



Commission for
Communications Regulation

Response to Consultation & Consultation on Draft Decision

Market Analysis: – Retail Fixed Narrowband Access Markets

(Response to Consultation 06/39 and Consultation
on Draft Decision)

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All responses to the draft decision should be clearly marked:-
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Contents

1	Executive Summary	3
	INTRODUCTION	3
	TIMEFRAME	4
	MARKET DEFINITION	4
	MARKET ANALYSIS	4
	REMEDIES	4
2	Introduction	8
	OBJECTIVES UNDER THE COMMUNICATIONS REGULATION ACT, 2002	8
	REGULATORY FRAMEWORK	8
	COMREG PROCEDURE	9
	LIAISON WITH COMPETITION AUTHORITY	10
	STRUCTURE OF THIS DOCUMENT	10
3	Relevant Market Definition	11
	SCOPE	11
	IS THERE A SINGLE MARKET FOR FIXED ACCESS AND FIXED CALLS?	11
	ARE FIXED ACCESS AND MOBILE ACCESS IN THE SAME RELEVANT MARKET?	17
	ARE ALL FORMS OF FIXED NARROWBAND ACCESS IN THE SAME MARKET?	25
	ARE THERE SEPARATE RELEVANT MARKETS FOR RESIDENTIAL AND NON-RESIDENTIAL CUSTOMERS?	34
	WHAT IS THE GEOGRAPHIC SCOPE OF THE MARKET?	36
	CONCLUSIONS ON MARKET DEFINITION	42
4	Relevant Market Analysis	45
	INTRODUCTION	45
	BACKGROUND	45
	MARKET STRUCTURE	46
	BARRIERS TO ENTRY AND POTENTIAL COMPETITION	52
	COUNTERVAILING BUYER POWER	53
5	Proposed Designation of Undertakings with Significant Market Power	56
6	Market Remedies	57
	INTRODUCTION	57
	COMPETITION PROBLEMS IN THE RETAIL NARROWBAND ACCESS MARKETS	57
	PRINCIPLES IN SELECTING REMEDIES	64
	SUFFICIENCY OF REGULATION IN RELATED MARKETS	65
	REGULATORY CONTROLS AT THE WHOLESALE LEVEL	67
	(A) CONTINUING NEED FOR WHOLESALE PRODUCTS	68
	(B) REQUIREMENT FOR REGULATORY INTERVENTION IN PRODUCT DEVELOPMENT AND IMPLEMENTATION	69
	(C) SUPPORTING REMEDIES FOR CPS AND SB-WLR	75
	REGULATORY CONTROLS AT THE RETAIL LEVEL	91
7	Regulatory Impact Assessment (RIA) – Retail Fixed Narrowband Access	104
	THE RIA	105
	I WHOLESALE REMEDIES	106
	II RETAIL REMEDIES	110
	Annex A: [Draft] Decision Instrument	119
	Annex B: Glossary of Terms	133
	Annex C – Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC	136

Annex D: Competition Authority Letter 141

Annex E: Other SMP Criteria 143

1 Executive Summary

Introduction

- 1.1 As part of ComReg's review of the fixed retail access and calls markets (markets 1-6 of the Relevant Markets Recommendation¹), ComReg considered the markets for retail narrowband (residential and non-residential) access at a fixed location². On 01 September 2004, ComReg published a national consultation on the markets for retail fixed narrowband access (ComReg Document 04/94) and on the 22 March 2005, ComReg notified to the European Commission and published the response to consultation (ComReg Document 05/25). Notified measures were accepted by the Commission.³
- 1.2 ComReg determined that before issuing a Final Decision, it was appropriate to review the findings of the market analysis in light of updated data and to take account of any market developments since the Notification. This allowed for consideration of changes in the markets, from the time of the initial review.
- 1.3 In the initial Recommendation, a distinction was made between residential and non-residential access. It is of note that the European Commission has reviewed this as part of the draft revised Recommendation⁴ where, based on the experience of notifications, they advocated an approach of defining the markets in terms of access products. However, it should be recognised that this decision is still subject to finalisation, and the Recommendation which is currently in force differentiates access by user type.
- 1.4 On 17 August 2006, ComReg issued a national consultation on its market review of the retail fixed narrowband access markets (ComReg Document 06/39). ComReg received detailed submissions from the four respondents listed below by the close of the consultation period:
 - alto,
 - BT Ireland,
 - eircom, and
 - Vodafone.
- 1.5 ComReg would like to thank all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its conclusions regarding the market review process. Please note that this document should be read in conjunction with the consultation paper on the retail narrowband access markets (ComReg Document 06/39), which sets out ComReg's initial proposals in detail. In some instances the final proposals differ from those presented in the consultation paper arising from further consideration of the issues and in particular the responses to consultation. ComReg's reasoning for such changes are set out in full in the relevant sections of this document.

¹ Retail Access Market Review – National Consultation (04/94) and Notification (05/25) & Retail Calls Market Review - National Consultation (04/95) and Notification (05/26).

² Markets 1 and 2 of the Relevant Markets Recommendation.

³ Comments pursuant to Article 7(3) of Directive 2002/21/EC. Brussels, 25-04-2005. Case IE/2005/0158-159.

⁴ Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets. Brussels, 28 June 2006 SEC (2006) 837.

Timeframe

1.6 The timeframe of this review is two years from the date of publication of the Decision.

Market definition

1.7 ComReg proposes to define two access markets:

- A national market for **lower level retail narrowband access**, including access via analogue exchange lines and ISDN BRA⁵ carried over copper, cable or FWA⁶.
- A national market for **higher level retail narrowband access**, including access via ISDN FRA⁷ and PRA⁸.

1.8 ComReg is of the view that this market differentiation is justified since there is limited demand and supply-side substitution between lower level and higher level narrowband access. This arises from differing functional characteristics along with the absence of a common pricing constraint. In addition, ComReg considers that there are different conditions of supply present in the two markets.

Market analysis

1.9 In its analysis of the market, ComReg found that eircom's market share was just over 83% in the lower level access market and approximately 66% in the higher level access market at the end of December 2006.

1.10 In addition to market share, ComReg considered other characteristics of the markets including barriers to entry and countervailing buyer power. Arising from this analysis, ComReg concluded that there is little likelihood of these market shares diminishing significantly over the lifetime of this review.

1.11 ComReg proposes to designate eircom as having SMP⁹ in the market for lower level retail narrowband access and in the market for higher level retail narrowband access.

Remedies

1.12 ComReg identified potential competition problems in the retail fixed narrowband access markets associated with single market dominance i.e. vertical leveraging/maintenance of a dominant position in these markets and horizontal leveraging of dominance in these markets into related markets (e.g. retail calls, broadband, LLU¹⁰). As shown in the market analysis section summarised above, ComReg considers that eircom's dominance of the retail narrowband access markets persists even in the presence of wholesale regulatory measures and regulation in adjacent markets, such as LLU. Following on from this, ComReg proposes that remedies in the retail narrowband access markets are required to address these problems. These remedies would be imposed at both the wholesale and retail levels as justified below.

1.13 A finding of SMP in the retail fixed narrowband access markets obliges ComReg to mandate the SMP operator to enable their subscribers to access the services of any

⁵ Integrated Services Digital Network Basic Rate Access. See Annex B for a full glossary of terms.

⁶ Fixed Wireless Access.

⁷ Integrated Services Digital Network Fractional Rate Access.

⁸ Integrated Services Digital Network Primary Rate Access.

⁹ Significant Market Power.

¹⁰ Local Loop Unbundling.

other interconnected provider of telephone services. In addition, the Access Regulations and the Universal Service Regulations provide ComReg with a number of remedies it can apply given its finding of eircom's SMP in these markets.

1.14 In the previous review, ComReg imposed a number of wholesale remedies mandating the SMP operator to enable subscribers to access the telephone services of OAOs and to ensure that the terms and conditions of these wholesale mandated products (e.g. SB-WLR¹¹, CPS¹²) permitted OAOs to compete effectively with eircom in the provision of retail narrowband access services. In light of ComReg's finding that there continues to be a lack of effective competition in these markets and its assessment of potential competition problems which may arise, it is proposed that the following wholesale remedies are warranted for both the higher and lower level retail narrowband access markets:

WHOLESALE OBLIGATIONS

- Mandate an obligation to provide SB-WLR and CPS. These are imposed under Regulation 16(1) of the Universal Service Regulations for CPS and under Regulation 13 of the Access Regulations for SB-WLR.¹³
- Impose supporting obligations to support the implementation and development of the SB-WLR and CPS products. This would be done under the Access Regulations and proposes that the SMP operator should be obliged to:

Access (SB-WLR)

- Permit access to relevant wholesale products.
- Grant open access to relevant information, interfaces, protocols and key technologies and be required to provide OSS¹⁴ or similar software to ensure fair competition in SB-WLR and adequate granularity of information.
- Not withdraw access to facilities already granted, except where ComReg has approved this withdrawal.

Non-discrimination (SB-WLR and CPS)

- Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and to provide services and information to others under the same conditions and of the same quality as it would provide for its own services or those of its subsidiaries or partners.
- Ensure that the CPS and SB-WLR products are fit-for-purpose and that SLA¹⁵ development should be supported with a transparency obligation.

Transparency (SB-WLR and CPS)

- Comply with a general transparency obligation to support other obligations.
- Maintain all current product documentation (including reference offers) for the SB-WLR and CPS product sets and any new offerings.

¹¹ Single Billing Wholesale Line Rental.

¹² Carrier Pre Select.

¹³ These provisions transposed Article 19(1) of the Universal Service Directive and Article 12 of the Access Directive respectively.

¹⁴ Operational Support Systems.

¹⁵ Service Level Agreements.

- In circumstances where a retail-minus price control is in place, obligations in relation to the pre-notification and pre-publication of changes to wholesale prices are laid down.

Price control (SB-WLR)

- Continue with the application of the retail-minus price control for SB-WLR at this time, pending a further detailed consultation on the margin available to other operators over the period of the review.

Cost Accounting and Accounting separation

- Maintain and suitably develop existing systems, pending the outcome of further consultation on accounting systems and associated methodologies for their support.

RETAIL OBLIGATIONS

1.15 In relation to regulatory controls on retail services, Article 17(1) of the Universal Service Directive specifies that where following a market analysis a NRA¹⁶ determines that a given retail market is not effectively competitive and where it concludes that obligations imposed under the Access Directive or Article 19 of the Universal Service Directive (for example, in this instance SB-WLR, CPS¹⁷) would not result in the achievement of the objectives laid down in Article 8 of the Framework Directive, NRAs shall impose appropriate regulatory obligations on undertakings identified as having SMP on the given retail market.¹⁸ Arising from ComReg's finding that there continues to be a lack of effective competition in the retail narrowband access markets and that potential competition problems are likely to persist even in the presence of the aforementioned wholesale obligations, ComReg proposes to impose the following retail obligations:

Price control

- Maintain current price cap order pending outcome of parallel review. The implementation of such a review will be subject to a further consultation.

