eir Group

Comments on Non-Confidential Submissions to Consultation 17/51:

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)

ComReg Document 17/51s

5th December 2017

DOCUMENT CONTROL

Document name	eir Group response to ComReg 17/51s
Document Owner	eir Group
Status	Non-Confidential

eir would like to take this opportunity to comment on the non-confidential submissions to ComReg's consultation on Price control obligations relating to Bundles - Further specification of the price control obligation not to cause a margin squeeze (ComReg 17/51s). eir has a number of general observations as well as specific concerns surrounding certain claims and assertions made by other alternative operators ('OAOs').

The purpose of this document is to comment on OAOs views in relation to ComReg's proposal to impose a margin squeeze test ('MST') relating to bundles. While eir notes that its position in this regard is that a MST is not appropriate where concurrent wholesale pricing obligations by means of cost orientation are either proposed or currently in place, it does not follow that eir agrees with ComReg's proposal that cost orientation for FTTC is appropriate or justified.

General Observations

1. OAOs have failed to adequately consider the rationale for a retail MST when concurrent cost-orientation of wholesale prices is imposed. This creates some confusion as to whether OAOs views are expressed in the context of perceived issues stemming from the wholesale market or present in the retail market.

2. eir considers that the imposition of retail market regulation in the form of retail MSTs is restricting its ability to compete, particularly in the context of concurrent wholesale market regulation. The presence of well-established retail brands, such as Vodafone, Virgin Media and Sky, with mature customer bases, ample funding and broad experience, make for an increasingly competitive Irish retail market in which eir's market share continues to decline. This would appear to be in direct conflict with OAOs claimed concerns in relation to leveraging.

3. OAOs are therefore unjustifiably seeking the imposition of the most stringent retail MST, while failing to provide any cogent reasoning as to why this should be the case. As set out in Table 1 of eir's response to ComReg 17/51[1], it is evident that competitors have no issue replicating eir's overall headline price or the level of promotions typically offered by eir. In addition, OAOs have failed to acknowledge that competition in the retail market is between all operators. There appears to be an erroneous assumption that eir is the only other operator that OAOs are competing with.

[1] eir, "Response to ComReg Consultation & Draft Decision Paper", page 51, 11 August 2017

4. As per eir's original response, assessing retail market shares in the context of a counterfactual where wholesale regulation is removed is the incorrect lens by which to identify regulatory retail market concerns.[2] The imposition of strict, narrowly defined and unwarranted MSTs is likely to support higher retail prices in the market to the ultimate detriment of consumers.

5. In allowing operators a choice of either unfairly undercutting eir's prices in order to win retail market share or of generating supernormal profits, ComReg is distorting the effectiveness of the market. Such outcomes in a complex retail market are even starker in the presence of already large multinational operators that have a strong foothold in the market and growing market shares and all of which have adopted different strategies and utilise their own strengths in terms of their bundling strategies.[3]

Rationale for the imposition of a bundles MST

6. eir notes a certain degree of alignment in the views of OAOs that a retail MST is required in order to *"help the market function more effectively"*[4] or to *"address ongoing negative market impacts"*.[5] As the underlying wholesale inputs in this case are currently or proposed to be fixed at cost-orientation, with the exception of Fibre to the Home ('FTTH') services, retail prices are the only parameter that can change to ensure on-going compliance with the proposed MST. Consequently, in ComReg proposing a MST with concurrent cost-oriented wholesale prices the 'market' in question is a retail one.

7. It is unclear from OAOs' submissions how their views on the ineffective functioning of the market or the perceived need to address negative market impacts align with their further stated views that *"…there are more bundle providers now than there were in the past"*[6] or references to *"the overall maturity of the broadband market"*.[7] These are outcomes more evident in fully functioning markets. OAOs have failed to provide any evidence as to the realities of competition in the retail market that would support potential competition concerns as identified in ComReg 17/51.

8. The lack of pricing flexibility provided for by the proposed imposition of concurrent wholesale and retail pricing remedies appears to be fundamentally misunderstood by OAOs. For example,

[2] eir, supra n 1, paragraphs 83-97
[3] eir, supra n 1, paragraphs 98-101
[4] ALTO, "Consultation: Price control obligations relating to Bundles – Further specification of the price control obligation not to cause a margin squeeze: FACO and WLA (3a & 3b) – Ref: 17/51", page 6, 11 August 2017
[5] Vodafone, "Vodafone Response to ComReg Consultation Document 17/51", paragraph 6, 11 August 2017
[6] Alto, supra n 4, page 5
[7] Vodafone, supra n 5, paragraph 7

the ALTO submission states that if eir *"can make this* [eir sports cost] *lower in the NRT cost stack, it means that they can include it in their retail bundle for free without having to reduce their wholesale price…"*[8] Cost-orientation means that wholesale prices are fixed and therefore cannot change irrespective of margins in the retail MST.

