



Commission for
Communications Regulation

Market Reviews

Retail Access to the Public Telephone Network
at a Fixed Location for Residential and Non-
Residential Customers

Wholesale Fixed Access and Call Origination

Consultation and Draft Decision

Reference: ComReg 22/10

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Additional Information

Approval

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1 Executive Summary

1.1 Introduction

- 1.1 This Consultation follows a Withdrawal Decision¹ issued by the European Commission ('EC') on 20 September 2021 in respect of a 'draft Decision' which was notified by the Commission for Communications Regulation ('ComReg') to the EC in June 2021. The draft Decision (the '**2021 Draft Decision**')² set out ComReg's analysis of the Retail Fixed Telephony Service ('RFTS') and wholesale Fixed Access and Call Origination ('FACO')³ markets. The 2021 Draft Decision followed the 2020 RFTS/FACO Consultation (the '**2020 Consultation**'),⁴ which issued in June 2020.
- 1.2 In the 2021 Draft Decision, ComReg proposed to deregulate and remove all existing regulation in the RFTS markets and to partially deregulate the FACO markets. The proposals in the 2021 Draft Decision meant that regulation would be maintained in the so-called 'Regional FACO Markets' only.
- 1.3 In accordance with Article 32(3) of the European Electronic Communications Code ('EECC')⁵ ComReg published and, at the same time, made the draft measures accessible to the European Commission ('EC'), the Body of European Regulators for Electronic Communications ('BEREC') and National Regulatory Authorities ('NRAs') in other Member States (the '**Article 32 Notification**'). The Article 32 Notification was submitted by ComReg on 19 June 2021.
- 1.4 Under Article 32(3) of the EECC, the EC, BEREC and other NRAs have one month, to comment on ComReg's Article 32 Notification. On 19 July 2021 the EC issued a comments letter in which it raised serious doubts with respect to ComReg's 2021 Draft Decision ('**Serious Doubts Comments Letter**'). The EC also issued a press release⁶ regarding its Serious Doubts Comments Letter.

¹ COMMISSION DECISION of 17.9.2021 pursuant to Article 32(6) of Directive (EU) 2018/1972 (Withdrawal of notified draft measure). Cases IE/2021/2332-2333: markets for retail fixed telephony services and wholesale fixed access and call origination in Ireland (the '**Withdrawal Decision**').

² Information Notice - Publication and notification to the European Commission (EC), the Body of European Regulators for Electronic Communications (BEREC), and Member State National Regulatory Authorities (NRAs) of draft measures under Article 32 of Directive 2018/1972, ('**ComReg Document 21/65**'), available at <https://www.comreg.ie/publication-download/information-notice-rfts-faco-draft-decision>.

³ FACO, in general, is a wholesale line rental and call origination product enabling the provision of retail fixed line rental and call services to end users.

⁴ Market Reviews: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers, Wholesale Fixed Access and Call Origination - Consultation and Draft Decision. ComReg 20/46, 17 June 2020 (the '**2020 Consultation**').

⁵ Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the '**EECC**').

⁶ See <https://digital-strategy.ec.europa.eu/en/news/commission-opens-depth-investigation-irish-markets-fixed-voice-telephony>.

- 1.5 On 17 August 2021 BEREC adopted, published and sent to the EC, its opinion (BEREC document BOR (21) 109)⁷ (the '**BEREC Opinion**'). The overall conclusions set out in the BEREC Opinion were that "*the Commission's serious doubts regarding the draft decision of the Irish national regulatory authority, ComReg, as expressed in the Commissions letter, dated 16 July 2021, are partially justified*". On 18 August 2021, ComReg issued an information notice⁸ concerning the BEREC Opinion.
- 1.6 In this Consultation, ComReg assesses the need for continued regulation of competition on two wholesale markets for the provision of Fixed Access and Call Origination ('**FACO**'), and three retail markets for the provision of Retail Fixed Telephony Services ('**RFTS**'). On 20 September 2021 the EC issued its Withdrawal Decision requiring ComReg to withdraw and to re-notify a draft decision. The EC also issued a press release regarding its Withdrawal Decision.⁹ On 21 September 2021, ComReg issued a second information notice¹⁰ concerning the Withdrawal Decision.
- 1.7 In accordance with Article 32(7) of the EECC, ComReg is required to amend or withdraw the Draft Decision. Where the Draft Decision as set out in the Article 32 Notification is amended, ComReg is required to undertake a public consultation in accordance with Article 23 of the EECC, and to notify the amended draft measure to the EC in accordance with Article 32(3).
- 1.8 In this Consultation, having regard to the Withdrawal Decision, ComReg re-assesses the need for continued regulation of the three RFTS Markets and two wholesale FACO markets that are currently regulated. The retail markets examined, and as further described below, are the:
- (a) Standalone Low-Level RFTS ('**Standalone LL-RFTS**') in the State;
 - (b) Bundled Low-Level RFTS ('**Bundled LL-RFTS**') in the State; and
 - (c) High-Level RFTS ('**HL-RFTS**') in the State.
- 1.9 The wholesale markets examined are the markets for:

⁷ See https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/10019-berec-opinion-on-phase-ii-investigation-pursuant-to-article-32-of-directive-eu-20181972-cases-ie20212332-2333-market-for-access-to-the-public-telephone-network-at-a-fixed-location-for-residential-and-non-residential-customers-m12007-in-ireland-market-for-call-origination-on-the-public-telephone-network-provided-at-a-fixed-location-m22007-in-ireland.

⁸ Information Notice, Market Review Update, ComReg Document 21/84, available at <https://www.comreg.ie/publication-download/market-review-further-update-retail-fixed-telephony-services-and-wholesale-fixed-access-and-call-origination>.

⁹ "Commission blocks proposed Irish regulation of fixed voice telephony" <https://digital-strategy.ec.europa.eu/en/news/commission-blocks-proposed-irish-regulation-fixed-voice-telephony>.

¹⁰ Information Notice, Market Review Update, ComReg Document 21/94, available at <https://www.comreg.ie/publication-download/market-review-further-update-retail-fixed-telephony-services-and-wholesale-fixed-access-and-call-origination-2>.

- (a) Low-Level Fixed Access and Call Origination market (the '**LL-FACO Market**') in the State; and
 - (b) High-Level Fixed Access and Call Origination market (the '**HL-FACO Market**') in the State.
- 1.10 In general, FACO is a wholesale input purchased by Access Seekers which do not operate their own networks, and which ultimately permit the provision of RFTS to end users. Those Service Providers ('**SP(s)**') with their own networks can also self-supply FACO. FACO and RFTS both consist of an access component (line rental), and a calling component.
- 1.11 In this Consultation, ComReg defines the RFTS markets from both a product perspective and a geographic perspective. ComReg then assesses the extent of competition within such markets. If competition were not working effectively in these RFTS markets it would seek to address these issues at the wholesale level, where appropriate. ComReg then assesses the extent of competition within such markets and, where appropriate, designates SPs with SMP if, in ComReg's view, and on the basis of the evidence available to it, competition does not effectively constrain the conduct of that SP on the market. Where competition is found to be likely to work effectively, existing regulation is withdrawn.
- 1.12 Having regard to the Withdrawal Decision, ComReg's overall conclusion is that, based on the analysis in Section 4 below,¹¹ continued *ex ante* regulation of the three RFTS markets is no longer warranted, as there is insufficient evidence of the likelihood of competition problems on those markets (including on the basis of the absence of any regulation of the upstream FACO markets). The three RFTS markets are, within the time horizon of this market review, likely to move towards a situation of effective competition. In this respect, there is evidence of barriers to entry being sufficiently eroded over time, including on the basis of SP(s) being able to self-supply Managed VoIP over next generation broadband services and the impact this will have on competition within the RFTS markets.

¹¹ The 3CT set out in the 2014 Explanatory Note (and at Article 67(1) of the European Electronic Communications Code (Directive (EU) 2018/1972), which does not yet have legal effect in the State, as of May 2020) sets out the criteria that must be cumulatively satisfied in order to determine that a relevant market should be - or continue to be - subject to *ex ante* regulation. The three criteria are

- a. the presence of high and non-transitory barriers to entry;
- b. a market structure which does not tend towards effective competition within the relevant time horizon; and
- c. the insufficiency of competition law alone to adequately address the market failure(s) concerned.

- 1.13 In respect of the two FACO markets (together, the '**Relevant FACO Markets**'), ComReg proposes that, in the absence of competition problems on the downstream RFTS markets, there is no reason to examine competition and ultimately the retention of remedies on the upstream FACO markets, in an absent regulation scenario. The Withdrawal Decision indicates that this arises, *inter alia*, from the capability of end users to substitute, to a sufficient degree, from RFTS to mobile telephony services ('**MTS**') to such an extent that fixed-mobile substitution ('**FMS**') generates a strong enough constraint on RFTS to warrant including MTS in the RFTS market as a direct constraint. Additionally, the Withdrawal Decision effectively points, on a forward looking basis, to the sufficient availability of NG broadband, thereby allowing SPs to compete in RFTS markets on the basis of self-supply of Managed VoIP.
- 1.14 Accordingly, ComReg proposes to remove SMP regulatory obligations on Eircom on the Relevant RFTS Markets and the Relevant FACO Markets. In respect of the Relevant FACO Markets alone, ComReg proposes to implement a sunset period which is designed to afford Access Seekers a reasonable and sufficient period of time to migrate away from the purchase of FACO from Eircom, to the purchase of other wholesale inputs capable of delivering FACO or RFTS (including self-supply), should they so wish.

1.2 The Withdrawal Decision

- 1.15 In summary, the Withdrawal Decision disagreed with certain aspects of the analysis set out in the 2021 Draft Decision. In summary, these were that:
- (a) MTS should be included in the RFTS and FACO product markets;
 - (b) A NG broadband coverage threshold used by ComReg to assess the ability for SPs to self-supply Managed VoIP was too low, and Virgin Media's self-supply of RFTS should be included in the FACO product market;
 - (c) ComReg's assessment was sufficiently forward-looking, focussing particularly on the future impact of ongoing substitution to MTS, and ongoing NG broadband network deployment;
 - (d) The assessment of competition, including the SMP findings, in respect of the Regional FACO Market were inappropriate given the above; and
- 1.16 In the remainder of this Consultation, ComReg takes into account the substance of the EC's concerns expressed in the Withdrawal Decision in arriving at its proposed position.
- 1.17 As noted above, having regard to the Withdrawal Decision, ComReg is required to withdraw the 2021 Draft Decision as notified to the EC under Article 32 of the EEEC. ComReg has written to the EC withdrawing its notification, with a copy of this correspondence at Annex: 3.

1.3 Summary of RFTS Market Assessment

- 1.18 In this Consultation, ComReg must carry out an assessment to determine whether *ex ante* regulation of the RFTS markets (which consists of both a line rental and a calls component) continues to be warranted. However, in advance of doing so, it is necessary to define the parameters of the RFTS markets on which this assessment is to be carried out.

Market Definition

- 1.19 A relevant market consists of both a relevant product market and a relevant geographic market. In respect of the relevant product market, ComReg analyses the downstream Relevant RFTS Markets to determine whether any retail products could be considered by an end user as an effective substitute for RFTS, taking account of any demand-side and supply-side considerations.
- 1.20 ComReg also considers that RFTS delivered over Next Generation ('NG') broadband as Managed VoIP¹² is likely to be an effective demand-side substitute to the focal products.
- 1.21 As set out in the Withdrawal Decision, the EC considers that the incidence of FMS indicates that MTS is a substitute for RFTS. Accordingly, and on the basis that ComReg has not found any evidence (additional to that presented in the 2021 Draft Decision), to support the position that MTS is not a substitute for RFTS, ComReg includes MTS as a demand-side substitute to other forms of RFTS as identified below.
- 1.22 ComReg's overall view is that there are three distinct Relevant RFTS Markets (the '**Relevant RFTS Markets**')
- (a) **Market 1a:** a national Standalone Low-Level RFTS ('**Standalone LL-RFTS**') market including RFTS delivered over PSTN ('**PSTN**', which delivers a single voice channel over a line) and ISDN Basic Rate Access ('**ISDN BRA**', which delivers two voice channels over a line), any Managed Voice over Broadband ('**VoB**') delivered over Next Generation ('NG') broadband and MTS on a standalone basis;
 - (a) **Market 1b:** Bundled Low-Level RFTS ('**Bundled LL-RFTS**') including RFTS over PSTN and ISDN BRA and Managed VoB¹³ delivered over (and with) NG Broadband and MTS on a bundled basis together with any of broadband, television or MTS,¹⁴ delivered on a bundled basis; and

¹² Voice over Internet Protocol.

¹³ Managed VoIP includes RFTS delivered in the form of Managed VoB, as well as Hosted PBX, or SIP Trunking.

¹⁴ This refers to instances where the RFTS element is not based on MTS. For example, where RFTS is delivered over Managed VoB, but the bundle also includes MTS.

- (b) **Market 1c:** a national High-Level RFTS (**'HL-RFTS'**) market including RFTS over ISDN Fractional Rate Access (**'ISDN FRA'**, which delivers 16 voice channels over a line), ISDN Primary Rate Access (**'ISDN PRA'**, which delivers 30 voice channels over a line), and SIP Trunk or Hosted PBX¹⁵ delivered over NG broadband, on a standalone basis or on a bundled basis together with any of broadband, television or MTS.
- 1.23 From a geographic perspective and consistent with the 2021 Draft Decision, ComReg considers that these markets are national in scope, given insufficient variations in the number and size of potential competitors geographically, no evidence of differentiated pricing or marketing strategies on a sub-national basis and limited differences in demand characteristics across regions.
- 1.24 The main distinction above, relative to the position in the 2021 Draft Decision, is the inclusion of MTS within the Standalone LL-RFTS Market and the Bundled LL-RFTS Market. MTS is not however included within the HL-RFTS Market on the basis that it is not likely, from product characteristics, pricing or intended use perspectives, to be an effective substitute for ISDN FRA, ISDN PRA, SIP Trunk or Hosted PBX based RFTS.

Competition Assessment of Relevant RFTS Markets

- 1.25 As set out above, the Relevant RFTS Markets are not identified at EU level as being susceptible to *ex ante* regulation, and a Three Criteria Test (**'3CT'**) must therefore be carried out. If any one of the three criteria fails, this is sufficient to conclude that the market cannot be subject to SMP regulation.
- 1.26 ComReg has assessed the first two criteria and considers that Criteria 1 (the presence of high and non-transitory barriers to entry) and 2 (the market is not likely to tend towards effective competition) both fail, having regard in particular to the regulatory assessment of the Relevant RFTS Markets, which suggests that the ability to supply MTS (as relevant) and Managed VoIP provide sufficient grounds on which both criteria fail.
- 1.27 The third criterion considers the sufficiency of competition law by itself to deal with any market failures identified in the market analysis, in the absence of *ex ante* regulation. ComReg notes that, since the first two criteria of the 3CT are not met, the third criterion cannot alter ComReg's overall conclusions that the 3CT fails overall on the Relevant RFTS Markets. It is accordingly not necessary to proceed to a full competition assessment of the Relevant RFTS Markets.

¹⁵ Hosted private branch exchange (**'Hosted PBX'**) is a Managed VoIP product designed to meet the needs of business end users. The SP hosts the RFVC functionality and PBX features off-site, at the SP's location, thereby reducing the level of infrastructure investment incurred by the end user. The end user connects via IP to the SP to engage in RFVC. Session Initiation Protocol Trunking (**'SIP Trunking'**) is another Managed VoIP product designed to meet the needs of business end users. Unlike Hosted PBX, SIP Trunking provides for RFVC delivered over IP at an on-premises PBX. This requires the end user to incur a greater level of infrastructure investment than Hosted PBX. SIP Trunks are multi-channel services comparable to the delivery of RFTS over ISDN FRA or PRA.

Withdrawal of Remedies

Withdrawal in the Relevant RFTS Markets

- 1.28 Given the 3CT fails on all three Relevant RFTS Markets it follows by definition that regulation is not appropriate in these markets. ComReg therefore proposes that existing SMP regulation should be withdrawn. ComReg does not consider that any sunset period in respect of deregulation of the Relevant RFTS Markets is appropriate, and proposes that all SMP obligations should be withdrawn at the effective date of the decision to be adopted on foot of this Consultation.

Withdrawal in the Relevant FACO Markets

- 1.29 ComReg considers that no case exists for regulation of the FACO markets, given the lack of competition problems on downstream RFTS markets in an absent regulation scenario. Accordingly, in Section 5, subject to the implementation of a sunset period, ComReg proposes to withdraw obligations imposed under the 2015 FACO Decision¹⁶ would be withdrawn from the Relevant FACO Markets.
- 1.30 From the effective date of the decision arising from this Consultation, ComReg proposes that a 12 and 18 month¹⁷ sunset period would apply as appropriate, by means of which Eircom would be effectively required to maintain existing supply of access to FACO products, services and facilities (for example, SB-WLR orders already supplied to Access Seekers) at no more than existing prices. With respect to new supply of FACO products, services and facilities (for example, SB-WLR orders received) a 9month sunset period is proposed for PSTN, ISDN FRA and ISDN PRA and a 2 month sunset period is proposed for ISDN BRA (which will run in parallel with the 12 month and 18month sunset periods described above). ComReg is of the view that these sunset periods are appropriate and proportionate to allow Access Seekers sufficient time in which to make any necessary preparations for the new market environment, arising from deregulation, thereby preserving continuity in the supply of both wholesale and retail services (were Eircom to withdraw SB-WLR, or significantly alter its SB-WLR terms and conditions, following deregulation).¹⁸
- 1.31 During the sunset period, Eircom would be required to maintain access at existing prices, but would not be required to meet other obligations (for example, in relation to transparency, non-discrimination etc.).

¹⁶ ComReg Decision No. D05/15, Market Review - Wholesale Fixed Voice Call Origination and Transit Markets. Response to Consultation and Decision, ComReg Document 15/82, 24 July 2015. See <https://www.comreg.ie/csv/downloads/ComReg1582.pdf> (the '2015 FACO Decision').

¹⁷ A 12-month sunset period will apply in respect of FACO delivered over ISDN BRA and 18-month sunset period will apply in respect of FACO delivered over PSTN, ISDN FRA, and ISDN PRA.

¹⁸ ComReg would not expect Eircom to significantly alter its terms and conditions given the presence of competition.

1.4 Next Steps

- 1.32 ComReg invites views from interested parties on the issues analysed in this Consultation, with the procedure and deadline for the submission of responses set out in paragraph 2.19 below. Responses to the Consultation are due by Monday, 14 March, 2022. Following consideration of responses to the Consultation, ComReg will issue its final Decision, including with any updates to data, where appropriate.

2 Introduction

2.1 Legal basis and regulatory framework

- 2.1 ComReg undertakes this market review in accordance with the obligation under (and commenced during the currency of) the Framework Regulations¹⁹ that NRAs should analyse relevant markets, taking utmost account of an EC recommendation on relevant markets susceptible to *ex ante* regulation and the 2018 SMP Guidelines, to determine whether competition is effective or not, and if not, to impose obligations in accordance with the Access Regulations.²⁰
- 2.2 The Framework Regulations and the Access Regulations (together with the Authorisation Regulations²¹ and the Universal Service Regulations)²² transpose into Irish law the regulatory framework for electronic communications set out in the Framework Directive, the Access Directive, the Authorisation Directive, and the Universal Service Directive,²³ all repealed with effect from 20 December 2020 and replaced with the EECC, which entered into force on 20 December 2018 and which was required to be transposed into national legislation by Member States by 21 December 2020. As of the publication date of this Consultation, the EECC has not been transposed into Irish law. While the work undertaken by ComReg for the purpose of this market review was conducted in part prior to the coming into effect of the EECC, throughout this market review ComReg has been aware of the need to be consistent with the EECC.
- 2.3 Regulation 26 of the Framework Regulations²⁴ requires that ComReg, taking the utmost account of the 2020 Recommendation and of the SMP Guidelines, defines relevant markets appropriate to national circumstances, in accordance with the principles of competition law.

¹⁹ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the '**Framework Regulations**').

²⁰ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, S.I. No. 334 of 2011 (the '**Access Regulations**').

²¹ European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011, S.I. No. 335 of 2011 (the '**Authorisation Regulations**').

²² European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, S.I. No. 337 of 2011 (the '**Universal Service Regulations**').

²³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (the '**Framework Directive**'); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the '**Access Directive**') as amended by Directive 2009/140/EC; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, as amended by Directive 2009/140/EC (the '**Authorisation Directive**'); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the '**Universal Service Directive**').

²⁴ This provision is mirrored at Article 64 EECC.

- 2.4 Neither the Relevant RFTS Markets nor the upstream FACO markets are deemed to be susceptible to *ex ante* regulation under the 2020 Recommendation (or the 2014 Recommendation which it replaced).
- 2.5 In view of this, there is no presumption in favour of continuing to regulate these markets. Therefore, in order to consider whether the markets are susceptible to *ex ante* regulation in light of national circumstances, ComReg must carry out the 3CT set out in the 2020 Explanatory Note²⁵ to the 2020 Recommendation and reiterated at Article 67(1) EECC.
- 2.6 The 3CT sets out the criteria that must be cumulatively satisfied in order to determine whether a relevant market should be, or should continue to be, subject to *ex ante* regulation. The three criteria are:
- (a) The presence of high and non-transitory barriers to entry;
 - (b) A market structure which does not tend towards effective competition within the relevant time horizon; and
 - (c) The insufficiency of competition law alone to adequately address the market failure(s) concerned.
- 2.7 If at least one of the 3CT criteria fails, this suggests that competition is working well on the market in question, and that *ex ante* regulation is no longer required. In such instances, the market in question should be deregulated.
- 2.8 If, on the other hand, the 3CT passes, that is to say, if all three criteria are satisfied, then competition is unlikely to be working well on the market in question, and *ex ante* regulation is, in principle, warranted. It is then necessary to carry out a competition assessment, to determine whether the market is characterised by the presence of SMP.

²⁵ COMMISSION STAFF WORKING DOCUMENT EXPLANATORY NOTE Accompanying the document COMMISSION RECOMMENDATION on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the '**2020 Explanatory Note**').

- 2.9 In particular, Regulation 25 of the Framework Regulations²⁶ requires that, where ComReg determines, as a result of a market analysis and in accordance with Regulation 27,²⁷ that a given market (defined in accordance with Regulation 26)²⁸ is not effectively competitive, ComReg is obliged under Regulation 27(4)²⁹ thereof to designate an Undertaking³⁰ (or Undertakings) with SMP in that market. In addition, ComReg must, as it considers appropriate, impose specific obligations on such Undertaking(s), or maintain or amend such obligations, where they already exist.
- 2.10 ComReg applies the Modified Greenfield Approach ('**MGA**') described in the 2020 Explanatory Note, when carrying out its assessment.
- 2.11 Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) sets out ComReg's objectives in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities, namely to:
- (a) Promote competition;
 - (b) Contribute to the development of the internal market; and
 - (c) Promote the interests of users within the European Union.

2.2 Previous Reviews of the Relevant Markets

- 2.12 As set out in the 2021 Draft Decision,³¹ the Relevant RFVA Markets have, to date, been regulated in accordance with ComReg's 2014 RFVA Decision (the '**2014 RFVA Decision**') with Eircom having been designated as having SMP on each of these markets.³² The **Relevant FACO Markets** have, to date, been regulated in accordance with the 2015 FACO Decision which designated Eircom as having SMP on both the Low-Level ('**LL-FACO**') and High-Level ('**HL-FACO**') FACO Markets.

²⁶ This provision is mirrored at Article 63 EECC.

²⁷ This provision is mirrored at Article 67 EECC.

²⁸ This provision is mirrored at Article 64 EECC.

²⁹ This provision is mirrored at Article 67(4) EECC.

³⁰ Regulation 2 of the Framework Regulations defines an Undertaking as "a person engaged or intending to engage in the provision of electronic communications networks or services or associated facilities".

³¹ See paragraphs 2.38 to 2.41 of the 2021 Draft Decision.

³² ComReg Decision No. D12/14, Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers, 28 August 2014. See <https://www.comreg.ie/csv/downloads/ComReg1489.pdf> (the '**2014 RFVA Decision**').

- 2.13 The remedies applied to the Relevant RFVA Markets in the 2014 RFVA Decision have been amended or altered over time by means of the 2015 FACO Decision and the 2018 Bundles Decision.³³

2.3 Current Review of the Relevant Markets

- 2.14 As set out at Section 1.1 above, ComReg has previously carried out a market review of the RFTS and FACO markets. Having issued the 2020 Consultation in June 2020, ComReg notified its 2021 Draft Decision to the EC on 19 June 2021, with this ultimately resulting in the Withdrawal Decision. In the 2021 Draft Decision, ComReg had proposed to fully deregulate the RFTS markets, and to deregulate 74% of the FACO markets, measured by RFTS lines.
- 2.15 In this Consultation, having regard to the Withdrawal Decision, ComReg re-assesses the need for continued regulation of two wholesale FACO markets, and the three RFTS Markets.

2.4 Consultation Process

- 2.16 ComReg invites all interested parties to respond to the questions set out in this Consultation, and to comment on any other aspect of the Consultation.
- 2.17 In so doing, respondents are requested to clearly explain the reasoning for their response, indicating the specific relevant paragraph numbers within the Consultation to which their response refers, along with all relevant factual or other evidence supporting views presented. Respondents should submit their views in accordance with the instructions set out in this Consultation.
- 2.18 Respondents should also be aware that all non-confidential responses to this Consultation will be published, subject to the provisions of ComReg's Guidelines on the treatment of confidential information.³⁴ **Respondents should ensure that a non-confidential version of their response is provided by the closing date set out below, which clearly sets out which specific text respondents consider to be confidential. Confidential elements of responses must be clearly marked as such, using the following format: [✂ text deemed to be confidential ✂], and be set out in a separate document which must also be provided to ComReg by the closing date set out below.**
- 2.19 All responses should be sent by post or email to the address below to arrive on or before 17:30 on 14 March 2022. ComReg is providing a one month period within which interested parties may respond. Responses received after this date will not be considered. Responses should be marked for the attention of:

³³ Response to Consultation and Decision on price control obligations relating to retail bundles: Further specification of the wholesale price control obligation not to cause a margin squeeze in the WLA, and WCA Markets [ComReg Document 18/96](#) Decision: D12/18, November 2018 (the '2018 Bundles Decision').

³⁴ See ComReg Document 05/24, 'Guidelines on the treatment of confidential information', March 2005. <https://www.comreg.ie/csv/downloads/ComReg0524.pdf>

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- 2.20 In submitting comments, respondents are requested to provide a copy of their submissions in an unprotected electronic format in order to facilitate their subsequent publication by ComReg.
- 2.21 This is a non-confidential version of the Consultation. Certain information within the Consultation has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂. Should an individual SP wish to review its own redacted information, it should make a request for such in writing to ComReg (to the person identified above) and indicate the specific paragraph numbers within which the redacted information being requested is contained. ComReg will consider requests for redacted information and will, subject to the protection of commercially sensitive and confidential information, respond accordingly.

2.5 European Electronic Communications Code

- 2.22 The EECC replaces the EU Common Regulatory Framework (which included the Framework Directive and the Access Directive) which was adopted in 2002 and amended in 2009. With some limited exception, Member States were required to transpose the EECC into national law by 21 December 2020.
- 2.23 As the EECC has not yet been transposed into Irish law as of the publication date of this Consultation, the legal basis for this market review is the existing Irish statutory regime, including the provisions set out in the Framework Regulations, the Access Regulations, the Authorisation Regulations and the Universal Service Regulations, read in light of the EECC. Whilst publication of this Consultation occurs before the EECC has been transposed into Irish law, ComReg has been mindful of the EECC in developing its proposals in this Consultation. In particular, where appropriate, ComReg has had regard to the amendments brought by the EECC to both the principles and substance of the regulatory regime, including changes to the General Objectives set out at Article 3 EECC, and specific changes to the market analysis procedures described at Chapter III EECC, or the remedies imposed on Undertakings designated with SMP set out at Chapter IV EECC.

2.24 Overall, in preparing this Consultation, ComReg has taken account of its functions and objectives under the Communications Regulation Act 2002 (as amended), in addition to requirements under the Framework Regulations and the Access Regulations.