Transparency

- Remove obligation to publish changes to prices and the terms and conditions in advance. The SMP operator would still be required to publish modifications in named sources¹⁹ when changes come into effect.
- The SMP operator should notify ComReg five working days before changes come into effect (currently this is done on a voluntary basis).

Cost accounting systems

- The existing level should be maintained and developed, pending the outcome of further consultation on accounting systems and associated methodologies for their support.

Obligation not to unreasonably bundle

- The SMP operator should be required not to unreasonably bundle. Two specific instances where bundling is likely to be considered unreasonable are given, which

¹⁶ National Regulatory Authority.

¹⁷ These are imposed by ComReg under Regulation 16(1) of the Universal Service Regulations for CPS and under Regulation 13 of the Access Regulations for SB-WLR.

¹⁸ This was transposed under Regulation 14(1) of the Universal Service Regulations

¹⁹ eircom's public offices and eircom's website.

are that: (i) eircom will be required to offer all retail narrowband access services as stand-alone products; and (ii) eircom should not price a retail bundle, which includes retail narrowband access and other products which may not be subject to price regulation, at a price which is below the costs of the fixed wholesale regulated elements. This regulation would be applied on an *ex post* rather than an *ex ante* basis except for bundles with a broadband component which will continue to be analysed on an *ex ante* basis²⁰.

- It should be emphasised here that ComReg recognises that bundling may have positive benefits for consumers and that regulatory intervention would only be made where it is considered that bundling is being utilised by the SMP operator to use its market power in an anti-competitive manner.

1.16 ComReg believes the remedies set out in this market review support the objectives outlined in the Communications Regulation Act 2002 as to how ComReg should exercise its functions (section 2.1). The remedies proposed aim to address market failures, to protect consumers against the exercise of market power and to promote competition in the markets for higher and lower level retail narrowband access.

²⁰ In line with Retail minus wholesale price control for the WBA market, D01/06, Document 06/01.

2 Introduction

Objectives under the Communications Regulation Act, 2002

- 2.1 Section 12 of the Communications Regulation Act, 2002 outlines ComReg's objectives in exercising its functions. In relation to the provision of electronic communications networks, electronic communications services and associated facilities these objectives are:
- (i) to promote competition,
 - (ii) to contribute to the development of the internal market, and
 - (iii) to promote the interests of users within the European Union.
- 2.2 Measures imposed as a result of this consultation will aim to achieve these objectives. The interests of users can be promoted by protecting them, among other things, from excessive pricing for retail narrowband access services in Ireland. The focus on remedying current and potential competition problems will promote effective competition leading to operator efficiency thereby providing choice, price and quality to end users.

Regulatory Framework

- 2.3 Four sets of Regulations,²¹ which transpose into Irish law four European Community directives on electronic communications and services,²² entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the Privacy and Electronic Communications Directive, was transposed into Irish law on 6 November 2003.²³
- 2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in accordance with the market definition procedure outlined in the Framework Regulations.²⁴ Further, the Framework Regulations require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market.

²¹ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the Framework Regulations"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the Authorisation Regulations"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the Access Regulations"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the Universal Service Regulations").

²² The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the Framework Directive"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the Specific Directives"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the Authorisation Directive"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the Access Directive"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the Universal Service Directive"), OJ 2002 L 108/51; and Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the Privacy and Electronic Communications Directive"), OJ 2002 L 201/37.

²³ European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 S.I. 535 of 2003.

²⁴ Framework Regulations 26.

- 2.5 As part of ComReg's review of the retail access and calls markets (markets 1-6 of the Relevant Markets Recommendation),²⁵ ComReg considered retail fixed narrowband access. On 01 September 2004, ComReg published a national consultation on the markets for retail fixed narrowband access (ComReg Doc 04/94), and on the 22 March 2005 ComReg notified to the European Commission and published the response to consultation (ComReg Document 05/25). Notified measures were accepted by the Commission.²⁶
- 2.6 ComReg determined that before issuing a Final Decision, it was appropriate to review the findings of the market analysis in light of updated data and to take account of any market developments since the Notification. This allowed for consideration of changes in the markets, from the time of the initial review.
- 2.7 In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Markets Recommendation ["the Recommendation"] and the European Commission's Guidelines on Market Analysis and Significant Market Power ("the Guidelines"). It should be noted that the European Commission has indicated in its draft revised recommendation,²⁷ that the retail narrowband access markets remain susceptible to *ex ante* regulation and its view is informed by eminent economists in the electronic communications sector²⁸.
- 2.8 On 17 August 2006, ComReg issued a national consultation on its market review of the retail fixed narrowband access markets (ComReg Document 06/39). ComReg received detailed submissions from the four respondents listed below by the close of the consultation period:
- alto,
 - BT Ireland,
 - eircom, and
 - Vodafone.

ComReg procedure

- 2.9 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services (ECNs²⁹ and ECSs³⁰) via a request for information ("the Data Direction"), and from consumer surveys commissioned by ComReg, in order to carry out its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of the Guidelines.
- 2.10 The results of ComReg's consumer surveys are referred to throughout this report. In particular, ComReg commissioned market research agencies to carry out both residential and business consumer research regarding usage of payphone, fixed and mobile services.

²⁵ Retail Access Market Review – National Consultation (Document no. 04/94) and Notification (Document no. 05/25) & Retail Calls Market Review - National Consultation (Document no. 04/95) and Notification (Document no. 05/26).

²⁶ Comments pursuant to Article 7(3) of Directive 2002/21/EC. Brussels, 25-04-2005.

²⁷ Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets. Brussels, 28 June 2006, SEC (2006) 837, page 25.

²⁸ As set out in Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006.

²⁹ Electronic Communications Networks.

³⁰ Electronic Communications Services.

2.11 The timeframe of this review is approximately two years from the date of publication of the Decision. In accordance with the SMP Guidelines, ComReg must conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions.³¹ Thus, the market definition and SMP analysis takes into consideration current market conditions and any potential developments over the next two years.

Liaison with Competition Authority

2.12 As noted above, there is a requirement on ComReg under Regulation 26 and 27 of the Framework Regulations to carry out an analysis of a relevant market which has been defined. Regulation 27 (1) of the Framework Regulations also requires that, as soon as possible after ComReg defines a relevant market, ComReg shall carry out an analysis of such market, in accordance, where appropriate, with an agreement with the Competition Authority under section 34 of the Competition Act 2002.¹² In December 2002, such a co-operation agreement was signed between ComReg and the Competition Authority for a period of three years, which upon completion was automatically extended. Annex D includes the Competition Authority's response to ComReg's finding on these markets.

Structure of this document

2.13 The remainder of this consultation document is structured as follows:

- **Section 3** presents ComReg's conclusions on the definition of the markets for retail fixed narrowband access. This section consists of a review of the market definition procedure and its scope, as well as demand and supply-side substitutability assessments at the wholesale and retail level;
- **Section 4** presents ComReg's market analysis for the retail narrowband access markets and ComReg's view on whether these markets are effectively competitive;
- **Section 5** presents ComReg's view on those undertakings with significant market power in these markets;
- **Section 6** provides a discussion of competition problems. The general principles associated with remedies are outlined. In addition, ComReg proposes which remedies should be implemented;
- **Section 7** outlines the regulatory impact assessment conducted in relation to the proposed regulatory intervention relating to these markets;
- **Section 8** sets out the procedure for submitting comments on the Draft Decision;
- **Annex A** sets out the Draft Decision Instrument;
- **Annex B** sets out a glossary of terms used in this document;
- **Annex C** contains notification of the draft measures;
- **Annex D** reproduces the Competition Authority's letter in relation to ComReg's conclusion on these markets; and
- **Annex E** provides an outline of other SMP criteria.

³¹ *SMP Guidelines*. See paragraph 20.

3 Relevant Market Definition

Scope

- 3.1 In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Markets Recommendation (“the Recommendation”) and the Commission's Guidelines on Market Analysis and Significant Market Power (“the Guidelines”). ComReg adopted the European Commission’s approach³² as its starting point for defining the market, such that the review was concerned with the ability of customers to access the public fixed telephone network.
- 3.2 The market definition exercise considered the following:
- Are fixed access and fixed calls in the same relevant market?
 - Are fixed access and mobile access in the same relevant market?
 - Are all forms of fixed narrowband access in the same market?
 - Are there separate relevant markets for residential and non-residential customers?
 - What is the geographic scope of the market?
- 3.3 ComReg sought respondents’ views on whether they agreed with the findings in relation to the market definition exercise.

Is there a single market for fixed access and fixed calls?

CONSULTATION PROPOSAL

- 3.4 In accordance with the Recommendation, ComReg considered that there were separate markets for telephone services from a fixed location as distinct from the market for narrowband access. This finding was based on a consideration of the following factors: i) service take-up, ii) customer awareness and iii) bundled services.
- 3.5 In the current draft of the Recommendation, the European Commission noted that telephone services were usually supplied as a single package of access and calls. They recognised that while most consumers acquire access and calls from the same provider, others choose an alternative provider (from the one providing access) for some or all of their outgoing calls.³³ The key factor was that if an operator attempted to raise the price of outgoing calls above the competitive level they would face the prospect of end users substituting to an alternative calls provider. There were found to be little or no switching barriers between service providers. This finding is supported by analysis of the Irish market, which identified that there are limited barriers to switching between fixed call providers. The Commission noted that whilst operators that provide retail narrowband access compete in the market for outgoing calls, it does not seem to be the case that calls-only providers would enter the access market in response to a small but significant non-transitory increase in the price of access. On this basis they concluded that it may be possible to identify separate retail markets for access and call services.

³² Commission Recommendation on Relevant Product and Service Markets, in accordance with Directive 2002/21/EC.

³³ ComReg notes that the CPS products facilitate the provision of National Calls (including local calls), International Calls and All Calls.

3.6 Further, it is of note that the expert paper commissioned to advise the Commission on the review of the Recommendation states that although CS³⁴/CPS does not directly affect the competitive conditions for access it creates more competition for outgoing calls.³⁵ Arising from this, in the presence of CS/CPS, access and outgoing calls are not part of a single cluster market and must be analysed separately.