9. The confusion between the relevant markets (i.e. wholesale versus retail) may have been originally created by ComReg. In the Bundles Consultation, ComReg presents examples of generalised anti-competitive effects that might arise in the retail market as a matter of theory due to eir having Significant Market Power ('SMP') in the relevant wholesale markets. As stated in eir's original response, those examples are incorrect. A key assumption in all the examples provided by ComReg is that such a firm is not subject to any regulatory remedies. In this context, it is important to highlight that anti-competitive concerns such as excessive pricing or leveraging from the wholesale market are already addressed by ComReg through the imposition of pricing, non-discrimination, transparency and cost accounting remedies at the wholesale level. Consequently, ComReg has misguided industry as to the potential regulatory concerns that may arise in the retail market when there is concurrent wholesale regulation in place.

10. eir is of the view that ComReg must undertake a thorough economic assessment in order to determine the effectiveness of competition in the retail market, taking utmost account of wholesale remedies imposed in related markets, before proceeding to consult any further on pricing remedies to be imposed in same. The 2014 Recommendation[9] is clear that in identifying retail competitive concerns the analysis must take into account *ex ante* regulation (if imposed) at the upstream level (i.e. in the wholesale market) in determining whether SMP is likely on a forward looking basis at the downstream level (i.e. the retail market): *"A downstream market should only be subject to ex ante regulation if competition on that market still exhibits significant market power despite the presence of ex ante regulation on the related wholesale upstream market(s)".*[10] As ComReg has not undertaken any such relevant analysis, the anti-competitive concerns it has identified can only be regarded as speculative rather than being grounded in any standard of economic assessment.

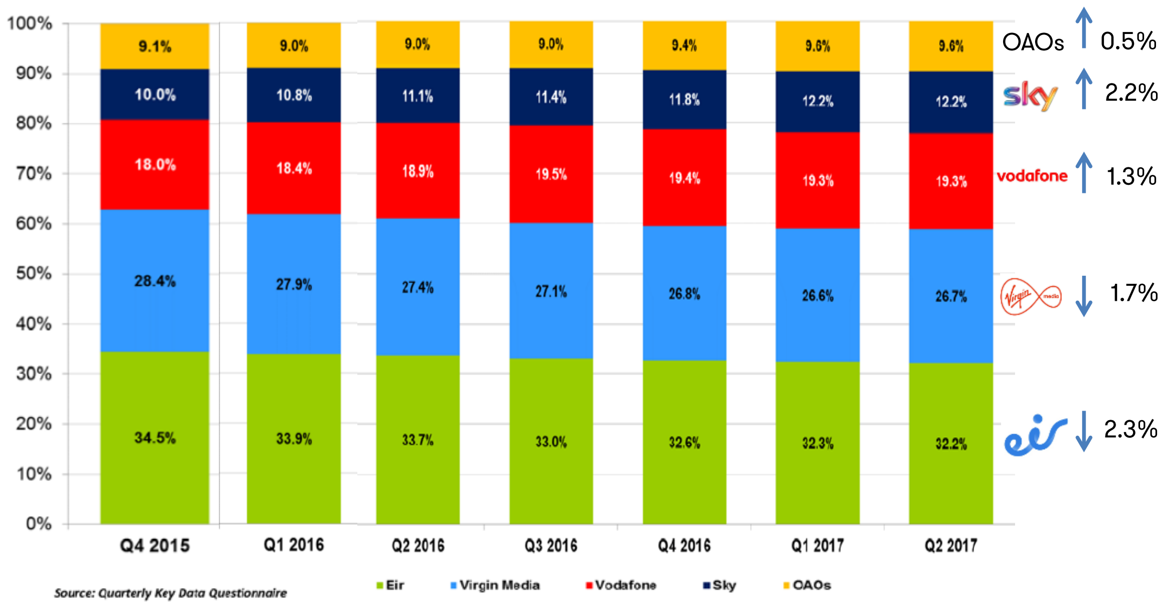
[8] ALTO, supra n 42, page 14, 11 August 2017
[9] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0710&from=EN
[10] Recital18

Retail market competitive dynamics

11. It is clear that the market that ComReg intends to regulate in this instance is a retail rather than a wholesale market and as such an in-depth analysis of the complete bundles market (if it is ultimately determined that there is indeed a separate defined "bundles market") within the wider context of the retail broadband market as a whole is required.