2.6 Structure of the Consultation

2.25 The remainder of this Consultation Paper is structured as follows:

- (a) **Section 3** defines the Relevant RFTS Markets from both a product and a geographic perspective;
- (b) **Section 4** assesses competition within the Relevant RFTS Markets by carrying out a 3CT to determine if continued *ex ante* regulation is warranted, and also sets out the withdrawal of SMP remedies and obligations on the Relevant RFTS Markets;
- (c) **Section 5** sets out the process whereby regulation may, as appropriate, be removed from the FACO markets;
- (d) **Section 6** sets out the next steps following publication of this Consultation;
- (e) **Annex: 1** sets out the draft Decision Instrument;
- (f) **Annex: 2** lists the Consultation questions; and
- (g) **Annex: 3** sets out a copy of the letter sent to the European Commission, formally withdrawing its draft measure.

3 Relevant RFTS Market Definition

3.1 In this section, having regard to the views of the EC in its Withdrawal Decision, ComReg revisits its definition of the relevant markets for Retail Fixed Telephony Services ('**RFTS**') and the geographic extent of each such market. Neither the 2014 EC Recommendation nor the 2020 EC Recommendation identifies '*access to the public telephone network at a fixed location for residential and non-residential customers*' as a market susceptible to *ex ante* regulation. Consistent with Article 67(2) of the ECC and regulatory practice, ComReg carried out this exercise applying the Modified Greenfield Approach ('**MGA**'). The MGA requires NRAs to assess whether markets are effectively competitive from a forward-looking perspective in the absence of SMP regulation, in order to avoid circular reasoning whereby a market is deemed to be competitive on the basis of the presence of SMP regulation. Accordingly, ComReg carries out its RFTS market definition exercise assuming that no SMP regulation is present on the RFTS market(s) or on the FACO market(s) which lie directly upstream of the RFTS markets.

3.1 View in the 2021 Draft Decision

3.2 The 2021 Draft Decision concluded that RFTS products provided over a copper-based FNA network constituted appropriate focal products – being the products against which possible substitute products are considered. ComReg identified two focal products, one for low-volume users comprising standalone copper based Fixed Narrowband Access ('**FNA**') RFTS over PSTN and ISDN BRA ('**Low-Level RFTS Focal Product(s)**'), and one for high-volume users comprising standalone FNA RFTS over ISDN FRA and ISDN PRA ('**High-Level RFTS Focal Product(s)**'). ComReg additionally identified Managed VoIP delivered over NG Broadband networks as an effective demand-side constraint on the focal products – Managed VoB in the case of Low-level RFTS, and SIP Trunking and Hosted PBX in the case of High-Level RFTS.

3.3 ComReg's position in the 2021 Draft Decision was that there were three distinct markets for RFTS (the '**Relevant RFTS Markets**'), each of which was considered to be national in scope:

- (a) **Market 1a:** Standalone Low-Level RFTS ('**Standalone LL-RFTS**') including RFTS over PSTN and ISDN BRA and any Managed VoB delivered over NG Broadband on a standalone basis;
- (b) **Market 1b:** Bundled Low-Level RFTS ('**Bundled LL-RFTS**') including RFTS over PSTN and ISDN BRA and Managed VoB delivered over (and with) NG Broadband on a bundled basis together with any of broadband, television or MTS; and

- (c) **Market 1c:** High-Level RFTS ('**HL-RFTS**') including RFTS over ISDN FRA and PRA and any Hosted PBX or SIP Trunking forms of Managed VoIP delivered over NG Broadband, including, on a standalone basis or on a bundled basis together with any of broadband, television or MTS.
- 3.4 In its Withdrawal Decision, the EC asserted that the RFTS product market definition set out in the 2021 Draft Decision was "*...insufficiently grounded by the market investigation carried out by ComReg*".³⁵ The EC's main argument in this regard is focussed on its perceptions of the role of MTS in the RFTS product market – that MTS appeared to be an effective substitute to RFTS and should therefore be included in the same product market. The EC did not query other aspects of the RFTS product market definition set out in the 2021 Draft Decision, although its comments elsewhere may have an indirect bearing on it. Accordingly, in this Consultation ComReg focusses in particular on addressing the EC's views on whether MTS should be considered as an effective demand-side constraint on the products referred to above.

3.2 Product Assessment of Relevant RFTS Markets

Identifying the Focal Product

- 3.5 ComReg proposes to retain its position as articulated in the 2021 Draft Decision in respect of the RFTS focal products. ComReg therefore considers that standalone RFTS products provided over a copper-based FNA network constitute appropriate focal products for the definition of the Relevant RFTS Markets. As of Q3 2021, PSTN remains the predominant network over which RFTS is delivered (just over 790,000 access paths, accounting for 79.5%% of total FNA access paths (995k)) and for high-volume users, there continues to be a non-trivial uptake of certain ISDN products.³⁶
- 3.6 ComReg therefore proposes to continue to define two focal RFTS products, as set out above in paragraph 3.2, namely the Low-Level ('**LL**') RFTS Focal Product(s) and the High-Level ('**HL**') RFTS Focal Product(s).

Assessment of Direct Constraints

- 3.7 In the 2021 Draft Decision ComReg then considered the strength of any direct constraints on the RFTS Focal Products to determine whether the Relevant RFTS Markets should be broadened to include any other effective substitutes.³⁷ In particular, direct constraints on the RFTS Focal Products may arise from demand-side substitution or from supply-side substitution. ComReg's overall conclusions on the assessment of direct constraints are set out below, having regard to the Withdrawal Decision.

³⁵ Paragraph 118 of the Withdrawal Decision.

³⁶ ComReg QKDR Q3 2021.

³⁷ See paragraphs 4.198 to 4.428 of the 2021 Draft Decision.

Demand-Side Substitution³⁸

- 3.8 On the demand side, the 2021 Draft Decision found that only Managed VoIP RFTS delivered over NG Broadband was capable of acting as an effective demand-side constraint, particularly in circumstances where end users have expressed a clear preference for purchasing RFTS as part of a bundle along with other services, which NG Broadband is capable of delivering. In contrast, MTS was considered not to act as an effective demand-side substitute due, inter alia, to end user perceptions of the costs of RFTS and MTS, poor mobile coverage in certain parts of the State, particularly indoors, and costs associated with purchasing a mobile package and a fixed broadband package in order to avail of Native WiFi calling. This is further considered below, having regard to the Withdrawal Decision.

Is Managed VoIP-based RFTS delivered over fixed NG Broadband a demand-side substitute to the focal product?

- 3.9 In the 2021 Draft Decision, ComReg concluded that Managed VoIP-based RFTS delivered over fixed NG broadband was a demand-side substitute to the focal RFTS product. In its Withdrawal Decision, the EC did not take issue with this finding. Accordingly, and based on the reasoning set out at paragraphs 4.206 to 4.275 of the 2021 Draft Decision, ComReg's position (which was arrived at having considered the views of Respondents) is that Managed VoIP-based RFTS delivered over NG broadband should be considered as a demand-side substitute to the RFTS Focal Products.
- 3.10 ComReg concludes³⁹ that Managed VoB delivered over NG Broadband is sufficiently substitutable with the LL-RFTS focal product. While Managed VoB is predominantly sold in a bundle comprising broadband and/or other services, ComReg's position is that standalone FNA RFTS users who value a bundle of services are likely to switch to Managed VoIP in a bundle with broadband.
- 3.11 For higher-volume RFTS users, ComReg's position is that Managed VoIP over SIP Trunking/Hosted PBX is substitutable with the HL-RFTS focal product as it can offer voice channels equivalent to ISDN FRA and ISDN PRA. However, such high-volume users will need to invest in suitable equipment on-site and SPs have indicated to ComReg that in greenfield sites, businesses would invest in SIP Trunking/Hosted PBX. ComReg considers SIP Trunking/Hosted PBX delivered over NG Broadband to be substitutable with the HL-RFTS Focal Product, as opposed to SIP Trunking/Hosted PBX over leased line, which bears a significantly higher cost differential.⁴⁰

³⁸ The 2021 Draft Decision assessment of RFTS demand-side substitution is set out at paragraphs 4.198 to 4.256.

³⁹ Consistent with the reasoning set out at 4.206 to 4.275 of the 2021 Draft Decision.

⁴⁰ Consistent with the reasoning set out at paragraphs 4.389 to 4.404 of the 2021 Draft Decision.

Is MTS a substitute to the focal product?

ComReg's position set out in the 2021 Draft Decision

- 3.12 In the 2021 Draft Decision, ComReg's view was that RFTS and MTS were not in the same product market and should be considered to be complements rather than substitutes.⁴¹
- 3.13 Although there was evidence of some substitutability of RFTS for MTS – that is, FMS (particularly mobile-only households (46%), of which only 39% previously had RFTS)⁴² ComReg's view in the 2021 Draft Decision was that both residential and SME end users were more likely to consider RFTS and MTS to be broadly complementary. It was identified that End Users therefore appeared to have a strong preference for purchasing both MTS and RFTS, to meet different needs.
- 3.14 The 2021 Draft Decision also considered that FMS was not sufficiently strong to amount to an effective and immediate constraint on suppliers of the two separate RFTS Focal Products (that is, LL-RFTS delivered over PSTN and ISDN BRA on the one hand, and HL-RFTS delivered over ISDN FRA and ISDN PRA on the other) over the lifetime of the market review period. The 2021 Draft Decision acknowledged that MTS may, in some usage cases, represent a substitute for RFTS, but argued that overall price differences between fixed and mobile calls, and variations in end user usage, preferences and perceptions regarding mobile telephone calls versus RFTS calls, indicated that MTS was not a sufficiently strong constraint on the focal products to warrant inclusion in the Relevant RFTS Markets.

Withdrawal Decision

- 3.15 The EC indicated in the Withdrawal Decision⁴³ that the RFTS and FACO product market definitions set out in the 2021 Draft Decision, in particular the exclusion of MTS, were not sufficiently supported by evidence. The EC considered that ComReg failed to sufficiently analyse other relevant evidence, some of which may, suggest FMS. Therefore, the EC concluded that it was uncertain whether the product markets defined in the 2021 Draft Decision were correctly defined in accordance with the principles of competition law.

⁴¹ For the reasons set out in detail at paragraphs 4.276 to 4.388, and 4.411 to 4.424 of the 2021 Draft Decision.

⁴² Slide 89 of the 2019 SME Market Research.

⁴³ At paragraphs 118 to 127 of the Withdrawal Decision.

Evidence in favour of FMS

- 3.16 The EC considered⁴⁴ that the evidence provided by ComReg was insufficiently conclusive to justify excluding the competitive constraint that the EC considered MTS places on RFTS. The EC noted that the Explanatory Note to the 2014 Recommendation stated that FMS may be clearly established in markets where fixed penetration has decreased substantially in favour of mobile, and mobile network coverage is close to 100%.⁴⁵ The EC also noted that per capita mobile phone penetration in Ireland exceeded 100%, the suggestion being that FMS may therefore be clearly established in Ireland.
- 3.17 The EC also noted “...*the availability of mobile plans offering unlimited voice calls for prices comparable to, or even lower than, RFTS subscriptions.*”⁴⁶ ComReg notes that the EC used the exact same formula of words in its Serious Doubts letter, while adding that an exact comparison was difficult, due to differences in the structure of the pricing and services included. The EC did not reiterate its concerns regarding exact comparisons in its Withdrawal Decision.
- 3.18 The EC therefore recommended that indicators of price convergence and behavioural patterns should be examined in analysing FMS, such as:
- (a) convergence between the average duration of fixed and mobile calls; and
 - (b) perception and comparison of call quality on mobile and fixed networks.
- 3.19 Again, while it is not made explicit, the EC appears to suggest that the presence of such unlimited mobile plans is indicative of price convergence, with the EC seeing this as a characteristic feature of relevance to the question of FMS.
- 3.20 The Withdrawal Decision simultaneously concluded that mobile plans offering unlimited voice calls for prices comparable to, or lower than, RFTS subscriptions, and also that the vast majority of RFTS subscriptions are part of a bundle, and adding RFTS to the bundle can result in net savings or comes at no or very small additional costs.

⁴⁴ At paragraph 126 of the Withdrawal Decision.

⁴⁵ COMMISSION STAFF WORKING DOCUMENT EXPLANATORY NOTE Accompanying the document Commission Recommendation 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 (the ‘**2014 Explanatory Note**’). Although the 2014 Recommendation has since been superseded by the 2020 Recommendation, there is no equivalent text in the 2020 Explanatory Note, arising from the fact that the discussion in the 2014 Explanatory Note concerned Market 1 of 2007 (Retail Fixed Voice Access), which was removed from the list of markets susceptible to *ex ante* regulation by means of the 2014 Recommendation.

⁴⁶ At p.23 of the Withdrawal Decision.

Factors insufficiently analysed

- 3.21 While the EC partially agreed with aspects of ComReg's analysis, it considered that ComReg had not sufficiently analysed a number of factors which, in its view, could lead to a finding of sufficient FMS to warrant including MTS in the relevant RFTS and FACO product markets. These factors are:
- (a) Availability;
 - (b) Pricing;
 - (c) Intended use;
 - (d) Adoption; and
 - (e) In particular, available usage data.
- 3.22 In respect of usage data in particular, the Withdrawal Decision alluded⁴⁷ to the respective actual declines in volumes of business and residential voice call minutes delivered over RFTS and increases in volumes of voice call minutes over MTS. Paragraph 119 of the Withdrawal Decision referred generally to convergence between the average duration of fixed and mobile voice calls as being one indicator that could be used in examining FMS, although it did not provide any evidence in favour of this proposition, or commentary as to how such evidence should be interpreted.
- 3.23 The EC noted that shifting traffic volumes from fixed to mobile calls may be indicative of a greater degree of FMS than ComReg had recognised in the 2021 Draft Decision, and that further analysis may be required. The EC also pointed to results from the 2019 Market Research which, in its view, indicated that a significant number of survey respondents did not purchase RFTS, and that those respondents who purchased RFTS did not necessarily make use of the service (such that, in the EC's view, usage data are more relevant than RFTS ownership data).
- 3.24 The EC also asserted that the relatively mild decline in the number of RFTS subscriptions was not in itself sufficient evidence to suggest that end users were reluctant to give up RFTS in favour of MTS, particularly given that the vast majority of RFTS subscriptions are part of a bundle, such that adding RFTS to the bundle can result in net savings or comes at no or very small additional costs. The EC therefore considered that the number of active RFTS lines in itself does not provide sufficiently reliable information about the importance of maintaining RFTS for end users.

⁴⁷ Footnote 63 of the Withdrawal Decision reads: "The overall number of voice call minutes remained very stable between 2014 and 2020. Fixed voice minutes dropped by 43%, business fixed voice minutes dropped by 45% and mobile voice minutes increase by 18% during that time-frame. 85% of overall voice call minutes stem from mobile calls today. Only 54% of end users in the Regional FACO Market still have RFTS service."

- 3.25 Overall, the EC considered that the evidence set out in the 2021 Draft Decision was “*..insufficiently conclusive...*” to allow ComReg to deduce that mobile calls do not place sufficient competitive constraints on RFTS on a forward-looking basis – the implication being that MTS should be included in the definition of the relevant RFTS product markets if no further evidence is available.
- 3.26 The Withdrawal Decision also indicated (at paragraph 118) that “*...the product market definition of the RFTS **and FACO market** in the draft measure are insufficiently grounded by the market investigation carried out by ComReg*” [EMPHASIS ADDED BY COMREG]. However, the relevant analysis appears to focus on FMS at the end user level, and the EC has not provided analysis specific to the FACO product market definition. ComReg must accordingly infer that it considers MTS to act as an indirect retail constraint on FACO by means of FMS – although no clear evidence/explanation is provided in this regard.

ComReg’s consideration of EC position and further evidence

HL-RFTS

- 3.27 Before considering the individual points made in the Withdrawal Decision, ComReg notes that the EC does not appear to have distinguished between the LL-RFTS and HL-RFTS markets in its assessment of the impact of MTS, and therefore seems to assume that MTS may place a similarly effective competitive constraint in terms of substitution on both markets. In particular, the Withdrawal Decision states (at paragraph 124) that a significant number of Irish households and business have unsubscribed from RFTS, despite the fact that there is a non-trivial difference in this number – 51% of households, but only 23% of businesses. Accordingly, the data on which the Withdrawal Decision relies to support an (implicit) finding that there is insufficient FMS, is somewhat weaker when it comes to the impact on the HL-RFTS market.
- 3.28 ComReg also notes that products may be regarded as substitutable by an end user by reason of the products’ characteristics, prices and intended use. In respect of HL-RFTS and MTS, ComReg considers that the characteristics and intended usage of HL-RFTS on the one hand, and MTS on the other hand, are sufficiently different, such that ComReg considers that there remain insufficient grounds to consider that MTS generates a sufficiently effective competitive constraint on the HL-RFTS Focal Product.

- 3.29 HL-RFTS, consisting of ISDN FRA and ISDN PRA lines capable of delivering 16 and 30 voice channels over a line respectively, or Managed VoIP Hosted PBX or SIP Trunking is dimensioned to the needs of corporate and institutional end users who need to provide RFTS capability to multiple end users, typically located in a single, or small number of locations. MTS is not readily capable of delivering this capability, as each MTS 'line' carries a single voice channel only. In this regard, the product characteristics of MTS are much more similar to those of LL-RFTS, which on PSTN or ISDN BRA delivers one or two voice channels over a line, than HL-RFTS.
- 3.30 Accordingly, ComReg's position is that the product characteristics of MTS and HL-RFTS are sufficiently different, such that there is insufficient evidence to conclude that MTS poses an effective demand-side constraint on the HL-RFTS focal product by means of FMS.

LL-RFTS

- 3.31 ComReg has given consideration to the additional factors upon which the EC has relied on in the Withdrawal Decision in support of its position that ComReg adduced insufficient evidence to justify excluding MTS from the LL-RFTS product market. The EC considered that ComReg had insufficiently analysed usage data which it considered could be indicative of FMS, specifically:
- (a) Convergence between the average duration of fixed and mobile calls;
 - (b) Relative traffic volumes over RFTS and MTS;
 - (c) Incidence of RFTS lines with no traffic;
 - (d) Perceptions and comparisons of fixed and mobile call quality, and
 - (e) Convergence between MTS and RFTS pricing.

ComReg considers each of these points below.

(a) Convergence between the average duration of fixed and mobile calls

- 3.32 The Withdrawal Decision notes that behavioural patterns such as convergence in the average duration of mobile and fixed calls should be analysed in assessing FMS. ComReg understands that the EC means that a similar average duration, or sufficiently converging duration, of fixed and mobile calls provides evidence of FMS. The Withdrawal Decision does not provide the underlying reason or evidence base upon which it relies to conclude that this should be so.

3.33 Call duration data⁴⁸ is not available to ComReg and it is therefore not in a position to consider whether the average duration of fixed and mobile calls has converged or not. Absent the EC’s underlying reasoning, it is unclear to ComReg how, specifically, convergence in the average call duration of fixed and mobile calls is suggestive of FMS. As set out in Section 4 of the Draft Decision, ComReg has shown that end users continue to demonstrate marked preferences for different call types, depending on whether they are using MTS or RFTS. In this regard, mobile penetration rates in Ireland exceed 100%,⁴⁹ which suggests that a high proportion of RFTS subscribers also have an MTS subscription, and therefore have the choice to make a call either over RFTS or MTS. Nevertheless, end users continue to display differences in calling preferences, depending on whether they are calling from a mobile phone or a fixed line phone. In particular, end users demonstrate strong preferences for calling other mobiles from a mobile phone, but calling other fixed lines from a fixed line phone.

Table 1: Percentage of all calls made from mobile phones and landlines, Q3 2021⁵⁰

	Calls from mobile phone	Calls from landline
To mobile numbers	76%	23%
To landline numbers	14%	45%
To international numbers	7%	11%
To advanced numbers	2%	21%
To all numbers	100%	100%

3.34 As set out above, 76% of calls from mobiles were made to other mobiles, while only 14% were made to landlines. In contrast, 23% of calls from landlines were made to mobiles, while 45% were made to fixed lines. This provides limited evidence of convergence in fixed and mobile voice call usage characteristics. Given the absence of information concerning any convergence in the average duration of mobile and fixed calls, there is no available alternative evidence for ComReg to present on this issue.

⁴⁸ ComReg collects data from SPs on minute volumes, but not call volumes.

⁴⁹ As of Q3 2021, ComReg recorded 5.3 million mobile subscriptions excluding mobile broadband and machine to machine subscriptions, while the population of the State was estimated to be 5.01 million in April 2021 (https://www.cso.ie/en/releasesandpublications/ep/p-pme/populationandmigrationestimatesapril2021/mainresults/#:~:text=Ireland's%20population%20was%20estimated%20to,table%201.1%20and%20figure%201.1.)).

⁵⁰ ComReg QKDR, Q3 2021.

(b) Relative traffic volumes over RFTS and MTS

- 3.35 Since the publication of the 2014 RFVA Decision, RFTS traffic volumes have, in general, continued to decline in both absolute and relative terms. As of Q3 2021, RFTS accounts for 13% of total voice traffic, a decline from 17% in Q3 2019. Similarly, RFTS minutes have continued, in general, to decline across all calling categories since the 2014 RFVA Decision, although there have been some instances of RFTS traffic increasing. In particular, ComReg QKDR data indicate that RFTS traffic increased in Q1 and Q2 2020, and again in Q4 2020 and Q1 2021, before resuming its declining trajectory in Q2 2021.
- 3.36 In contrast, MTS traffic has generally continued to increase since the 2014 RFVA Decision, again with some instances of declining traffic in certain quarters – specifically, Q3 2020, Q1 2021, and Q3 2021. The instances of increasing RFTS traffic and decreasing MTS traffic over the course of 2020 and 2021 run contrary to longer term, persistent downward trends in RFTS traffic and upwards trends in MTS traffic. Although precise determinative causes are difficult to pinpoint, these instances correspond to the onset of the Covid-19 pandemic and consequent changes to day-to-day behaviour including, at different points in time over the course of the pandemic, restrictions on movement and increased levels of working and studying from home, compared to pre-pandemic levels.
- 3.37 While it is, as of Q1 2022, still too early to draw firm inferences, ComReg is of the view that any changes to RFTS and MTS traffic patterns arising from the Covid-19 pandemic are likely to be mainly temporary in nature, rather than indicative of a broader reversal of the trends over the past few years. ComReg bases this conclusion on the fact that, even during the course of the pandemic, there have been quarters where traffic trends are consistent with pre-existing patterns. In this respect, RFTS traffic declined in Q3 2020, Q2 2021 and Q3 2021, while MTS traffic increased in Q2 2020, Q4 2020, and Q2 2021.⁵¹ ComReg therefore considers, on a stable and forward-looking basis, that RFTS traffic is likely to continue to decline, while MTS traffic is likely to continue to increase. Accordingly, there does appear to be evidence of declining RFTS traffic volumes and increasing MTS traffic volumes.

⁵¹ See ComReg's QKDRs.

(c) Incidence of RFTS lines with no voice traffic

3.38 The Withdrawal Decision, referring to ComReg’s 2019 Market Research, noted⁵² that, of the 49% of households and 77% of businesses which retain RFTS, a significant number do not use RFTS for voice call purposes. The EC also relied on data provided to it by Eircom⁵³ in support of this argument. These data, which were not provided to ComReg by Eircom during the course of its assessment, indicated that 52% of Eircom RFTS lines did not produce any traffic. The EC sought ComReg’s views on these data during the Phase 2 assessment in its RFIs of 25 June 2021 and 2 August 2021. In response, ComReg indicated that it did not, at that time, have access to such data. ComReg was therefore not in a position to verify the data provided by Eircom to the EC – including the methodology involved⁵⁴ and its accuracy. Since then, ComReg has obtained outgoing call incidence data from Eircom, and, as the following table indicates, data for Q3 2021 indicated that [X EIRCOM: [REDACTED] X]⁵⁵ of Eircom indirect and direct access voice lines reported no outgoing voice calls over that period.

Table 2: Eircom LL-RFTS traffic [X REDACTED X]

	Outgoing calls		No outgoing calls	
	n	%	n	%
ISDN BRA SB-WLR	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
ISDN BRA WLA	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
PSTN SB-WLR	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
PSTN WLA	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
VoIP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total Lines	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

⁵² At paragraph 124 of the Withdrawal Decision. The percentage figures quoted by the EC are based on Slide 8 of ComReg’s 2019 SME Market Research, and Slide 8 of ComReg’s 2019 Residential Market Research.

⁵³ At footnote 58 of the Withdrawal Decision.

⁵⁴ For example, does it involve an assessment of a sample of customers and, if so, on what basis does it reflect broader consumer preferences; does it involve assessing customers on particular price plans, which may themselves drive particular usage etc?

⁵⁵ 51-60%.

3.39 The impact of RFTS lines carrying no voice traffic must be assessed in the context of the fact that these end users continue to retain (and pay for) RFTS, notwithstanding any question on FMS. They may also receive calls. RFTS consists of both an RFVA component and an RFVC component. Thus, even where an end user does not initiate calls, they continue to pay for the RFVA component of RFTS (and also receive calls). In general, some end users may also be paying for bundled minutes that they do not use – and this is irrespective of whether or not there is FMS. This suggests that the incidence of RFTS lines with no traffic as an indicator of FMS is likely to vary, and it may be difficult to draw firm conclusions.

(d) Perceptions and comparisons of fixed and mobile call quality

3.40 The Withdrawal Decision suggested that ComReg should assess perception and comparison of the quality of calls on the mobile and fixed networks. ComReg carried out such an assessment in the 2021 Draft Decision.⁵⁶ ComReg notes that both end user perceptions as reported in various market research, and technical assessments cited in the 2021 Draft Decision indicate that, particularly in rural areas, MTS call quality is not equivalent to RFTS call quality, measured by end user perceptions, end user experience, and ComReg's own technical research.⁵⁷ Given that the above information was already provided to the EC in the context of the 2021 Draft Decision, it follows that there is no available alternative evidence for ComReg to present on this issue.

(e) RFTS and MTS pricing and price convergence

3.41 Paragraph 119 of the Withdrawal Decision indicated that FMS may be more clearly established where MTS-RFTS price convergence is demonstrated, *inter alia*, by the availability of mobile plans offering unlimited voice calls for prices comparable to, or even lower than, RFTS subscriptions. ComReg is aware of the availability of both RFTS plans and MTS plans that offer limited or unlimited minutes (frequently with exceptions for, for example, international or peak calls). However, the provision of such call plans does not necessarily imply equivalence of fixed and mobile pricing.

3.42 Given the absence of a fixed line rental component to MTS, as well as the presence of inclusive minutes, the comparative price of fixed and mobile calls may be contingent on the volume of calls made. The presence of an inclusive data component in mobile tariffs, and the predominance of RFTS being purchased as part of a bundle along with, typically, broadband or TV also makes like-for-like comparisons of actual call costs difficult.

⁵⁶ See paragraphs 4.348 to 4.349, and 4.373 to 4.377 of the 2021 Draft Decision.

⁵⁷ ComReg document 18/73, The Effect of Building Materials on Indoor Mobile Performance, August 2018, ComReg document 18/05, Mobile Handset Performance (Voice), February 2018, and ComReg document 18/82, Mobile Handset Performance (Data), September 2018.

- 3.43 That said, a number of Mobile Service Providers (**'MSP(s)'**) advertise plans including 'unlimited' minutes, although some limit may be placed on the number of inclusive minutes for making international or non-EU calls, depending on the plan chosen.⁵⁸ Similarly, a number of RFTS SPs advertise plans including 'unlimited' minutes, although these minutes may be restricted to Irish landlines, or to off-peak calls.⁵⁹ Thus, while both MTS and RFTS SPs offer plans which advertise 'unlimited' minutes, in practice, unlimited minutes may be restricted to certain usage criteria, as set out in the footnotes below.
- 3.44 Given the wide range of prices for various RFTS and MTS plans advertising 'unlimited' minutes, there is only some overlap in pricing between some RFTS and MTS plans. ComReg understands that the EC infers that this partial overlap supports the proposition that, as set out at paragraph 119 of the Withdrawal Decision, FMS "*may already be more clearly established*" in Ireland.
- 3.45 ComReg has been unable to find further evidence of RFTS/MTS price convergence corroborating this conclusion. The evidence available to ComReg suggests that there is some pricing overlap between MTS and RFTS plans. However, ComReg also notes that it is difficult to clearly distinguish evidence of price convergence, particularly in the case of bundled products where the price of the calling component may be difficult to isolate from the other bundle components, or mobile plans which include data and messaging components.
- 3.46 Given that the above information was already provided to the EC in the context of the 2021 Draft Decision, it follows that, there is no available alternative evidence for ComReg to present on this issue.