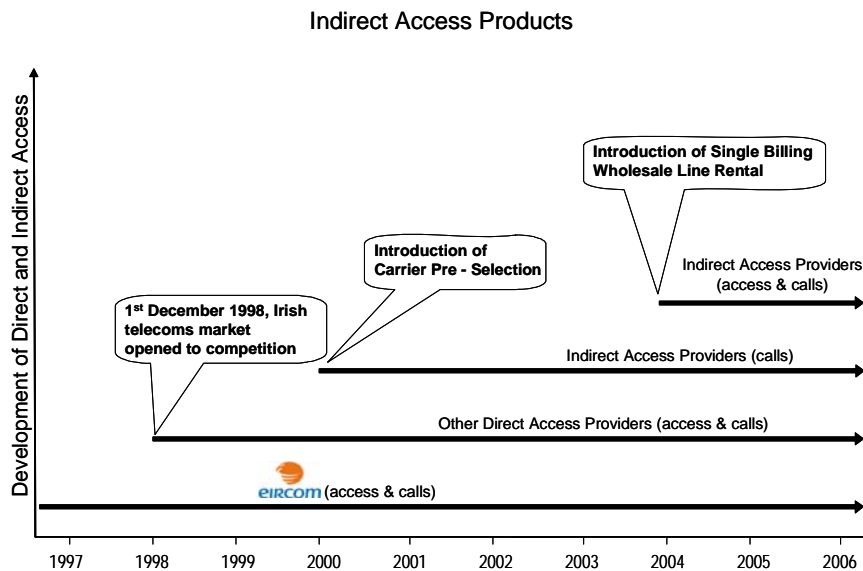
3.7 In the consultation paper, ComReg considered three key questions:

- (a). Does the take-up of a combined calls and access product indicate that calls and access should be considered as part of the same market?
- (b). Does consumer awareness suggest that calls and access are perceived by users to be part of the same market?
- (c). Does the introduction of more complex bundled products render calls and access in the same market?

(a) Service take-up - Take-up of combined calls and access products

3.8 In the consultation paper, ComReg assessed purchasing patterns of access and calls and examined the take-up of SB-WLR (which facilitates the provision of access and calls together) compared to CPS (which facilitates the provision of calls only).

3.9 Figure 3.1 below shows the development of wholesale indirect access products over the period 1997-2006. End users have been able to buy calls separately from access, from an operator other than eircom, since the introduction of CPS in 2000. In 2004, SB-WLR was introduced to allow retail customers to purchase access and calls together with a single bill from eircom's downstream competitors.³⁶



³⁴ Carrier Select.

³⁵ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006. See page 48.

³⁶ The impetus for the introduction of SB-WLR was that it was considered that separate billing for access and calls acted as a constraint on the development of competition since many customers could see the advantage of and wished to receive a single bill for both products from a single operator.

³⁷ Source: ComReg.

3.10 ComReg has assessed the take-up of indirect access products, and examined demand for calls-only CPS compared with demand for a single access and calls package (SB-WLR). Figure 3.2 presents the take-up of CPS and SB-WLR since July 2004:

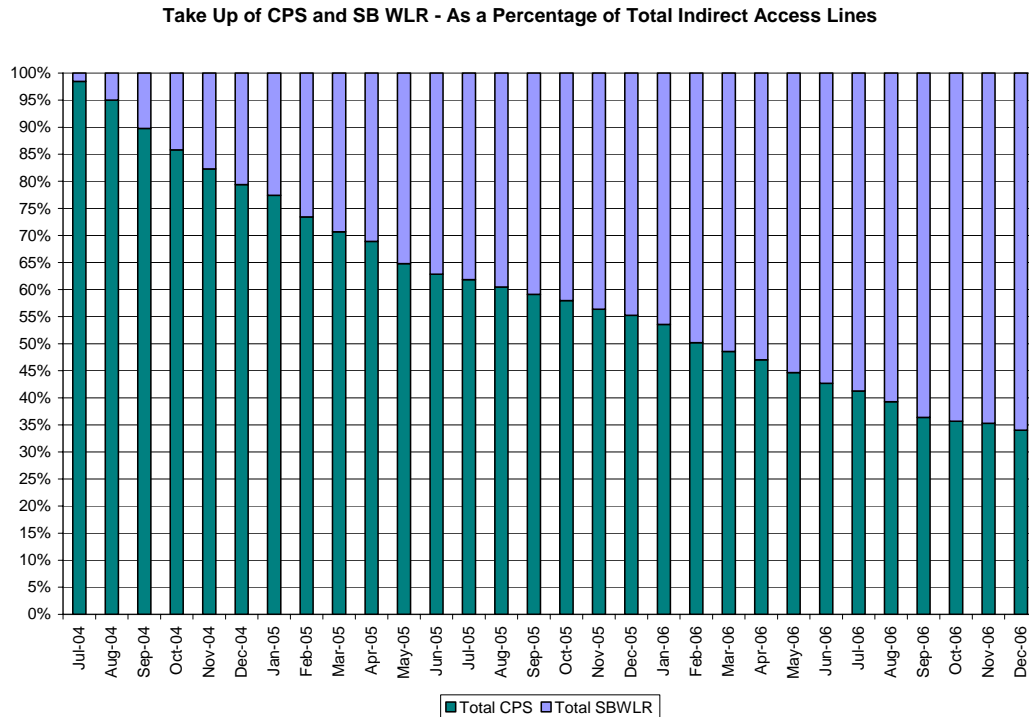


Figure 3.2: Take-up of CPS and SB-WLR as a Percentage of total indirect access³⁸

3.11 Data shows that the total number of indirect access lines increased (representing 17% of all access lines as of the end of December 2006), and SB-WLR represents an increasingly greater proportion. However, CPS still corresponds to 34% of all indirect access (or close to 9% of all lines) which would indicate that although there was migration from CPS-only to SB-WLR, a significant number of CPS-only subscribers remained.³⁹

3.12 Supply conditions also differ between calls-only and calls and access products. At the time of publication of the consultation document, there were fourteen CPS providers and seven providing services via SB-WLR.⁴⁰ Subsequent to the launch of SB-WLR, some operators retained CPS-only offerings and some even began offering CPS only.⁴¹ Furthermore, business survey results indicated that 15% of corporates were provided with fixed line services by eircom and another provider.⁴² It was suggested that this

³⁸ Source: ComReg.

³⁹ It is of note that there was a decrease by nearly 4% in the number of indirect access lines between Q3 2006 and Q4 2006. This decrease was primarily due to Smart Telecom's withdrawal from the residential telephony market in October 2006. However, there has still been annual growth in the number of lines i.e. an increase by 4% in the 12 months to the end of December 2006. See Quarterly Key Data Report Q4 2006, 27 March 2007, ComReg Document 07/17, pages 13-14.

⁴⁰ This does not include resellers.

⁴¹ It should be noted that SB-WLR subscribers also acquire CPS in combination with line rental.

⁴² Millward Brown IMS – SME and Corporate ICT Research, H1 2006.

may indicate that there was still demand for access and calls on their own and therefore that there may be a separate market for calls.

3.13 ComReg concluded from its assessment that while the take-up of single billing products had grown since their introduction, enough customers still buy the products separately and enough operators still offer them separately to render calls and access in separate markets.

(b) Customer awareness

3.14 In June 2005, ComReg published a survey which showed that 75% of SMEs⁴³ and 94% of corporates were aware of single billing.⁴⁴ More recent survey data indicated that switching activity had increased significantly, while only 16% of SMEs had switched provider in 2004, 45% had done so in 2006 (and 40% of corporates had switched in the same time period).⁴⁵

3.15 Awareness among residential users who were not availing of single billing remained relatively high. In response to the question of whether users were aware of single billing the following results were found among residential users:

Are you aware of SB-WLR?		
	Aware	Unaware
Q2 2005	41%	59%
Q1 2005	41%	59%
Q4 2004	50%	50%

Table 3.1: Survey Findings on Awareness of SB-WLR.

3.16 In relation to the above finding it was noted that the survey question was directed at customers who did not use SB-WLR, and that as such as the penetration of SB-WLR increases, the pool of potential respondents decreases.

3.17 Examples of other indicators of awareness among consumers included:

- In Q4 2005, those who did not avail of single billing cited lack of awareness as the main reason for not doing so.⁴⁶
- At Q1 2006, the main reason given by consumers for switching back to eircom was that “it was too much hassle to receive two bills.”⁴⁷
- At Q4 2006, 78% of respondents who used a company other than eircom for residential phone services indicated that they received a single bill for line rental and calls.⁴⁸

3.18 ComReg’s assessment of consumer survey data indicated that, as would be expected, overall awareness of single billing had increased since the time of the initial review.

⁴³ Small and Medium Enterprises.

⁴⁴ Millward Brown IMS, H1 2005.

⁴⁵ Millward Brown IMS, H1 2006. Over half of respondents had switched in the previous 12 months.

⁴⁶ amárach Q4 2005 survey.

⁴⁷ amárach Q1 2006 survey.

⁴⁸ amárach Q4 2006 survey.

(c) Bundled services

- 3.19 A significant development since the time of the initial review was that operators were offering bundles which included a broader range of services than access and calls, with some offering data and TV in the bundle as well.⁴⁹ For example, eircom offers a bundle of line rental and calls, marketed as ‘talktime’. This bundled package was introduced in June 2004, and there were 238,000 packages sold by the end of March 2005⁵⁰, representing less than 20% of all of eircom’s retail narrowband access lines.⁵¹ ComReg noted examples from other countries of plans to introduce bundles which would incorporate voice, data, TV and mobile (i.e. quadruple play).⁵² However, it was found that while the demand for calls and access bundles may have increased this did not automatically preclude a finding of separate markets for calls and access respectively⁵³ since despite the increase in availability and take-up of bundled packages, calls and access were still often purchased separately.
- 3.20 In relation to bundled products, it was noted there was a trend towards offering bundles which were flexibly structured, and could include elements of access, calls, data and broadcast. Many Irish operators offered a package which was customised. However, each element of the bundle (whether access, calls, data or TV) could be, and often was, bought separately. Even if the price of the access and calls elements sold separately were to increase by a small but significant amount, it was not clear that customers would switch in sufficient numbers to a bundled product offering such as to render it a close enough substitute.

VIEWS OF RESPONDENTS

- 3.21 One respondent strongly disagreed with ComReg’s preliminary conclusion that fixed access and fixed calls were in separate markets. They argued that what was relevant for users was the price of access and calls combined and as such products offering bundled access and calls were very close demand-side substitutes for access and calls purchased separately such that, in the absence of significant switching costs, bundled products and offerings where the two elements are acquired separately must all be considered in the same market. The respondent emphasised that, in their view, the key issue was not the actual level of take-up of bundled access and calls products but the extent to which their availability constrained the pricing of access and calls purchased as separate elements. They contended that the very rapid growth in the take-up of SB-WLR demonstrated that switching costs were negligible.
- 3.22 In addition, the respondent asserted that ComReg’s conclusion that access and calls were in separate markets appeared to be largely based on the view that the take-up of single billing products had not reached a level sufficient to allow access and calls to be in the same market. They noted that ComReg had not specified what level of take-up of single billing products would have to be achieved before access and calls could be considered to be part of the same market. Furthermore, they considered the level of growth of SB-WLR since its introduction provided sufficient evidence for access and calls to be considered in the same market.

