 In relation to the issue of whether or not VoIP calls should be included in the markets for retail calls, the wider evidence and data received from operators on foot of various data directions would suggest that VoB should be included in the non-residential market and that this differentiation is based on distinct levels of broadband penetration. In terms of functionality only VoB calls are substitutable for fixed calls. Nevertheless, in view of significant switching costs, VoB may, at this stage, have a significant impact only on the non-residential market. However, as previously noted, ComReg makes no formal finding in relation to market definition in this Decision.
- 4.10 ComReg would finally note the absence of any negative comments from the EU Commission in relation to ComReg’s approach taken on the market definition.

Section 2: Decision

- 4.11 One respondent believed the draft decision instrument to be imprecise with regard to the key decision within (i.e. that the retail fixed calls markets are not susceptible to *ex ante* regulation). The respondent notes that in previous market analyses, ComReg’s key decision has been stated in terms of no undertaking being found to have SMP, i.e. that the market was effectively competitive.

¹³ Paragraphs 3.94 to 3.114 of document 06/51 and paragraphs 3.28 to 3.40 of document 07/84 respectively.

ComReg's conclusions

4.12 ComReg is of the view that a formal analysis or finding in relation to the second criterion (tendency towards effective competition) or third criterion (sufficiency of competition law) is rendered unnecessary in light of the finding that there exist no high and non-transitory barriers to entry in retail calls markets (i.e., the first of the three cumulative criteria is not met). ComReg has decided that the retail calls markets do not fulfil cumulatively the three criteria test, and on that basis therefore should not be subject to any *ex ante* regulation. Where a market is found not to satisfy the “three criteria” making that market susceptible to regulation, existing remedies should be withdrawn and the question of whether or not there is SMP is immaterial for those purposes.

Section 3: Withdrawal of existing SMP obligations

4.13 In the interests of clarity, practicability and certainty, one respondent suggests that ComReg had to articulate which obligations concerned will be withdrawn by section 3 of the draft decision instrument. This respondent believes there to be an inconsistency with ComReg consulting on the “length of a suitable timeframe for the removal of obligations”, as it did not do so when previously removing *ex ante* obligations. According to this respondent, the period of time involved in the consultation process itself, gives a suitable period of notice for the removal of remaining regulatory obligations in the retail calls market and that withdrawal should be effective immediately from the date of a final decision. The respondent notes that in the recent decision on retail narrowband access, ComReg used the consultation process as a suitable period of notice for the removal of one of the SMP remedies on the retail calls market, i.e., the price cap (Telecommunications Tariff Regulation Order 2003). The respondent suggests that if ComReg believes a longer period is required, then the maximum suitable time period is 21 days from the date of the final decision. This is the same time period that was deemed to be sufficient for notification to customers, other authorized operators (“OAOs”) and industry of a change in Eircom’s pricing to enable a competitive response (if any) to be prepared.

4.14 The second respondent agrees that a “suitable period of notice” be applied, which should be linked to the resolution of any potentially anti-competitive issues in relation to margins, retail bundles, win-back and the need for improvement in wholesale equivalent wholesale services in terms of service and price. According to this respondent, removal of existing obligations from retail calls markets should only occur when the aforementioned fundamental market issues are resolved. Prior to withdrawing any of the existing regulations, the respondent suggests that remedies should be put in place including:

- Publication in the public domain of full comparative performance details of service (provision and repair) to its downstream arms on the one hand vis a vis wholesale customers on the other.
- Transparency must be provided on Eircom retail bundles vis a vis the wholesale components.
- Monitoring Eircom’s use of retail discount schemes for win-back.