Conclusion on whether MTS is a substitute to RFTS

- 3.47 The Withdrawal Decision concluded that MTS may exert a constraint on RFTS by means of FMS. In doing so, the Withdrawal Decision did not distinguish between LL-RFTS and HL-RFTS. It focussed on the following specific areas which, in its view, ComReg had not assessed or had assessed insufficiently:
- (a) Mobile and fixed usage data;
 - (b) Shifting traffic patterns from RFTS to MTS;
 - (c) Relative traffic volumes over RFTS and MTS;
 - (d) Convergence between the average duration of fixed and mobile calls;
 - (e) Incidence of RFTS lines with no traffic;

⁵⁸ For example, Clear Mobile advertises unlimited calls and texts to any Irish mobile or landline. https://clearmobile.ie/?c_id=12026663401&c_name=IE-ClearMobile-Competitors-GoMo-Exact&c_source=google&c_medium=ppc&c_term=gomo-e, accessed on 20 January 2022.

⁵⁹ For example, Eircom's dual play broadband and RFTS packages provide unlimited off-peak calls to Irish landlines, unless the end user purchases a monthly €9.99 add-on which includes unlimited calls to Irish and international landlines and mobiles. <https://www.eir.ie/store/customise-your-bundle/>, accessed 20 January 2022.

- (f) Perception and comparison of the quality of calls on the mobile and fixed networks; and
 - (g) Price convergence, as indicated by as the availability of mobile plans offering unlimited voice calls for prices comparable to, or even lower than, RFTS subscriptions.
- 3.48 ComReg had already assessed some of these factors (specifically, factors (a), (b), (c), and (f)) in the 2021 Draft Decision and has given further consideration to those factors as well as the remaining factors ((d),(e), and (g)) in the paragraphs above.
- 3.49 As set out at paragraphs 3.27 to 3.30 above, ComReg does not consider that MTS is capable of exercising an effective competitive constraint on HL-RFTS, due to the absence of evidence of FMS, and differences in HL-RFTS and MTS product characteristics.
- 3.50 In some instances (average call duration convergence, and incidence of RFTS lines with no traffic), ComReg has not been able to acquire the relevant data, and cannot therefore draw any inferences in respect of FMS based on those factors. Additionally, ComReg considers that call duration convergence metrics may be of limited explanatory value in the presence of LL-RFTS and MTS plans offering inclusive or unlimited minutes which likely reduce end user sensitivity to call duration and costs.
- 3.51 ComReg has already set out its view in the 2021 Draft Decision that differences persist in MTS call quality and LL-RFTS call quality which are reflected by end user responses to the 2019 ComReg Mobile Customer Experience survey, and also by ComReg's assessment of the impact of modern construction materials on mobile signal attenuation. In its Withdrawal Decision, the EC was not convinced by the merit of the arguments made in respect of poor mobile call quality by some respondents to the 2020 Consultation, BEREC and ComReg. Accordingly, and in the absence of evidence to the contrary, the EC would be unlikely to agree that poor call quality justifies concluding that MTS is not a substitute for LL-RFTS.
- 3.52 Usage and traffic data, as well as pricing data indicate that there is an ongoing usage migration from LL-RFTS towards MTS, and that there is some overlap between the pricing of MTS and LL-RFTS (although many end users continue to retain both LL-RFTS and MTS). As set out at paragraphs 119, and 122 to 125 of the Withdrawal Decision, the EC considers that these indicators are likely to be indicative of a greater level of FMS than considered by ComReg in the 2021 Draft Decision, such that a different conclusion in respect of MTS is warranted. In this regard, ComReg notes that the EC's interpretation of the evidence available to it suggests that MTS should be included in the Relevant RFTS Markets as a demand-side constraint on RFTS.

- 3.53 The results of ComReg's additional analysis have not provided significant additional evidence to support ComReg's position. Accordingly, and in the absence of any further evidence to the contrary, ComReg's position, having regard to the Withdrawal Decision, is to include MTS in the Relevant LL-RFTS Market on the grounds that there is sufficient FMS to warrant making a finding that MTS is a substitute for RFTS⁶⁰. However, ComReg proposes to continue to exclude MTS from the Relevant HL-RFTS Market.

Supply-Side Substitution

- 3.54 ComReg must also consider whether any alternative products represent an effective supply-side substitute⁶¹ to the focal products and their demand-side substitutes. ComReg set out its conclusion at paragraphs 4.405 to 4.424 of the 2021 Draft Decision that there was insufficient evidence of the presence of sufficient supply-side substitution on the Relevant RFTS Markets.
- 3.55 On the basis of the available evidence, ComReg has no clear grounds to alter this conclusion. ComReg therefore proposes that there are no sufficiently effective supply-side substitutes to the focal RFTS product.

Overall Conclusions on Relevant RFTS Product Markets

- 3.56 ComReg proposes that there are two distinct focal products for RFTS, pertaining to low-volume and high-volume RFTS users:
- (a) Low-Level RFTS ('**LL-RFTS**') including RFTS delivered over PSTN and ISDN BRA and MTS; and
 - (a) High-Level RFTS ('**HL-RFTS**') including RFTS delivered over ISDN FRA and ISDN PRA.
- 3.57 In light of the high incidence of RFTS being provided as part of a bundle with NG Broadband (particularly for Managed VoIP, a demand-side substitute for the focal products) and a considerable but declining number of standalone RFTS users, consistent with the 2014 RFVA Decision, ComReg considers it appropriate to further delineate Standalone and Bundled LL-RFTS Markets.
- 3.58 In the light of the Withdrawal Decision, ComReg proposes to include MTS in the LL-RFTS Product Markets, but not the HL-RFTS Product Market.

⁶⁰ For the avoidance of doubt, this should not be construed as indicating that fixed telephony is a substitute for MTS (that there is two-way substitution). ComReg considers that, given the differences in functionality and use, in particular MTS are mobile and do not need to be used at a fixed location, fixed telephony is not likely to be an effective substitute for MTS. Substitution of MTS for fixed telephony is likely to be asymmetric.

⁶¹ Supply side substitution considers whether an SP would be likely, in response to a HM's SSNIP of RFTS above the competitive level, to switch into production of RFTS in the immediate to short term (typically within one year), without incurring significant costs, and start supplying services of equivalent characteristics to the focal product. ComReg must also consider whether supply-side substitution would likely render the HM's price increase unprofitable through any consequential demand-side substitution.

- 3.59 ComReg's overall position is that there are three distinct Relevant RFTS Product Markets (the '**Relevant RFTS Product Markets**')
- (a) **Market 1a:** Standalone Low-Level RFTS ('**Standalone LL-RFTS**') including RFTS over PSTN and ISDN BRA and Managed VoB delivered over NG Broadband on a standalone basis, together with MTS;
 - (b) **Market 1b:** Bundled Low-Level RFTS ('**Bundled LL-RFTS**') including RFTS over PSTN and ISDN BRA and Managed VoB⁶² delivered over (and with) NG Broadband and MTS on a bundled basis together with any of broadband, television or MTS,⁶³ delivered on a bundled basis; and
 - (c) **Market 1c:** High-Level RFTS ('**HL-RFTS**') including RFTS over ISDN FRA and PRA, and Managed VoIP delivered over NG Broadband, including Hosted PBX or SIP Trunking forms of Managed VoIP, on a standalone basis or on a bundled basis together with any of broadband, television or MTS.

3.3 Geographic Assessment of Relevant RFTS Markets

- 3.60 This section considers the geographic scope of the Relevant RFTS Product Markets, as outlined above in paragraph 3.59. ComReg's approach follows the approach adopted by the EC in the 2020 Explanatory Note, and proceeds under the Modified Greenfield Approach assumption that no SMP regulation is present on either the RFTS markets or the upstream FACO markets.

Position on Geographic Assessment of RFTS Markets in the 2021 Draft Decision

- 3.61 In the 2021 Draft Decision, ComReg concluded that it was appropriate to define the Relevant RFTS Product Markets as being national in geographic scope for the reasons set out at paragraphs 4.429 to 4.494 thereof. In doing so, ComReg took utmost account of the Notice on Market Definition and the BEREC Common Position on Geographic Aspects of Market Analysis.⁶⁴

⁶² Managed VoIP includes RFTS delivered in the form of Managed VoB, as well as Hosted PBX, or SIP Trunking.

⁶³ This refers to the instance where the RFTS element is not based on MTS, for example, where RFTS is delivered over Managed VoB, but the bundle also includes MTS.

⁶⁴ BEREC [Common Position on Geographic Aspects of Market Analysis](#), BoR (14) 73, 05.06.2014.

EC position set out in the Withdrawal Decision

- 3.62 In the Withdrawal Decision, the EC took issue with the FACO geographic market definition set out in the 2021 Draft Decision, but not the RFTS geographic market definition. Nevertheless, the Withdrawal Decision views on the need for ComReg to carry out a forward-looking assessment do have an impact on the proposed RFTS geographic market definition. In particular, the 2021 Draft Decision concluded that it was appropriate to define a national RFTS geographic market, *despite* the presence of some geographic differences in competitive conditions arising from the availability (or not) of NG Broadband capable of delivering Managed VoIP RFTS.⁶⁵
- 3.63 In contrast, ComReg now proposes, in view of the Withdrawal Decision, that the existing presence or absence of NG Broadband capable of delivering Managed VoIP RFTS should not be a determinative factor in assessing the geographic scope of the RFTS market. Rather, as set out in the Withdrawal Decision, network rollout should be assessed on a forward-looking basis, to determine whether a market will, arising from ongoing network rollout, be effectively competitive at some point in the foreseeable future. ComReg considers, and following the EC's reasoning in the Withdrawal Decision, that this is likely to be the case at a point in the foreseeable future.

Further Consideration of Geographic Scope of Relevant RFTS Markets

- 3.64 Three factors arise which result in ComReg re-examining its geographic assessment set out in the 2021 Draft Decision, all of which are considered below. These are the:
- (a) Proposed inclusion of MTS in the LL-RFTS product market definition;
 - (b) Impact of NG Broadband rollout on a forward-looking basis; and
 - (c) Passage of time since the 2021 Draft Decision.

The proposed inclusion of MTS in the LL-RFTS product market definition

- 3.65 As set out at paragraphs 3.12 to 3.46 above, ComReg proposes to now include MTS in the LL-RFTS relevant product market definition, thus broadening the overall scope of that market. It is therefore necessary for ComReg to assess whether the proposed alteration to the LL-RFTS product market compared to the 2021 Draft Decision similarly warrants the alteration of the proposed LL-RFTS geographic market definition, compared to the 2021 Draft Decision.

⁶⁵ At paragraphs 4.486 to 4.489.

- 3.66 Given that the 2021 Draft Decision defined LL-RFTS and HL-RFTS markets of national geographic scope, the proposed inclusion of MTS in the LL-RFTS product market would only cause the proposed LL-RFTS geographic market definition to change if the inclusion of MTS led to sufficient differences in conditions of competition between different geographic areas.
- 3.67 The inclusion of MTS could lead to the definition of sub-national geographic markets where MTS coverage, MSP presence or MSP pricing varied between geographic areas and this gave rise to differences in conditions of competition which were appreciably different across different geographic areas. ComReg does not consider that this is likely to be the case, for the reasons set out below.
- 3.68 Seven MSPs are currently active in the provision of MTS to end users in the State.⁶⁶ Three of these MSPs (Eir Mobile,⁶⁷ Three and Vodafone) operate their own mobile networks,⁶⁸ while the remaining four MSPs deliver services by renting access to those networks and are known as Mobile Virtual Network Operators ('**MVNO(s)**'). In respect of the geographic assessment criteria detailed at paragraph 3.61 above, ComReg assesses whether MTS delivered by these seven MSPs sufficiently changes conditions of competition such that it is suggestive that sub-national geographic LL-RFTS markets might exist.

Geographic differences in entry conditions over time

- 3.69 As set out at paragraphs 4.438 to 4.458 of the 2021 Draft Decision, ComReg concluded that there were likely to be some differences in geographic entry conditions in the Relevant RFTS Markets, depending on the availability/coverage of NG Broadband to support provision of Managed VoIP by Access Seekers to end users.
- 3.70 All MSPs (that is, the three MNOs which operate their own networks, together with the MVNOS which access those networks) have broadly similar coverage levels for voice call purposes. This coverage is, effectively, national in scope, notwithstanding the fact that coverage issues arise in some areas characterised by low premises or population density, or challenging topographical features. The evidence available to ComReg, as particularly set out in its outdoor coverage map, suggests that the presence of MSPs does not appear to differ significantly across the State, allowing for localised coverage issues.
- 3.71 ComReg's outdoor coverage map suggests, at a high level, that coverage tends to be classified as 'Fringe' or 'Fair' in those areas of the State that are characterised by lower population and premises density, as well as more challenging topography, for example, in remote areas of the western seaboard.

⁶⁶ Eircom, Vodafone, Virgin Media, Three, LycaMobile, Tesco Mobile, and Post Mobile.

⁶⁷ Eir Mobile is owned and operated by Eircom.

⁶⁸ Eir Mobile, Three and Vodafone also operate their own 'sub-brands', GoMo, 48 and Clear Mobile respectively.

- 3.72 While this suggests that there are some differences in geographic entry conditions, each of the MSPs operating in the State report 4G population coverage levels of at least 98%. Accordingly, ComReg considers that, while there may be some areas of the State characterised by less comprehensive mobile coverage arising from higher economies of scale and sunk costs associated with serving less populated areas, such instances are localised and, in their own, are not likely to suffice to warrant the definition of sub-national geographic LL-RFTS markets. The presence of MSPs does not appear to differ significantly in different geographic areas across the State, and there do not appear to be instances of geographic differences in entry conditions over time.
- 3.73 ComReg also assesses the extent to which differences in competitive conditions may evolve in particular areas arising from the coverage and market share evolution of wholesale NG Broadband networks over time as a means of identifying any existing or potential variances in entry and competitive conditions across different geographic areas.
- 3.74 Wholesale NG Broadband, at an appreciable level of coverage, is one of the main determinants in distinguishing differences in competitive conditions between EAs. Pursuant to the Withdrawal Decision, ComReg proposes to assess NG broadband network coverage on an even more forward-looking basis (relative to that in the 2021 Draft Decision), to account for expected network rollout in assessing competitive conditions. In the paragraphs below, ComReg assesses market share distributions and expected network coverage.
- 3.75 The availability of NG Broadband to an RFTS end user varies across Exchange Areas ('EAs'),⁶⁹ and will therefore depend on that end user's location. However, on a forward-looking basis, and as described in greater detail at paragraph 3.74 above, this level of variation across EAs is likely to diminish over time, as Eircom and SIRO continue their FTTP rollout on a commercial basis, as Virgin Media overlays its existing CATV network with FTTP, and as NBI continues its FTTP rollout in the Intervention Area ('IA') – that is, in those areas of EAs which would otherwise be unlikely to be served by operators with NG broadband on a commercial basis.

⁶⁹ Exchange Areas', or 'EAs' refer to Eircom's Exchange Areas which, as outlined in Annex 11 of the 2021 Draft Decision, was the appropriate geographic unit of measurement used in the geographic analysis.

- 3.76 Accordingly, ComReg considers that, while wholesale NG Broadband coverage and market shares currently vary across geographic areas, as NG broadband network rollout continues, this level of divergence on a geographic basis in NG broadband availability is likely to decline over time. On the assumption that geographic convergence in the availability of wholesale NG broadband and self-supply of NG broadband coverage is likely to occur in the foreseeable future, ComReg considers that, on a forward-looking basis (and having regard to the Withdrawal Decision), competitive conditions on the RFTS product markets are likely to be sufficiently similar across the State that sub-national geographic markets would not be warranted.

NG broadband rollout

- 3.77 ComReg considers that RFTS Managed VoIP provided using wholesale NG broadband inputs is capable of generating a sufficiently effective constraint on the RFTS focal products. Accordingly, as part of the RFTS 3CT, ComReg takes account of both existing wholesale NG broadband infrastructure operated by Eircom and SIRO, and also planned SIRO, Eircom, and NBI wholesale NG broadband infrastructure rollout where sufficiently reliable deployment plans are available. Given the absence of firm deployment data, ComReg does not propose to take into account wholesale NG broadband inputs to be provided by Virgin Media once it has upgraded its network to FTTH.
- 3.78 The Withdrawal Decision indicated that ComReg should carry out its analysis of NG broadband rollout on a more forward-looking basis than had been the case in the 2021 Draft Decision. In particular, the EC advised that ComReg should, as a result, take into account NBI rollout, which ComReg had excluded from its geographic market analysis on the basis that insufficiently accurate rollout data were available to take NBI rollout into account with a reasonable degree of predictability – also noting that at the time NBI had publicly indicated it had missed its then roll-out targets.
- 3.79 The Withdrawal Decision also took issue with the 80% wholesale NG Broadband threshold proposed by ComReg in the 2021 Draft Decision. ComReg applied this threshold to EAs to determine whether they should be assigned to the then-defined Urban FACO Market or the then-defined Regional FACO Market on the basis, *inter alia*, that this would facilitate the delivery of Managed VoIP RFTS to a significant majority of premises at an EA. The Urban FACO markets were proposed to be fully de-regulated. The Withdrawal Decision held that the use of this indicator was of limited relevance, insufficiently robust, and excessively conservative, particularly when compared with thresholds used by other NRAs in other market reviews. The Withdrawal Decision offered no guidance on what the EC deemed to be more appropriate thresholds.

- 3.80 The application of the 80% wholesale NG broadband threshold in the 2021 Draft Decision led ComReg to propose to deregulate 69% of the FACO market (being the totality of the then Urban FACO Markets), measured by premises. Had the 2021 Draft Decision applied a 60% wholesale NG broadband threshold instead of an 80% threshold, this would result in deregulation of 88% of the FACO market (based on Q4 2020 data), measured by premises, before taking into account additional NG Broadband rollout on a forward-looking basis. A more forward-looking assessment taking into account planned rollout would, in all likelihood, shrink the size of the Regional FACO Markets further, bringing the area to be deregulated, measured by premises, above 90%. In those circumstances, it would likely be the case that the Regional FACO Market would have been of a comparatively trivial magnitude in it would be questionable whether this would be a market worth monopolising.
- 3.81 As set out below, while various SPs are currently engaged in NG Broadband rollout, the level of certainty in respect of the timing and location of these rollouts is variable. Accordingly, ComReg has limited capability to carry out its assessment on a forward-looking basis, as indicated by the Withdrawal Decision, in circumstances where firm and reliable deployment data are unavailable. This has important consequences for the forward-looking assessment of competition, the sequencing of the withdrawal of regulation and the transition to deregulation, given that it will not be possible to determine sunset periods by reference to precise NG broadband network rollout dates, such that Managed VoIP delivered over NG Broadband may not be capable of being provided at a sizeable number of premises at the time of the decision to be made on foot of this Consultation. There is however, the prospect that over a longer time horizon, NG broadband coverage will increase given SPs announced network expansion/upgrade plans and the degree of certainty to which such plans actually materialise. This creates an inherent tension between the need for a forward looking analysis and the certainty regarding the degree to which and timing of future competitive dynamics may evolve – and thus whether or not regulation is necessary.

3.85 Virgin Media does not currently offer wholesale broadband services over its CATV network. However, Virgin Media indicated in November 2021 that it intended to upgrade its network to FTTH and to commence offering wholesale access to third parties.⁷⁵ Virgin Media has indicated to ComReg that [§ VMI: ■
 ■
 ■
 ■] ComReg therefore considers on a preliminary basis that Virgin Media does not yet have “sufficiently reliable deployment plans”, that can be considered for the purpose of this assessment and that, accordingly, it is not appropriate to take into account potential use by other SPs of Virgin Media wholesale broadband access to offer Managed VoIP based RFTS. In any event, ComReg also notes that Eircom’s regulated WLA/WCA services largely overlap Virgin Media’s network footprint, and SP use of these regulated services to provide Managed VoIP based RFTS is accounted for.

SIRO

3.86 SIRO is a joint venture between the ESB and Vodafone which offers WLA over FTTH on a wholesale-only basis, making use of ESB’s legacy electricity distribution network assets. SIRO commenced Phase 1 of its network rollout in 2015, which was scheduled to pass 500,000 premises,⁷⁶ subsequently revised to 450,000 premises.⁷⁷ As of January 2022, SIRO passes in excess of 400,000 premises. In October 2021, SIRO announced the launch of Phase 2 of its network rollout programme, which is scheduled to increase its network footprint by 320,000 premises to a total of 770,000 premises.⁷⁸ [§ SIRO: ■
 ■
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 ■] ComReg therefore considers that it is appropriate, as part of its analysis, to take into account existing SIRO fibre rollout.

⁷⁵ ‘Virgin Media to create 500 jobs with €200m fibre network upgrade’, 4 November 2021 - <https://www.independent.ie/business/irish/virgin-media-to-create-500-jobs-with-200m-fibre-network-upgrade-41014717.html>

⁷⁶ <https://siro.ie/wp-content/uploads/2015/05/SIROfttbPR14MAY20151.pdf>

⁷⁷ <https://siro.ie/news-and-insights/expansion-of-our-gigabit-broadband-network/>

⁷⁸ Ibid.

National Broadband Ireland ('NBI')

- 3.87 In May 2019, Granahan McCourt was designated as the Preferred Bidder for the NBP.⁷⁹ Granahan McCourt has incorporated a new Irish registered company, NBI, to build, operate and maintain the NBP in the Intervention Area (the 'IA'). The NBP contract was awarded by the Department of Communications, Climate Action, and Environment ('DCCA'),⁸⁰ and was signed on 19 November 2019. It will require the successful bidder to build, maintain and operate a future-proofed, high-speed broadband network in the IA over a 25-year period. Following confirmation of State Aid Approval by the EC and contract closing requirements, DCCA awarded NBI the contract for the NBP. NBI will maximise the use of existing Eircom pole and duct infrastructure.⁸¹
- 3.88 The Withdrawal Decision noted that ComReg should take into account ongoing NBI deployments, despite the fact that actual NBI rollout at the time of the Withdrawal Decision was extremely limited and behind schedule. The Withdrawal Decision therefore indicated that ComReg should, on a forward-looking basis, take into account planned network rollout, even if existing rollout is trivial or non-existent. As set out above, the Withdrawal Decision also counselled that ComReg should take into account "*sufficiently reliable deployment plans of operators and/or NBI*".
- 3.89 In that regard, ComReg notes that NBI indicated at an Oireachtas committee hearing in September 2021 that it was six months behind schedule on rollout, due to the disruption caused by Covid-19, and that a target of passing 115,000 homes and businesses by the end of January 2022 had been reduced to about 60,000 premises,⁸² with a revised estimate of 130,000 connections to be completed by the end of 2022.⁸³ At a subsequent Oireachtas committee meeting in January 2022, NBI indicated that this revised 60,000 premises target would again be pushed back, this time to the end of March 2022.⁸⁴ ComReg also notes that NBI itself, at the same parliamentary hearing, sought to reduce expectations that an accelerated rollout could be facilitated, and stated that it would not be possible to accelerate rollout until at least 2023.⁸⁵

⁷⁹ "Government Signs Contract for National Broadband Plan", <https://www.gov.ie/en/press-release/e15062-high-speed-broadband-for-11m-people-in-homes-schools-businesses-acro/>

⁸⁰ The former DCCA is now known as the Department of the Environment, Climate and Communications ('DECC').

⁸¹ *Ibid.*

⁸² www.rte.ie/news/business/2021/0915/1246956-rollout-of-national-broadband-plan-behind-schedule/

⁸³ <https://www.irishexaminer.com/news/arid-40720986.html>

⁸⁴ <https://www.irishexaminer.com/news/arid-40794984.html>

⁸⁵ <https://www.independent.ie/business/technology/acceleration-of-rural-broadband-roll-out-wont-happen-for-years-says-scheme-chief-40854221.html>

3.90 As of January 2022, retail services over NBI infrastructure are actually available to end users in parts of Cork, Limerick, Clare, Galway, Roscommon, Cavan, Monaghan, and Louth, totalling 54,466 premises classed as being available to order,⁸⁶ according to the NBI website.⁸⁷ Although NBI rollout remains at a very low level, substantial rollout is envisaged over the next five years.⁸⁸

Variation in the number and size of potential competitors

3.91 Together, four MSPs account for 95% of the MTS retail voice market in Ireland as of Q3 2021, measured by subscriptions – Eircom, Vodafone, Three, and Tesco Mobile. Eir Mobile, Three and Vodafone, all operate mobile networks which report coverage (measured by both population and area) of in excess of 90%, while Tesco Mobile is an MVNO making use of Three’s network.⁸⁹ MVNOs effectively have the same voice coverage footprint as the host mobile network. Thus, all MSPs have similar coverage levels, and differ by size, measured by subscribers, for reasons other than differences in coverage.

3.92 ComReg concludes, therefore, that the number of MSPs (notwithstanding any size differences between MSPs) is not a distinguishing factor such that it would warrant the definition of sub-national geographic LL-RFTS markets. The competitive conditions resulting from the presence of MSPs are likely to be consistent across the State, given generally high and similar coverage levels.

3.93 While there are localised areas where MTS coverage is likely to be poor, ComReg’s conclusion is that the evidence on the number and size of potential competitors is insufficient to support the view that there are sub-national geographic markets. This is because MSPs compete nationally and have largely similar national coverage footprints that enable the delivery of MTS voice services across the State.

Distribution of LL-RFTS and MTS market shares

3.94 As set out at paragraph 3.59 above, having regard to the Withdrawal Decision, ComReg proposes that MTS should be included in the LL-RFTS product market, but not in the HL-RFTS product market. In view of this, the distribution of MTS market shares is only of potential relevance to the geographic scope of the LL-RFTS market.

⁸⁶ Note that ‘available to order’ does not mean that rollout is as yet at all of the premises. It includes premises that are actually passed, but also premises not yet passed but NBI indicates a high degree of certainty that they will be passed by the NBI network within a number of months.

⁸⁷ www.nbi.ie. Data accessed on 31 January, 2022.

⁸⁸ As set out in greater detail at paragraphs 3.122 to 3.124 of the 2021 Draft Decision.

⁸⁹ Other MVNOs include Virgin Mobile, Post Mobile and Lycamobile.