12. As noted by Vodafone, eir's share of the retail broadband market continues to decline (See Figure 1). However, Vodafone also asserts that "*this contrasts with a marginal increase in its share of the fixed wholesale broadband market from 68% in Quarter 1 2016 to 69% in Quarter 1 2017*" and that this *"level of wholesale market share gives rise to concerns about eircom's ability to exert vertical leverage into the associated retail market and thus justifies ComReg's continuing use of margin squeeze tests in retail markets".*

Figure 1. Fixed Broadband Market Shares (Subscriptions)



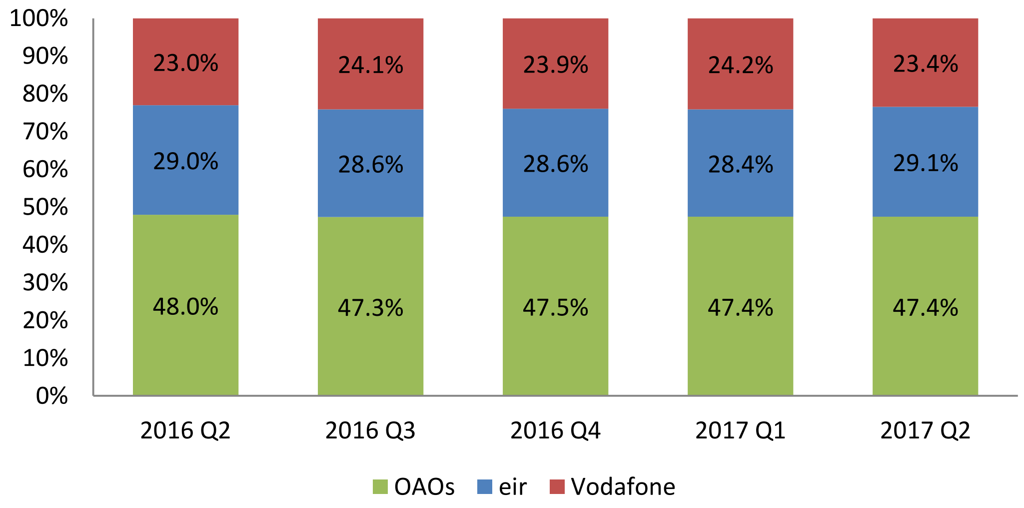
Source: Quarterly Key Data Report, ComReg

13. eir notes that any marginal increase in its share of the fixed wholesale broadband market has not resulted in a corresponding increase in its retail market share and is of the view that this exposes the inherent flaw in OAOs argument that a retail MST is required to address vertical leveraging concerns. If eir were able to leverage market power from the relevant wholesale market to the retail market one would assume that eir's market share at the retail level would have also increased over the same period of time. Vertical leveraging concerns do not arise where there is an inability to vertically leverage market power.

14. In addition, this would seem to markedly differ from the view of the Vodafone Group in general. Vodafone Group has expressed the view that the key is getting the wholesale price of regulated inputs right and that if this is done retail regulation should not be necessary.[11] Vodafone Group has also stated that *"margin squeeze tests across bundles of regulated and un-regulated services do not work"*.[12] Vodafone Ireland's divergence from this view is questionable and appears to suggest that weakening competition at the retail level and maintaining prices at an artificial level are greater considerations than vertical leveraging concerns.

15. Vodafone also states that when the *"volumes in the fixed and mobile broadband markets are combined, it is clear that eircom's retail share of these markets is in excess of 55%"* and appears to consider that this is further evidence that these retail markets should continue to be regulated. eir is unsure as to the exact methodology used to calculate this particular figure but it is clear to eir that this is overinflated and incorrect. According to data provided by ComReg's Quarterly Key Data Report, the total number of broadband subscriptions (fixed and mobile) in Ireland was 1.68 million as of Q2 2017, of which ca. 1.38 million were fixed connections and ca. 0.3 million were mobile broadband subscriptions. In Q2 2017, eir had a 32.2% share of the retail fixed broadband market and a 15.4% share of the mobile broadband market. This equates to a market share of the total broadband market of approximately 29.1% (significantly less than Vodafone's claim of 55%). By comparison, Vodafone's share of the total broadband market is approximately 23.4% (See Figure 2).

Figure 2. Total Broadband Market Shares (Subscriptions)