⁴⁹ Examples include ntl and Magnet.

⁵⁰ eircom group plc, quarterly 1 results to 30 June 2004, 27 August 2004, slide 10 and quarter 3 results to December 2005, slide 6 available at.

http://investorrelations.eircom.net/pdf/3rd_quarter_results_2005_presentation.pdf

⁵¹ ComReg notes that even with the ‘talktime’ package, the call and access elements can be identified so it could be argued that this is not a true bundle.

⁵² Merger between virgin and ntl - see http://en.wikipedia.org/wiki/Fixed_mobile_convergence.

⁵³ This is supported by ECJ/CFI case law e.g. *Airtours v. Commission*.

- 3.23 A second respondent disagreed with the definition of separate access and calls markets and asserted that the extent to which customers can buy lines and calls separately in the fixed market was primarily a construct of existing regulation.
- 3.24 The respondent also argued that ComReg's prospective review should be of a single market for retail communications services or "cluster of services", for example, where end-users purchase bundles of services e.g. triple play packages. They pointed to ComReg's use of the concept of a cluster of services in its market review of wholesale mobile access and call origination (MACO).

CONCLUSION

- 3.25 ComReg has considered its preliminary conclusion in the light of responses, and notes that its view was based on a detailed analysis of the market, including quantitative demand factors such as the level of migration between calls-only and calls and access products, qualitative demand factors as evidenced in consumer surveys, and a consideration of supply-side substitution. ComReg remains of the view that, in Ireland, calls and access products can be, and are, bought and sold separately. ComReg has found no evidence that the availability of a combined calls and access product constrains the pricing of the separate elements. The market assessment suggests that there is not sufficient demand-side or supply-side substitutability between a bundled access and calls product and each element sold separately to render a single access and calls market.
- 3.26 In considering the proposal that a cluster of services should be defined, ComReg notes that the MACO market review referred to a "mobile communications" services market, based on aggregated services i.e. a "cluster" of services comprising mobile access, calls, value added voice services and SMS. In its analysis ComReg found that individual elements were not sufficiently unbundled from other mobile retail services so as to constitute a separate product market. This is not the case in the fixed access markets where the individual components are purchased and provided in isolation. It was also found that the provision of a mobile communications service on an individual basis would not materially affect the identification of a cluster market, at least where it could be demonstrated that the provision of such a service on an individual basis had an insignificant impact on the degree of competition between the provider of the individual service and the provider of the range of mobile services.⁵⁴ Arising from this, the use of the cluster concept as applied to the mobile market is clearly not applicable in the context of a broader retail market for communications as proposed by the respondent.
- 3.27 It is of note that the expert paper commissioned to advise the European Commission on the review of the Recommendation notes that there is not a cluster market which comprises the whole set of fixed narrowband services and notes that access should be treated separately from calls. The authors also state that mobile and fixed broadband access (or service bundles) do not sufficiently constrain fixed narrowband access (or service bundles).⁵⁵ ComReg's analysis of the Irish market is consistent with this finding (as outlined further below). Furthermore, the European Commission were firmly of the view in the draft revised Recommendation (which remains subject to finalisation) that calls and access remained in separate markets.

⁵⁴ See ComReg Document 04/118, Market Analysis: Wholesale Mobile Access and Call Origination (Response to Consultation 04/05), 9th December 2004, pages 18-21.

⁵⁵ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006. See page 38.

3.28 Finally, ComReg notes that at the end of December 2006, CPS-only lines accounted for close to 9% of all lines. SB-WLR (combining CPS and SB-WLR) represented 17%. As such, while the proportion of indirect access paths has grown, it remains a small part of the overall market.

3.29 This suggests that even if the price for calls or access sold separately increased by a small but significant amount it is unlikely that customers would switch in sufficient numbers to fixed calls/access convergent products such as to render that price increase unprofitable.

ComReg concludes in line with the Relevant Markets Recommendation that there are separate markets for telephone services from a fixed location as distinct from the market for narrowband access.

Are fixed access and mobile access in the same relevant market?

CONSULTATION PROPOSAL

3.30 ComReg found that access from fixed locations and access from mobile locations were not in the same market.

3.31 The European Commission noted in the current draft of the Recommendation, that the general division made between services provided at fixed locations and those at non-fixed locations should remain. They stated that despite the move towards converged offerings the distinction remained.

3.32 Since the time of the initial review, there have been no decisions of either the Irish Competition Authority or the European Commission to the effect that there are separate markets for fixed and mobile services. Indeed, recent merger decisions of the European Commission have relied on the market definitions contained in the Recommendation on Relevant Markets⁵⁶. None of the recent decisions appear to have departed from the Vodafone *Airtouch/Mannesmann* decision⁵⁷ where the European Commission, as in previous decisions⁵⁸, confirmed the existence of a distinct product market for the provision of mobile telecommunications services. The Commission found that the key difference between mobile and fixed services was the mobility inherent in all mobile services (i.e. mobile numbers were associated with individuals on the move, rather than a fixed location).⁵⁹

3.33 This position is very much reflected in Ireland, where, for example, the Competition Authority cleared eircom's acquisition of Meteor, and decided that there existed distinct product markets. The decision clearing the acquisition did however note the possibility of an emerging market for fixed/mobile convergent products:

“The Competition Authority believes that the level of substitution has not reached the point where the different products can be considered to be in the same market. There

⁵⁶ European Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁵⁷ Decision of 12 April, 2000 in case COMP/M.1795 - *Vodafone Airtouch/Mannesmann*.

⁵⁸ For example Decision of 13 October, 1999 in case COMP/M.1439 – Telia / Telenor. See paragraph 94.

⁵⁹ See, for example: Commission Decision of 10 July 2002, Case No. COMP/M.2803 – TeliaSonera; Commission Decision of 20 September 2001, Case No. COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia; Commission Decision of 20 September 2001, Case No. COMP/M.1439 – Telia/Telenor and Commission Decision of 12 April 2000, Case No. COMP/M.1795 – Vodafone Airtouch/Mannesmann.

is no evidence that the level of substitution has changed significantly since the most recent determinations by ComReg and the Commission that fixed line and mobile telecommunications services are in separate markets.⁶⁰

- 3.34 While most European NRAs (including those with a higher mobile penetration rate and/or lower fixed penetration rate than Ireland⁶¹) have recognised, in their notifications to the European Commission, some level of fixed mobile substitution, none has concluded that there is a single market for fixed and mobile services.⁶²
- 3.35 In the expert report commissioned to inform the European Commission on the revised Recommendation, it was noted that so far access substitution at home or in the office was limited for a number of reasons: (i) use of access for dial up internet; (ii) multi person households usually prefer to have a generally available fixed handset for all family users; (iii) mobile termination rates are higher than fixed rates and the price of making a call to a mobile phone is generally higher than the price of making a call to a fixed phone - where the cost of calling home or the office is internalised, a mobile connection is less likely to be considered a substitute; (iv) there may be light user tariffs as part of universal service obligations which provide low cost access; and (v) for users with a higher usage intensity, a mobile service bundle is usually more expensive than a fixed service bundle. ComReg supports this analysis and believes that it is relevant in the context of Ireland.
- 3.36 The issue of separate markets for fixed and narrowband access was only of relevance to PSTN and ISDN BRA, as it is extremely unlikely that mobile services could be seen as a substitute for ISDN FRA or PRA within the lifetime of the review.
- 3.37 In the initial consultation, ComReg analysed potential demand and supply-side substitution of fixed and mobile access.⁶³ It is considered that the conclusion on potential supply-side substitution – that a mobile operator would not be likely to switch to the supply of fixed access given a small but significant and non-transitory price increase – remains valid. Supply-side considerations are therefore not revisited in the current review, and the following analysis focuses on potential substitution on the demand side.

Demand-side considerations

- 3.38 In order to extend the analysis of possible demand-side substitution, ComReg examined recent trends in the following areas:
- (a). Trends in penetration,
 - (b). Functionality,
 - (c). Pricing, and
 - (d). Consumer behaviour.

⁶⁰ Merger determination of the Competition Authority (M/05/050). Proposed acquisition of Meteor Mobile Communications Limited by eircom Group plc, 18 November 2005.

⁶¹ Portugal, Sweden, UK, Finland, Spain, Austria and the Netherlands have a higher mobile penetration rates than Ireland. (See Irish Communications Market: Quarterly Key Data - June 2006, ComReg Document 06/28 for a comparative analysis of mobile penetration among Member States.) Belgium, Spain, France, Italy, Austria, Portugal and Finland have lower fixed penetration rates than Ireland. (See E-communications household survey, July 2006 report produced for the European Commission DG Information Society 2004 for a comparative analysis of fixed penetration.)

⁶² See CIRCA - Communication & Information Resource Centre Administrator.htm for Notifications and Comments from individual NRAs in respect of the relevant markets.

⁶³ See Market Analysis: Review of the Narrowband Access Markets (05/25) for analysis.

(a) Trends in penetration

3.39 As of August 2005, mobile penetration per capita was higher than fixed-line penetration per capita.⁶⁴ In Ireland, fixed line penetration is relatively stable while mobile penetration is increasing.⁶⁵ Q4 2006 mobile data shows a penetration rate of 111% or approximately 4.7 million subscribers⁶⁶ while there are 1.34 million PSTN and ISDN lines (business and residential subscribers). It should be noted that the pattern of take-up is that a household would generally have one fixed line, but could have as many mobile lines as there are people in the household, so that the potential penetration rate for mobile is considerably higher than that for fixed lines.

3.40 ComReg does recognise a trend towards ‘mobile only’ households (from 12% in 2003 to 18% in 2005⁶⁷), however, ComReg also takes the view that this is not an indication of the market as a whole but rather substitution is taking place on the periphery, among certain consumer groups.

3.41 According to the amárach survey results, fixed line subscriptions vary according to age profile, geographical region, income group and whether or not respondents own or rent their property. Based on analysis of quarterly ComReg surveys carried out in 2006, the average residential fixed line penetration is 70%.⁶⁸ These surveys also indicate that 15-24 year olds, lower income groups, those in rented accommodation and students, are less likely to have a fixed line in their home. The charts below analyse fixed line penetration by specific demographic sub-sets of the residential market at Q4 2006.