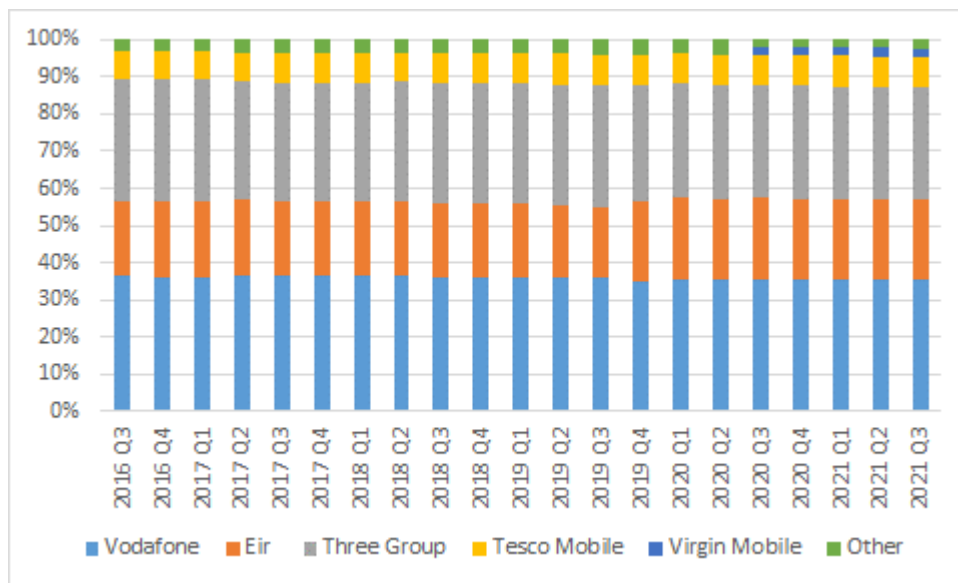
- 3.95 Before addressing MTS market shares in the context of the geographic scope of the LL-RFTS market, it is important to note the analytical limitations of accounting for MTS market share data. The proposed inclusion of MTS in the LL-RFTS product markets presupposes that MTS market shares should be taken into account when assessing overall LL-RFTS market shares. However, simply adding MTS market shares to ‘traditional’ LL-RFTS market shares does not generate analytically meaningful overall market shares in the context of the high incidence of RFTS subscribers also holding MTS subscriptions. Similarly, given data limitations, ComReg does not hold information on the overlap between RFTS subscriptions and MTS subscriptions offered by various operators. Accordingly, ComReg does not attempt to measure overall market shares, taking into account both ‘traditional’ RFTS and MTS.
- 3.96 However, ComReg notes, as a matter of analytical logic, that the addition of MTS subscribers and MTS market shares must dilute pre-existing ‘traditional’ RFTS market shares, as the totality of subscriptions would now include both MTS and ‘traditional’ RFTS, rather than ‘traditional’ RFTS alone. Accordingly, RFTS market shares measured by subscription, as reported in ComReg’s QKDR, would no longer accurately reflect overall LL-RFTS market shares and, instead, would represent absolute maximum market shares for each SP, under the extreme assumption that each MTS operator had a market share of 0%.
- 3.97 RFTS SP market shares currently vary across EAs, driven, *inter alia*, by the differing availability of NG Broadband. Thus, for example, Virgin Media’s RFTS market share is localised to those EAs where its network has rolled out. However, on a forward-looking basis, ComReg considers that geographic differences in RFTS market shares are likely to even out. Firstly, on the LL-RFTS markets, MTS market shares are unlikely to be distinguished by significant geographic differences. Secondly, as NG broadband network rollout progresses, RFTS SPs will ultimately be capable of providing services on a national basis by purchasing wholesale inputs from multiple operators or through self-supply of broadband. On a forward-looking basis, this suggests that differences in the conditions of competition at EAs are, over time, likely to converge, as wholesale NG Broadband rollout continues. However, as noted in the 2021 Draft Decision,⁹⁰ ComReg notes that the pace of network rollout has tended to fall behind projected rollout and this impacts SPs’ abilities to use associated wholesale services to provide Managed VoIP. Nevertheless, the EC in its Withdrawal Decision, did not accept ComReg’s arguments in this regard.

⁹⁰ See paragraphs 5.426 to 5.428 of the 2021 Draft Decision.

Comparison of national and regional MTS market shares

3.98 Figure 1 below provides MTS market shares measured by subscription (excluding mobile broadband and machine-to-machine subscriptions) nationally, according to ComReg QKDR data. On a national basis, market shares appear to be stable and consistent. Vodafone has retained a steady 35-38% market share over the past five years, Eir Mobile has remained in the 19-21% market share range, Tesco Mobile has remained in the 6-8% market share range, and Three Ireland has remained in the 30-32% range since 2015.

Figure 1: MTS Subscription Market Shares, Q3 2016 - Q3 2021

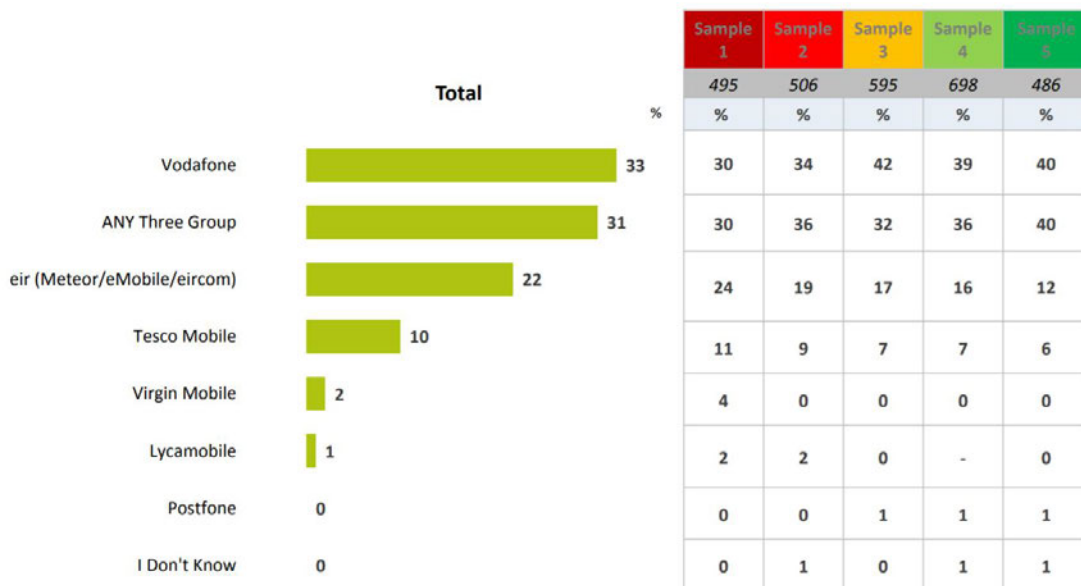


3.99 Compared to the national figures set out above, Figure 2 below gives a snapshot of MTS market shares by location from the 2019 Mobile Consumer Experience Survey.⁹¹ This does not represent actual market shares – it is based on survey evidence only and, hence, can be interpreted only as indicative evidence. The five samples aggregated electoral districts (‘EDs’) according to population density, Sample 1 representing the highest population density and Sample 5 representing the lowest population density.⁹² Vodafone and Three have higher market shares in rural areas, and Eircom, Tesco Mobile, and Virgin Mobile have higher market shares in urban areas:

⁹¹ “Mobile Consumer Experience Survey of Consumers - Summer 2019” (the ‘2019 Mobile Consumer Experience Survey’). Available online at https://www.comreg.ie/media/dlm_uploads/2019/11/ComReg-19101.pdf.

⁹² As set out in greater detail at Slide 6.

Figure 2: Current mobile phone network provider by Sample location⁹³



- 3.100 Increasing competitive pressures may be evident in more densely-populated sample areas, as manifested in lower market shares for Vodafone and Three. However, the presence of slightly increased competitive pressures is, in itself, insufficient to support the existence of sub-national geographic markets, given the small magnitude of these differences. Taking concentration ratios as a headline measure of differences in intensity of competition, the C3 ratio range from a low of 84% in Sample 1 to a high of 92% in Sample 5, while the C5 ratio is 99% for Sample 1, and 98% for all other samples.
- 3.101 MTS market shares across the State do not yield evidence that competitive conditions in the provision of MTS are sufficiently different across those areas, such that when considered alongside 'traditional' RFTS shares, it merits defining separate sub-geographic RFTS markets.
- 3.102 Thus, it is ComReg's view that, on a geographic basis, the distribution of MTS market shares arising from the inclusion of MTS in the RFTS Product Markets does not suggest that sufficient differences exist in competitive conditions across different geographic areas.

⁹³ Slide 33 of the 2019 Mobile Consumer Experience Survey. Sample 1 represents highest density areas, and Sample 5 represents lowest density areas.

Evidence of differentiated pricing strategies or marketing

3.103 Each of the MSPs identified by ComReg advertises, prices and sell services on a national basis, although it is likely that larger scale business customers receive bespoke pricing. In view of this, it does not suggest that pricing or marketing strategies tend towards differences in competitive conditions across geographic areas in the State. Similarly, in respect of geographic variances in RFTS products or pricing of RFTS, ComReg considers that there is little behavioural evidence to suggest that sufficiently different competitive conditions exist in the provision of RFTS between different geographic areas. ComReg has no grounds to conclude that such variances would arise in a scenario where FACO regulation were removed.

Geographical differences in product functionality and demand characteristics

- 3.104 MTS may be offered over different generations of cellular network technology ranging from 2G to 5G, with 5G currently being rolled out in Ireland. Network coverage associated with each of these technologies varies, as set out in ComReg's Outdoor Mobile Coverage Map,⁹⁴ which maps 2G, 3G and 4G coverage offered by each MSP in the State on a continuum from 'Fringe' to 'Very Good'. The coverage map indicates that, particularly on the western seaboard, 'Fringe' 4G coverage levels are present, and disparities in mobile coverage are discussed in detail in the 2021 Draft Decision.
- 3.105 As set out at paragraphs 4.325 to 4.378 of the 2021 Draft Decision, mobile coverage is not uniform throughout the State, and this has implications for both the availability and the reliability of MTS voice telephony. ComReg is of the view that there are some geographical differences in MTS product functionality across the State (based on whether there is 2G to 5G coverage/availability), arising from differences in coverage levels. However, ComReg also notes that mobile coverage measured by population exceeds 99%, and that other factors are indicative of broadly uniform provision of MTS at a national level, notwithstanding localised variations in coverage levels.
- 3.106 This does not suggest that there are sufficient differences in MTS product functionality and demand characteristics to indicate the presence of different competitive conditions across geographic areas in the State.

⁹⁴ www.coveragemap.comreg.ie

Conclusion on impact of MTS on Geographic Scope of the LL-RFTS Market

3.107 Given ComReg's view that MTS is offered on a national basis without sufficient geographic differentiation, measured by the five criteria set out above, it follows that the inclusion of MTS in the LL-RFTS product market does not warrant defining sub-national LL-RFTS geographic markets. The inclusion of MTS, which appears to be offered on a homogenous basis across the State, does not give rise to distinct differences in competitive conditions in the provision of LL-RFTS across different geographic areas of the State.

The passage of time since the 2021 Draft Decision

3.108 ComReg has assessed trends in the provision of RFTS under each of the five criteria identified at paragraph 3.61 above. The 2021 Draft Decision relied on data up to Q4 2020. An additional three quarters of data are now available. Having examined these data, ComReg is satisfied that the trends identified in the 2021 Draft Decision continue to be present on the RFTS product markets, as of Q3 2021. In particular, having taken account of market data and activity from Q4 2020 onwards, ComReg considers that the following positions set out in respect of the RFTS geographic markets in the 2021 Draft Decision remain valid, and continue to accurately describe the trends of relevance to proposed relevant geographic markets:

- (a) There are likely to be some differences in geographic entry conditions in the Relevant RFTS Markets, depending on the availability of NG Broadband to support provision of Managed VoIP by Access Seekers to end users. These differences are, on a forward-looking basis, likely to erode over time as NG Broadband coverage expands;

- (b) While there may be some emergent localised competition for RFTS, the evidence on the number and size of potential competitors is insufficient to support the view that there are sub-national geographic markets. This is because the major competitors to Eircom for RFTS compete nationally and have, or have access to, coverage of NG Broadband that enables the provision of Managed VoIP-based RFTS. Only those areas without NG Broadband availability are likely to see Access Seeker SPs rely on upstream FACO inputs. Pending further rollout of NG Broadband by Eircom, SIRO, NBI and – potentially – Virgin Media, parts of the State are not currently served by NG Broadband and, in some instances, timelines for the rollout of NG Broadband to these areas are uncertain. The Withdrawal Decision states, however, that a market need not be effectively competitive within a review period, but instead that there should be a tendency to that effect “*in the foreseeable future*”.⁹⁵ It accordingly notes that ComReg should take into account network deployment by both NBI and commercial operators, based on “...*sufficiently reliable deployment plans*” over “...*at least two or three years into the future*”.⁹⁶ The Withdrawal Decision does not elaborate on how “*foreseeable future*” or “*sufficiently reliable*” are to be construed, and whether, for instance, rollout plans to towns with no further level of detail should be relied upon.
- (c) It is unclear whether increasing competition with regard to wider bundles of services (in particular RFTS and broadband) indicates that competitive conditions are sufficiently different between different areas and sufficiently stable to merit defining separate sub-geographic RFTS markets at the retail level. Eircom’s continued FTTP investment, continued rollout by SIRO and Virgin Media in other areas and NBI in the remaining areas, coupled with uptake of WLA/WCA in these areas by Access Seekers, means that the current boundaries of the Bundled LL-RFTS market segment are unlikely to be stable over the period of the market review. It is likely that, as NG Broadband becomes more available, and a proportion of standalone RFTS customers switch to bundles comprising (at least) RFTS and broadband, the cohort of standalone RFTS customers will decline, undermining any previously defined boundary between the Standalone LL-RFTS Market and the Bundled LL-RFTS Market. Thus, on a geographic basis, the distribution of market shares does not suggest sufficient differences exist in competitive conditions across different geographic areas;

⁹⁵ At paragraph 139.

⁹⁶ At paragraph 142.

- (d) Insofar as potential differences in prices across different geographic areas are concerned, there appears to be little behavioural evidence to suggest that sufficiently different competitive conditions exist, specifically in the provision of RFTS between different geographic areas. For example, ComReg has not observed evidence that, in areas where bundled offers involving an RFTS component are available, standalone RFTS products have been priced differently to areas where bundled offerings are not available; and
 - (e) While there may be some variation in demand for RFTS, ComReg is of the view that sub-geographic markets do not exist for Standalone LL-RFTS, Bundled LL-RFTS and HL-RFTS. ComReg does not consider it feasible to determine boundaries for each of these markets, as dynamic developments such as NG Broadband rollout can ultimately mire these defined boundaries.
- 3.109 Accordingly, ComReg has been unable to identify material changes impacting its assessment of the criteria identified above in the intervening three quarters which would, in its opinion, warrant drawing a different conclusion to that drawn in the 2021 Draft Decision, in respect of the RFTS geographic market definition.

Conclusion on RFTS Geographic Market Definition

- 3.110 ComReg therefore considers that the Relevant RFTS Product Markets are national in scope, for the reasons set out at Section 4.3 of the 2021 Draft Decision, and allowing for the alteration of the RFTS product markets compared to the 2021 Draft Decision, arising from the proposed inclusion of MTS. This is based on limited variations in the number and size of potential competitors geographically, insufficient evidence of differentiated pricing or marketing strategies on a sub-national basis, and limited differences in demand characteristics across regions.

3.4 Overall Conclusion on RFTS Market Definition

- 3.111 ComReg has further analysed the Relevant RFTS Markets from a product and geographic perspective and considered developments in the market since the publication of the 2021 Draft Decision, including having regard to the Withdrawal Decision, applying the MGA.
- 3.112 ComReg accordingly considers that it is appropriate to define three national markets for RFTS, which are delineated as follows:
- (a) **Market 1a:** Standalone Low-Level RFTS (**'Standalone LL-RFTS'**) including RFTS delivered over PSTN and ISDN BRA, MTS, and Managed VoB delivered over NG Broadband on a standalone basis;

- (b) **Market 1b:** Bundled Low-Level RFTS (**'Bundled LL-RFTS'**) including RFTS over PSTN and ISDN BRA and Managed VoB⁹⁷ delivered over (and with) NG Broadband and MTS on a bundled basis together with any of broadband, television or MTS,⁹⁸ delivered on a bundled basis; and
- (c) **Market 1c:** High-Level RFTS (**'HL-RFTS'**) including RFTS delivered over ISDN FRA and PRA, and Hosted PBX or SIP Trunking delivered over NG Broadband, including, on a standalone basis or on a bundled basis together with any of broadband, television or MTS.

⁹⁷ Managed VoIP includes RFTS delivered in the form of Managed VoB, as well as Hosted PBX, or SIP Trunking.

⁹⁸ This refers to the instance where the RFTS element is not based on MTS. For example, where RFTS is delivered over Managed VoB, but the bundle also includes MTS.

4 RFTS Competition Analysis – 3CT

4.1 Three Criteria Test for Relevant RFTS Markets

Overview

- 4.1 ComReg notes that neither the 2014 Recommendation nor the 2020 Recommendation includes the RFVA or RFTS markets on its list of markets deemed susceptible to *ex ante* regulation. Accordingly, at EU level, there is no presumption in favour of continuing to regulate these markets. ComReg must therefore determine whether, in light of national circumstances, the RFTS markets defined at Section 3 continue to warrant regulation.
- 4.2 The 3CT set out in Article 67(1) EEC and described in the 2020 Explanatory Note⁹⁹ is the mechanism which allows for this assessment to be carried out in a structured and objective way.
- 4.3 The 3CT sets out the criteria that must be cumulatively satisfied in order to determine that a relevant market should be, or should continue to be, subject to *ex ante* regulation. The three criteria are:
- (a) the presence of high and non-transitory barriers to entry;
 - (b) a market structure which does not tend towards effective competition within the relevant time horizon; and
 - (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.
- 4.4 ComReg concluded in the 2021 Draft Decision, and on the basis of the RFTS market definition set out therein, that the 3CT was failed and that, accordingly, there were no grounds to warrant ongoing regulation of the RFTS markets defined in the 2021 Draft Decision. ComReg now revisits the 3CT exercise in light of its proposed definition of the Relevant RFTS Markets set out at Section 3 above, which differs materially from the RFTS market definition set out in the 2021 Draft Decision. In particular, and arising from the reasoning set out in the Withdrawal Decision, the proposed LL-RFTS market definition now includes MTS and ComReg proposes to take a more forward-looking perspective in terms of NG broadband network rollout (and its impact on the capability to provide Managed VoIP), in respect of both the proposed LL-RFTS market and the proposed HL-RFTS market. ComReg's RFTS Market 3CT findings are set out in paragraphs 4.117 to 4.119 below.

⁹⁹ Explanatory Note to Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

- 4.5 The following sub-sections consider each of the 3CT criteria, in order to determine whether it is, in principle, appropriate to regulate each of the three Relevant RFTS Markets.
- 4.6 Before moving to carry out the 3CT to determine the appropriateness of regulation in the Relevant RFTS Markets, ComReg notes that the MGA assumes a hypothetical scenario in which there is no *ex ante* SMP regulation in any of the Relevant RFTS Markets, or on the upstream FACO markets.¹⁰⁰ The purpose of this exercise is to determine whether the RFTS markets are effectively competitive only because of the presence of downstream RFTS regulation or upstream FACO market regulation, or if the RFTS markets would continue to be effectively competitive, even assuming no FACO market or RFTS market regulation. In the latter case, it would be then appropriate to remove both downstream RFTS market regulation and upstream FACO market regulation.
- 4.7 ComReg also notes that, as set out in the 2020 Explanatory Note,¹⁰¹
- “the starting point for the identification of wholesale markets susceptible to ex ante regulation is the analysis of the corresponding retail markets. The analysis of effective competition at the retail and at the wholesale level is conducted from a forward-looking perspective over a given time horizon, and is guided by competition law, including, as appropriate, the relevant case law of the Court of Justice. Therefore, SMP-based ex ante regulation should be applied only where this is needed in order to address, under the modified Greenfield approach, a lack of effective competition at the retail level. **If it is concluded that a retail market would be effectively competitive in the absence of ex ante wholesale regulation on the corresponding relevant markets, this should lead the NRA to conclude that regulation is no longer needed at the relevant wholesale level.**”*
- 4.8 Accordingly, the conclusions of ComReg’s proposed RFTS markets 3CT may have a bearing on the assessment of any associated upstream markets. In particular, if ComReg were to conclude that the Relevant RFTS Markets would likely be competitive, absent FACO market regulation, this would lead to the proposed withdrawal of FACO regulation, in the absence of any evident competition problems in the downstream RFTS markets, absent regulation.

Criterion 1: The presence of high and non-transitory barriers to entry

- 4.9 The 2020 Explanatory Note and Article 67(1)(a) EECR identify that high, non-transitory barriers to entry may be structural, legal or regulatory in nature:

¹⁰⁰ Which could mean that Eircom would be free to decide not to provide SB-WLR to Access Seekers.

¹⁰¹ At pp.8-9.

- (a) **Structural barriers to entry** arise where technology or network characteristics (e.g. cost structure, level of demand) create asymmetric conditions between SPs. Examples include the presence of absolute cost advantages, substantial economies of scale or scope, capacity constraints, and high sunk costs; and
 - (b) **Legal or regulatory barriers** result from legislative, administrative or other state measures that directly affect the relevant market. Examples include legal requirements related to the necessary permissions to roll out infrastructure (e.g. planning permission for civil works, or the need to obtain rights of way to roll out a network over private property).
- 4.10 In the 2021 Draft Decision, ComReg carried out its 3CT of the RFTS markets assuming the presence of upstream regulation in the Urban FACO Markets (given the then view the RFTS markets would not be competitive absent such regulation). Under that assumption, ComReg concluded that Criterion 1 of the 3CT failed and that, accordingly, without necessarily needing to assess Criterion 2 or Criterion 3 (although it did so for analytical completeness), the 3CT failed overall, and that, in principle, there were grounds to withdraw *ex ante* regulation of the Relevant RFTS Markets. ComReg now reassesses Criterion 1 of the 3CT in respect of the RFTS markets, but, as indicated above, assuming no upstream FACO regulation.

Structural barriers to entry

- 4.11 Barriers to entry generally comprise any disadvantage that a new entrant faces when entering a market, where incumbents do not face such barriers. According to the 2020 Explanatory Note:¹⁰²
- “... high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints, and high sunk cost.”*
- 4.12 ComReg assessed structural barriers to entry to the Relevant RFTS Markets in the 2021 Draft Decision under four main headings:
- (a) Overall size of the incumbent and control of infrastructure that is not easily replicated;¹⁰³
 - (b) Sunk costs;¹⁰⁴
 - (c) Economies of scale, scope and density;¹⁰⁵ and

¹⁰² 2020 Explanatory Note, page 12.

¹⁰³ At paragraphs 6.16 to 6.47.

¹⁰⁴ At paragraphs 6.49 to 6.62.

¹⁰⁵ At paragraphs 6.64 to 6.72.

(d) Vertical integration.¹⁰⁶

4.13 ComReg now revisits that exercise in respect of the Relevant RFTS Markets now defined in this Consultation and having regard to the Withdrawal Decision.

Overall size of the incumbent and control of infrastructure that is not easily replicated

4.14 In the 2021 Draft Decision, ComReg concluded (at paragraphs 6.16 to 6.47) that, on balance, barriers to entry, in terms of the size of Undertakings and control of infrastructure not easily replicated, in the provision of RFTS had been eroded since the 2014 RFVA Decision. On the basis of the evidence available to it, ComReg has no grounds to alter that conclusion in respect of the proposed RFTS markets.

4.15 In the case of Standalone LL-RFTS, WLA/WCA broadband inputs can be used to provide standalone RFTS, although, as set out at paragraph 6.41 of the 2021 Draft Decision, there may be limited incentives for SPs to purchase WLA or WCA inputs for the purpose of offering Managed VoIP RFTS on a standalone basis. Alternative networks such as Virgin Media, NBI and SIRO are, in principle, equally capable of providing Managed VoIP on a standalone basis, with SIRO and NBI providing wholesale FTTP to Access Seekers which can, in turn, support Managed VoB. Eircom also sells White Label VoIP for RFTS on a commercial basis which is purchased by some SPs, conditional on the end user having a broadband connection. Accordingly, a range of wholesale inputs are available on both a regulated and a commercial basis, by which means Access Seekers may provide Standalone LL-RFTS to their own end users. In the context of the inclusion of MTS in the LL-RFTS Markets, MSPs are also capable of serving end user needs for voice calls, although this only applies to MSPs.

4.16 The presence of the above suggests that barriers to entry to the provision of LL-RFTS are low. However, despite these reduced barriers to entry, ComReg notes that commercial incentives to supply Standalone LL-RFTS are limited, as greater margins can be earned on bundles of RFTS and broadband and other services.¹⁰⁷ Thus, limited new entry is less likely to be a function of any barriers to entry, but rather SPs being reluctant to actively sell Standalone LL-RFTS. This was noted in ComReg's 2021 Draft Decision, however, the EC in its Withdrawal Decision did not seem to accept that this was a material issue.

¹⁰⁶ At paragraphs 6.73 to 6.79.

¹⁰⁷ ComReg bilateral meetings with SPs, October 2018.

- 4.17 In the case of Bundled LL-RFTS, as with Standalone LL-RFTS, Access Seekers can enter the market using White Label VoIP, WLA or WCA market inputs provided by Eircom, SIRO, NBI as applicable and – potentially – Virgin Media (although it is, as yet, unclear when Virgin Media will offer wholesale services), and provide, *inter alia*, broadband and RFTS, the latter either as POTS-based RFTS or Managed VoB. MSPs can also enter the Bundled LL-RFTS market offering voice and data packages over 3G, 4G, or 5G networks. This suggests that, while Eircom controls RFTS infrastructure not easily replicable in terms of network coverage, this is not necessarily an impediment to new entry or expansion over a five year time horizon. Moreover, ComReg QKDR data suggest that access to FACO is no longer a prerequisite for entry and/or expansion in the provision of RFTS by Access Seekers who do not own or operate their own networks. Indeed, while RFTS delivered over FNA is in decline, RFTS delivered over Managed VoIP continues to grow. Since the publication of the 2014 RFVA Decision, FACO indirect access paths (SB-WLR and WLA) have declined by 20%, from 547,403 in Q3 2014 to 436,671 in Q3 2021, and have fallen for 15 successive quarters in a row. Over the same time period, Managed VoB subscriptions have increased by 50%, from 367,010 to 551,359, and have increased in 19 of the last 21 quarters.
- 4.18 The contrasting decline in FACO access paths and increase in Managed VoIP subscriptions suggests that, despite the presence of FACO regulation to date, which prevents Eircom from exercising its market power by, for example, increasing prices or withdrawing access without ComReg's express prior permission, Access Seeker demand for FACO is in decline, and any increased demand for RFTS is concentrated on Managed VoIP, which must be delivered over White Label VoIP, WLA or WCA on a merchant market or self-supply basis. This suggests that structural barriers to the RFTS market are not sufficiently high or non-transitory, as Access Seekers can rely on White Label VoIP, WLA or WCA inputs to provide Managed VoIP RFTS, even if, absent regulation, Eircom were to withdraw merchant market provision of FACO. ComReg acknowledges that SPs may incur time and expenses in migrating their customers from Eircom FACO inputs to Managed VoIP based on upstream wholesale NG broadband inputs, and addresses this issue at Section 5 below.
- 4.19 Virgin Media's CATV network also poses a direct constraint on Eircom in the provision of Bundled LL-RFTS, while, based on their current and, on a forward-looking basis, expected footprints, the SIRO and NBI FTTP networks are likely over the time horizon of this review to facilitate a sufficient degree of demand-side constraint on Eircom in the provision of Bundled LL-RFTS through SPs that purchase wholesale access from SIRO or NBI. In addition, the Withdrawal Decision infers that MTS additionally places a degree of constraint on *both* Standalone LL-RFTS *and* Bundled LL-RFTS.
- 4.20 For HL-RFTS, SPs can enter the market by purchasing:

- (a) WLV delivered over ISDN FRA and ISDN PRA;
 - (b) WLA/WCA market inputs to provide Managed VoIP (including, but not limited to, SIP Trunking and Hosted PBX) for voice channels equivalent to ISDN FRA and ISDN PRA; or
 - (c) White Label VoIP from Eircom or BT on a commercial basis.
- 4.21 SIRO and NBI are likely to facilitate an increasing degree of competitive constraint in the provision of HL-RFTS through SPs that purchase WLA or WCA delivered over those networks. The latter holds true for the HL-RFTS market, insofar as SIRO or NBI FTTP NG wholesale broadband can be leveraged to provide Managed VoIP.
- 4.22 As with the Bundled LL-RFTS market, this suggests that, while Eircom controls infrastructure not easily replicable in terms of FNA network coverage, this does not represent an insurmountable impediment to new entry to the HL-RFTS market.
- 4.23 ComReg notes also that BT provides WCA on a commercial basis to Access Seekers, providing an alternative to Eircom provision of wholesale inputs which can be used to provide both LL-RFTS and HL-RFTS (see paragraph 6.47 of the 2021 Draft Decision).