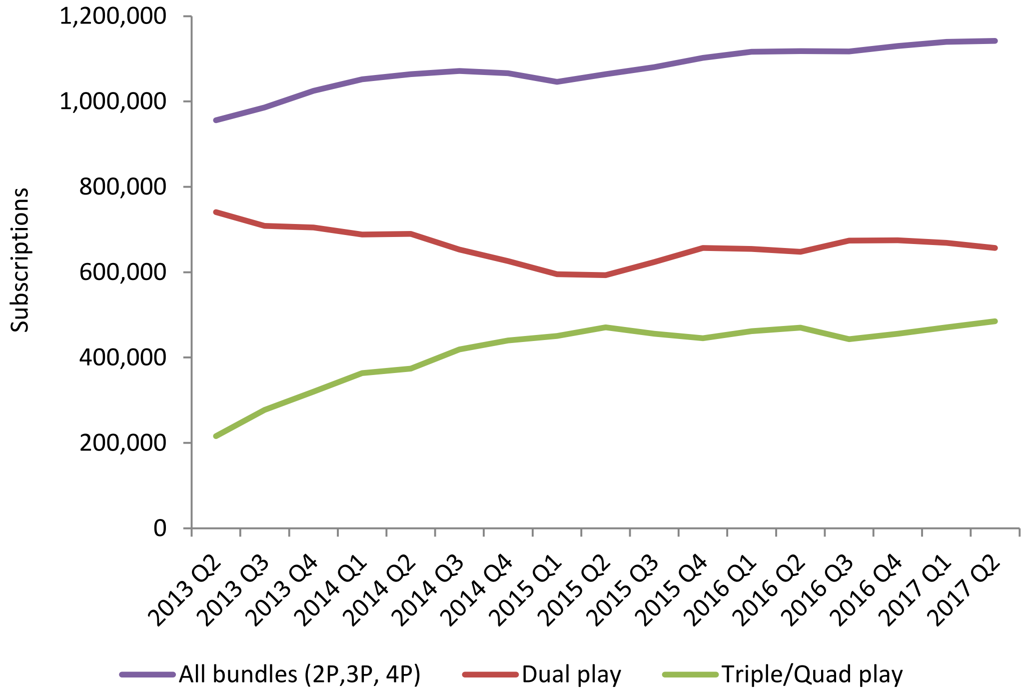


Source: Quarterly Key Data Report, ComReg

[11] http://www.wik.org/fileadmin/Konferenzbeitraege/2011/Multi-Play/Woodrow_WIK_Brussels_31052011.pdf
[12] Ibid

16. Upon examination of the bundles market specifically, it is clear that while an increasing number of bundles are being sold, the largest growth in bundle subscriptions presents itself in the triple and quad play space rather than in the dual play market (See Figure 3). The increasing sale of bundles is therefore not only present in the form of increasing fixed voice and internet dual play bundles, which for customers may essentially serve the same purpose as a standalone broadband product, but rather also in the form of the increasing sale of <u>all</u> dual play bundles and even larger proportional increases in the number of triple and quad play bundles.

Figure 3. Bundle subscriptions by bundle type (Total market)



Source: Quarterly Key Data Report, ComReg

17. In terms of triple and quad play bundles and in the context of an increasing market, eir's market share is significantly below the threshold that would be considered indicative of SMP and it is clear that eir's competitors are more than able to compete in this space (See Figure 4). This further highlights the extent to which any concerns with regard to vertical leveraging are unwarranted. As an undertaking that has onerous regulatory obligations in a number of wholesale markets, eir is at a disadvantage against other unregulated operators, who are able to leverage their experience and existing customer bases in various other markets including TV and mobile.

Figure 4. Triple and Quad Play Bundles Market Share (Subscriptions)

[✂]

18. It appears from ComReg's Annual Action Plan (updated October 2017)[13] that ComReg intends to make a final decision on regulating eir's retail bundles in Q1 2018. Unless such a decision is not to impose a retail MST, ComReg will be *ultra vires* in the context of the regulatory framework. As required by the 2014 Recommendation[14], ComReg must undertake a Three Criteria Test (3CT) before imposing ex ante regulation in the retail market. The imposition of a Retail MST remedy is contingent on the correctness of ComReg's market definition analysis. To date, ComReg has not undertaken or consulted on any such assessment. Consequently, the legal conditions for the imposition of a retail price control have not been met.

Parameters of the retail MST

19. In terms of proposing parameters for the retail MST, it would appear that OAOs are seeking an outcome that would create the highest regulatory burden on eir. Were such parameters to be implemented in designing the MST, the result would be the creation of a pricing umbrella in the retail market below which eir cannot compete and its competitors need not compete. [✂] eir submits that the views expressed by OAOs appear completely misaligned with their own pricing practices. Each of these parameters of the MST will be discussed in turn.

Average Customer lifetime

20. ALTO and Vodafone both state that a shorter average customer lifetime ('ACL') would be appropriate. These proposals range from assuming an ACL equivalent to the contract life, to an ACL of 24 months.[15] However, this is clearly not in line with the pricing practices adopted by OAOs.

21. [✂]

[13] https://www.comreg.ie/media/2016/05/Annual-Action-Plan-Ye-300618_Updated.pdf
[14] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0710&from=EN
[15] See for example: Alto, supra n 4, page 6 and Vodafone, supra n 5, paragraph 51

22. Consequently, it would appear that OAOs consider the ACL to be much longer in practice and their submissions that the ACL should be reduced on the basis of assertions that this would be more reflective of an industry standard are merely tactical.

Cross subsidisation

23. OAOs are of the view that cross subsidisation should not be allowed in the retail MST.[16] Vodafone states that cross subsidisation *"would give an unfair advantage to the incumbent over other operators"*.[17] It is not clear why this would be the case and Vodafone provides no further elaboration on this point. eir submits that it is not proportionate for ComReg to apply strict recovery controls on eir when its retail competitors are free to determine how best to recover their own costs regionally and between all elements of their retail portfolio.