ComReg's conclusions

4.15 In Document Nos. 06/51 and 07/84, ComReg clearly indicated why the current entry barriers to fixed calls markets cannot be considered as either sufficiently high or non-transitory to warrant *ex ante* regulation. This is because of the availability of regulated wholesale inputs¹⁴ for the retail access markets, and regulated cost-oriented rates of interconnection which facilitated market entry to competitors with relatively low levels of sunk costs. ComReg notes the significant take up of indirect access means, and fast growth of single billing - wholesale line rental in the last two year. ComReg also notes that five largest competing operators offer similar range of services as Eircom and there are not high barriers to switching in the retail calls markets. Having further considered the issue and the views expressed by respondents, and in view of the EU Recommendation, ComReg believes that, on balance, in the presence of effective wholesale inputs regulation should be removed from retail fixed call markets.

4.16 However, in the interests of legal certainty and fairness, ComReg has decided to withdraw existing regulation from fixed call services, but subject to an appropriate period of notice to be given to affected parties. The need for such a notice period is owing to:

- The fact that the competitive conditions are less clear in respect of three markets (domestic residential, domestic non-residential and international residential calls). On each of these 3 markets Eircom's enjoys relatively high market share slightly above 70%; the change of market shares has generally stagnated in the last 2-3 years but the current level of market share indicates a slow decrease in Eircom's market share; ComReg also notes that the remaining market is some what fragmented, and there is no strong competitor;¹⁵
- The concerns expressed in consultation on potentially low margins for wholesale indirect access services, bundling activities at the retail level and the potential for pricing discontinuities between bundled retail prices and wholesale unbundled prices required to deliver the same suite of services;
- Recent competition law developments in other jurisdictions in relation to the telecoms sector;¹⁶
- The fact that these are retail markets, directly involving relationships with end-customers, which may need greater time to deal with, and make arrangements with customers for, the removal of current regulation; and,

¹⁴ Namely Call Pre Selection ("CPS") and Single Billing ("SB") – Wholesale Line Rental ("WLR") mandated pursuant to ComReg's decision relating to retail access markets.

¹⁵ ComReg also notes that Eircom has maintained its position of dominance in the provision of access services to consumers even in the presence of wholesale regulatory measures and regulation in adjacent markets, such as, local loop unbundling ("LLU").

¹⁶ The Telefonica decision of the European Commission found an *ex post* abuse of dominance via a margin squeeze.

- The requirement in Article 16(3) of the Framework Directive that: “*An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations*”.

4.17 So that the removal of obligations does not diminish commercial confidence in the retail calls markets to the detriment of consumers and allows operators to make suitable alterations to their commercial and contractual arrangements, ComReg has decided that the timing of the removal of obligations imposed on Eircom shall be subject to a notice period from the effective date of this final Decision i.e., from 28 December 2007 until 30 April 2008.

4.18 While ComReg notes the concerns of one respondent in relation to some of the market issues, it does not consider it appropriate to postpone the withdrawal of regulation from these services indefinitely. ComReg will continue to closely monitor market share, competitive activity and other indicators within this market to identify any concerns pertaining to potentially anti-competitive practices in the three remaining calls markets in the future. ComReg notes that such concerns could arise in the fixed calls markets (through price squeeze strategies of incumbent operators that remain dominant on related upstream markets). ComReg is cognisant that although bundling has the potential to provide net welfare gains to end users, it could also in certain circumstances be used to foreclose and/or dampen competition in retail markets. ComReg notes for example the recent *Telefónica* decision of the EU Commission with the respect to the incumbent operator in Spain. Competition law potentially provides the appropriate instruments to deal with such market failures. ComReg plans to closely monitor this issue and a further consultation will very shortly be published in relation to the specific issue of bundling. ComReg believes that its approach balances the dual concerns by ensuring that regulatory intervention would take place only where it is considered that bundling is being implemented by the SMP operator in an anti-competitive manner.

4.19 The period of notice takes into consideration the factors outlined above and gives a suitable period of time for all market operators to make necessary adjustments in order to avoid any negative disturbance, or impact on the calls market or associated markets. In addition to the legal requirements, such approach has been implemented in markets where obligations were to be removed. In other member states, withdrawal of regulation has been subject to appropriate notice periods when deemed appropriate.¹⁷ Also, a period of notice was given to affected parties in respect of the retail narrowband access markets. In that particular instance, in addition to the consultation process itself extending over a period of 12-15 months, a specific period of 2 months notice was provided even in relation to the replacement of the existing price control with a safeguard price cap, and not for the complete withdrawal of regulation from the access markets. As noted above, the EU Commission has examined the draft measure and no negative comments were received by ComReg in respect of a notification period for the withdrawal of regulation from this market.