Sunk costs

- 4.24 In the 2021 Draft Decision, ComReg concluded (at paragraphs 6.49 to 6.62) that sunk costs were likely to undermine entry and/or expansion into the Relevant RFTS Markets for SPs that did not currently operate a network, or had not invested in infrastructure for purchasing wholesale inputs. Where SPs already maintained, or had upstream access to an existing network for providing retail broadband services, the incremental cost of providing RFTS may be low, thereby facilitating entry into the Relevant RFTS Markets. For SPs that already purchased wholesale inputs such as WLA/WCA, the incremental cost of offering RFTS (if they did not already do so) was also likely to be low.
- 4.25 ComReg noted, however, that, although market entry to the Standalone LL-RFTS Market was technically possible, SPs may have limited commercial incentives to do so, as the margins earned on these services were likely lower than the margins earned on Bundled LL-RFTS, and end user demand for Standalone LL-RFTS was in decline.
- 4.26 On the basis of the evidence available to it, ComReg has no grounds to depart from this finding and therefore concludes that sunk costs are unlikely to generate sufficiently significant barriers to entry, arising in particular from:

- (a) the availability of WLA/WCA NG broadband inputs or, on a forward-looking basis, the expected availability of such inputs where network rollout is scheduled over the coming years, which can be used to supply Managed VoIP, such that an SP does not need to replicate Eircom's narrowband and/or NG Broadband network in order to enter the Relevant RFTS Markets, and
- (b) The presence of multiple competing operators active in the supply of MTS which, as postulated in the Withdrawal Decision, acts as a demand-side constraint on RFTS.

Economies of scale, economies of scope and economies of density

- 4.27 In the 2021 Draft Decision, ComReg concluded (at paragraphs 6.64 to 6.72) that there was evidence to suggest that economies of scale, scope, and density were relevant factors for consideration in terms of their potential to pose a barrier to entry for new entrants intending to compete in the provision of RFTS. The 2021 Draft Decision noted that Eircom had benefited from economies of scale, scope and density in the provision of RFTS, which was likely to result in some barriers to entry for other SPs that may seek to enter the Relevant RFTS Markets. However, for SPs already present in related markets (such as broadband, TV or leased line services), the extent of entry barriers posed by economies of scale, scope and density was less likely to discourage entry.
- 4.28 ComReg considers that this conclusion no longer fully reflects the extent to which economies of scale, scope and density generate barriers to entry to the Relevant RFTS Markets defined at Section 3 above, given, in particular, the proposed inclusion of MTS in the RFTS product markets and the more forward looking assessment on the rollout of NG broadband (and, thus, Managed VoIP capability) arising from the Withdrawal Decision.
- 4.29 ComReg considers that the Relevant RFTS Markets are characterised by economies of scale, scope and density, since a large proportion of the costs of building and maintaining a (fixed or mobile) telecommunications network is fixed. Therefore, the average cost per subscriber of providing services falls as the number of customers served by the network increases. Economies of scale and density will, therefore, be achieved where an SP can serve as many subscribers as possible from its investment in a given part of the network, e.g. an exchange or equivalent. That also means that the ability of an SP to offer a viable service may depend on its ability to acquire a large number of RFTS customers at local and national level. However, the availability of wholesale services on a regulated or commercial basis, including White Label VoIP, WLA, and WCA means that the magnitude of the barriers to entry erected by economies of scale, scope and density is likely reduced, as an Access Seeker may avoid some costs associated with network rollout and service provision.

- 4.30 ComReg considers that the barriers to entry generated by economies of scale, scope and density are low, given the presence of multiple operators on the market, as well as, on a forward-looking basis, the rollout of NG broadband networks offering WLA and WCA capable of facilitating the delivery of Managed VoIP RFTS on a widespread geographic basis in the medium term. Accordingly, although the RFTS markets are structurally characterised by the presence of economies of scale, scope and density, these are not, in ComReg's view, at a level sufficient to be considered high and non-transitory.
- 4.31 Economies of scope are evident in respect of Bundled LL-RFTS, as the access path is used for the provision of both voice and broadband. For a new entrant, the upfront investment in network coverage (by means of own build or using WLA/WCA inputs) will lead to economies of scope if the entrant can leverage an access path to provide Bundled LL-RFTS. This also applies to rolling out a broadband network, as the access path can be used to provide Managed VoIP RFTS. While there is an increasing trend towards the provision of Bundled LL-RFTS, some 16% of end users continue to purchase Standalone LL-RFTS over the Eircom network (excluding MTS). It should also be noted that, by design, mobile 4G and 5G networks facilitate economies of scope by accommodating both voice and data traffic.
- 4.32 ComReg notes that competitors to Eircom in the LL-RFTS markets such as Vodafone, Virgin Media, Sky and Pure Telecom offer a variety of retail services, including both RFTS and, in some cases, MTS. Such SPs already, or have the potential to, benefit from economies of scale and scope by growing retail end user numbers, including through FMS, cross-selling and bundling products. In respect of RFTS specifically, apart from Virgin Media self-supply, this has, in the past, been largely enabled through regulated access to FACO and WLA/WCA products. Nevertheless, in an absent regulation scenario and, on a forward-looking basis, the availability (including the ability to self-supply) of White Label VoIP, WLA, WCA and MVNO access all lower the barriers to entry posed by economies of scale, because they allow SPs to enter the Relevant RFTS Markets without incurring significant fixed costs. This means that entrants are better able to scale their business appropriately for their customer base and grow their business incrementally in line with the growth of their customer base.
- 4.33 A similar principle applies in respect of MTS which, pursuant to the Withdrawal Decision, is now considered by ComReg to form part of the proposed LL-RFTS market on the basis of the demand-side constraint arising from FMS. The presence of three mobile networks with national coverage operated by Three, Eircom, and Vodafone, together with the capability for MVNOs to offer MTS across these networks suggests that barriers to entry to the LL-RFTS market are further lowered, by the additional possibility offered to an SP of entering the LL-RFTS market as an MVNO, again avoiding incurring significant fixed costs.

- 4.34 In the HL-RFTS market, SPs can achieve economies of scale when they sell ISDN FRA and ISDN PRA products to high numbers of subscribers (i.e. end users that demand multiple ISDN FRAs or ISDN PRAs). In the case of Managed VoIP, economies of scope can be achieved if the RFVA component (i.e. broadband/IP access path) can also be used to provide data connectivity services to business end users. Economies of scale can also be achieved through provision of SLAs with voice plans and other features, such as video conferencing, messaging platforms and advanced calling features.¹⁰⁸
- 4.35 SPs intending to compete with Eircom, Vodafone and other HL-RFTS SPs will likely have to offer these ancillary services to win large business contracts, which could impede market entry. ComReg considers that competition for HL-RFTS is a function of the quality of the RFTS offered and the range of ancillary services that businesses demand, such as SLAs. The 2019 SME Market Research indicated that few businesses purchase ISDN for access to RFTS (15%),¹⁰⁹ with ISDN BRA being the most prevalent at 54%.¹¹⁰
- 4.36 In respect of the Relevant RFTS Markets, economies of density are evident from the uneven deployment of competing networks across Ireland. As discussed in paragraphs 3.84 to 3.86 SIRO's FTTP network and Virgin Media's CATV network have sub-national footprints, predominantly in areas with higher premises density, and this is likely to continue to be the case following additional announced Phase 2 rollout by SIRO. NBI will provide high speed broadband to premises in the IA that are not currently served on a commercial basis on completion of its rollout.

¹⁰⁸ <https://business.eir.ie/product/voice-and-collaboration/>.

<https://n.vodafone.ie/business/products-and-solutions/unified-communications/one-net-business.html>.

¹⁰⁹ Slide 16 of the 2019 SME Market Research.

¹¹⁰ Slide 18 of the 2019 SME Market Research.

- 4.37 In the 2021 Draft Decision, ComReg proposed to discount NBI from its competition assessment on the grounds that, at the time of publication, it served a very low number of premises, and its rollout forecasts were insufficiently reliable, due to delays, as described in further detail at paragraphs 3.87 to 3.90 above. While ComReg drew the EC's attention to NBI rollout delays,¹¹¹ the EC appeared to discount this reasoning, relying, *inter alia*, on the fact that DECC had requested that NBI accelerate its rollout (while acknowledging that NBI had not confirmed that it would be capable of meeting this request).¹¹² ComReg notes that at a January 2022 Oireachtas committee appearance, NBI appeared to have incurred further delays in rollout, as set out in greater detail above. However, given that NBI is funded on a state-aided basis with a specific mandate to serve end users who would not otherwise be served by high speed broadband on a commercial basis, it is not clear that NBI will be constrained by economies of density in the same way as commercial operators in their network rollout. Indeed, NBI rollout appears, as a matter of public policy, to focus on areas characterised by diseconomies of scale, with this being overcome through State aid funding.
- 4.38 ComReg considers that the LL-RTS and HL-RFTS markets are both likely to be characterised by the presence of economies of scale, scope, and density. However, these economies are unlikely to create high and non-transitory barriers to entry. This is because potential entrants can avoid many of the high sunk costs associated with entry and expansion (e.g. extending the footprint of a network, rather than infilling within the existing network footprint, will require relatively more investment) in the Relevant RFTS Markets by relying instead on the purchase of wholesale access to either a FNA network (SB-WLR, WLV), a NG broadband network (WLA, WCA), or – in the case of LL-RFTS - a mobile network (MVNO). Moreover, as NG broadband network rollout continues, potential entrants will be able to provide Managed VoIP RFTS across the entirety of the State in the medium term, rather than being restricted only to those more densely populated areas where operators have rolled out networks to maximise economies of density, in particular.

¹¹¹ See footnote 35 of the Withdrawal Decision.

¹¹² See footnote 70 of the Withdrawal Decision.

Vertical Integration

- 4.39 In the 2021 Draft Decision, ComReg concluded (at paragraphs 6.73 to 6.79) that Eircom's vertically-integrated structure could afford it a favourable position in the provision of RFTS and increase barriers to entry by, for example, requiring an entrant to enter multiple vertically-related markets concurrently. The 2021 Draft Decision also noted that the availability of regulated wholesale inputs meant that, where an SP intended to enter the RFTS market, vertical integration did not unduly raise barriers to entry, as Eircom was prevented by means of regulation (on the WLA market and the Revised Regional WCA Market) from leveraging its vertically-integrated position to raise barriers to entry. ComReg also noted that BT and SIRO provided an alternative to Eircom for wholesale inputs to the RFTS markets, where available (although this scenario was under the proposal to regulate the Regional FACO Markets).
- 4.40 Having regard to the Withdrawal Decision, given ComReg's proposals in this Consultation in respect of the Relevant RFTS Markets, the conclusions set out in the 2021 Draft Decision no longer accurately reflect ComReg's updated analysis. In particular, and on a forward-looking basis, it is unlikely to be the case that upstream regulation will be the mechanism which prevents Eircom from leveraging its vertically-integrated position to act as a barrier to entry.
- 4.41 Vertical integration may constitute a barrier to entry where the presence of a firm at multiple levels of the production or distribution chain raises the costs of new entry, for example, where prospective new entrants perceive the need to enter multiple markets simultaneously to pose a viable competitive constraint on the vertically-integrated SP. Vertical integration can also pose an entry barrier where it increases the possibility of the integrated SP foreclosing competition at one or more levels in the value chain, the threat of which could, in turn, discourage new entry.
- 4.42 As well as being the largest FACO supplier, Eircom is also a significant provider of RFTS, broadband and other services to its own retail end users. Eircom's market share as of Q3 2021 in the Standalone LL-RFTS market is [~~✗ EIRCOM: [REDACTED] ✗~~], [~~✗ EIRCOM: [REDACTED] ✗~~] in the Bundled LL-RFTS market, and [~~✗ EIRCOM: [REDACTED] ✗~~] in the HL-RFTS market, when measured in subscriptions. Eircom therefore has an incentive to increase the costs of retail competitors which purchase wholesale inputs from it, and thereby foreclose its retail competitors from the Relevant RFTS Markets.

- 4.43 Virgin Media is also vertically-integrated in that it provides retail services on its CATV network by self-supplying to itself at the wholesale level. Virgin Media does not offer FACO on a merchant market basis. Other than Virgin Media, Eircom's competitors are not, for the most part, vertically-integrated. For example, Vodafone and Sky provide RFTS and retail broadband using wholesale inputs provided by Eircom, BT and SIRO. Similarly, SIRO and NBI are active at the wholesale level only. Thus, Eircom is the only vertically-integrated SP that is active at both the wholesale and retail levels, on both a self-supply and a merchant market basis, at any level of scale.
- 4.44 However, ComReg does not consider Eircom's vertically-integrated structure to pose a significant barrier to entry for Standalone or Bundled LL-RFTS. Given ComReg's now proposed definition of the Relevant RFTS Markets, and on a forward-looking basis, Access Seekers can purchase regulated WLA and/or WCA inputs from Eircom to provide LL-RFTS. SPs can also purchase WLA/WCA inputs from SIRO and NBI where they have or will have network roll-out. Accordingly, Eircom would be prevented from leveraging its vertically-integrated position to raise barriers to entry not by means of regulation, but by means of the competitive constraints on its supply of SB-WLR arising from existing and potential competition. ComReg also notes that, as a means of facilitating the delivery of RFTS, SB-WLR and WLV numbers have declined for 15 consecutive quarters, and stand at 76% of their Q4 2016 peak, and now represent a small proportion (27%) of access paths falling into the proposed RFTS markets, when including direct access paths and Managed VoIP subscriptions. This figure is an over-estimate arising from the exclusion of MTS subscriptions, which, as discussed in paragraph 4.98 below, cannot, for calculation purposes, be meaningfully added to RFTS subscriptions.
- 4.45 ComReg also notes in this regard, as set out at paragraph 3.80 above, that if the wholesale NG Broadband threshold were reduced from 80% to 60%, this would result in 88% of the RFTS market, measured by premises, being deregulated. In such circumstances, that would have resulted in a Regional FACO Market being defined which consisted of just 12% of premises served by RFTS. In its Withdrawal Decision, the EC also noted (at paragraphs 134 and 156) that 61% of premises in the then-defined Regional FACO Markets were passed by NG Broadband, and could therefore switch to Managed VoIP RFTS in response in an increase by Eircom in the price of FACO which was passed through to end users.

- 4.46 Additionally, Access Seekers can (or will, on a forward-looking basis, be able to) purchase wholesale inputs from a variety of other sources on a commercial basis, including WCA from Eircom (in the Revised Urban WCA Market), WCA from NBI, WLA from NBI or SIRO, or White Label VoIP from BT or Eircom in order to provide Managed VoIP RFTS. As network rollout progresses, this will facilitate Access Seekers in delivering Managed VoIP RFTS on a national basis. Given the proposed inclusion of MTS in the LL-RFTS product market definition, Access Seekers may also become an MVNO and provide MTS on an MNO's network. In addition, were Eircom to leverage its vertically-integrated structure by reducing the price of Standalone LL-RFTS through cross-subsidisation with Bundled LL-RFTS, ComReg considers that, while this could, in principle, deter entry to the Standalone LL-RFTS market, SPs have limited incentives to enter the Standalone LL-RFTS market in any case.
- 4.47 In relation to the HL-RFTS market, some vertically-integrated SPs operate independently of Eircom and are less exposed to Eircom's wholesale services. These include Goldfish, Colt¹¹³ and Magnet,¹¹⁴ which provide Managed VoIP HL-RFTS. However, these SPs are limited in scale and geographic reach compared to Eircom. As noted above, the provision of HL-FACO by Eircom is in continuing decline (FRA and PRA numbers have declined for 18 of the last 19 quarters, and now stand at 39% of their Q2 2012 peak) and wholesale NG products are, on a forward-looking basis, available nationwide on both a regulated and a commercial basis which are capable of facilitating Managed VoIP in the form of SIP Trunking or Hosted PBX. Accordingly, the proportion of HL-RFTS lines supported by Eircom SB-WLR or WLV is in absolute and relative decline, and alternative wholesale NG Broadband products capable of delivering Managed VoIP RFTS are available from Eircom on a commercial and a regulated basis, and from BT, SIRO, and NBI on a commercial basis.

Legal, regulatory and administrative barriers to entry

- 4.48 Unlike the structural barriers to entry discussed above, legal, regulatory and administrative barriers to entry are derived not from economic conditions, but rather from interventions by statutory bodies which have a direct impact on a firm's ability to enter a new market. Pursuant to the 2020 Explanatory Note, which sets out the guidelines for the 3CT, the aforementioned barriers must be assessed in respect of the relevant market, in a MGA scenario, in order to determine whether the specified market requires *ex ante* regulation.

¹¹³ <https://www.colt.net/product/sip-trunking/>.

¹¹⁴ <https://www.magnet.ie/business/business-type/enterprise/sip-trunking/>.

4.49 In the 2021 Draft Decision (as set out at paragraphs 6.80 to 6.81, and 7.140 to 7.159), ComReg concluded that the RFTS markets were not characterised by legal or regulatory barriers to entry, and that the need to satisfy administrative criteria generated a barrier to entry, but that this barrier was not substantial, and did not appear to differ substantially, either between Eircom and other SPs. ComReg considers that this reasoning continues to apply to the Relevant RFTS Markets defined herein and therefore concludes that they are not characterised by high and non-transitory legal, regulatory, or administrative barriers to entry.

Conclusions on barriers to entry

4.50 ComReg considers that the Relevant RFTS Markets are unlikely to be characterised by the presence of high and non-transitory barriers to entry:

- (a) While a new entrant would find it difficult to replicate Eircom's legacy FNA network, noting, in particular, the ubiquity of that network, Virgin Media has a significant presence in providing RFTS, and other SPs, including Vodafone, Sky and Pure Telecom are also active in the provision of RFTS and, in some cases, MTS. On a forward-looking basis, this presence in delivering RFTS is likely to be increasingly facilitated by the presence of multiple NG Broadband networks (Eircom, SIRO, NBI, and, potentially, Virgin Media) offering wholesale access capable of delivering Managed VoIP, together with the possibility of MSPs providing MTS;
- (b) While Eircom likely benefits from economies of scale, scope and density in the provision of FNA RFTS, it has not done so to an extent that they constitute high and non-transitory barriers to entry to the Relevant RFTS Markets, bearing in mind the decline in Access Seeker demand for Current Generation ('CG') FNA based FACO, and the increase in RFTS delivered by means of Managed VoIP;
- (c) While entry to the Relevant RFTS Markets requires a new entrant to incur some level of sunk costs, many SPs purchase wholesale NG Broadband inputs for the provision of bundles comprising RFTS and broadband, such that sunk costs can be spread across multi-product offerings. Sunk costs associated with entry are likely to be mitigated for SPs with extensive wholesale NG Broadband infrastructure or mobile infrastructure already in place and for SPs already present in related markets such as broadband or mobile voice; and
- (d) While Eircom is vertically-integrated and controls an important upstream input to RFTS (SB-WLR and WLV), the evidence does not indicate that this is likely to pose a barrier to entry, as SPs provide (i) RFTS via Managed VoIP to end users where NG Broadband is available, including through the use of upstream WLA, WCA or White Label VoIP inputs and (ii) MTS by MSPs.

- 4.51 ComReg notes that, at the retail level, for business end users that require only the call origination component of RFTS (i.e. RFVC), obtaining a Managed VoIP service is relatively easy, if the end user already has a broadband connection in place (i.e. RFVA). SPs in this space include Blueface¹¹⁵ and Goldfish.¹¹⁶
- 4.52 ComReg notes that there may be limited commercial incentives to enter the Standalone LL-RFTS market, as the margins earned on these services are lower than the margins on Bundled LL-RFTS. Thus, SPs have, in recent years, shifted their focus from the provision of Standalone LL-RFTS to the provision of Bundled LL-RFTS and the absence of FACO regulation would be unlikely to significantly alter this trend.
- 4.53 New entry into the Standalone LL-RFTS market may not be significant, while entry into the Bundled LL-RFTS market may be more likely, driven by RFTS being bundled with broadband. Ongoing rollout of NG Broadband will likely, on a forward-looking basis, see the number of end users in the Standalone LL-RFTS market continue to decline and, in any event, barriers to offering Standalone LL-RFTS (whether based on heretofore regulated access to FACO or otherwise) have fallen since the 2014 RFVA Decision. This again, is reflected in an increasing proportion of end users purchasing RFTS as part of a bundle. For the HL-RFTS market, incentives to enter are again likely driven by opportunities to provide business data/connectivity services alongside RFTS.
- 4.54 As set out at paragraph 4.44 above, SB-WLR and WLV currently accounts for 27% of total RFTS access paths, a number which is an over-estimate arising from the exclusion of MTS subscriptions. Even if Eircom were to cease offering SB-WLR, this would only impact a small and declining proportion of RFTS end users. In response to any such withdrawal, end users could immediately switch to MTS, or immediately switch to Managed VoIP delivered over NG Broadband, where it is currently available, or, on a forward—looking basis, could do so at some point in the foreseeable future. Accordingly, over the lifetime of this market review period, Access Seekers may procure alternative upstream inputs either on a regulated basis, or on a commercial basis, which suggests that barriers to entry on the Relevant RFTS Markets are likely to be low. Access to these upstream wholesale inputs would allow Access Seekers to deliver RFTS by means of Managed VoIP.

¹¹⁵ <https://www.blueface.com/voip/>.

¹¹⁶ <https://www.goldfish.ie/6832/all/1/Business-VoIP-Packages.aspx>.

- 4.55 At least one of the 3CT criteria must fail for the presumption in favour of *ex ante* regulation to be lifted.¹¹⁷ Since ComReg's analysis suggests that the first criterion has failed for the Relevant RFTS Markets in the absence of RFTS and FACO market regulation, the presumption should be lifted, and, in principle, there are grounds to withdraw regulation of the Relevant RFTS Markets. It is therefore not strictly necessary to assess the second and third criteria.

Criterion 2: Is the market tending towards effective competition within the relevant time horizon?

- 4.56 The second criterion to be assessed is whether the Relevant RFTS Markets are likely to tend towards effective competition over the lifetime of this market review.¹¹⁸ By definition, it is necessary to carry out the assessment of the second criterion on a dynamic and forward-looking basis.
- 4.57 In the 2021 Draft Decision, ComReg concluded that Criterion 2 of the 3CT failed (although this was in the presence of the then-proposed regulation of the Regional FACO Markets) and that, accordingly, without necessarily needing to assess Criterion 1 or Criterion 3 (although it did so for analytical completeness), the 3CT failed overall, and that, in principle, there were grounds to withdraw *ex ante* regulation of the Relevant RFTS Markets. ComReg now reassesses Criterion 2 of the 3CT in respect of the proposed Relevant RFTS Markets, having regard to the Withdrawal Decision, and assuming no upstream FACO regulation.
- 4.58 As set out below, ComReg assessed whether the Relevant RFTS Markets, as defined therein, were tending towards effective competition in the 2021 Draft Decision under three main headings set out below.
- (a) Whether there were observable trends towards effective competition (see paragraphs 6.96 to 6.130 of the 2021 Draft Decision);
 - (b) Whether SPs other than Eircom were in a position to enter the RFTS market to the extent that they would be able to effectively compete with the incumbent (see paragraphs 6.131 to 6.154 of the 2021 Draft Decision); and
 - (c) Whether any expected or foreseeable technological and economic developments were likely to impact on competition within the time period of the market review (see paragraphs 6.155 to 6.159 of the 2021 Draft Decision).

¹¹⁷ See page 6 of the 2020 Explanatory Note: "However, the Recommendation does not prevent NRAs from analysing markets which differ from those identified in this Recommendation but that are regulated within the territory of their jurisdiction based on previous market analyses, or other markets, if they have sufficient grounds, because of national circumstances, to consider that those specific markets meet the three criteria used for identifying markets susceptible to *ex ante* regulation"

¹¹⁸ A market may tend towards effective competition not only by means of new entry into the RFTS Markets, but also by the deployment of alternative infrastructures by Access Seekers that would allow them to offer RFTS.

4.59 In the Withdrawal Decision,¹¹⁹ the EC noted that the 2020 Explanatory Note had counselled that,

“a tendency towards effective competition does not necessarily imply that the market will reach the status of effective competition within the period of review. It simply means that there is clear evidence of dynamics in the market within that period, which indicates that the status of effective competition will be reached in the foreseeable future without ex ante regulation in the market concerned.”

4.60 ComReg interprets this to mean that, for Criterion 2 to be satisfied, it is not necessary to conclude that a market will become effectively competitive within the lifetime of a market review period. Rather, it will suffice for Criterion 2 to be satisfied if, over the market review period, there is sufficient evidence of a trend towards effective competition which will be reached at a point in the foreseeable future. Thus, Criterion 2 is satisfied by evidence of a trend towards an end point, and it is not necessary that the end point be reached during the lifetime of the market review.

4.61 ComReg now reassesses Criterion 2 in respect of the Relevant RFTS Markets now defined.

Whether there are observable trends towards effective competition

4.62 ComReg’s assessment considers levels of existing competition, noting that the 3CT contains many of the factors considered in an SMP analysis. In the 2021 Draft Decision, ComReg considered five factors to determine whether there are observable trends towards effective competition. These are:

- (a) Market shares,¹²⁰
- (b) Pricing behaviour,¹²¹
- (c) Universal Service Obligation (‘USO’),¹²²
- (d) Wholesale prices,¹²³ and
- (e) Fixed Number Porting.¹²⁴

Market shares

4.63 A number of SPs provide RFTS across all of the Relevant RFTS Markets, with overall market shares reported in ComReg’s QKDR. Eircom is the only SP with a ubiquitous FNA network.

¹¹⁹ At paragraph 139.

¹²⁰ At paragraphs 6.97 to 6.114.

¹²¹ At paragraphs 6.115 to 6.119.

¹²² At paragraphs 6.120 to 6.121.

¹²³ At paragraphs 6.122 to 6.126.

¹²⁴ At paragraphs 6.127 to 6.128.

- 4.64 In calculating RFTS market shares, ComReg does not take into account MTS market shares, even though ComReg now proposes to include MTS in the RFTS market definition. This is because the high incidence of mobile phone ownership would suggest a non-trivial overlap between RFTS and MTS ownership. Accordingly, there is no analytical value in reporting MTS market shares without detailed information on RFTS and MTS overlap by operator. Thus, the RFTS market shares reported below are market share ceilings and overestimate actual market shares because they do not take into account MTS.
- 4.65 Approximately 25 SPs currently provide RFTS. The largest competitors to Eircom are Virgin Media, Sky, Vodafone, Pure Telecom and Digiweb. Additionally, six MSPs are active in the supply of MTS.
- 4.66 Eircom and Virgin Media operate independent networks, while BT (Sky) and Digiweb purchase SB-WLR, and Vodafone and Pure Telecom purchase WLV. Approximately 13 other SPs purchase SB-WLR and WLV and compete in the provision of RFTS on a local basis, such as IFA Telecom¹²⁵ and Telcom.¹²⁶ In an absent regulation scenario, Access Seekers would potentially be unable to offer RFTS based on SB-WLR or WLV inputs, if Eircom ceased supply of merchant market SB-WLR.
- 4.67 There are various ways of computing market shares in the Relevant RFTS Markets, allowing for the exclusion of MTS for the reasons set out at paragraph 4.64 above. These include number of subscriptions (an account with an SP could have multiple services, all under a single subscription), number of voice lines, number of access paths, and revenue. In the 2014 RFVA Decision, ComReg measured market shares in the then-Standalone and Bundled RFVA markets using subscription data, noting that, in each case, small numbers of ISDN FRA and ISDN PRA may be included, but that this did not materially affect market shares.¹²⁷ For the HL-RFVA market, ComReg measured market shares using access lines. Given data availability, ComReg presents market shares based on subscriptions and access lines, both of which indicate similar trends.
- 4.68 The LL-RFTS market shares presented below are in the presence of upstream FACO regulation, and do not include MTS. They do not therefore represent the hypothetical market shares demanded by inclusion of MTS (which would tend to reduce each RFTS SP's market share) and the absence of FACO market regulation (which would - potentially - tend to increase Eircom's market share and reduce the market shares of SPs purchasing SB-WLR or WLV, but only where substitutes were unavailable). These market share should therefore be interpreted as providing a useful starting point for the Criterion 2 assessment.

¹²⁵ <https://ifamemberservices.ie/ifa-telecom/>

¹²⁶ <https://www.telcom.ie/>

¹²⁷ See Figures 7, 8 and 9 of the 2014 RFVA Decision.

4.69 Table 3 below outlines market shares in the Standalone LL-RFTS Market, measured by lines (and any equivalent Managed VoB lines), and excluding MTS. Eircom has the highest market share at [REDACTED] EIRCOM: [REDACTED] [REDACTED]¹²⁸ followed by Vodafone and Pure Telecom.