24. [✂]

25. Despite opposing a portfolio approach, Vodafone also states that *"operators who have invested in their own infrastructure may be able to be more aggressive in particular offers to the market which Eircom could not match because of the impact of the aggregate MST test"*. [18] This is true for all competitors and not just infrastructure-based ones. eir agrees that an aggregate approach means that some offers will need to be significantly above cost in order to provide sufficient margins to cross-subsidise other offers. The weighting of such offers would need to favour those with higher available margins.

26. Consequently, as identified by Vodafone, this means that there are opportunities for all competitors to charge below those "high margin" retail offers and gain market share from eir — this would impact eir's portfolio recovery and may require a re-balancing of tariffs in order to ensure it remained compliant at the overall portfolio level. In this context, it is important to note, as identified by ComReg, that the market sets national not regional prices. Therefore, it is unclear how eir could successfully undertake a sustainable cross-regional subsidisation strategy, why such a strategy could not be replicated by other retailers and whether it could actually occur without creating significant opportunities for competing retailers.

[16] See for example: Vodafone, supra n 5, paragraph 57 and Alto, supra n 4, page 6
[17] Vodafone, supra n 5, paragraph 47
[18] Vodafone, supra n 5, paragraph 48

Equally Efficient Operator Cost Standard

27. OAOs submit that the retail MST should use a higher cost base than EEO.[19] If competitors are already at scale, which operators like Vodafone, Sky and Virgin Media clearly are, then they do not need to be supported via the REO/SEO standard. As stated in eir's original submission, ComReg has not provided any justification as to why large multinational operators require additional retail margin or headroom in different geographic footprints which are determined by a wholesale market analysis. eir considers that OAOs have also failed to provide any justification in this regard.

28. eir should be allowed to compete on the merits of its own costs. An EEO approach is consistent with the 2013 EC Recommendation[20] and ex-post competition law. [✂]

Bundle by Bundle

29. As identified by Vodafone *"operators who have invested in their own infrastructure may be able to be more aggressive in particular offers to the market which Eircom could not match because of the impact of the aggregate MST test"*.[21] As stated above, this is true for all competitors and not just infrastructure-based as suggested by Vodafone. With the availability of fixed cost-oriented wholesale prices, a portfolio approach can be pursued by all operators. As submitted by eir in our original submission, eir considers that the bundle-by-bundle approach in Regional Area 1 is inappropriate. To implement a retail MST obligation(s) at an individual service offer level provides too much weight by ComReg to the theory that retail competition in its entirety would be harmed if individual offers did not pass a MST.[22] eir submits that no operator competes on an single offer basis.

30. [✂]

[19] For example: Alto, supra n 4, page 6 and Vodafone, supra n 5, paragraph 40
[20] European Commission Recommendation C(2013) 5761
[21] Vodafone, supra n 5, paragraph 48
[22] eir, supra n1, paragraph 190

Treatment of Retention Offers

31. OAOs' submissions have not provided sufficient reasoning as to why retention offers are an issue in the retail market. As with all regulatory intervention, ComReg should be mindful of unintended market consequences. Asymmetric retail regulation creates market anomalies, which other operators will seek to use to their advantage. Furthermore, any industry practice on retention offers is transitory and changeable, unlike the parameters of any retail regulation imposed on eir.

32. In proposing special treatment for retention offers, ComReg must be transparent as to the outcomes it is trying to achieve and identify what regulatory success looks like. Any remedies imposed by ComReg now, will apply in the context of the retail market for the next three years at least.[23] As set out in eir's original submission, ComReg has failed to identify the nature of the problem it is trying to address. Similarly, as identified by eir, the recent Sky promotional offer for €30 per month for 12 months (on a 12 month contract) was also available to existing customers.

33. ComReg is aware of eir's retention offers as they must currently be pre-notified to it for regulatory approval. It is unclear what analysis, if any, or the in-depth extent of such analysis, ComReg has undertaken in analysing competitor's retention offers. Therefore, there is no basis to determine if ComReg's proposal is proportionate and justified.

Weighted Average Wholesale Network Input

34. OAOs' views with regard to the Weighted Average Wholesale Network Input ('WAWNI') adjustment appear to have been influenced by ComReg's lack of clarity in the Bundles Consultation. OAOs believe that the WAWNI has been downward adjusting only and has never increased. This has resulted in ALTO for example stating that this has allowed eir *"time to potentially exploit the artificially low WAWNI as Wholesale operators' actual costs were clearly higher".*[24] The WAWNI increased when the LEA Discount expired at the end of December 2014 and also reflected all wholesale prices changes since that time.