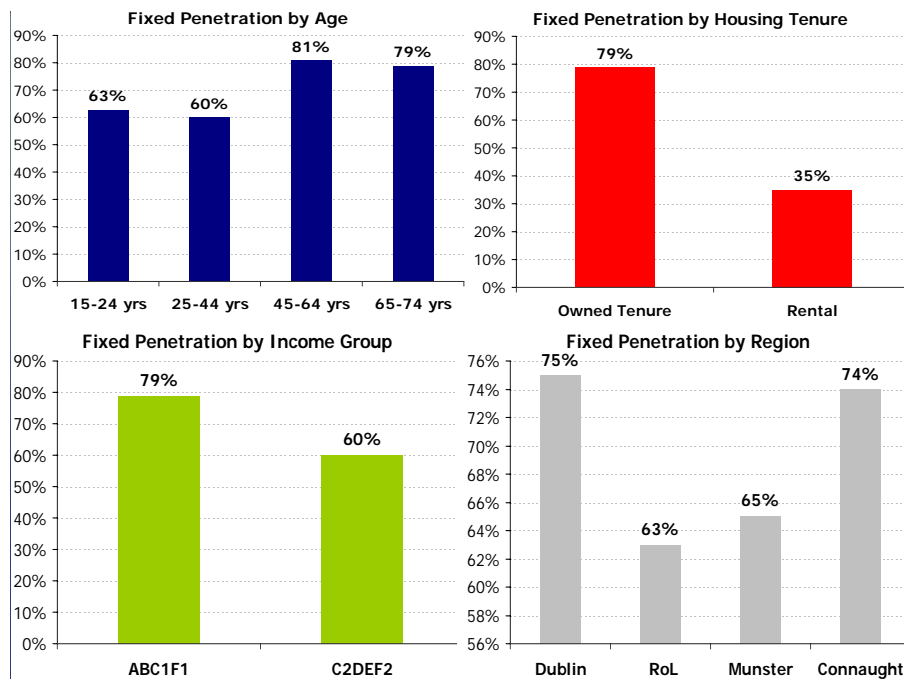


Figure 3.3: Demographics of Fixed Line Ownership⁶⁹

⁶⁴ Source: ComReg.

⁶⁵ Comparative analysis of consumer survey amárach 2005

⁶⁶ ComReg Quarterly Key Data Report, Document 07/17, 27 March 2007, page 27.

⁶⁷ E-communications households survey - TNS survey for the European Commission, 2005. July 2006.

⁶⁸ In response to the question ‘Do you have a residential fixed line phone in your home i.e. not a mobile phone?’ the percentage of respondents who answered ‘Yes’ was 70% in Q1 2006, 69% in Q2 2006, 72% in Q3 2006 and 69% in Q4 2006, amárach, Q1-Q4 2006 surveys.

⁶⁹ amárach, Q4 2006 survey.

- 3.42 Survey results suggest that large households are less likely than small households to replace their landline with mobile connections,⁷⁰ since more mobile phones would be required, thus incurring higher overall costs. This was confirmed by a survey conducted for the EU in 2004, which showed a correlation between single-person households and mobile-only households, but also between single-person households and households with no telephony access.⁷¹
- 3.43 Households most likely to replace their fixed line with mobile connections are small households with relatively high incomes (because they can afford the convenience) and those with relatively low incomes (due to budget constraints). The former are likely to opt for mobile post-paid contracts, and the latter prepaid mobile accounts. This is in line with the expert report, which notes that there is a sub-set of predominantly residential fixed subscribers who are susceptible to access substitution, noting that these customers use fixed access for calls only and reside in single-person households – it was suggested that they may not always take account of the higher mobile termination rates imposed on the parties they receive calls from.

In conclusion, ComReg would note that although there has been an increased tendency towards ‘mobile only’ households, this is not reflective of the market as a whole but rather substitution is taking place on the periphery, among certain consumer groups.⁷² Looking forward, ComReg does not believe that sufficient substitution towards such households as to imply that mobile and fixed would be likely to be in the same market is probable during the period of the review.

(b) Functionality

- 3.44 ComReg has considered functional differences between fixed and mobile access which may impact on possible substitutability.
- 3.45 Evidence indicates consumers acquire fixed narrowband access for both voice and narrowband data transmission, while mobile access is used primarily for voice. Further, where mobile data service are accessed this is mostly for SMSs⁷³. Only 4.7% of mobile subscribers access the Internet via their mobile,⁷⁴ 1% of home internet access is through a mobile phone or mobile device⁷⁵. Whereas 47% (of home Internet access) is provided via fixed lines.⁷⁶
- 3.46 For access to voice services, ComReg considers that fixed access does *not* provide the same functionality as mobile access. Fixed access is attached to a place; mobile services are attached to the person and can transfer with that person. This added functionality, resulting from the convenience of being able to make and receive calls ‘on the move’, suggests that fixed services are unlikely to act as a substitute for

⁷⁰ Analysys report on Mass market voice, June 2005.

⁷¹ IPSOS survey for the European Commission, 2004.

⁷² In the initial consultation, one respondent submitted a report prepared by Indecon on their behalf on fixed mobile substitution. This was not referred to in their response to this consultation. ComReg considered the report, but determined that fixed/mobile services are not sufficiently strong substitutes to indicate a single market.

⁷³ Short Message Service.

⁷⁴ 2.4% of Internet access was via mobile in 2004, increasing to 4.7% in 2005 according to the CSO. (Mobile access was not given as an option in the 2006 survey.) 2005 Information Society and Telecommunications, December 2006. Also, according to the amárach Q4 2005 survey, 68% of respondents with mobile phones have used none of these data services.

⁷⁵ amárach, Q4 2006 survey.

⁷⁶ 47% of households according to the amárach Q4 2006 survey (33% dial up and 14% ISDN) and 20% of SMEs and 1% of large corporates (over 100 employees) according to the IMS Millward Brown H1 2006 survey.

- mobiles. However, mobile phones can be substitutable for fixed services since they have the same function as a fixed line but with a mobility element. This represents a fundamental difference between the two communications services.
- 3.47 ComReg has assessed the level of demand-side substitution between fixed and mobile Internet access and suggests that there is very little substitution between the two types of access. This is because the price of mobile data for an equivalent data speed is relatively high. Additionally, from the majority of handsets, only a fraction of the Internet is accessible and only part of this fraction is delivered because of the constraints of screen size on mobile telephones. Interactivity is also limited due to the small size keypad.
- 3.48 Taking a forward-looking perspective, the level of functional substitution is likely to increase with technological developments of mobile package switched services.⁷⁷ However, it is of note while three of the mobile operators have begun to offer 3G services, the current take-up of these services is *de minimis*.⁷⁸ It is not considered that mobile and fixed access will become functional substitutes within the timeframe of the review i.e. the next two years.
- 3.49 Since the time of the initial review, there has been widespread interest in the idea of a converged fixed/mobile market. As there are currently no converged products or services available in the Irish market, ComReg must instead rely on a prospective assessment of the likelihood of a converged market developing within the period of the review.
- 3.50 When operators were asked⁷⁹ to identify the main areas of potential convergence between fixed and mobile services, it was suggested by one operator that a converged F-M market may develop in the future depending on the success of the development of communications technology. However, they also noted that these products were not currently available in Ireland, nor was it clear when they would be developed, and what their specification and prices would be, and/or their target customers. The view was that any such fixed/mobile converged market was entirely speculative. It was noted that a number of operators were trialling services, but none claimed that service would be launched commercially within the next two years⁸⁰ and that ComReg has recently published a consultation on Geographic Number Allocations for Hybrid Fixed-Mobile Telecoms Services⁸¹.
- 3.51 ComReg noted that in several other countries, there were proposals for converged fixed and mobile products.⁸² Considering supply-side substitution between the fixed and mobile markets, ComReg noted that the development of 3G mobile networks may

⁷⁷ GPRS (General Packet Radio Service) and UMTS (Universal Mobile Telecommunications Systems).

⁷⁸ Around 5% of mobile phone users according to the amárach Q4 2006 survey.

⁷⁹ 2005 Market Analysis Data Direction – Issued by ComReg in October 2005 to all ECN and ECS providers.

⁸⁰ Submission provided October 2005.

⁸¹ ComReg Document 06/33. The Response to Consultation on the allocation of geographic telephone numbers to mobile operators for home zonal services was published on 14 March 2007 (Document 07/15). It is not anticipated that this will have a significant impact on the delineation of the markets as set out in this document over the lifetime of the review. However, ComReg will keep this issue under review. It is of note in this regard that Digiweb has very recently been granted mobile number allocations by ComReg. It is anticipated that Digiweb is likely to provide mobile broadband and mobile phone services ('Digiweb Mobile Takes 088', 5 April 2007, See www.digiweb.ie). However, it is not expected that this will have a sufficient impact on the functional substitutability of fixed and mobile services within the timeframe of this review.

⁸² Yankee Group Report. Wireless/Mobile Europe, October 2004, Matt Hatton. 'Cost and convenience will determine the success of fixed mobile convergence'.

impact on whether mobile networks can provide a range of converged voice and data services on a single platform. Furthermore, in the future, the emergence of 4G solutions and the technological convergence of WiFi, GSM, 3G and WiMax technologies may provide opportunities for a mobile voice and high bandwidth data offering which would provide users with a seamless solution as a complete substitute for fixed line services. ComReg highlighted that in line with the SMP Guidelines supply-side substitution should involve no significant additional costs, whereas potential entry occurs at significant costs.⁸³ ComReg concluded that supply-side substitution was unlikely to take place within the timeframe of the review, but may represent potential competition which should be assessed in the market analysis (section 4).

3.52 Additionally, ComReg expressed the view that a bundled product would represent a form of “added value” to the fixed access network, rather than a substitute for it, and so its introduction would not alter the conclusions of the analysis. It was noted that this view was supported by market developments in other jurisdictions.⁸⁴

(c) Pricing

3.53 It is difficult to directly compare the cost of fixed access with the cost of mobile access, as mobile access is generally sold either as a bundle of access and calls, or as a pre-paid service which does not incur an identified access charge. (It should be noted in this respect that 75% of all active mobile subscriptions are pre-paid⁸⁵). Mobile handsets are generally subsidised by the mobile operator and there is not a direct retail charge for connection to the network. This differs to the pricing of fixed access, which generally has a separate connection fee which is relatively high.

3.54 Access and call services are inextricably linked, for a person to make a call, they must have access. The tariff structures for fixed and pre-paid mobile services are different. In Ireland for fixed services a consumer must pay a monthly line rental of €24.18. Beyond this the variable cost (i.e. the cost of the actual call) is relatively low. As such, the marginal cost will be lower for consumers who make a higher volume of calls. This is because the fixed cost - the line rental - is spread over a larger number of minutes. In comparison, in relation to the tariff structure of pre-paid mobile services the access and call costs are bundled. Therefore, if a consumer makes a very low number of calls, a pre-paid mobile bundle may be lower in cost than fixed line rental. However, it is of note that the vulnerable user scheme, (which is aimed at low volume users) is available to those who make very low volumes of fixed calls at low rates.⁸⁶

3.55 It is important to note here that a fixed connection is not limited to voice services only but offers high quality access to data services also.

(d) Consumer behaviour

3.56 From discussions with industry participants, ComReg has identified that some consumers perceive their calling experience to be different when made from a fixed

⁸³ SMP Guidelines. See paragraph 38.