Table 3: Standalone LL-RFTS Market Shares (PSTN and ISDN BRA access lines and VoIP equivalent lines) Q4 2019-Q3 2021¹²⁹ [REDACTED]

SP	Lines Q3 2021	Q4 2019	Q3 2021 ¹³⁰	% change, Q4 2019 – Q3 2021
Eircom	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Digiweb	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Pure Telecom	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Sky	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Virgin Media	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Vodafone	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Other	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total	[REDACTED]	[REDACTED]	[REDACTED]	

4.70 Figure 3 below presents Standalone LL-RFTS market shares since the 2014 RFVA Decision measured by subscriptions, absent MTS. ComReg notes that standalone fixed voice subscription data include subscribers purchasing ISDN FRA and PRA lines. However, as the number of these subscriptions is relatively small, they do not materially affect the analysis of market shares in the Standalone LL-RFTS Market. Eircom’s market share, measured by subscriptions is [REDACTED] EIRCOM: [REDACTED] [REDACTED]¹³¹.

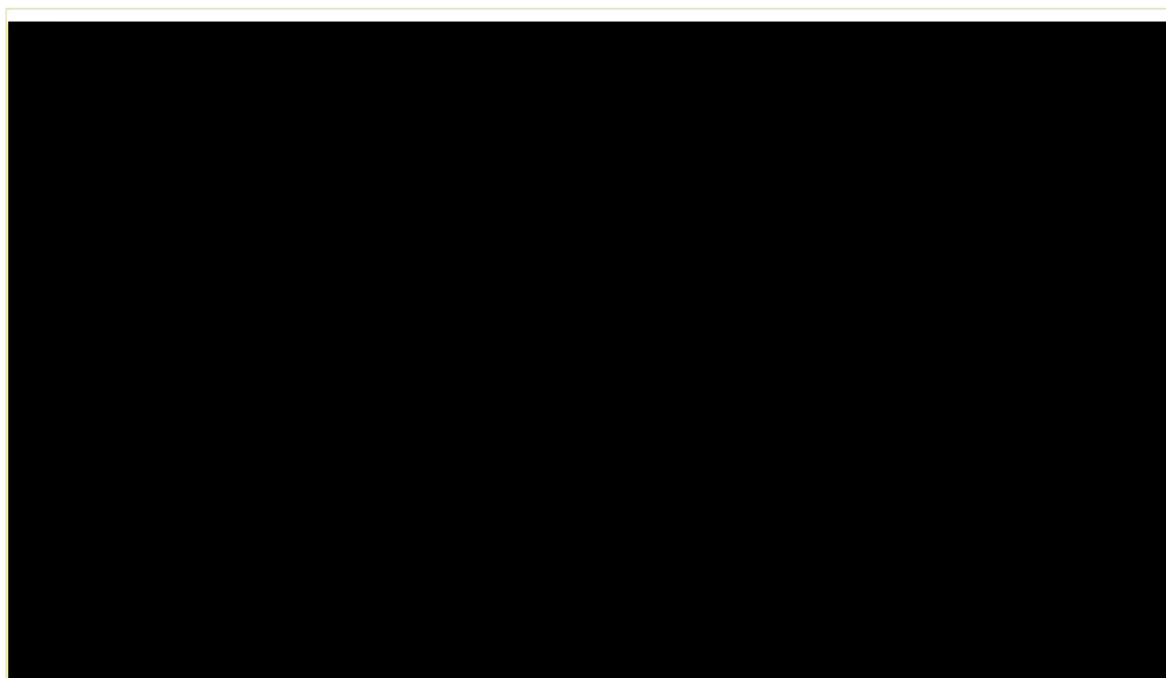
¹²⁸ 60-70%.

¹²⁹ ComReg QKDR data.

¹³⁰ As set out at paragraphs 2.49 to 2.51 of the 2021 Draft Decision, due to Eircom management information system difficulties, ComReg believes these data to be partially incomplete.

¹³¹ 40-50%.

Figure 3: Standalone LL-RFTS Market Shares (Number of PSTN, ISDN BRA and VoIP equivalent subscriptions) Q3 2014 to Q4 2020 [REDACTED]¹³²



- 4.71 The number of Standalone LL-RFTS customers has fallen since the 2014 RFVA Decision (Q3 2014) when there were 445,234 subscriptions (31% of total RFTS subscriptions) to 209,572 subscriptions (16% of total RFTS subscriptions, excluding MTS) in Q4 2020. At the time of the 2012 RFVA Consultation, Standalone LL-RFTS accounted for 51% of RFTS subscriptions. It should be noted that this excludes MTS subscriptions which, if they were included, would likely further reduce Eircom’s market share.

- 4.72 Furthermore, the distribution of market shares has changed since the 2014 RFVA Decision. As illustrated in Figure 3, Eircom’s Standalone LL-RFTS market share as of Q4 2020 is [REDACTED], compared with [REDACTED] in Q3 2014, again excluding MTS.

- 4.73 Table 4 below outlines market shares in the Bundled LL-RFTS Market measured by lines (and equivalent Managed VoB lines), again excluding MTS. Eircom has the highest market share at [REDACTED],¹³³ followed by Virgin Media, Sky and Vodafone, as well as a number of smaller SPs.

¹³² ComReg QKDR data.

¹³³ 40-50%.

Table 4: Bundled LL-RFTS Market Shares (Number of PSTN and ISDN BRA access lines and VoIP equivalent lines Q4 2019 to Q3 2021)¹³⁴ [REDACTED]

SP	Lines Q3 2021	Q4 2019	Q3 2021	% change, Q4 2019 – Q3 2021
Eircom	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Digiweb	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Pure Telecom	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Sky	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Virgin Media	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Vodafone	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Other	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

4.74 Figure 4 below presents Bundled LL-RFTS market shares since the 2014 RFVA Decision, excluding MTS, measured by subscriptions. ComReg notes, as with the 2014 RFVA Decision, and as discussed above in paragraph 4.67, that Bundled LL-RFTS subscription data may include a small number of ISDN FRA and ISDN PRA subscriptions. However, the number of these subscriptions is relatively small and does not materially affect the analysis of market shares. Eircom’s market share, measured by Bundled LL-RFTS subscriptions ([REDACTED] **EIRCOM:** [REDACTED]), a figure which has remained fairly stable over time. For the reasons set out at paragraph 4.67 above, it is difficult to calculate accurate market shares across both Bundled LL-RFTS and MTS, given end user overlap in RFTS and MTS subscriptions. Accordingly, the Bundled LL-RFTS market shares represent a hypothetical market share ceiling for these firms, assuming 0% MSP market share. The actual market shares of each of the firms present on the Bundled LL-RFTS Market graph below would therefore all reduce, once MTS market shares were added.

¹³⁴ ComReg QKDR data.

Figure 4: Bundled LL-RFTS Market Shares (Number of PSTN, ISDN BRA and VoIP equivalent subscriptions) Q3 2014 to Q4 2020 [REDACTED]¹³⁵

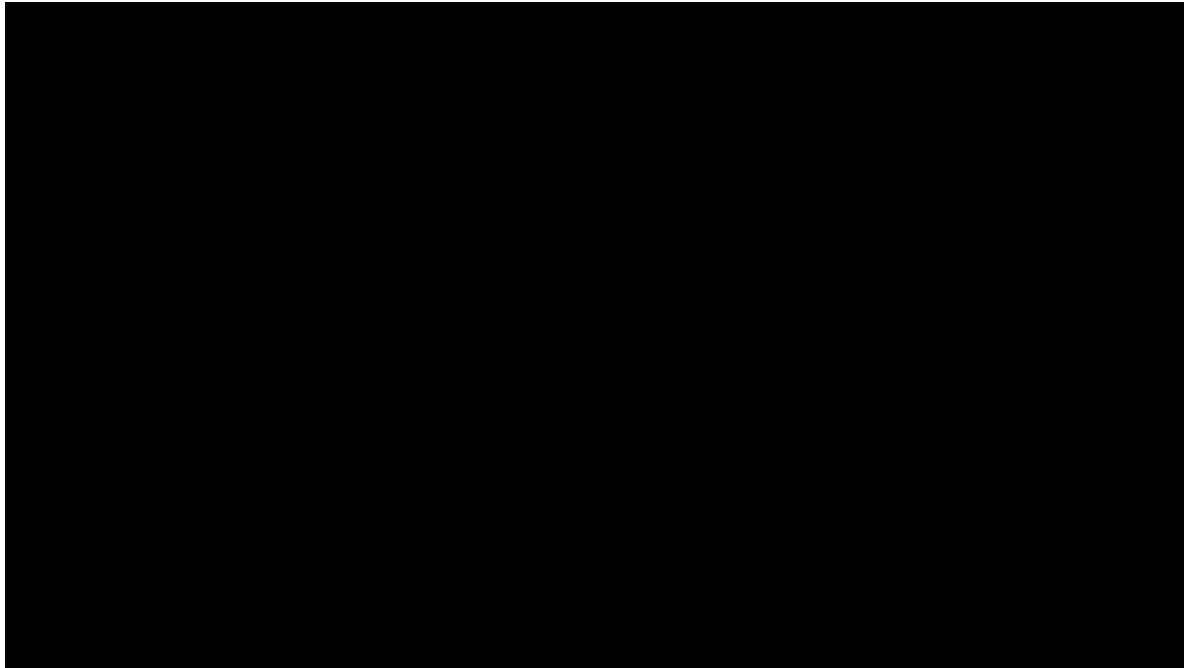


4.75 Figure 5 below outlines market shares in the HL-RFTS Market, measured by subscriptions, comprising both standalone and bundled ISDN FRA, ISDN PRA and VoIP equivalent subscriptions. Goldfish holds the highest share in this market at [REDACTED: GOLDFISH: [REDACTED]],¹³⁶ followed by Vodafone, Eircom and Digiweb.

¹³⁵ ComReg QKDR data.

¹³⁶ 40-50%.

Figure 5: HL-RFTS Market Shares (Number of ISDN FRA, PRA and VoIP equivalent subscriptions), Q3 2014 – Q4 2020 [REDACTED]¹³⁷



- 4.76 The presence of SB-WLR (and WLV, which makes use of SB-WLR inputs) in the above datasets means that these data are not fully representative of an absent regulation scenario where, for instance, Eircom withdrew provision of SB-WLR. However, the trends described below suggest that a number of Access Seekers are migrating away from SB-WLR in any case, despite the regulatory obligations placed on Eircom – likely to be driven by migrating to Managed VoIP services.
- 4.77 Since the 2014 RFVA Decision, Access Seekers have migrated away from CPS, SB-WLR and, since, Q3 2018, from WLV. In Q3 2014, CPS accounted for 5% of total indirect (i.e. wholesale) access paths, SB-WLR accounted for 70% and WLV accounted for 26%. As of Q3 2021, the CPS and SB-WLR shares have dropped to 1% and 49% respectively, and WLV has increased to 50%. In practice, many end users that previously purchased RFVA from Eircom and RFVC from another SP have since switched to a single SP for both RFVA and RFVC, which is evidenced by the very low number of CPS access paths. This implies that, while Eircom has lost RFVA subscribers and revenues on the one hand, it has gained many of the same subscribers at the wholesale level, as these retail customers buy RFTS from an SB-WLR or WLV Access Seeker.

¹³⁷ ComReg QKDR data. ComReg began collecting data from Goldfish for QKDR purposes at the end of 2017.

- 4.78 As set out in Section 3, Managed VoIP-based RFTS delivered over NG Broadband is a substitute for FNA RFTS, especially for end users that have already decided to purchase broadband, and that place value on a bundle. The bulk of Managed VoIP subscriptions are currently provided over CATV (mainly Virgin Media), with 49% delivered over FTTx. Most of the recent growth in Managed VoIP (effectively, growth in Managed VoB) has been over FTTx.
- 4.79 SPs have indicated to ComReg that higher margins can be earned on bundles of services where broadband is the anchor product, and that RFTS generally has, in their view, reached saturation point.¹³⁸
- 4.80 Finally, as set out above in respect of the assessments of market shares on the Standalone LL-RFTS Market, the Bundled LL-RFTS Market, and the HL-RFTS Market, ComReg reiterates that these market shares represent, at best, a starting point, as they do not take into account MTS market shares (on the LL-RFTS markets only), nor do they apply a MGA scenario, where regulation is not present on the upstream FACO markets. These two conditions are likely to alter the likely market share figures in an absent regulation scenario on the defined relevant product markets.
- 4.81 In an absent FACO regulation scenario, Eircom merchant market sales of SB-WLR (and, therefore, WLV) could cease. If the Access Seeker procures alternative wholesale inputs – specifically, WLA or WCA – it may be able to retain its RFTS end users by offering them Managed VoIP (although this involves a migration of services). If the Access Seeker is unable to do so, a range of outcomes arises, and its RFTS end users may:
- (a) Switch to Eircom RFTS delivered over FNA;
 - (b) Switch to an RFTS SP which is not reliant on Eircom wholesale inputs;
 - (c) Switch to an MSP (in the case of LL-RFTS users only); or
 - (d) Cease usage of RFTS or MTS altogether.
- 4.82 Thus, in an absent regulation scenario where Eircom withdraws SB-WLR, multiple outcomes are possible, only one of which results in Eircom increasing its market share.

¹³⁸ Eircom, Virgin Media and Vodafone – response to April 2019 IIR.

- 4.83 In respect of the **Standalone LL-RFTS Market**, Eircom SB-WLR and WLV account for 46% of access paths. If Eircom ceased supply of merchant market SB-WLR, end users would be capable of switching to MTS, which would likely act as a sufficiently effective substitute, except in small localised areas characterised by 'fringe' mobile coverage, as set detailed on ComReg's Outdoor Mobile Coverage Map. ComReg considers that such end users would be less likely to switch to Managed VoIP provided over wholesale NG broadband, as Managed VoIP is typically not available on a standalone basis and is only sold in a bundle. Standalone LL-RFTS end user preferences suggest that few end users would purchase a bundle including Managed VoIP. In this scenario, ComReg cannot exclude the possibility that Eircom would increase its already high market share of 46% as end users migrate to it. However, ComReg notes that the Standalone LL-RFTS Market appears to be in ongoing decline and also that, even if Eircom were to increase its market share, these end users would be afforded certain pricing protections under the USO. The Standalone LL-RFTS market makes up only a small proportion (16%) of total Standalone and Bundled LL-RFTS subscriptions, and this share continues to decrease over time. As discussed below in paragraph 4.106, the absolute size of the Standalone LL-RFTS market is also relatively small and again, decreasing over time. On a forward looking basis, as NG broadband rollout continues, ComReg would expect the standalone LL-RFTS market to continue to decline as end users, through increased availability of NG broadband, are increasingly able to migrate to Managed VoIP.
- 4.84 In respect of the **Bundled LL-RFTS Market**, Eircom SB-WLR and WLV account for 26% access paths. This figure has declined from 32% in 2019, illustrating the decline over time in the share of access paths reliant on Eircom SB-WLR or WLV. If Eircom ceased supply of merchant market SB-WLR, end users would similarly be capable of switching to MTS. ComReg data indicate that 99.1% of all Bundled LL-RFTS subscriptions include a broadband component. Accordingly, for those end users, it is likely that they are located on an area which is served by NG broadband, and they are therefore likely to have the capability to switch to Managed VoIP delivered over RFTS. Additionally, in scenarios where an end user purchases RFTS as part of a bundle, but does not make use of the RFTS component, that end user may switch to a bundle which has no RFTS component. In the context of increased NG broadband rollout capable of delivering Managed VoIP, ComReg considers that few end users would be incentivised to switch to Eircom FNA RFTS, such that Eircom's Bundled LL-RFTS market share would be unlikely to increase significantly from its current share of 26%, and, indeed, could actually decrease, once MTS market shares were factored in. Accordingly, ComReg considers it unlikely that, in an absent regulation scenario, Eircom would accrue a market share which would be indicative on a preliminary basis of SMP.

4.85 In respect of the **HL-RFTS Market**, Eircom SB-WLR and WLV account for 38% access paths. ComReg does not consider that MTS should be included in the product market definition. Accordingly, MTS would have no impact on HL-RFTS market shares. If Eircom ceased supply of merchant market SB-WLR, HL-RFTS end users would similarly be capable, on a forward-looking basis, of switching to Managed VoIP immediately, where NG broadband is already present, or in the medium term, where NG broadband rollout is forecast. In such circumstances, ComReg considers that few end users would be incentivised to switch to Eircom FNA RFTS, such that Eircom's HL-RFTS market share would be unlikely to increase significantly from its current share of 38%. Accordingly, ComReg considers it unlikely that, in an absent regulation scenario, Eircom would accrue a market share which would be indicative on a preliminary basis of SMP. Eircom's HL-RFTS market share figure has declined from 45% in 2019 to 38% in 2020, a level at which it remained at during 2021, indicating a downward trend in terms of reliance on SB-WLR in HL-RFTS.

Pricing behaviour

4.86 The extent of competition in a market over time may be evident in the pricing of RFTS. On the basis of the evidence available to it, ComReg has no grounds to depart from its findings set out in the 2021 Draft Decision.¹³⁹ In particular, ComReg notes that,

- (a) absent RFTS or FACO regulation,
- (b) in the context of the low barriers to entry identified in the Criterion 1 assessment above, and
- (c) on a forward-looking basis, assuming additional NG broadband rollout

4.87 pricing of RFTS would likely continue to be disciplined by self-supply of Managed VoIP RFTS delivered over NG broadband. ComReg notes the discipline on pricing exerted by Managed VoIP RFTS is likely to be more effective on the Bundled LL-RFTS Market than on the Standalone LL-RFTS Market, given the apparent absence of a standalone Managed VoIP RFTS product. However, ComReg notes that the Standalone LL-RFTS Market continues to decline, and that end users in this market are afforded certain protections by the Universal Service Obligation discussed below.

4.88 Additionally, as set out in the Withdrawal Decision, the EC relied, *inter alia*, on the presence of mobile plans offering unlimited voice calls for prices comparable or even lower than fixed subscriptions to RFTS¹⁴⁰ as evidence in favour of the proposition that FMS is present on the RFTS market to a sufficient extent to warrant the inclusion of MTS in the relevant RFTS and FACO markets.

¹³⁹ At paragraphs 6.115 to 6.119.

¹⁴⁰ At paragraph 119. The Withdrawal Decision did not identify any specific MTS plans or provide evidence in favour of its proposition, and, rather, relied on a general assertion.

- 4.89 On the basis of the pricing evidence available to it, ComReg has no grounds to conclude that pricing behaviour on the RFTS markets is consistent with a market which is not moving towards effective competition.

Universal Service Obligation

- 4.90 ComReg notes that its assessment of the Universal Service Obligation in the 2021 Draft Decision¹⁴¹ continues to apply, although an updated 2021 USO Decision issued following the publication of the Draft Decision. Eircom continues to be required, where requested, to provide RFTS at a geographically averaged price ('**GAP**').¹⁴² This limits Eircom's commercial pricing freedom by requiring it to charge the same price for RFTS, regardless of location. Thus, Eircom is not entitled to charge more to end users who, for example, live in remote rural areas. This obligation relates specifically to a connection and Publicly Available Telephone Service ('**PATS**').¹⁴³
- 4.91 The requirement under the 2021 USO Decision to apply geographically averaged pricing ('**GAP**') restricts Eircom's commercial pricing freedom by requiring it to charge the same price for RFTS, regardless of location. Thus, Eircom is not entitled to charge more to end users who, for example, live in remote rural areas.
- 4.92 Additionally, Regulation 8 of the Universal Service Regulations gives ComReg the power to monitor retail tariffs and to impose tariff options (with the consent of the Minister) in order to ensure that consumers are not prevented from accessing certain services, including AFL. In the 2021 USO Decision, having regard to the presence of other mechanisms that ensure that basic voice services are broadly affordable for end users, including the Department of Social Protection's Telephone Support Allowance Scheme, ComReg did not consider it necessary to impose tariff options. Accordingly, the sole affordability measure included in the 2021 USO Decision is the obligation on the USP to charge according to GAP principles.

¹⁴¹ At paragraphs 6.200 to 6.205.

¹⁴² Universal Service Requirements: Provision of Access at a Fixed Location (AFL USO) Response to Consultation and Decision, 5 November 2021. Decision D09/21 (the '**2021 USO Decision**').

¹⁴³ '**Publicly Available Telephone Service**' or '**PATS**' means a service made available to the public for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international telephone numbering plan. For the avoidance of doubt, this does not apply to bundled products.

Wholesale prices

- 4.93 The extent to which competitors in the Relevant RFTS Markets can set prices independently of Eircom impacts the competitive constraint imposed by those SPs in those markets. Many of Eircom's competitors have, to date, relied on its wholesale inputs, including SB-WLR, to provide RFTS, as they do not have a network of their own. ComReg currently regulates the price of SB-WLR, pursuant to the 2015 FACO Decision. Similarly, WLV is purchased by some SPs to provide RFTS, which avoids the need for SPs to manage interconnection for their traffic. While the price of WLV is not regulated by ComReg, the WLR and FVCO components (together being SB-WLR) that are necessary for this end-to-end service to be offered by SPs are subject to price control obligations. Other components such as transit are not regulated, but in order to provide the end-to-end service, are priced in by Eircom in its offering to SPs.
- 4.94 However, in an MGA scenario and, as proposed below, Eircom would no longer be subject to any regulatory obligations, including pricing obligations in the supply of SB-WLR (and, therefore, WLV).
- 4.95 Data available to ComReg indicate that 54% of Access Seeker purchases of wholesale NG Broadband inputs (FTTC or FTTP VUA, or Bitstream) are on a standalone basis, as of Q3 2021 (which would require the Access Seeker to deliver RFTS by means of Managed VoIP if offering a bundle of broadband and RFTS), while the remaining 46% of wholesale NG Broadband inputs were purchased alongside SB-WLR to provide POTS-based RFTS (which requires the Access Seeker to pay FACO charges to Eircom).
- 4.96 To date, Eircom wholesale pricing has largely been a function of regulation in the FACO market rather than competition *per se*, but ComReg notes that prices of regulated products are set in relation to Eircom's underlying costs, compared to an equally efficient SP and what prices would prevail, were prices cost-oriented.
- 4.97 ComReg notes, however, that, as NG broadband network rollout has progressed further, and given that it proposes to include MTS in the Relevant LL-RFTS Markets, FACO wholesale pricing will ultimately only have an impact on a small proportion of RFTS end users, specifically those end users who purchase RFTS from Access Seekers reliant on Eircom SB-WLR inputs. As NG broadband continues to roll out, this will facilitate migration to Managed VoIP RFTS, which will likely lead to a continued decline in demand for SB-WLR.

4.98 Furthermore, as set out at paragraph 4.44 above, RFTS delivered using merchant market FACO inputs accounts for a maximum of 27% of all RFTS access paths, bearing in mind that MTS subscriptions cannot, for calculation purposes, be meaningfully added to RFTS subscriptions. Accordingly, FACO wholesale pricing, while currently regulated, only accounts for a proportion of all wholesale pricing feeding into the provision of RFTS. This suggests that, overall, RFTS is likely to move towards effective competition, even if FACO regulation were removed and Eircom substantially increased the price of SB-WLR to Access Seekers.

Conclusions on observable trends towards effective competition

4.99 Having regard to the assessment in paragraphs 4.62 to 4.96 above, absent regulation, ComReg concludes that, on balance, Eircom, as the previously-designated SMP SP is sufficiently constrained by existing competition, suggesting a tendency towards effective competition.

4.100 In the Relevant RFTS Markets, ComReg's position is that competition in the retail market is likely to be sufficiently effective over the next 3 to 5 years. This includes competition from Managed VoIP-based RFTS delivered over alternative networks, including by SPs through the use of WLA and WCA inputs and from MSPs supplying MTS.

Potential Entry to the Relevant RFTS Markets

4.101 In this section, ComReg examines the likelihood, extent and timeliness of potential entry and further competition occurring in the Relevant RFTS Markets over the lifetime of this market review period.

4.102 While Section 3 defined the Relevant RFTS Markets in terms of short to medium term constraints on a HM provider of RFTS, in the context of the 3CT assessment, the effectiveness of potential direct and indirect competitive constraints that may materialise is considered over a longer time horizon.

4.103 ComReg notes that the primary source of additional competition is likely to be arise as a consequence of the further rollout of NG broadband networks, which SPs use, including through the purchase of wholesale broadband services, to deliver Managed VoIP. For example, SIRO is rolling out an FTTP network, and has announced Phase 2 of its rollout programme. Similarly, ComReg notes that NBI rollout is ongoing and is expected to complete over a seven-year period.¹⁴⁴ The rollout of NBI and SIRO (while having proven to be slower than originally anticipated in the past) will be capable of facilitating the delivery of RFTS over time. Accordingly, in the short to medium term, potential further competition will likely emerge from additional RFTS SPs offering Managed VoIP in the NBI and SIRO network footprint.

¹⁴⁴ <https://nbi.ie/news/latest/2021/01/22/nbi-connects-the-first-premises-under-the-national-broadband-plan/>

Expected or foreseeable technological and economic developments

- 4.104 This section identifies any anticipated technological or economic developments that may alter the competitive dynamics of the Relevant RFTS Markets and considers how such developments might impact on the market.
- 4.105 FACO (and, therefore, RFTS delivered using FACO inputs) has been in decline, as measured by declining sales of Eircom WLV and SB-WLR. Uptake of WLV has declined for 12 successive quarters starting in Q4 2018, while SB-WLR has declined for 25 of the last 28 quarters. Provision of SB-WLR and WLV access paths together has declined for 15 consecutive quarters and has fallen by 23% since Q4 2017. Accordingly, recent evidence indicates that Eircom has not, in fact, been successful in growing take-up of either SB-WLR or WLV for at least the last two years.
- 4.106 ComReg also notes that the Standalone LL-RFTS market is in decline, falling by an average of 8,300 customers per quarter (over 2014 to 2021), many (but not all) of which are switching to bundles of RFTS with broadband and/or other products. ComReg considers that the Standalone LL-RFTS market is likely to continue to decline over the period of the market review as end users migrate to bundles of broadband and RFTS, a development which is dependent on the availability of NG broadband.
- 4.107 In the Bundled LL-RFTS Market, 45% of subscriptions are delivered over Managed VoIP while 55% are delivered over PSTN. SPs have indicated to ComReg that, for new customers on bundles of NG Broadband with RFTS, Managed VoIP is provided, and this is particularly the case for greenfield HL-RFTS customers.¹⁴⁵ For greenfield FTTH connections, it is likely that customers will be provided with Managed VoIP-based RFTS, as legacy CG infrastructure over which FNA RFTS could be delivered, in some cases will not be present.
- 4.108 Eircom will ultimately decommission its legacy FNA network ('copper switch-off') and in March 2021, open eir published a White Paper entitled "*Copper switch-off: Leaving a legacy for the Future*" (the '**White Paper**') which set out some indicative proposals in respect of Eircom's approach to copper switch-off.¹⁴⁶ Once copper switch-off occurs, RFTS will cease to be delivered over the legacy network and will likely be delivered by means of Managed VoIP. As set out in its 2022 Action Plan, ComReg intends to issue a consultation on its regulatory approach to copper switch-off in March 2022.¹⁴⁷

Overall Conclusions on Tendency of Relevant RFTS Markets towards

<https://nbi.ie/news/latest/2020/05/18/first-phase-of-national-broadband-plan-nbp-well-underway/>

¹⁴⁵ Responses to April 2019 Informal Information Requests ('IIR(s)') from [X ██████████ X]

¹⁴⁶ Available online at https://www.openeir.ie/wp-content/uploads/2021/03/White-paper_Leaving-a-Legacy.pdf

¹⁴⁷ ComReg Action Plan for Year to 30 June 2022, available online at www.comreg.ie/about/strategy/action-plan/.