¹⁷ For example, when the Austrian TTK withdrew the obligations imposed on TA in the transit market (M 10), they defined a transition period from March 19, 2007 (date of the decision) to June 30, 2007 – on the basis that interconnection partners need this transition period in order to adapt their contracts.

- 4.20 ComReg would note that the fact that it is setting a notice period of four months for the removal of regulations in these markets does not necessarily imply that it will set a similar period, or indeed any period, for the removal of regulations in other markets, should that occur. Any such removal of regulations in markets will be considered on its own merits and the market circumstance, though ComReg will consult with interested parties on the issue.
- 4.21 In view of the final outcome of the EU review of recommended markets and the exclusions of retail calls from *ex ante* regulation, ComReg is to withdraw all existing SMP obligations imposed on Eircom in respect of retail calls effective from the 30 April, 2008.

APPENDIX A – DECISION INSTRUMENT

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument relates to markets previously identified as numbers 3-6 in the Recommendation¹⁸ (“the Markets”). The Markets, so identified are:

1. Publicly available local and/or national telephone services provided at a fixed location for residential customers;
2. Publicly available international telephone services provided at a fixed location for residential customers;
3. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers; and
4. Publicly available international telephone services provided at a fixed location for non-residential customers.

1.2 This Decision Instrument is made by the Commission for Communications Regulation (“ComReg”):

1. Pursuant to sections 10 and 12 of the Act of 2002¹⁹;
2. Pursuant to and having taken the utmost account of the EU Commission’s Recommendation (Second Edition);²⁰
3. Having (where appropriate) complied with the Policy Directions made by the Minister²¹;
4. Having taken account of the submissions received in relation to ComReg Document No. 06/51;
5. Having regard to the reasoning and analysis set out in ComReg Document No. 07/111; and,
6. Pursuant to Regulations 8 and 9 of the Access Regulations²².

¹⁸ EU Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

¹⁹ The Communications Regulations Act, 2002.

²⁰ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

²¹ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

2 DECISION

- 2.1 It is hereby decided that the Markets are not susceptible to *ex ante* regulation by reason of the fact that the first of the three cumulative criteria required *for ex ante* regulation is not fulfilled i.e, because the Markets are not subject to high and non-transitory entry barriers.

3 WITHDRAWAL OF SMP OBLIGATIONS

- 3.1 The significant market power (“SMP”) designation 3.1 set out in Decision Notice D 10/01²³, insofar as it relates to the Markets is hereby revoked, subject to section 3.2.²⁴
- 3.2 All SMP obligations on Eircom Ltd (“Eircom”) in force immediately prior to the effective date of this Decision Instrument, to which Eircom was subject by virtue of its having had SMP on the Markets are withdrawn with effect from 30 April, 2008.

4 EFFECTIVE DATE

- 4.1 Subject to section 3.2, this Decision Instrument is effective from the date of its publication.

**JOHN DOHERTY
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
DATED THE 28 DAY OF DECEMBER 2007**

²² The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

²³ Office of the Director of Telecommunications Regulation Decision Notice: D 10/01 “Significant Market Power in the Irish Telecommunications Sector”. Document No. ODTR 01/57 27 July, 2001.

²⁴ For the avoidance of doubt, ComReg would note that the withdrawal of existing SMP obligations on Eircom is not as a result of ComReg having conducted a complete market analysis on the markets (which it has not done) nor a decision or conclusion that the Markets are effectively competitive, but is as a result of the Markets no longer being susceptible to *ex-ante* regulation. ComReg reserves all of its legal rights with respect to any assessment of the competitive state of the Markets, prospectively.