[23] See also paragraph 50

[24] Alto, supra n 4, page 11. Sky shared a similar view, see Sky, "*Sky response to Consultation on Price control obligations relation to Bundles: Further specification of price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b)"*, paragraph 10, 11 August 2017

35. Sky states that WAWNI should be published on a quarterly basis.[25] eir agrees with ComReg's preliminary view that this would be inappropriate and that the publication of the WAWNI *"could encourage price following and reduce the dynamism of the market"* [26], which would only serve to exacerbate the situation whereby eir cannot fully compete in the market and thus further weakening competition. Similarly, Vodafone's view that the WAWNI should be fixed and reviewed annually[27] is not appropriate. Fixing and reviewing the WAWNI would only be appropriate, were ComReg to implement a target wholesale mix that is based upon efficient usage of eir's wholesale products, and defines a glide-path from the current mix of products to the target mix.

36. Related to this issue is the potential inclusion of Wholesale Line Rental ('WLR') in the WAWNI calculation for the MST. eir notes that some OAOs submit that *"WLR…remain important services and inputs to/for new entrant wholesale operators"*[28] and that WLR is *"an important wholesale input for OAOs to purchase from Eircom wholesale if they wish to replicate an Eircom retail bundle".*[29] Of significant concern to eir is that should WLR be included in the WAWNI calculation, as operators invest in their own network (as is already the case in the Urban Area) and migrate from eir's wholesale products,[30] without appropriate adjustment the WAWNI would increase again (based on the remaining resellers wholesale inputs). Therefore, the implications of the ladder of investment means that eir's retail pricing flexibility will initially improve as OAOs climb the ladder of investment but will dis-improve once OAOs reach the upper "rungs".

37. ComReg is failing to review markets in the specified time frame set by the EC. Inappropriate inclusion of parameters in a test cannot be quickly addressed by ComReg. Regulatory failure has a damaging impact on eir and on competition in the market. For example, the continued and substantial negative impact on eir's leased line business in a competitive market is occurring as a result of the inexcusable and on-going delay in ComReg's review of the price control by cost-orientation implemented in that market in 2008. While there are regulatory reliefs available in the leased line MST imposed in 2012, these are not easily exercised by ComReg. [✂] Such known potential negative consequences of regulation cannot be entered into lightly by ComReg — this is why the EC requires timely review of the relevant markets.

[25] Sky, "*Sky response to Consultation on Price control obligations relation to Bundles: Further specification of price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b)"*, paragraph 11 August 2017
[26] Bundles Consultation, paragraph 5.81, 9 June 2017
[27] Vodafone, supra n 5, page 8
[28] Alto, supra n 4, page 8
[29] Sky, supra n 25, paragraph 5
[30] Including for example Sky's recent announcement of its partnership with SIRO https://www.irishtimes.com/business/technology/siro-announces-landmark-partnership-with-sky-ireland-1.3296120

Recovery of eir sports

38. The Bundles Consultation raised three broad themes regarding eir sports, namely; the period of time over which the on-going content costs should be recovered, the period of time over which the acquisition cost should be recovered and the appropriate subscriber base that the eir sports costs should be recovered over.

39. As set out in eir's original response, ComReg and its advisors should not lose sight of the fact that eir Sports is a business in its own right — that enters into commercial contracts and assesses content opportunities. This is a market where eir does not have SMP, it is a market that is not within the regulatory framework considered by the European Commission and is a market in which eir faces strong competition.

(i) On-going content costs: ALTO considers that the on-going content costs should be recovered at an upper limit of 60 months. While both Sky and Vodafone consider that the period of recovery should be restricted to the time period that content has value. As set out in eir's original response, a short-term approach which restricts the recovery to the rights period [✂]. eir maintains its view that a 42 month recovery time period is appropriate as it would allow for a smoothening out of material short term or single year content costs in the MST while equally ensuring that over time that margins are sufficient to recover those costs. Such cost recovery in combination with a wider portfolio approach would, while not eliminating it entirely, further mitigate against negative market outcomes as a result of ComReg rigidly setting regulatory pricing/recovery controls on an unregulated service.

(ii) One-off acquisition cost: Both ALTO and Sky submit that they consider a 60 month time period appropriate, while Vodafone states that a maximum defined payback period "appears reasonable". eir maintains its view that for the purposes of the MST the purchase price for Setanta is completely irrelevant. The substantive economic issue is whether, on an on-going basis, eir sets retail prices based on actual incurred operational costs. This is consistent with ComReg's proposal that unregulated services should recover their LRIC. In this context, eir's purchase price should be considered to be a sunk cost as it does not affect future decision making.

However, as stated in eir's original submission, should ComReg maintain its position that the acquisition of Setanta Ireland is relevant then a two-step approach is required. The first step is to calculate a minimum contribution based on a maximum payback period. The second step is to determine using available contributory margins (i.e. those in excess of the regulatory price floors) whether the acquisition cost could be recovered faster. Without the complimentary second approach being implemented it would require a continued allocation in the cost stack of the acquisition cost for a cost that may have long been recovered — which results in higher than required margins and restricts eir's ability to transfer such margin back to consumers through increased value-based propositions and competitive retail offers.