Effective Competition

- 4.109 In paragraphs 4.56 to 4.106, ComReg has examined whether the Relevant RFTS Markets are likely to tend towards effective competition within the time horizon of this market review period, having regard to whether:
- (a) there are observable trends suggesting a tendency towards effective competition;
 - (b) potential entry in the Relevant RFTS Markets, and whether alternative SPs are in a position to roll out infrastructure, to the extent that they would be able to compete effectively with Eircom; and
 - (c) any expected or foreseeable technological and economic developments that will impact on competition within the timeframe of this market review.
- 4.110 ComReg's view is that the Relevant RFTS Markets are likely to tend towards effective competition, absent RFTS or FACO market regulation. Eircom's market share in the Standalone LL-RFTS Market, which was indicative of a position of SMP in the 2014 RFVA Decision, has fallen considerably since then. Many Standalone LL-RFTS end users have moved into the Bundled LL-RFTS Market, and this has been facilitated by the increased availability of broadband. In the HL-RFTS Market, end users can avail of Managed VoIP products (including SIP Trunks or Hosted PBX) and likely upgrade their infrastructure when contracts are due for renewal.
- 4.111 ComReg considers that the dynamics of competition on the Relevant RFTS Markets are likely to continue to change over time, due to end user behaviour and technological developments. Based on current market dynamics, ComReg's position is, therefore, that the Relevant RFTS Markets are likely to fail the second criterion of the 3CT.
- 4.112 The trends identified above indicate that the Bundled LL-RFTS Market is characterised by greater levels of competition due to the availability of broadband bundles. Where NG Broadband rollout has occurred or is, on a forward-looking basis, likely to occur, SPs will be able to offer a suite of services to end users, including Managed VoB, on the basis of purchases of WLA or WCA from Eircom, SIRO, BT, or NBI. Such enhanced NG Broadband availability also allows for the provision of HL-RFTS over SIP Trunking or Hosted PBX, thus reducing reliance on Eircom HL-FACO. Access Seekers are accordingly likely to be able to offer RFTS to end users delivered using wholesale NG Broadband inputs, even in an absent regulation scenario where Eircom withdraws supply of SB-WLR.
- 4.113 For the Standalone LL-RFTS Market, despite wider dispersion of market shares since the 2014 RFVA Decision, ComReg's position is that the market is likely to continue to decline in absolute terms, although the barrier to offering Standalone LL-RFTS has been lowered by the availability of wholesale access products, including WLA/WCA products from Eircom, SIRO, or NBI.

- 4.114 Accordingly, ComReg's view is that the Relevant RFTS Markets are likely to tend towards, and are likely to continue to tend towards, effective competition, based on ongoing NG broadband rollout capable of delivering Managed VoIP RFTS, evolving consumer preferences and technological developments. On that basis, ComReg's position is that the second 3CT criterion fails in relation to the Relevant RFTS Markets.
- 4.115 At least one of the three 3CT criteria must fail in order for the presumption in favour of *ex ante* regulation to be lifted.¹⁴⁸ Since ComReg's analysis suggests that the first and second criteria have failed, the presumption can be lifted, and, in principle, there are grounds to withdraw *ex ante* regulation of the Relevant RFTS Markets.

Criterion 3: The insufficiency of competition law alone to adequately address the market failure(s) concerned

- 4.116 Given ComReg's view that Criterion 1 and Criterion 2 fail on the basis of lower barriers to entry and a general tendency towards effective competition in the Relevant RFTS Markets, Criterion 3 is therefore moot, as the outcome of that assessment cannot alter the overall 3CT findings. It is therefore not necessary to assess Criterion 3, as it cannot alter ComReg's overall conclusion on the application of the 3CT to the Relevant RFTS Markets.

Conclusions on the 3CT

- 4.117 Accordingly, ComReg has formed the view that, in respect of the proposed Relevant RFTS Markets, the 3CT is not passed. ComReg therefore considers that there is evidence to suggest that each of the Relevant RFTS Markets are characterised by sufficient levels of competition to immediately withdraw *ex ante* regulation. It follows from this finding that ComReg is not required to carry out a competition assessment of the proposed Relevant RFTS Markets, to determine whether any SP or SPs on those markets hold positions of SMP.

¹⁴⁸ See p.5 of the 2014 Explanatory Note: ".....the Recommendation provides that NRAs should only *regulate* markets which differ from those identified in this Recommendation where this is justified by national circumstances in the sense that the three cumulative criteria referred to in point 2 of this Recommendation are met."

4.2 Conclusions on RFTS Market Assessment

- 4.118 Having defined the Relevant RFTS Markets in Section 3 and carried out an assessment of the 3CT for these markets in paragraphs 4.9 to 4.117 above assuming no RFTS or FACO market regulation, ComReg's position is that none of the three Relevant RFTS Markets continue to warrant *ex ante* regulation. ComReg's assessment suggests on a forward-looking basis that the RFTS markets would likely be characterised by effective competition, even if RFTS and FACO market regulation were removed, due in large part to the capability of end users to switch to Managed VoIP RFTS delivered over NG Broadband in a hypothetical scenario where Eircom ceased provision of SB-WLR to Access Seekers and the ongoing rollout of NG broadband networks offering wholesale access by Eircom, SIRO, NBI and, potentially, Virgin Media.
- 4.119 Accordingly, ComReg proposes to withdraw existing regulation from the Relevant RFTS Markets.

4.3 Withdrawal of SMP and Remedies on the Relevant RFTS Markets

- 4.120 In cases where Eircom has previously been designated as holding SMP on a specific market, and has therefore been subject to regulatory obligations, ComReg notes that Regulation 27(2) of the Framework Regulations¹⁴⁹ allows ComReg to give reasonable notice to any parties which it considers to be affected by the withdrawal of such obligations.
- 4.121 ComReg's position is that the following Relevant RFTS Markets should no longer be susceptible to *ex ante* regulation:
- (a) **Market 1a:** Standalone Low-Level RFTS ('**Standalone LL-RFTS**') including RFTS delivered over PSTN and ISDN BRA, MTS, and Managed VoB delivered over NG Broadband on a standalone basis;
 - (b) **Market 1b:** Bundled Low-Level RFTS ('**Bundled LL-RFTS**') including RFTS over PSTN and ISDN BRA and Managed VoB¹⁵⁰ delivered over (and with) NG Broadband and MTS on a bundled basis together with any of broadband, television or MTS,¹⁵¹ delivered on a bundled basis; and
 - (c) **Market 1c:** High-Level RFTS ('**HL-RFTS**') including RFTS delivered over ISDN FRA and PRA, and SIP Trunk or Hosted PBX forms of Managed VoIP delivered over NG Broadband on a standalone basis or on a bundled basis together with any of broadband, television or MTS.

¹⁴⁹ This provision is mirrored at Article 67 EECC.

¹⁵⁰ Managed VoIP includes RFTS delivered in the form of Managed VoB, as well as Hosted PBX, or SIP Trunking.

¹⁵¹ This refers to the instance where the RFTS element is not based on MTS. For example, where RFTS is delivered over Managed VoB, but the bundle also includes MTS.

- 4.122 In particular, high and non-transitory barriers to entry no longer appear to be present, and these markets are likely to tend towards effective competition at a point in the foreseeable future. Failure to meet any of the 3CT criteria implies that the Relevant RFTS Markets are no longer susceptible to *ex ante* regulation and are effectively competitive. In such cases, ComReg is required, pursuant to Regulation 27(3), to remove regulation from those markets.
- 4.123 ComReg accordingly proposes to withdraw existing regulatory obligations imposed on Eircom by means of the 2014 RFVA Decision and associated decisions, given its finding that the Relevant RFTS Markets are not susceptible to *ex ante* regulation. All existing SMP obligations would be withdrawn from the Relevant RFTS Markets on the effective date of the final decision.

4.4 Withdrawal of SMP finding on the Relevant FACO Markets

- 4.124 ComReg has formed the view that the 3CT is likely to fail on the Relevant RFTS Markets, even in the absence of upstream FACO market regulation. This suggests that competition is likely to be sufficiently effective on the RFTS markets, even without the protections afforded by upstream FACO market regulation. The EC has noted in its 2020 Explanatory Note that SMP regulation of wholesale markets should only be applied in order to address a lack of effective competition at the retail level on downstream markets. It follows that, where a retail market can be shown to be effectively competitive absent wholesale market regulation, then wholesale market regulation becomes unnecessary. Accordingly, and as set out at pages 8 and 9 of the 2020 Explanatory Note, since ComReg concludes that the RFTS markets are likely to be effectively competitive in the absence of FACO market regulation, it then follows that FACO regulation is no longer required, since it is no longer necessary to prevent the emergence and exercise of competition problems at retail level.
- 4.125 ComReg accordingly proposes to withdraw existing regulatory obligations imposed on Eircom by means of the 2015 FACO Decision and associated decisions, given its finding that the Relevant RFTS Markets are not susceptible to *ex ante* regulation. Existing SMP obligations would be withdrawn in accordance with the sunset periods discussed in Section 5.

5 Withdrawal of Remedies on the Relevant FACO Markets

5.1 Issues arising with the withdrawal of regulation

- 5.1 ComReg considers that regulation of the Relevant FACO Markets defined in the 2015 Decision is no longer warranted. ComReg therefore proposes to withdraw the obligations imposed on Eircom by the 2015 FACO Decision (and associated decisions) in respect of the Relevant FACO Markets. ComReg proposes, as provided for by Regulation 27(2) of the Framework Regulations, to allow for a sunset period prior to the withdrawal of obligations becoming effective, by way of notice to affected parties, in particular those Access Seekers currently availing of regulated access in the Relevant FACO Markets.

5.2 Sunset periods

- 5.2 The purpose of the sunset periods is to give reasonable and sufficient notice to Access Seekers affected by the withdrawal of obligations, in order to facilitate orderly deregulation in the Relevant FACO Markets. ComReg therefore proposes a sunset period for ISDN BRA of 12 months,¹⁵² and for PSTN and ISDN FRA/PRA a sunset period of 18 months¹⁵³. For ISDN BRA a 2 month period would apply and for PSTN and ISDN FRA/PRA 9 month period would apply with respect to new orders which would run in parallel with the overall 12/18 month sunset periods in respect of existing access, to allow Access Seekers sufficient time in which to make any necessary preparations for the new market environment and to preserve continuity in the supply of both wholesale and retail services (were Eircom to withdraw SB-WLR, or significantly alter its SB-WLR terms and conditions, following deregulation).

¹⁵² For ISDN BRA a 2 month period would apply with respect to new orders which would run in parallel with the overall 12 month sunset period.

¹⁵³ For PSTN and ISDN FRA/PRA a 9 month period would apply with respect to new orders which would run in parallel with the overall 18 month sunset period.

- 5.3 The proposed initial 9-month period following the effective date of a final decision in the case of PSTN and ISDN FRA/PRA seeks to ensure that an Access Seeker would have sufficient time to (further) develop or procure a VoIP platform and associated operational/support systems and processes to enable the delivery of Managed VoIP to RFTS end users. The sunset period seeks to ensure continuity in the supply of SB-WLR while an Access Seeker develops or procures a VoIP platform (along with, for example, all ancillary systems integration for in-life management of the Managed VoIP product(s)). This initial 9-month period should also provide sufficient time for an Access Seeker to, in parallel to these activities, initiate a communication programme with its end users regarding the replacement of its existing SB-WLR-based RFTS by Managed VoIP delivered via NG Broadband.
- 5.4 The subsequent 9-month period of the 18-month sunset period seeks to ensure that Access Seekers have sufficient time to migrate their end users from POTS-based NGA broadband to standalone NGA broadband with Managed VoIP, noting that SB-WLR-only end users will require NGA broadband to be installed before migrating to standalone NGA broadband with Managed VoIP. The length of the latter 9-month period is determined having regard to the volume of FACO lines in the Relevant FACO Markets¹⁵⁴ which ComReg proposes to deregulate.
- 5.5 While ComReg is now proposing to deregulate the entire market rather than just the Urban FACO Market as was proposed in the 2021 Draft Decision, due to the passage of time since the 2021 Draft Decision was notified, the volumes of FACO services have fallen, meaning that it will be possible to migrate the entire market within the timeframe proposed in the 2021 Draft Decision. This is based on Eircom's published product migration processes,¹⁵⁵ which state a maximum throughput of 1,000 migrations per operator per day on the FTP channel of the UG.¹⁵⁶ Eircom has confirmed to ComReg that this migration capacity is available¹⁵⁷ but noted that there had been no significant demand to date from SPs for bulk migrations.
- 5.6 ComReg considers that sunset periods are appropriate in circumstances where immediate deregulation of a market would impede the capacity of Access Seekers to, where necessary, make alternative arrangements to assure continued service for end users. ComReg also considers that the finding that the Relevant RFTS Markets are likely to tend towards effective competition over the timeframe of this review period is dependent on future FTTP network roll-out by SPs such as NBI and SIRO. This timeframe also takes account of this to ensure competition is not undermined in the transition to deregulation.

¹⁵⁴ The overall volume of FACO lines is set out in Table 5.

¹⁵⁵ <https://www.openeir.ie/products/>

¹⁵⁶ As specified in the Open eir UG Data Contract.

¹⁵⁷ Eircom submission to the 2020 Consultation, paragraph 276.

- 5.7 In this respect, ComReg recalls that Article 67(3) EEC requires NRAs to provide notice to parties affected by the withdrawal of SMP obligations “*defined by balancing the need to ensure a sustainable transition for the beneficiaries of those obligations and end-users, end-user choice, and that regulation does not continue for longer than necessary*”. ComReg considers that the absence of a notice period – in the form of the sunset periods described below – on the Relevant FACO Markets would endanger the capacity of Access Seekers to assure the transition of their end users to alternative arrangements, in particular, the provision of Managed VoIP RFTS.
- 5.8 Taking into account information provided by Eircom in the context of its request for approval to withdraw ISDN BRA under the 2015 FACO Decision (which was refused by ComReg),¹⁵⁸ ComReg’s position is that it is appropriate to distinguish between PSTN and ISDN FRA/PRA services on the one hand, and ISDN BRA services on the other, so that there shall be two sunset periods of differing length for the Relevant FACO Markets, as follows:
- (a) A PSTN and ISDN FRA/PRA services sunset period (the ‘**PSTN and ISDN FRA/PRA Sunset Period**’); and
 - (b) An ISDN BRA services sunset period (the ‘**ISDN BRA Sunset Period**’).
- 5.9 The proposed sunset periods maintain Eircom’s existing Access obligations (as described in the 2015 FACO Decision) on the Relevant FACO Markets. Products, services and facilities must be provided at prices no higher than those prevailing for such products, services, facilities or associated facilities on the effective date of the final decision. ComReg proposes that other obligations (for example, in relation to transparency and non-discrimination, etc.) be removed on the Relevant FACO Markets on the effective date of the final decision.

¹⁵⁸ Information Notice: Eircom’s request to withdraw access to Integrated Services Digital Network (ISDN) Basic Rate Access (BRA), ComReg Document 20/118, dated 09 December 2020.

PSTN and ISDN FRA/PRA Sunset Period

- 5.10 ComReg is of the view that, insofar as PSTN and ISDN FRA/PRA services are concerned, sunset periods of 9 months for new orders and 18 months for existing lines are of an appropriate duration, having regard to the need to allow Access Seekers sufficient time to finalise and implement a migration strategy, and that they will not be in a position to start migrating end users immediately following the publication of a final decision (or, indeed, following the publication of this Consultation). The sunset periods are designed to provide reasonable and sufficient notice to affected Access Seekers, while at the same time protecting end users from potential unnecessary disruption to their services. In particular, the sunset periods proposed by ComReg have had regard to Eircom's own published product migration processes. ComReg also notes that it has below set out the potential harm to RFTS end users in circumstances where SMP obligations were fully removed, without alternative service provision having first been arranged.
- 5.11 ComReg notes, in particular, that the fact that a large number of SPs already offer VoIP to their retail end users does not render the provision a 9-month sunset period unnecessary or disproportionate. All Access Seekers must be provided with the opportunity to put in place appropriate substitute products to enable their end users to migrate from SB-WLR. While most SPs may have some VoIP capability, they may not have the full range of products available to align with the SB-WLR product set, or the ability to operate them at scale.
- 5.12 Accordingly, ComReg proposes that Eircom should not withdraw access to these products, or related services, or facilities on the Relevant FACO Markets for a period of 18 months from the effective date of the final decision. Furthermore, during the first 9 months of the PSTN and ISDN FRA/PRA Sunset Period, ComReg proposes that Eircom should be required to provide access to products, services and facilities related to PSTN and ISDN FRA/PRA set out in Section 7 of the Decision Instrument contained in Appendix H of the 2015 FACO Decision. The 18-month PSTN and ISDN FRA/PRA Sunset Period for the removal of all obligations on the Relevant FACO Markets would run in parallel with this 9-month 'new order' period.
- 5.13 ComReg notes that, due to the size of the Relevant FACO Markets, Access Seekers would likely need to upgrade their existing VoIP platforms and processes to cope with anticipated end user volumes. The first 9 months of the PSTN and ISDN FRA/PRA Sunset Period are needed for this activity, given the related procurement, planning and testing phases which will be required.

- 5.14 In setting the 9-month PSTN and ISDN FRA/PRA Sunset Period for new orders following the effective date of the final decision, ComReg also takes into account any potential tenders for business by SPs, which may be ongoing at the time of this Consultation. The 9-month PSTN and ISDN FRA/PRA Sunset Period for new orders will allow for tenders to progress to completion with certainty and for the Access Seeker’s internal processes to be updated.
- 5.15 With regard to the proposed 18-month PSTN and ISDN FRA/PRA Sunset Period for existing lines, ComReg must have regard to the large number of end users in the Relevant FACO Markets and the likely requirement for SPs in advance of any potential migration, to put in place a customer engagement programme. In particular, in order to ensure successful migration and minimal disruption for end users, SPs will have to contact their customers and offer alternative products, post out new equipment (in certain scenarios) and agree the scheduling of migrations.
- 5.16 ComReg notes further that end users include users of both standalone SB-WLR and POTS-based NGA. While migrations from POTS-based NGA may be carried out electronically, they are subject to limitations in volumes as outlined in Eircom’s UG Data Contract.¹⁵⁹ Migrations from standalone SB-WLR require installation of an NGA Broadband service to enable migration of the telephony service to VoIP and so are more time consuming.
- 5.17 As of Q3 2021, the Relevant FACO Markets consists of 384,049 active merchant market SB-WLR lines, as follows:

Table 5: Wholesale FACO lines per SP, Q3 2021 [REDACTED]

SP	Number of Active Lines	WLR with Broadband (including ADSL)	Standalone WLR
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

¹⁵⁹ UG Data Contract, V41.3, FTP Channel section.

- 5.18 ComReg's finding that the Relevant FACO Markets are no longer susceptible to regulation is based on the availability of, *inter alia*, NG Broadband capable of delivering Managed VoIP RFTS as a substitute for RFTS delivered by means of SB-WLR; given the number of lines affected by deregulation, however, it is essential to ensure that sufficient time is provided to SPs so that they can migrate away from SB-WLR (including as part of POTS-based VUA) and offer an adequate substitute to their end users.
- 5.19 A small percentage of end users reliant on ADSL broadband may not have NG Broadband service available to them, while other end users may have POTS-based NGA service, but do not use the POTS component. However, as Eircom will no longer be required to supply SB-WLR following the sunset period, POTS-based broadband lines may need to be migrated to a standalone service (either CG or NGA broadband), while the telephone number will be either ported out to the SP's VoIP platform or ceased, depending on the end user's preference. Based on Eircom's capability to process 1,000 orders per operator per day,¹⁶⁰ migrating current active SB-WLR lines as set out at Table 5 above will take a minimum of [X **EIRCOM:** ██████████ X], assuming Access Seeker ability to avail of the maximum daily migration allocation. This timeline would fall within the latter 9-month period (of the 18-month period following the effective date of the final decision) earmarked for migrations by ComReg. ComReg notes that there is nothing preventing Access Seekers starting migrations earlier if they have the VoIP platform and capacity available together with the necessary processes to support migrations at scale.
- 5.20 ComReg considers it unlikely that all standalone SB-WLR end users in Table 5 will wish to migrate to a broadband-based solution. Rather, it is likely that a small portion of these standalone SB-WLR end users will be unable to access the NG Broadband service they require prior to deregulation; other standalone SB-WLR end users will have no requirement for broadband; or will not be able to afford it.¹⁶¹
- 5.21 ComReg notes in this regard that the 2019 Market Research found that 53% of standalone SB-WLR end users kept their phone line in case of emergency, 40% because they always had it, 31% for the call quality of the fixed line over mobile and 30% because certain types of calls were cheaper over fixed line.

¹⁶⁰ In its Submission to the 2020 Consultation (paragraph 276, pages 95-96), Eircom disagreed with ComReg's use of the 1,000 migrations per day limitation, stating that this was an IT limitation only. Eircom implied that this number could be exceeded through the use of an Operator-requested programme-managed migration. However, this is not documented by Eircom and it is not clear what the terms and conditions of such a programme would be, including the maximum number of end users which could be migrated in a single request; whether multiple exchanges could be included in a single request etc. Accordingly, in the absence of any further reliable information, ComReg considers that it is appropriate to use the number of 1,000 migrations as a benchmark.

¹⁶¹ The 2019 Market Research indicated that of those standalone SB-WLR end users who do not have broadband, 64% stated they don't need or use it, 19% said they did not know how to use it, 5% stated that the monthly price was too high, and 6% said the installation price was too high.

- 5.22 It is also the case that there is a sizeable difference in the cost of broadband and PSTN, particularly when comparing standard rates over introductory offers. There may also be additional one-off costs for end users when setting up a broadband connection which vary between SPs and technology (FTTC/FTTH/Cable).
- 5.23 For the purpose of analysis, and in the context of the proposed de-regulation of the entire FACO markets, ComReg assumes that 40% ([~~§~~ EIRCOM: ██████████ ~~§~~]) of standalone SB-WLR end users will migrate to Managed VoIP delivered over NGA broadband. Each of these orders will require a technician installation at the end user premises. Eircom's NGA broadband delivery capacity varies between [~~§~~ EIRCOM: ██████████ ~~§~~].¹⁶² This equates to [~~§~~ EIRCOM: ██████████ ~~§~~] total NGA broadband delivery capacity for Eircom. It is reasonable to expect that installation of broadband for these standalone SB-WLR end users can be completed within the initial 9-month PSTN and ISDN FRA/PRA Sunset Period. ComReg accordingly considers that the PSTN and ISDN FRA/PRA Sunset Period of 9 months for new orders provides sufficient and adequate notice to SPs.

Migration process

- 5.24 Pursuant to the 2018 WLA/WCA Decision,¹⁶³ Eircom is required to make available a VUA/Bitstream Soft Migration process, the purpose of which is to provide an efficient migration path from POTS-based NGA to standalone NGA with no interruption of the broadband service and the ability to port the telephone number. 'Soft' migrations do not require any physical network intervention at the time of provisioning. The VUA/Bitstream Soft Migration process is an important process for allowing the transition to VoIP in the Relevant FACO Markets.¹⁶⁴

¹⁶² Based on Eircom order data for the period October 2017 to January 2020.

¹⁶³ Market Review: Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products, Response to Consultation and Decision, ComReg Document 18/94, dated 19 November 2018 ('**2018 WLA/WCA Decision**').

¹⁶⁴ To the extent that an SP continues to avail of SB-WLR in respect of subscribers after the sunset period has elapsed under a commercial agreement with Eircom, it will be able to avail of the VUA Soft Migrations process required to be provided by Eircom under the 2018 WLA/WCA Decision, and to the extent that the line is in the Revised Regional WCA Market of the Bitstream Soft Migrations process.

- 5.25 ComReg does not consider that it would be necessary, appropriate or proportionate to impose on Eircom an obligation to provide end-to-end migrations in respect of a market that is being deregulated. ComReg's view is that the main work to be carried out by Eircom on migrations from POTS-based services to VoIP services centres on the provision of an NGA Broadband service, either a new install or a migration to a standalone service, not on the voice aspect, and this is appropriately addressed by way of regulation of the WLA Market and the Revised Regional WCA Market in the 2018 WLA/WCA Decision and the 2021 WCA MTA Decision.¹⁶⁵
- 5.26 It is, however, necessary to re-consider the extent to which the current VUA/Bitstream Soft Migrations process may be relied upon by Access Seekers during the sunset period in order to achieve a smooth transition to VoIP. A number of features are relevant in this respect. With the VUA/Bitstream Soft Migration order (PNS order type) developed by Eircom, the un-jumpering of the POTS line by a technician does not happen until after the POTS service has been ceased and the migration has taken place. However, the PNS order remains open until such time that the line has been un-jumpered and during the interval between the SB-WLR being ceased, and the un-jumpering of the line, certain orders cannot be placed in respect of that line. ComReg understands¹⁶⁶ that it may take 5 or 6 days under standard conditions for un-jumpering to take place after a SB-WLR service has been migrated to standalone NGA, and it is expected that this timeline will increase with bulk migration, as may occur during the sunset period. While the un-jumpering task is outstanding on the PNS order, ComReg understands that it is not possible to:
- (a) Make changes to the standalone NGA service (using orders including CHN, CPN, CEN, QND, PNO);¹⁶⁷
 - (b) Raise faults via the UG on the standalone NGA service; or
 - (c) Raise an order to request the rollback or reverse migration to the WLR service (either POTS-based NGA or standalone SB-WLR) using PWU or PPW orders.
- 5.27 As issues under (a) and (b) are not matters that are relevant to the FACO markets, they are therefore not addressed in this Consultation. As for (c), issues which may arise on the end user side after migration include:¹⁶⁸

¹⁶⁵ Mid-term Assessment: Regional Wholesale Central Access (WCA) Market, Response to Consultation and Final Decision; ComReg Decision D10/21, 25 November 2021 ('**2021 WCA MTA Decision**').

¹⁶⁶ Based on information received via email (WPIR 20-10-01) from Eircom.

¹⁶⁷ Order types are defined in the Open eir UG Data Contract. The order types mentioned here are: CHN: "Change NGA"; CPN: "Change Profile for NGA"; CEN: "Cease NGA"; QND: "Query NGA Details"; and PNO: "Provide NGA from Other".

¹⁶⁸ This list is not exhaustive.

- (a) The VoIP configuration or firmware on the modem is incorrect and not repairable, resulting in the end user having no access to voice service; or
 - (b) Home or medical alarm no longer works without SB-WLR service.
- 5.28 To an extent, these issues can be adequately addressed by SPs through the development of appropriate migration strategies. The overall 18-month PSTN and ISDN FRA/PRA Sunset Period allows SPs adequate time to integrate and test migrations with Eircom's IT systems and ensure adequate substitute products as required by their end users. It would be incumbent on SPs in this regard to seek to engage with Eircom as early as possible to resolve any issues with their migration strategy and maximise the use of the PSTN and ISDN FRA/PRA Sunset Period proposed in this Consultation. It would also be incumbent on SPs to set up and test solutions for end users previously relying on SB-WLR for services such as medical alarms, home alarms and in-home wiring, and engage with any end users availing of in-home services and advise them of associated risks and how to minimise issues which may arise.
- 5.29 ComReg acknowledges that in any mass migration (as required during the PSTN and ISDN PRA/FRA sunset period), exceptional circumstances could occur which would need to be remediated in a short timeframe.
- 5.30 In order for ComReg to address fully the issues described at paragraph 5.26 (a) and (b) above, ComReg has issued a direction to Eircom in accordance with Regulation 18 of the Access Regulations.¹⁶⁹ ComReg has directed Eircom in respect of Soft Migrations as defined under the 2018 WLA/WCA Decision, that where a VUA/Bitstream Soft Migration is being carried out and a new order is made on the standalone broadband line, Eircom shall, save as regards orders for NGA fault handling purposes, accept such an order and ensure that the order is progressed within five days of being made, whether or not an un-jumping task is required.
- 5.31 In addition, Eircom is required to update its documentation for migrations to take account of the changes it makes to its process for migrations in light of the direction. The requirements in the direction were to be complied with by Eircom no later than 29 April 2022 and the documentation shall be updated to reflect the changes made on or before 1 February 2022 (having notified ComReg on or before 3 January 2022).

¹⁶⁹ As referenced in [Information Notice 21/53](#).