⁸⁴ E.g. BT BluePhone (UK).

⁸⁵ ComReg Quarterly Key Data Report, Document 07/17, 27 March 2007, page 29.

⁸⁶ In June 2003, the cap of CPI on the lower quartile bill was removed on the understanding that eircom's proposed Vulnerable User Scheme would be introduced. A cap of CPI was placed on the median Vulnerable User Scheme bill, which includes PSTN access and some call types. This ensures that the median bill of customers who avail of the scheme will not increase by more than inflation. Users of the scheme account for approximately 1% of total fixed line subscribers.

line as opposed to a mobile. ComReg commissioned qualitative research identified the following attitudes to fixed line access among SMEs in Ireland:

- Few businesses would be interested in operating without a landline phone;
- A landline was often seen as “adding credibility” to a business and not being perceived as a “fly by night”; and
- Ultimately a fixed line reassured their customers and acted as a “base contact point” for many Irish businesses.⁸⁷

3.57 Further survey results show consumers consider that there is a difference between mobile and fixed access. 60% of mobile phone users did not believe their mobile was a substitute for a fixed line phone.⁸⁸ Only 19% of respondents who had a fixed line phone indicated that if the price levels of fixed and mobile phones were similar it would encourage them to give up their residential landline.⁸⁹

3.58 Furthermore, consumer survey findings suggest there are distinct call patterns from fixed and mobile handsets. Consumers are more likely to make a call from a mobile for calls of shorter duration. For a five minute call – as opposed to a two minute call - respondents were more likely to call from a landline and less likely to call from a mobile. Also respondents were more likely to use their mobile to call another mobile.⁹⁰

VIEWES OF RESPONDENTS

3.59 One respondent stated that despite ComReg’s claim that the current review considered the market prospectively over the next two years, in its view the market analysis relied mostly on historic data, and in particular on market share data. They called upon ComReg to conduct a truly prospective market analysis, taking into account trends from advanced markets and forecasts for Ireland for supply and demand-side market developments.

3.60 The respondent also noted a number of developments such as ComReg’s consultation on “hybrid fixed mobile services” and the issue of unlicensed mobile access (UMA) and other fixed mobile convergence technologies. They pointed to a number of future industry developments in terms of the introduction of bundled and converged products.

3.61 In addition, the respondent outlined their view that there may be a market for services at a fixed location and a market for services used while mobile. They stated that the former market would contain services and applications delivered over either fixed or mobile networks, whereas the latter market would not include services offered over traditional fixed infrastructure.

3.62 The respondent further highlighted a number of points in relation to ComReg’s pricing analysis. They asserted that MNOs for many years charged connection fees but these have been reduced in recent years. Similarly, they noted that fixed operators charged connection fees but a majority of customers connecting to fixed networks during the past two years availed of free connection promotions or offers. In addition, the respondent suggested that regulation imposed in the fixed market had inhibited the introduction of pre-paid services and maintained that as such it represented a circular,

⁸⁷Millward Brown IMS, SME Qualitative Research, October 2006.

⁸⁸ amárach survey, Q4 2006.

⁸⁹ amárach survey, Q4 2006.

⁹⁰ amárach survey, Q1 2006.

weak argument to suggest that the absence of pre-paid services proved the existence of a separate market. They stated that ComReg must consider what would be the market outcome, if only market forces were at work.

- 3.63 Another respondent, while agreeing that fixed services and mobile services did not belong in the same market, maintained that the key reason for this was functional in the form of the mobility that fixed services do not offer. They disputed ComReg's position that pricing or quality of service were relevant factors in this, noting that strong-one way fixed to mobile substitution was present, driven not only by additional mobile functionality but also by the fact that mobile represented good value for customers.

CONCLUSION

- 3.64 ComReg is minded of the need to analyse the market on a forward-looking, prospective basis. In this regard, historic data is used as a guide to future developments in the market. This methodology is in keeping with the SMP Guidelines which note that 'NRAs should take past data into account in their analysis when such data are relevant to the developments in that market in the foreseeable future.'⁹¹ Forecasting is based on numerous assumptions regarding future developments; as such, ComReg considers that the best guide lies in considering, as a starting point to the analysis, developments in the market to date. Where available ComReg also considers data from other jurisdictions.
- 3.65 ComReg has considered further the potential introduction of hybrid fixed/mobile products. At present, there are no hybrid products commercially available and as such it is not possible for ComReg to carry out a demand-side analysis of their impact, for example, analysis of pricing and likely take-up, and certainly it could not conclude that there would be sufficient substitution from retail narrowband access to justify the definition of a single fixed/mobile market. Furthermore, in line with the SMP Guidelines supply-side substitution should involve market entry or expansion at no significant additional costs, whereas potential entry with a hybrid product would likely incur significant cost.⁹² However, ComReg recognises the impact such products could have, and has considered this further in the context of potential competition (section 4). This approach is in accord with the expert report prepared for the European Commission, which notes that the distinguishing factors between fixed narrowband and mobile access should be weakened in time with improved mobile data transfer rates and the introduction of hybrid/home-zone products.⁹³
- 3.66 In considering functionality, ComReg agrees that mobility is a key functional difference, and notes also that mobile currently offers lower data speeds. In addition, for the majority of handsets only a fraction of the Internet is accessible and only part of this fraction is delivered because of the constraints of screen size on mobile phones. Interactivity is also limited due to the small size keypad. This is not anticipated to change within the lifetime of the review.
- 3.67 ComReg has considered alternative market definitions including the proposal that there should be a market for services from a fixed location (which may or may not include mobile services) and a market for mobile services (which would not include fixed services). It should be noted that no other NRA has applied such market

⁹¹ SMP Guidelines. See paragraph 20.

⁹² SMP Guidelines. See paragraph 38.

⁹³ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006. See page 40.

definitions. It is ComReg's view that the proposed alternative does not accurately reflect market behaviour, in that the key differentiator between fixed and mobile access is the nature of mobile functionality and the ability to always receive and make a call – regardless of whether the person is on the move or at a fixed location. Over the timeframe of the review, this distinction is not likely to change sufficiently.

- 3.68 ComReg has considered further respondents' views on the pricing analysis. ComReg wishes to highlight that MNOs do not have a connection charge comparable to that for fixed operators. In particular, mobile pricing is in the main sold as a bundle of access and calls, or as a pre-paid service which does not comprise an access charge. (In this regard it should be noted that 75% of all mobile access is pre-paid.⁹⁴) In contrast, fixed operators generally have a clearly defined stand-alone connection charge which is high relative to the price of calls. It should be noted that ComReg's analysis is based on the prevailing status quo and as such does not take into account temporary discount schemes. ComReg considers that it is significant that no OAO in the fixed market has introduced a pre-paid offering.
- 3.69 Based on its detailed assessment of developments in the market, ComReg holds that fixed and mobile access are not substitutes, and are not part of the same relevant market. This is because the market characteristic of increasing mobile penetration alongside stable fixed access penetration may not be a result of some customers giving up a fixed line in favour of mobile only, but may also reflect that a household is likely to have one fixed access line but potentially several mobile connections.
- 3.70 ComReg does not consider that fixed and mobile access represent sufficiently strong functional substitutes. Mobile is used primarily for voice, with mobile data utilised primarily for SMS. Fixed is used for voice and Internet access. The mobility element associated with mobile also indicates the absence of a sufficiently high degree of functional substitutability.
- 3.71 The introduction and dissemination of converged fixed and mobile products and services in the Irish market could change this conclusion over time, but according to the views of operators, this is not likely to occur within the timeframe of the review.⁹⁵

Fixed access and mobile access are not part of the same product market

Are all forms of fixed narrowband access in the same market?

CONSULTATION PROPOSAL

- 3.72 In the current consultation, ComReg maintained that, based on demand and supply-side considerations, there were two relevant markets in relation to fixed retail access to the public telephone network:
1. **Lower Level Access** – including services over the public switched telephone network (PSTN), narrowband fixed wireless access (FWA) and ISDN basic rate access (BRA);
 2. **Higher Level Access** – including services over ISDN fractional rate access (FRA) and primary rate access (PRA).

⁹⁴ ComReg Quarterly Key Data Report, Document 07/17, 27 March 2007, page 29.

⁹⁵ 2005 Market Analysis Data Direction – Issued by ComReg in October 2005 to all ECN and ECS providers.

3.73 In analysing the scope for effective demand-side substitution, ComReg has considered the end use of the various access products, their functional substitutability and the extent of any pricing similarities or differences which indicate the degree to which consumers may view them as close or effective substitutes. The assessment of supply-side substitution examines the potential for existing firms to switch production readily between higher and lower level narrowband access services respectively in response to small but significant price increases.

Demand-side

3.74 For the purposes of market definition, the key issue in considering the scope for effective demand-side substitution amongst different forms of retail access is the extent to which consumers would be prepared to switch from one form of access to another in response to small price increases. To that end, the following considers their functional interchangeability and any pricing differentials or similarities in coming to a view on the likely degree of substitution between the various access services in response to small price changes.

Functional Substitutability

3.75 ComReg initially identified two broad types or categories of access product based on their underlying technical characteristics and considered the extent to which the discrete services provided within those broad categories were functional substitutes:

- **Analogue exchanges lines.** This provides a single channel, originally designed to provide voice traffic but capable also of supporting fax and data modems with speeds of up to 56 kbit/s. This is the predominant form of access.
- **Digital ISDN exchange lines.** Three levels of service are available:
 - ISDN BRA, which supports two channels for user voice and data. This category includes ISDN ‘hi speed’⁹⁶.
 - ISDN FRA, which supports between 16 and 30 channels⁹⁷.
 - ISDN PRA, which supports 30 channels.

3.76 It was not considered necessary to analyse FWA as a separate category as access services delivered over narrowband FWA are not considered to be functionally distinct to those provided over the PSTN although they may be packaged differently, since narrowband access via FWA still offers access to analogue access lines and/or to digital ISDN and may be used to supplement PSTN services.⁹⁸ ComReg notes that all different forms of access are not uniformly available via FWA. PSTN access is ubiquitous, whereas narrowband FWA is currently available in limited locations. Nonetheless, where FWA is available it is considered functionally similar to various narrowband access services provided over the PSTN. For example, eircom use narrowband FWA to infill PSTN services in some rural areas.

3.77 All technologically-enabled fixed access lines offer fixed access to networks capable of supporting telephony services. All offer a similar quality of service for the purposes of making a voice call and the possibility of access to other narrowband

⁹⁶ eircom’s ISDN ‘hi speed’ product is a two Bearer channel and one Delta channel ISDN product with similar characteristics to ISDN BRA but tariffs differ due to different connections.

⁹⁷ Technically, ISDN FRA represents a sub-equipped variant of ISDN PRA.