(iii) Relevant subscribers: Both ALTO and Vodafone submit that only those subscribers that 'avail' of the service should be used as the relevant subscriber base to calculate the net cost of eir sports. eir maintains its position, as set out in the original submission to the Bundles Consultation, as to the appropriate subscriber base to be used in deriving the net cost of eir sports. In respect to OAOs views that it is only those customers that 'avail' of the service which should be included, it is important to note that it is common business practice to incorporate all users that have purchased a service as part of any assessment of that service. In the telecommunications market this can include the purchase of voice packages with inclusive minutes (which may or may not be fully used in any given month) by end-users. In this particular circumstance, the inclusion by eir of a premium sports content package for free to all customers who purchase its broadband services is no different. The question is whether there is sufficient margin available to allow replicability.

ALTO, Sky and Vodafone state that eir's mobile subscribers should not be allowed to be included in the relevant subscriber base. ALTO submits that any inclusion of these customers would "permit regulatory gaming" [31]. However, it is unclear why that would be the case. eir sports is a fixed indirect and common cost and mobile customers could be allocated their share of such cost. However, how eir apportions and chooses to recover those costs should be a commercial decision made by eir. eir has no dominance in the retail fixed voice or broadband market, the content market or the retail mobile market. Therefore, there cannot be any bundling concerns. Provided eir applies a methodology, at any given time, which demonstrates full cost recovery then by default it ensures replicability.

40. As identified by Brian Williamson's paper *"access to scarce (content) bundle inputs that are not regulated is not the preserve of eir – but is a feature of the Irish market. Imposing an economic*

[31] Alto, supra n 4, page 15

replicability test on eir may therefore serve not only to limit pricing freedom and investment incentives, but also limit eir's ability to compete effectively, thereby reducing competition overall" [32]. With the recent entry of Sky in the mobile market in the UK with its stated intent to *"Exploit headroom in customer base"*[33] and *"Leverage Sky assets and partnerships"*[34] should Sky decide to enter the mobile market in Ireland it may be eir and OAOs that struggle to profitably replicate Sky's bundles.

41. The retail market is fast moving and eir must have sufficient flexibility to respond to and adapt to such changes. Such market forces are evident in fully functioning markets and are not easily achieved by regulation. eir has provided cogent reasoning to support its views including analysis which supports eir's proposals made in its original response. eir's proposals demonstrate a better approach capable of meeting ComReg's regulatory objectives. They are also consistent with the 2013 EC Recommendation and standards applied in ex-post competition law. It would not be justifiable or proportionate for ComReg to impose regulation on eir [✂]. In this manner, the market is distorted leading to outcomes that are sub-optimal and to the ultimate detriment of consumers.

Market responsibility

42. ALTO and Vodafone state a similar view that *"the market for fixed telecoms services is extremely challenging and the fixed service needs to be viable at a local level for all operators"*. eir agrees that the fixed telecoms market is challenging but that it is important to acknowledge that competitors face competition from other operators in the market and not just from eir. Therefore, it is unclear why a retail MST is required to enable *"other operators to compete on a level playing field with Eircom"*[35]*.* A "level playing field" is already achieved by cost-oriented wholesale prices, non-discrimination and transparency obligations. In addition, the more appropriate retail remedy of ex-post competition law is also available to all operators including eir.

43. Similarly, it is unclear why it is *"critical that Eircom are required to demonstrate that it is not causing a margin squeeze"*[36] or that *"*[w]*ithout an effective margin squeeze test in place*

[32] Brian Williamson, "*Leveraging regulation into retail broadband and adjacent markets via margin squeeze - Primum non nocere", June 2017*
[33] Sky Investor presentation Q4 16/17, Results for the twelve months ended 30 June 2017
[34] Ibid
[35] ALTO, supra n 4, page 9
[36] Sky, supra n 25, paragraph 5

between Eircom's retail bundles and FACO, Eircom may be able to offer bundles of services that cannot be replicated by OAOs"[37]. Such a concern equally applies to all retailers in the market (which includes large multinational operators such as Vodafone and Sky). In addition, Virgin Media's bundle offering does not rely on purchasing fixed voice call origination from eir — yet interested parties' submissions do not comment on their ability to compete with Virgin Media offers.

44. As stated in eir's original submission, if ComReg has a concern that lower retail prices could lead to foreclosure in the market, how is it different in this case when ComReg doesn't have similar oversight of other competitor retail offers (for example, those of Sky, Vodafone, Pure Telecom etc.)? eir submits that it is not.

45. At the recent ComReg conference on "Future innovations in the Telecoms Sector", Sébastien Soriano (Chair of BEREC and ARCEP) commented that in applying regulation (in Market 3a, 3b) ARCEP felt that OAOs had to take responsibility for themselves and that imposing cost-orientation in the access network is sufficient to incentivise investment in the market (i.e. there is no retail MST required). With eir's retail broadband market share at 32.2% and declining (compared to Orange's retail market share of ca. 40% in France), ComReg should clearly set out in Regulatory Impact Assessment ('RIA') why it considers it necessary to impose retail regulation on eir while also imposing cost-orientation at the wholesale level, why it considers a 3CT is not required in order to impose retail regulation and identify the regulatory outcomes it is seeking to achieve by interfering in a market which is not recognised by the EC as being susceptible to ex-ante regulation.