- 5.32 Together with having issued a direction under Regulation 18 of the Access Regulations, ComReg also proposes to attach a condition to the provision of Access during the sunset periods prior to the withdrawal of remedies in the Relevant FACO Markets. In respect of any line migrated during the PSTN and ISDN FRA/PRA Sunset Period from SB-WLR or POTS-based NGA (VUA or Bitstream), for the duration of that sunset period, ComReg proposes that Eircom shall provide a (manual or automatic) expedited/escalation process for the rollback of the line to the pre-existing SB-WLR or POTS-based NGA service, at the request of the Access Seeker concerned, where the un-jumpering task remains outstanding. For the avoidance of doubt, the escalation process would not require un-jumpering (of the POTS service) to take place followed by subsequent re-jumpering prior to SB-WLR being restored. While the jumper is in place, Eircom would provide the ability to electronically restore the pre-existing SB-WLR or POTS-based NGA service. Therefore, ComReg expects that Eircom would restore the service as soon as possible, and within no later than one business day.
- 5.33 ComReg notes that Eircom proposed to ComReg as part of the dialogue leading to the 2021 Draft Decision, a new automated rollback procedure to enable Access Seekers to roll back to the original service settings within one business day for as long as the un-jumpering task remains outstanding and a technician has not been dispatched to carry this task out. Also, as part of its implementation of the direction referred to above, Eircom produced updated product documentation outlining an exception handling scenario stating that in the event an Access Seeker requires a reversal of the PNS order, it should submit the required order and contact Eircom to expedite order completion.
- 5.34 ComReg understands that the implementation of this proposal may require IT development on the part of Eircom (particularly if an automatic solution was chosen by Eircom). ComReg also notes that Access Seekers must be able to test their respective migration strategies in advance of the PSTN migration beginning in earnest. Taking these considerations into account, particularly the point that the solution may be a manual option (and may already exist), ComReg proposes that Eircom should implement the condition proposed in paragraph 5.32 above within five months from the effective date of the final decision. To ensure Access Seekers are fully informed how the condition is implemented, ComReg also proposes that Eircom should update the product migration documentation on its publicly available wholesale website,¹⁷⁰ one month before any new product is implemented.

¹⁷⁰ <https://www.openeir.ie/products/voice/product-migrations/>

- 5.35 Together with the direction issued by ComReg under Regulation 18 of the Access Regulations, ComReg believes that this proposed condition would constitute an effective and proportionate mechanism for facilitating rollback. ComReg notes that Eircom has implemented a rollback procedure for its network modernisation project in respect of lines migrated from legacy PSTN switching equipment to MSAN technology. In addition, on 5 May 2021, Eircom wrote to ComReg to suggest potential changes to its PNS order type. One of those changes was to develop a new order type to allow the migrating provider to cancel the PNS and undo any changes made to the inventory on the basis that Eircom considered this solution could be of interest to Access Seekers. The proposed solution is very similar to the condition which ComReg is now proposing in this Consultation.
- 5.36 On 28 January 2022, to comply with ComReg's Direction (ComReg 21/61), Eircom published an updated NGA IPM (Version 26.1).¹⁷¹ Eircom plans to launch this PNS order enhancement on 11 April 2022.

ISDN BRA Sunset Period

- 5.37 In respect of the ISDN BRA Sunset Period, ComReg proposes that it is sufficient to maintain, in relation to new requests for ISDN BRA, Eircom's obligation to provide access to the products, services and facilities related to ISDN BRA set out in Section 7 of the Decision Instrument contained in Appendix H of the 2015 FACO Decision, at prevailing prices, for 2 months from the effective date of the final decision. For existing ISDN BRA lines, ComReg proposes that Eircom should be required to maintain access for a period of 12 months. The 12-month ISDN BRA Sunset Period would run in parallel with the 2-month period for new orders.
- 5.38 In setting the sunset period for ISDN BRA, ComReg has had regard to Eircom's Submission to the 2020 Consultation regarding ISDN BRA,¹⁷² and also the challenges which Eircom has in sourcing ISDN BRA NTUs.¹⁷³ ComReg notes that ISDN BRA services continue to decline, with this rate of decline having increased over the past 12 months.

¹⁷¹ On the Proposal section of the open eir website, under product development CRD 847 PNS Order Revision.

¹⁷² Eircom submission, paragraphs 227-229.

¹⁷³ Information Notice: Eircom's request to withdraw access to Integrated Services Digital Network (ISDN) Basic Rate Access (BRA), ComReg Document 20/118, dated 09 December 2020.

- 5.39 ISDN BRA cannot be delivered on the same line as NGA Broadband, so the migration from ISDN BRA to Managed VoIP is a simpler process. Accordingly, ComReg proposes that, if and where required, prioritising ISDN BRA migrations (to Managed VoIP) in advance of PSTN or ISDN FRA/PRA migrations is an option available to Access Seekers, including in light of the PSTN and ISDN PRA Sunset Period, so that the ISDN BRA Sunset Period is an appropriate and proportionate withdrawal notice period for affected Access Seekers.

Summary of Sunset Periods

- 5.40 ComReg proposes that access to any products, services, facilities or Associated Facilities provided by Eircom shall be provided at prices no higher than those prevailing for such products, services, facilities or Associated Facilities on the effective date of the final decision for the following periods of time, as outlined in Table 6:

Table 6: Summary of Sunset Periods

Product	New Lines	Existing Lines
PSTN and ISDN FRA / ISDN PRA	9 months	18 months
ISDN BRA	2 months	12 months

5.3 Applicable price during the Sunset Period

- 5.41 ComReg further proposes that access to any products, services, facilities or associated facilities in the Relevant FACO Markets provided by Eircom shall be provided at prices no higher than those prevailing for such products, services, facilities or Associated Facilities on the effective date of the final decision for the duration of the sunset periods stipulated at Table 6 above. Apart from this and the aforementioned access requirements, Eircom will not be required to meet other obligations (for example, in relation to transparency, non-discrimination etc.) during this period.

6 Next Steps

- 6.1 The consultation period will run to 5.30pm on Monday, 14 March, 2022, providing a one month consultation period. ComReg encourages all interested parties to comment on the issues set out in this Consultation. The task of analysing responses will be greatly facilitated if all comments are supported by evidence and referenced to the specific question set out in Annex: 1 of this Consultation.
- 6.2 Having analysed and considered the comments received, ComReg will review the proposals set out in this Consultation, consult with the CCPC, and maintain or amend its proposals, as appropriate, including with respect to the draft measures set out in the draft decision instruments.
- 6.3 ComReg will then notify these final draft measures to the EC, other NRAs and BEREC, pursuant to Article 32 EECC. Taking utmost account of any comments received from the EC as well as from other aforementioned parties, ComReg will then adopt and publish the final decision in its subsequent Response to Consultation and final decision.
- 6.4 In order to promote further openness and transparency, ComReg will publish all responses to this Consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No. 05/24.
- 6.5 ComReg appreciates that many of the issues raised in this Consultation may require respondents to provide confidential information. As it is ComReg's policy to make all responses available on its website, and for inspection generally, respondents to this Consultation are requested to clearly identify confidential material within their submissions and place any such confidential material in a separate document to their response, with this also being provided by the date referred to in paragraph 6.1 above.
- 6.6 Confidential elements of responses must be clearly marked, using the following format: [✕ text deemed to be confidential ✕], and be set out in a separate document which must also be provided to ComReg by the date referred to in paragraph 6.1 above.
- 6.7 Such information will be treated subject to the provisions of the guidelines on the treatment of confidential information as set out in ComReg Document No. 05/24. In submitting comments, respondents are also requested to provide a copy of their submissions in an unprotected electronic format in order to facilitate their subsequent publication by ComReg.

Annex: 1 Draft Decision Instrument

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**”):

- (i) Pursuant to and having had regard to Sections 10 and 12 of the Communications Regulation Act;
- (ii) Pursuant to and having had regard to the EECC;
- (iii) Pursuant to and having had regard to Regulation 6(1) of the Access Regulations and Regulation 16 of the Framework Regulations;
- (iv) Having, pursuant to Section 13 of the Communications Regulation Act, where applicable, complied with Ministerial Policy Directions;
- (v) Having taken the utmost account of the 2020 Recommendation and the SMP Guidelines;
- (vi) Having had regard to the analysis and reasoning set out in ComReg Documents 20/46; 21/65 and 22/10;
- (vii) Having, in accordance with Regulation 12(3) of the Framework Regulations, published the text of the proposed measure and given reasons for it, including information as to which of ComReg’s statutory powers gives rise to the measure, in ComReg Documents 20/46; 21/65 and 22/10;
- (viii) Having, in accordance with Regulation 12(4) of the Framework Regulations, considered the representations received in response to ComReg Documents 20/46 and 22/10;
- (ix) Having consulted with the Competition and Consumer Protection Commission pursuant to Regulation 27 of the Framework Regulations and Article 67 of the EECC;
- (x) Having taken the utmost account of the European Commission’s Decision of 17 September 2021 pursuant to Article 32(6) of Directive (EU) 2018/1972 (Withdrawal of notified draft measure) regarding the draft decision set out in ComReg Document 21/65;
- (xi) Having withdrawn the draft decision set out in ComReg Document 21/65 and 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 in accordance with Regulation 13 of the Framework Regulations and Article 32 of the EECC and having taken the utmost account, pursuant to Regulation 13(6) of the Framework Regulations, of any comments

made by the European Commission, BEREC and any national regulatory authority in another EU Member State;

- (xii) Pursuant to Regulations 25, 26 and 27 of the Framework Regulations;
 - (xiii) Pursuant to Regulation 8 of the Access Regulations;
 - (xiv) Pursuant to Regulations 9, 10, 11, 12, and 13 of the Access Regulations; and
 - (xv) Having regard to the analysis and reasons set out in ComReg Decision DXX/XX [Final Decision].
- 1.2 This Decision Instrument shall, as and where required, be construed consistently with and in light of the Response to Consultation and Final Decision, ComReg Decision DXX/XX.
- 1.3 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.

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;

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time to time or replaced with equivalent effect;

“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);

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009;

“Bitstream” means a wholesale product which consists of an Access Path to the End User premises and transmission of data at various bandwidths to a defined set of Points of Handover;

“CATV” refers to the provision of broadband by means of a cable access TV network which runs on the Data Over Cable Service Interface Specification (DOCSIS) 3.0 standard or higher;

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

“ComReg” means the Commission for Communications Regulation, established under Section 6 of the Communications Regulation Act;

“ComReg Decision D12/14” means ComReg Document No. D14/89 entitled Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers, ComReg Document 14/89, dated 28 August 2014;

“ComReg Decision D05/15” means ComReg Document No. 15/82 entitled “Market Review, Wholesale Fixed Voice Call Origination and Transit Markets, Response to Consultation and Decision”, dated 24 July 2015;

“ComReg Decision D03/16” means ComReg Document No. D16/39, entitled Pricing of Eir’s Wholesale Fixed Access Services: Response to Consultation Document 15/67 and Final Decision”, dated 18 May 2016;

“ComReg Decision D10/18” means ComReg Document No. 18/94, entitled “Market Review, Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products. Response to Consultation and Decision”, dated 19 November 2018;

“ComReg Decision D11/18” means ComReg Document No. 18/95 entitled “Pricing of wholesale broadband services - Wholesale Local Access (WLA) market and the Wholesale Central Access (WCA) markets. Response to Consultation Document 17/26 and Final Decision”, dated 19 November 2018;

“ComReg Decision DXX/XX” means ComReg Document No. XX/XX entitled “Market Reviews: Wholesale Fixed Access and Call Origination; Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers. Response to Consultation and Final Decision”, dated XX/XX/XXXX [Final Decision Document];

“ComReg Document 22/10” means ComReg Document No.22/10 entitled “Market Reviews: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers. Wholesale Fixed Access and Call Origination. Consultation and Draft Decision”, dated 14 February 2022;

“ComReg Document 20/46” means ComReg Document No. 20/46 entitled “Market Reviews: Wholesale Fixed Access and Call Origination; Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers. Consultation and Draft Decisions”, dated 17 June 2020;

“ComReg Document 21/65” means ComReg Document No. 21/65 entitled “Market Reviews: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers, Wholesale Fixed

Access and Call Origination. Response to Consultation and Final Decision” dated 18 June 2021 which was notified as a draft decision to the European Commission on 19 June 2021 and was withdrawn by ComReg on 14 February 2022;

“**Companies Act 2014**” means the Companies Act 2014 (No. 38 of 2014), as amended from time to time;

“**Competition and Consumer Protection Commission**” means the body established under section 9 of the Competition and Consumer Protection Act 2014;

“**EECC**” means the European Electronic Communications Code established by Directive 2018/1972 of 11 December 2018 which entered into force on 20 December 2020;

“**Effective Date**” means the date set out in Section 13.1 of this Decision Instrument;

“**Eircom**” means Eircom Limited, a company incorporated in Jersey (Number 116389), registered as a Branch in Ireland (Number 907674), with an Irish registered Branch Office at 2022 Bianconi Avenue, Citywest Business Campus, Dublin 24, D24 HX03;

“**End User**” 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;

“**Exchange Area(s)**” means the geographic area(s) that is/are served by the relevant Exchange;

“**Exchange launched VUA/Bitstream**” means that the active VDSL equipment that is required to provide the VUA or Bitstream service is housed in an Eircom Exchange building or equivalent;

“**Fixed Voice Call Origination**” or “**FVCO**” means a service whereby voice calls originating at a fixed location of an End User are conveyed and routed through any switching stages (or equivalent, regardless of underlying technology) up to a Point of Handover nominated by an OAO seeking, and/or being provided with, access to this service. The nominated Point of Handover can be the primary, tandem, or double tandem Exchange associated with the Access Path on which the voice call was originated;

“**FNA FVCO**” means calls originated at a fixed location of an End User which are conveyed and routed through any switching stages (or equivalent) up to

a point of interconnection taking place at the primary, tandem, or double-tandem exchange (or equivalent) associated with the Fixed Access at which the voice call was originated. FNA is provided by means of PSTN, ISDN BRA, ISDN FRA or ISDN PRA.

“Fibre to the Cabinet” or “FTTC” means fibre to the cabinet which is a variant of the FTTN access network architecture where the Node used to house active equipment is the street cabinet;

“Fibre to the Home” or “FTTH” means an access network architecture where fibre optic cable is used to connect the End User premises to the ODF in an Exchange;

“Fibre to the Node” or “FTTN” means an access network architecture where fibre optic cable is used to connect a Node in the local access network to the ODF in an Exchange;

“Fixed Narrowband Access FACO” or “FNA FACO” means Fixed Narrowband Access HL-FACO and Fixed Narrowband Access LL-FACO;

“Fixed Narrowband Access HL-FACO” means fixed access for the provision of voice telephony services by means of fixed narrowband access (provided by means of ISDN FRA or ISDN PRA) together with fixed voice call origination being calls originated at a fixed location of an End User which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange (or equivalent) associated with the fixed access;

“Fixed Narrowband Access LL-FACO” means fixed access for the provision of voice telephony services by means of fixed narrowband access (provided by means of PSTN or ISDN BRA) together with fixed voice call origination being calls originated at a fixed location of an End User which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange (or equivalent) associated with the fixed access;

“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 or replaced with equivalent effect;

“FTTC-based VUA/Bitstream” means VUA or Bitstream that is based on FTTC, and includes Exchange launched VUA/Bitstream;

“FTTH-based VUA/Bitstream” means VUA or Bitstream that is based on FTTH;

“Hosted PBX” means a type of Managed VoIP which involves the provision of fixed voice calls over an IP access path on multiple channels and which is generally provided to the End User over CATV, Exchange launched Bitstream or FTTx networks. Hosted PBX requires suitable customer premises equipment (IP handsets or equivalent) in the End User premises while the PBX functionality is hosted in the network by the service provider;

“IP” means internet protocol;

“ISDN” means Integrated Services Digital Network;

“ISDN BRA” means ISDN basic rate access;

“ISDN BRA Sunset Period” means the Sunset Period in respect of ISDN BRA; new orders for the relevant products, services and facilities to be processed for a period of at least 2 months from the Effective Date; access to all lines to be maintained for at least a period of 12 months from the Effective Date.

“ISDN FRA” means ISDN fractional primary rate access;

“ISDN PRA” means ISDN primary rate access;

“Managed VoB” means a type of Managed VoIP which involves the provision of fixed voice calls over an IP access path on single or multiple channels and which is generally provided to the End User, directly or indirectly, over NG Broadband. A Managed VoB service includes quality of service parameters which enable prioritization of voice in congestion situations, thereby delivering an equivalent quality to circuit switched voice;

“Managed VoIP” means a voice service provided to an End User over an IP access path either directly on its own network, or indirectly, by renting the IP Access Path from a third party. A Managed VoIP service includes quality of service parameters which enable prioritization of voice in congestion situations, thereby delivering an equivalent quality to circuit switched voice;

“Ministerial Policy Directions” for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004;

“Next Generation” or **“NG”** refers to modern equipment and infrastructure such as IP based packet switched networks;

“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 and other access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access networks such as FTTC-based VUA/Bitstream, and FTTH-based VUA/Bitstream;

“NG Broadband” means broadband provided by means of NGA or CATV;

“Node” means any location or concentration point in the access network (excluding termination points at End Users' premises) which houses equipment for the purpose of providing services to End Users;

“Other Authorised Operator(s)” or “OAO(s)” means an Undertaking that is not Eircom, providing or intending to provide an ECN or an ECS pursuant to Regulation 4 of the Authorisation Regulations;

“PSTN” means Public Switched Telephone Network;

“PSTN and ISDN FRA/PRA Sunset Period” means the Sunset Period in respect of PSTN and ISDN FRA/PRA services; new orders for the relevant products, services and facilities to be processed for a period of at least 9 months from the Effective Date; access to all lines to be maintained for at least 18 months from the Effective Date;

“Related company” or “related companies” shall have the same meaning as under Companies Act 2014;

“(the) Relevant RFTS Markets” means the markets described in Section 4 of this Decision Instrument;

“(the) Relevant FACO Markets” means the markets described in Section 4 of the Decision Instrument of ComReg Decision D05/15;

“(the) SMP Guidelines” means the European Commission guidelines of 7 May 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01) (OJ C159, 7.5.2018, p.1);

“Single Billing - Wholesale Line Rental” or “SB-WLR” means a wholesale service comprised of both FNA FVCO and WLR;

“SIP Trunking” means a type of Managed VoIP which involves the provision of fixed voice calls over an IP Access Path on multiple channels and which is generally provided to the End User over CATV, Exchange launched Bitstream or FTTx networks. SIP Trunking requires a suitable customer premises equipment (IP PBX or equivalent) in the End User premises;

“Subsidiary” or “subsidiaries” shall have the same meaning as under Companies Act 2014;

“Sunset Period(s)” means a period of time after the Effective Date prior to the withdrawal of obligations becoming effective, by way of notice to affected parties.

“(the) Three Criteria Test” means the test set out in the 2020 Recommendation and Article 67 of the EECC used to identify markets other than those set out in the Annex to the 2020 Recommendation as being susceptible to *ex ante* regulation;

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

“VDSL” means a very-high-bit-rate digital subscriber line;

“Virtual Unbundled Access” or “VUA” shall have the same meaning as

under Section 2 of the Decision Instrument at Appendix 20 of ComReg Decision D10/18, as may be amended from time to time;

“**Wholesale Central Access**” or “**WCA**” shall have the same meaning as under Section 2 of the Decision Instrument at Appendix 21 of ComReg Decision D10/18, as may be amended from time to time;

“**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, described in the document entitled “Single Billing through Wholesale Line Rental Product Description” (version 3, dated 12 June 2017) as may be amended from time to time and published on Eircom’s wholesale website;

“(the) **2020 Recommendation**” means the European Commission Recommendation of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument applies to Eircom in respect of activities falling within the scope of the Relevant RFTS Markets defined in Section 4 of this Decision Instrument and the Relevant FACO Markets defined in Section 4 of the Decision Instrument of ComReg Decision D05/15.
- 3.2 This Decision Instrument is binding upon Eircom and its subsidiaries and any related companies, and any Undertaking which owns or controls Eircom, and its successors, affiliates and assigns and all shall comply with it in all respects.

4 RELEVANT RFTS MARKETS

- 4.1 For the purposes of this Decision Instrument, ComReg identifies three separate RFTS markets as more particularly defined in Section 4.2 of this Decision Instrument (referred to in this Decision Instrument singularly as the Relevant RFTS Market and together as the Relevant RFTS Markets).
- 4.2 The Relevant RFTS Markets are the markets in the State for:
 - (i) Standalone Low-Level RFTS including RFTS over PSTN and ISDN BRA and any Managed VoB delivered over NG Broadband and mobile telephony services on a standalone basis (“**Market 1a**”);
 - (ii) Bundled Low-Level RFTS including RFTS over PSTN and ISDN BRA and Managed VoB delivered over (and with) NG Broadband and mobile telephony services on a bundled basis together with any of broadband, television or mobile telephony services (“**Market 1b**”); and

- (iii) High-Level RFTS including RFTS over ISDN FRA and PRA and any Hosted PBX or SIP Trunking forms of Managed VoIP delivered over NG Broadband, on a standalone basis or on a bundled together with any of broadband, television or mobile telephony services (“**Market 1c**”).

5 REMOVAL OF REGULATION

- 5.1 ComReg hereby finds that the Three Criteria Test is not met in respect of Markets 1a, 1b or 1c so that Markets 1a, 1b or 1c are not susceptible to *ex ante* regulation.
- 5.2 Accordingly, subject only to Section 6 of this Decision Instrument, all obligations imposed on Eircom pursuant to Regulation 8 of the Access Regulations in respect of the RFTS Markets are hereby withdrawn and the following Decision Instruments (to the extent still extant) are hereby withdrawn at the Effective Date:
 - (i) the Decision Instruments contained in Appendices 6, 7 and 8 of ComReg Decision D12/14;
 - (ii) save as provided for in Section 6 of this Decision Instrument, the Decision Instrument contained in Appendix H of ComReg D05/15;
 - (iii) save as provided for in Section 6 of this Decision Instrument, the Decision Instrument contained in Annex 3 of ComReg Decision D03/16;
 - (iv) save as provided for in Section 6 of this Decision Instrument, section 4.4 of the Decision Instrument contained in Annex 1 of ComReg Decision D11/18; and
 - (v) save as provided for in Section 6 of this Decision Instrument, section 4.5 of the Decision Instrument contained in Annex 2 of ComReg Decision D11/18.

6 SUNSET PROVISIONS

- 6.1 There shall be two Sunset Periods of differing lengths for the Relevant FACO Markets, dependent on the product as follows:
 - (i) the PSTN and ISDN FRA/PRA Sunset Period; and
 - (ii) the ISDN BRA Sunset Period.

- 6.2 Eircom shall not withdraw Access to any products, services, facilities or Associated Facilities in the Relevant FACO Markets to which Access was previously granted on or before the Effective Date, pursuant to or consistent with an obligation imposed by the Decision Instrument contained in Appendix H to ComReg Decision D05/15 (as amended by the Decision Instruments contained in Annex 3 of ComReg Decision D03/16 and Annexes 1 and 2 of ComReg Decision D11/18), or in respect of which Access has been sought on or prior to the Effective Date of this Decision. In respect of the PSTN and ISDN FRA/PRA Sunset Period, this obligation is withdrawn with effect from 18 months from the Effective Date. In respect of the ISDN BRA Sunset Period, this obligation is withdrawn with effect from 12 months from the Effective Date.
- 6.3 In respect of the PSTN and ISDN FRA/PRA Sunset Period, the obligations imposed by Section 7 of the Decision Instrument to ComReg Decision D05/15 shall apply to, and continue in force for a period of nine months from the Effective Date of this Decision Instrument in respect of requests for the provision of Access to any existing products, services, facilities or Associated Facilities in respect of FNA FACO in the Relevant FACO Markets including Associated Facilities.
- 6.4 In respect of the ISDN BRA Sunset Period, the obligations imposed by Section 7 of the Decision Instrument to ComReg Decision D05/15 shall apply to, and continue in force for a period of two months from the Effective Date of this Decision Instrument in respect of requests for the provision of Access to any existing products, services, facilities or Associated Facilities in respect of FNA FACO in the Relevant FACO Markets including Associated Facilities.
- 6.5 Access to any products, services, facilities or Associated Facilities in the Relevant FACO Markets provided by Eircom to any Undertaking pursuant to the obligations contained in Section 6.2, 6.3 and 6.4 above, shall be provided at prices no higher than those prevailing for such products, services, facilities or Associated Facilities on the Effective Date, in respect of the PSTN and ISDN FRA/PRA Sunset Period, for the duration of the 18 month period and the nine month period respectively and in respect of the ISDN BRA Sunset Period, for the duration of the 12 month period and the two month period respectively.

- 6.6 During the PSTN and ISDN FRA/PRA Sunset Period, in respect of any line migrated from SB-WLR or POTS-based NGA (VUA or Bitstream), Eircom shall provide an escalation process (either manual or automatic) enabling it to rollback the line to the original SB-WLR or POTS-based NGA service within one business day of the Access Seeker's request, where the un-jumpering task remains outstanding. The escalation process must not require un-jumpering of the original line to take place followed by subsequent re-jumpering prior to restoring SB-WLR or POTS-based NGA Service. While the jumper is in place, Eircom shall provide the ability to electronically restore the original SB-WLR or POTS-based NGA service. This obligation applies within five months of the Effective Date of this Decision for the period of the PSTN and ISDN FRA/PRA Sunset Period.

7 MAINTENANCE OF OBLIGATIONS

- 7.1 Save as provided for at Section 5.2 of this Decision Instrument, 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 the same.
- 7.2 For the avoidance of doubt, to the extent that there is any conflict between a Decision Instrument dated prior to the Effective Date and Eircom's obligations set out in this Decision Instrument, the latter shall prevail.
- 7.3 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.

8 STATUTORY POWERS NOT AFFECTED

- 8.1 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) from time to time as the occasion requires.

9 PUBLICATION AND NOTIFICATION

- 9.1 This Decision Instrument shall be published on ComReg's website, www.comreg.ie and notified to Eircom.

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.

GARRETT BLANEY

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE XX DAY OF XXXX 2022

Annex: 2 Consultation Question

A 2.1 In the 2021 Draft Decision, ComReg proposed to deregulate and remove all existing regulation in the RFTS markets and to partially deregulate the FACO markets. The proposals in the 2021 Draft Decision meant that regulation would be maintained in the so-called 'Regional FACO Markets' only. The Withdrawal Decision requires ComReg to withdraw and to re-notify a draft decision. Having regard to the Withdrawal Decision, following further analysis, ComReg's overall conclusion is that, in the absence of evidence to the contrary, *ex ante* regulation of the Relevant RFTS Markets or the upstream FACO Markets is not warranted.

A 2.2 The Consultation Question is therefore as follows:

Q. 1. Having regard to the Withdrawal Decision and ComReg's analysis in this Consultation, do you agree with the proposals set out in this Consultation? Please provide evidence in support of your response where appropriate.

Annex: 3 Correspondence to EC on Withdrawal of Draft Measure



14 February 2022

Mr Thierry Breton
Member of the Commission
DG CONNECT
Rue de la Loi 200
1049 Brussels
Belgium

BY EMAIL

Withdrawal of draft measures – Cases IE/2021/2332-2333: markets for retail fixed telephony services and wholesale fixed access and call origination in Ireland

Dear Commissioner Breton,

I refer to the draft measure notified in respect of the markets for retail fixed telephony services and wholesale fixed access and call origination in Ireland. This draft measure was notified by ComReg to the Commission on 18 June 2021 and registered under case numbers IE/2021/2332-2333 (the 'Draft Measure').

The European Commission issued a decision on 17 September 2021 (the 'Decision') requiring (at Article 1) that ComReg withdraw the Draft Measure for the reasons specified in the Decision. Please be advised accordingly that, by means of this letter, ComReg withdraws the Draft Measure.

Please further be advised that, having regard to the Commission's Decision, ComReg will today publish a new public consultation in respect of draft measures pertaining to its analysis of these markets. In the interests of transparency, a copy of this letter will be published in that consultation. Upon conclusion of the consultation, ComReg intends to promptly notify the draft measures to the Commission pursuant to Article 32 of the EECC.

Should you or your colleagues have any queries in relation to the foregoing, please feel free to contact either myself or my colleagues Eric Tomkins (eric.tomkins@comreg.ie) or Dave O'Connell (dave.oconnell@comreg.ie), who will be pleased to assist.

Yours sincerely,

Garrett Blaney
Commissioner

cc: Ms. Rita Wezenbeek, Ms. Kamila Kloc, European Commission

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