⁹⁸ Services in the 3.5GHz and 26 GHz band may be provided via narrowband FWA. Both voice and Internet services can be delivered to end users over these platforms; however the internet service may be limited by bandwidth capacity.

services such as dial-up internet. However, some key functional differences may still be observed between the various narrowband access products outlined above.

- 3.78 Broadly speaking, the preference for using ISDN rather than analogue lines for access to voice services is primarily because the subscriber needs more than one channel.⁹⁹ Functionally, the ISDN product may be seen as a multiple of PSTN lines, with ISDN terminating equipment allowing transparent data transmission without a traditional modem. Like other forms of fixed access, data access via ISDN is a switched circuit service operating over a dial-up connection.¹⁰⁰ ISDN access supports some 'supplementary services' not supported by PSTN access, but these are of minor importance.¹⁰¹ A PBX¹⁰² which is required to switch calls on the customer's side of the network termination point can be used with both PSTN and ISDN access services. Supplementary services¹⁰³ can also be used with a PBX to allow certain additional facilities.
- 3.79 However, in terms of the functional substitutability between PSTN and ISDN BRA access on the one hand and ISDN FRA and PRA access on the other, significant differences in the number of channels supported by these respective forms of access suggests they likely satisfy differing customer needs in terms of usage. Further, it is of note that while PSTN only supports one direct dial number and ISDN BRA provides two; in contrast, ISDN FRA and PRA may accommodate up to 50 and 100 direct dial numbers respectively.
- 3.80 As such, for ISDN PRA and ISDN FRA, while these services share overall functionality with analogue access and ISDN BRA, the larger number of channels (associated with ISDN FRA and PRA) means that demand is most likely to derive from higher volume users than is the case for PSTN and ISDN BRA access. In terms of functional interchangeability between PSTN access and ISDN FRA/PRA access respectively, it is possible to connect multiple PSTN lines to a PBX, and share a single directory number. However, many PBXs are configured to use only ISDN lines, and these are often provided in conjunction with direct dialling, which allows direct dial to an individual PBX extension. Thus, for large volume users with PBXs configured for ISDN access in place, it may not be technically possible for them to switch from using ISDN access to using multiple PSTN lines in response to small price increases.
- 3.81 Thus, ComReg concludes in terms of functional substitutability:
- Narrowband FWA is not considered functionally distinct to access services delivered over the PSTN as access via FWA still offers access to analogue access lines and/or to digital ISDN and may be used to supplement PSTN services.

⁹⁹ This may be because the user needs more than one voice channel, or the user needs a mix of voice and data channels or simply wants one higher speed channel (which can be achieved by bonding two access channels together).

¹⁰⁰ Higher speed data services are available e.g. up to 2Mbps for ISDN PRA. However, functionally, service is still switched dial-up, and uncontended, and so is distinct from packet switched services such as xDSL.

¹⁰¹ For example, ISDN access supports a higher standard of fax services i.e. class 4 although this is only suitable for ISDN to ISDN transmissions. ISDN access can also support multiple numbers within a building by means of additional suffixes at the end of the number although this functionality is rarely used.

¹⁰² Private Branch Exchange.

¹⁰³ For example, automatic call distributor, automated directory services, automatic ring back, call accounting etc.

- The ability for large volume users with PBXs configured for ISDN lines only, to switch from using higher level ISDN access to multiple PSTN lines in response to small price increases may be constrained.
- The higher level access products (i.e. ISDN FRA and ISDN PRA) are functionally distinct from the lower level access products (i.e. ISDN BRA, PSTN/FWA narrowband access) since significant differences in the number of channels and direct dial numbers supported indicates that they meet different end user requirements.

Pricing

3.82 In considering the market boundaries for access products including ISDN, PSTN and the other access technologies in the context of a small but significant price increase by a hypothetical monopolist, it is useful to establish the current price differentials. Ideally ComReg would apply the hypothetical monopolist test by using prices evaluated at competitive levels. ComReg is aware that many prices in this review are subject to regulation. Current regulated prices may not be a perfect reflection of competitive prices however they are used as a proxy for the purpose of this analysis.

3.83 A user typically buys access to the telephone network in the form of an initial connection charge and an ongoing monthly rental fee. This applies to access for PSTN, narrowband FWA and ISDN (BRA, FRA and PRA) services. Table 3.2 below presents eircom's current pricing for these products:

Product	No. channels	Connection charge	Monthly rental
PSTN/FWA	1	€107.43	€19.98
ISDN BRA	2	€202.47	€30.99
ISDN BRA 'hi speed'	2	€99.16	€30.99
ISDN FRA	16	€3,299	€158.72
ISDN PRA	30	€3,299	€264.11

Table 3.2: eircom Retail Pricing – Narrowband Services¹⁰⁴

3.84 As shown in Table 3.2, to access the telephone network via an analogue exchange line/narrowband FWA supplied by eircom, a customer needs to pay a one-off connection charge of €107.43 and a monthly rental of €19.98. (The same connection charge and monthly rental applies to a second line.) From the customer's perspective they are likely to be indifferent to whether their retail access service is underpinned via PSTN/narrowband FWA since they fulfil the same end use and there is no price differential, narrowband FWA is typically used to supplement the PSTN.

3.85 In terms of the pricing of ISDN, eircom ISDN BRA¹⁰⁵ has an initial connection charge of €202.47 and an ongoing monthly rental of €30.99. As this offers the customer two channels, there is a saving on the equivalent cost of buying two separate exchange lines in relation to the total of the connection charge and the monthly rental. eircom

¹⁰⁴ For clarity, all prices are quoted exclusive of VAT. VAT is currently charged at 13.5% for standard PSTN connections only. The VAT rate for all other services is charged at 21%. See Monthly rental and connection for all eircom.ie products, and Charges in respect of Integrated Services Digital Network Facility – Connection and Rental Charges, Telecommunications Scheme 2007, Part 10.1, Effective 16.12.05 at www.eircom.ie.

¹⁰⁵ eircom's ISDN BRA offering consists of two Bearer channels and one Delta channel and is provided with two free numbers.

- has another ISDN product marketed as ‘hi-speed’¹⁰⁶. It has a connection charge of €99.16 and a monthly rental of €30.99 which represents a significant cost saving over purchasing two separate analogue exchange lines. It is arguable, therefore, that a hypothetical monopolist of analogue exchange lines/narrowband FWA may be restricted from implementing a small but significant price increase above competitive levels by the scope for customers to substitute to ISDN BRA and ISDN ‘hi-speed’ services (where they require more than one channel to access voice and data services simultaneously).
- 3.86 Furthermore, even though following a 5-10% price increase a single analogue access channel may still be cheaper than ISDN BRA and ISDN ‘hi-speed’, the additional level of access provided by ISDN BRA and ISDN ‘hi speed’ and the fact that it is more cost effective than buying two separate analogue lines suggests that sufficient numbers of customers may nonetheless find it profitable to switch in response to small price changes. Similarly, a hypothetical monopolist supplying ISDN BRA who sought to increase the price by a small but significant amount could find that a sufficient numbers of users would substitute by, for example, buying two access lines. For instance, following a 10% price increase in ISDN BRA it may then be more cost effective for consumers to buy two separate PSTN lines.
- 3.87 As regards potential substitutability between ISDN BRA and ISDN ‘hi speed’, ISDN ‘hi-speed’ has a lower connection fee than the standard ISDN BRA offering and a marginally lower connection fee than a single PSTN line. The lower connection fee arises as the customer already has a PSTN connection which is surrendered in order to acquire the ISDN ‘hi-speed’ access. However, the monthly rental for ‘hi-speed’ and BRA are the same which suggests there is also significant scope for effective demand-side substitution between ISDN ‘hi-speed’ and BRA respectively in response to small but significant price changes.
- 3.88 In terms of the pricing of higher level access services, eircom’s ISDN FRA¹⁰⁷ and PRA¹⁰⁸ both have a connection charge of €3,299 and a monthly charge dependent on the number of channels. For example, 16 channel ISDN FRA costs €158.72 per month and 30 channel ISDN PRA costs €264.11.
- 3.89 In terms of the connection charge, the price of ISDN FRA and PRA broadly reflect their characteristic as a multiple of PSTN lines. However, the monthly charge per channel for PRA ISDN variants is around €8.80, compared with a single PSTN line rental price of €19.98. This suggests that a customer would not be prepared to substitute their higher level ISDN with individual PSTN lines, as the monthly rental cost would effectively more than double.
- 3.90 It is therefore conceivable that a hypothetical monopolist supplier of higher level ISDN services could profitably raise prices by 5-10%, since the current rental differential makes it unlikely that sufficient numbers of users would switch to using multiple PSTN lines/narrowband FWA instead. Similarly, given the significant price differential between the ISDN FRA and PRA products (i.e. higher level access) on the one hand and the PSTN/narrowband FWA and ISDN BRA (including ‘hi-speed’) access products (i.e. lower level access) on the other, it is suggested that the ability of a hypothetical monopolist supplier of lower level access services to increase prices by a small but significant amount is unlikely to be constrained by low volume users (who require less than 16 channels) switching in significant numbers to purchasing ISDN

¹⁰⁶ eircom’s ‘hi-speed’ ISDN access product comprises 2 Bearer channels and 1 Delta channel (permitting analogue and digital interface) and is provided with two free numbers.

¹⁰⁷ eircom’s ISDN FRA product consists of 16 channels.

¹⁰⁸ eircom’s ISDN PRA comprises 30 Bearer channels and 1 Delta channel.

FRA and PRA given that the connection and monthly fees are multiples of the corresponding lower level access prices. There is therefore a clear distinction in the pricing of lower and higher level access services respectively based on customers' usage i.e. it appears feasible to price discriminate between customers based on their volume of purchases.

- 3.91 In general, lower level access products may be seen to be characterised by a low fixed cost and high variable cost whereas, in contrast the higher level access products have a high fixed cost and low variable cost (on an individual channel basis). The different cost functions between lower and higher level access products reduces the scope for substitutability between them.
- 3.92 Table 3.3 below shows the total cost (i.e. the initial connection and ongoing monthly rental fee) for an entity with a demand for a different number of channels (i.e. 1, 2, 8, 16 and 30) over a period of 1 year:¹⁰⁹

No. Channels	1	2	8	16	30
ISDN PSTN/FWA	€347.19	€694.38	€2,777.52	€5,555.04	€10,415.70
ISDN BRA	€574.35	€574.35	€2,297.40	€4,594.80	€8,615.25
ISDN BRA 'hi speed'	€471.04	€471.04	€1,884.16	€3,768.32	€7,065.60
ISDN FRA	€5,203.64	€5,203.64	€5,203.64	€5,203.64	n/a ¹¹⁰
ISDN PRA	€6,468.32	€6,468.32	€6,468.32	€6,468.32	€6,468.32

Table 3.3: Analysis demand-side substitution¹¹¹

- 3.93 The data presented in Table 3.3 further reinforces the static pricing analysis presented above by showing that the general trend is a gap in the chain of substitution between lower and higher level access services and visa versa. It also indicates the limited scope for demand-side substitution between lower and higher level access products respectively in response to a small but significant and non-transitory increase in price. While ISDN BRA might act as a substitute for two PSTN lines, a multiple of ISDN BRA or analogue products would not act as a cost effective substitute for ISDN FRA/PRA products where 16 or 30 channels are required. It does not appear cost effective to use lower level access products above this level or to use higher level access products below this level. Thus, a distinct break in the chain of substitution appears to arise at the 16 channel level.
- 3.94 Therefore, ComReg would argue that in terms of demand-side substitution, a small but significant rise in the price of analogue fixed line/narrowband FWA access could lead to a significant number of customers deciding to use alternatives for PSTN/narrowband FWA access, either via ISDN BRA or ISDN 'hi-speed'. However,

¹⁰⁹ For the purposes of market definition, 1-2 years is considered an appropriate period of time over which to assess customers likely switching behaviour.