46. While every national market is different, eir encourages ComReg to consider European precedent to analyse in what context (if any) cost-oriented wholesale prices are applied concurrently with retail MSTs. It appears to eir, consistent with the 2013 EC Recommendation that national regulatory authorities apply either wholesale cost-orientation or MSTs and not both.

47. In a recent separate report, Oxera, ComReg's consultants to the Bundles Consultation, state that *"Retail price regulation has been withdrawn in most of Europe, with regulation focusing instead on upstream bottlenecks"*[38]. As set out in eir's submission to ComReg's WLA WCA Pricing consultation (ComReg 17/26), ComReg's proposals are much more severe than regulation imposed on comparable operators elsewhere in the EU. eir would be the only SMP

[37] ALTO, supra n 4, page 9
[38] https://www.oxera.com/getmedia/91fbebaa-1b89-4ae3-925e-3b055e2c9aaa/Regulating-oligopolies-in-electronic-communications-markets-.pdf.aspx?ext=.pdf

designated operator in Europe that would be subject to concurrent cost-orientation and margin squeeze obligations for both FTTC Bitstream and FTTC-based VUA — an even starker fact when considering eir's relatively low retail market share compared with that of other European ex-incumbents.

48. Oxera state that *"investment by infrastructure providers has increased competition and eroded the market power held by incumbents. Market outcomes for consumers in terms of prices and quality (e.g. broadband speeds) have improved significantly. With increased competition from cable networks, a growing number of fibre investment projects, and the advent of superfast mobile broadband from 4G and 5G mobile networks, the time seems right for regulators to step back and rely on competition law"*[39]. While this Oxera report considers the regulation of oligopoly markets, their view that national regulatory authorities should *"rely on competition law"* should clearly apply to the Irish retail market (where concurrent wholesale pricing remedies apply) as those conditions outlined by Oxera are already evident in the Irish market and in this particular circumstance are present in the Urban Area — where ComReg has identified that the wholesale broadband market is not subject to SMP (but nevertheless is an area where ComReg proposes a piecemeal retail MST to be implemented).

49. As noted in eir's original response, it is important to highlight that the Oxera recommendations to the Bundles Consultation, which ComReg relies on to support its preliminary views do not appear to be based on any meaningful market analysis other than assessing retail market shares in the counter-factual in each area assuming wholesale regulation is removed. This is the incorrect lens to determine retail market shares as such market outcomes are already addressed by imposing wholesale regulation. This means the retail market shares are over-stated and to base any retail remedies on such analysis is simply wrong. Furthermore, any attempt to infer significant market power based solely on market shares does not provide a complete competitive analysis. This is why the economic practice of undertaking a Three Criteria Test is required by all national regulatory authorities before imposing remedies — which ComReg has failed to do in this instance for the retail market.

Conclusion

50. eir submits that OAOs have failed to provide any evidence that supports the need for retail regulation. ComReg cannot proceed to introduce a series of retail MSTs without a detailed

[39] Ibid September

market analysis. To introduce retail regulation through a wholesale market is merely introducing retail regulation through the back door.

51. eir is aligned with OAOs views with regard to the length of time ComReg takes to complete market reviews and pricing decisions. eir notes that ComReg is currently behind schedule on a number of items included in its work programme for 2017/2018, some of which have already been rolled over from its 2016/17 Action Plan. For example, ComReg has been slow in completing significant projects on spectrum allocation and next generation networks and is also now significantly behind in its programme of market analyses and in breach of its obligations under the Framework. eir notes that the EC has sent a letter[40] of formal notice to Ireland, to request that it carries out its analysis without delay of relevant telecom markets and inform the Commission within the timeframe set by the EU law.

52. Related to this matter is the current Bundles Consultation which seeks to impose retail regulation, although ostensibly through further specification of pricing remedies in wholesale markets. ComReg cannot obviate its legal requirements. Regulation 13 of the Universal Service Regulations clearly considers the imposition of retail price controls to be a two-step approach — in that it envisages such imposition including the required market definition and analysis only in circumstances where a similar process has already taken place in the upstream market but wholesale obligations imposed under the Access Regulations are considered insufficient (Regulation 13(1) (b)).

53. ComReg must also now commit to revisiting the retail fixed narrowband access market, which does not feature in ComReg's Annual Action Plan, to ensure that in completing the WLA/WCA market analysis that any retail regulation remains appropriate — which the European Commission invited ComReg to do without undue delay in Article 7 correspondence in July 2015.[41]

[40] http://europa.eu/rapid/press-release_MEMO-17-3494_en.htm
[41] C(2015) 5011 final – Letter from the European Commission to ComReg dated 14 July 2015.