¹¹⁰ Technically, ISDN FRA represents a variant of ISDN PRA and as such where a customer wished to avail of 30 lines they would opt for ISDN PRA.

¹¹¹ The total cost is calculated as follows: For example, in relation to demand for 8 channels, the initial connection charge and ongoing monthly rental are calculated for each access product i.e. 8 PSTN/FWA connections = 8*PSTN/FWA connection charge + 8*12*PSTN/FWA monthly rental, similarly the total cost is calculated for 4 ISDN BRA/BRA 'hi speed', 1 ISDN FRA and 1 ISDN PRA.

the pricing differences between higher level ISDN access and lower level access services suggest that the price of lower level access services do not sufficiently constrain the price of higher level access services and vice versa. Further, it is of note that the same charges apply uniformly across Ireland and to both business and residential customers.

Conclusion – demand-side substitutability

3.95 In the initial Recommendation, a distinction was made between residential and non-residential access. However, the European Commission has reviewed this as part of the draft revised Recommendation where, based on the experience of notifications, they propose an approach of defining the markets in terms of access products. They stated that since similar products (in particular PSTN access lines) were often used by residential and non-residential users, suppliers to non-residential users could generally divert their supplies to residential customers should prices to residential customers rise and vice versa. On that basis, the Commission proposed to define a single market for residential and non-residential access, and noted that taking into account national circumstances distinct markets for different types of access lines may be appropriate.¹¹²

3.96 The expert report commissioned by the European Commission set out that there was a retail market for connection, over which no more than two calls can be made at a time (low-capacity connections e.g. PSTN/analogue or ISDN 2 connections) which is distinct from a market for which three or more calls can be carried concurrently (high-capacity connections e.g. ISDN 30 connections). The authors state it may be appropriate to identify whether there are gaps in the chain of substitution between access products and highlight that there does not appear to be demand substitution between low-capacity and high-capacity connections. They note that while two analogue connections are a substitute for an ISDN 2 connection it appears that a multiple of analogue or ISDN 2 connections are usually not a substitute for an ISDN 30 connection given the differences in overall price and functionalities.¹¹³ It is of note that this is in line with ComReg's findings.

Supply-side

3.97 It was determined in the initial consultation that the supply of BRA was more similar to PSTN access than it was to the supply of ISDN FRA and PRA products (which offer a greater number of lines) since the supply of higher rate ISDN was predominantly via direct access to customers.

3.98 Analysis in the initial review indicated that the cost for existing suppliers of lower level access services to switch to supplying higher level access services via owned infrastructure would likely be significant and limit prompt or effective switching.

3.99 In terms of switching from supplying higher level access to lower level access services, an operator currently offering higher rate ISDN but not basic PSTN access would have to acquire older generation equipment at the exchange. There is therefore a cost disincentive for an ISDN supplier beginning to offer PSTN access; such disincentives would be especially strong if the supplier concentrated on higher rate services due to

¹¹²Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets, Brussels, 28 June 2006 SEC (2006) 837. See page 20. It is further of note that the Commission accepted a market split on the basis of higher and lower level retail narrowband access services in the initial review (See Comments pursuant to Article 7(3) of Directive 2002/21/EC, Brussels, 25-04-2005, Case IE/2005/0158-159.). ComReg is of the view that it remains appropriate to delineate the market on this basis as supported by its updated analysis.

¹¹³ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006. See pages 48-9.

factors outlined below. In that regard, there would appear to be limited scope for effective supply-side substitution from higher rate ISDN to basic PSTN access.

- 3.100 In terms of switching from supplying lower level access to higher level access services respectively, higher rate ISDN customers are typically larger and more concentrated and as such a whole range of related costs would be significantly different from offering the more ‘mass appeal’ products of ISDN BRA and PSTN the consumers of which tend to be lower volume users and less concentrated. ComReg notes that the economics of serving a series of industrial estates for example compared to a residential population would be sufficiently different to negate or lessen the scope for quick or effective supply-side substitution between the two markets. This is because the larger, more concentrated higher level access customers such as business parks are likely to be in distinct locations to the typically smaller and more disaggregated lower level access customers such that switching supply would entail significant costs and time delay in terms of additional network build and adjustments needed in terms of marketing arrangements, customer support etc.
- 3.101 It is of note in this regard that supply of higher level access services is predominately via direct connection, which may involve significant cost (which may not be sufficiently offset by the higher upfront cost paid by customers in relation to the higher level access products) and also may not take place sufficiently quickly to constrain a significant and non-transitory increase in price. For example, at the end of December 2006, supply by OAOs of higher level access services was predominately via direct connection (approximately 28%, compared with 6% via SB-WLR). This is not the case in relation to lower level access services where the level of direct connection is negligible. In other words, the economics of supply are such that the supply of ISDN BRA is more similar to PSTN access than it is to the supply of the larger ISDN FRA and PRA products.
- 3.102 While one may argue that prompt or effective supply-side substitution may be feasible between the two forms of access via the use of indirect access products (i.e. SB-WLR), it should be borne in mind in relation to carrying out the market definition exercise that SB-WLR is a mandated wholesale input deriving from the retail narrowband access markets. As such, basing the market definition exercise on the presence of such regulation (which may be imposed following the market analysis of the delineated markets and a finding of SMP in relation to them should such a remedy be found to be justified and proportionate¹¹⁴) may give rise to a circular argument. Notwithstanding this, ComReg considers that the economics of supplying the higher level and lower level access services as outlined above are sufficiently different to the extent that effective supply-side substitutability between them is limited irrespective of the presence of wholesale mandated products.
- 3.103 Thus, it would appear that switching between supplying lower level and higher level access services respectively would likely involve significant additional cost and would be unlikely to take place sufficiently quickly as to constrain a small but significant and non-transitory increase in price (i.e. 5-10%) above the competitive level. As such, ComReg considered that lower level access and higher rate ISDN access were in separate markets on the supply side.

¹¹⁴ Remedies must be based on the nature of the problem identified, proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act, 2002.

Supply-side and demand-side analysis

- 3.104 Since the time of the initial review, there have been no significant changes in the functional forms of access in the market. The updated pricing analysis indicates that there are distinct markets for higher and lower level access, ComReg therefore proposed in the current consultation paper to maintain the distinction between lower and higher level access.
- 3.105 ComReg concluded that analogue exchange lines, narrowband FWA and ISDN BRA belong in the same relevant market. They are products which offer a similar function, have a similar end use, and operate under similar price constraints. A hypothetical monopolist seeking to impose a price increase in one would likely be subject to effective substitution by customers to another.
- 3.106 ISDN FRA and PRA are, at a basic level, multiples of exchange lines. However, in reality the types of PBX equipment which are normally used with higher level ISDN means that the functional substitutability via multiple PSTN lines is limited. The pricing differential between higher and lower level access services suggest that a hypothetical monopolist increasing the price of higher level ISDN connection by 5-10% above the competitive level would not be subject to immediate or effective substitution by customers to lower level access services or vice versa.
- 3.107 Further, supply-side substitution between lower level and higher level access services respectively would be likely to involve significant additional costs and would be unlikely to take place sufficiently quickly to constrain a small but significant and non-transitory increase in price.

VIEWS OF RESPONDENTS

- 3.108 In response to the current consultation, one respondent held that there were not separate markets for fixed access and calls. Arising from this, they maintained that there were not distinct markets for retail fixed lower level narrowband access and for retail fixed higher level narrowband access. They noted that SB-WLR had a 5% share of the higher level retail narrowband access market (as of the end of March 2006), suggesting that direct connection and its associated additional costs were not necessarily required to compete in the provision of 'higher level' ISDN access. They asserted that the use of direct connection appeared to be a strategic decision, involving considerations of cost as weighed against the benefits of control over the additional elements of the value chain, rather than an unavoidable barrier to entry for the provision of higher level access services to customers. Following on from this, they maintained that there was sufficient supply-side substitutability for operators currently offering higher rate ISDN access to move to the provision of PSTN access (and visa versa) to conclude that higher level and lower level access were not in separate markets.
- 3.109 The respondent further noted the absence of an updated analysis on the impact of developments in technologies such as VoIP and FWA on ComReg's market definition.

CONCLUSION

- 3.110 ComReg has carefully considered the views of respondents but believes that its delineation of the market in terms of lower and higher level access remains valid as justified in detail by the arguments set out above.
- 3.111 ComReg addressed the question of separate markets for calls and access earlier in this document, and has maintained that there is not sufficient demand or supply-side substitution to consider a single market for calls and access.

- 3.112 ComReg notes that it is possible for a supplier to enter the higher level access market by offering a SB-WLR product in light of the current regulatory measures in place, and that this form of market entry incurs lower sunk costs than entering via direct connection. However, supply by OAOs is predominately via direct access (approximately 28%, compared with 6% via SB-WLR at the end of December 2006). As reasoned above, ComReg also considers that it is not appropriate to take into account regulatory measures which may be imposed following a finding of SMP in relation to these markets in carrying out the market definition exercise since this may lead to circular argumentation. Notwithstanding, even if this wholesale input were considered the differing costs in supplying large concentrated and low volume users (e.g. in terms of adjustments required to marketing, customer support arrangements) would still likely constrain immediate or low cost switching between the higher and lower level access markets. Further, ComReg considers that the lower and higher level access products are not effective substitutes in terms of demand (based on a detailed analysis of functional substitutability and pricing analysis), and ComReg maintains that prompt or effective supply-side substitutability is limited.
- 3.113 In considering a respondent's comment on the need to provide an updated analysis on FWA and VoIP, ComReg notes that access over narrowband FWA is included in the lower level access market and market conditions have not changed since the time of the initial review. VoIP is considered in detail in the retail calls consultation¹¹⁵ and is not considered relevant in the context of this market analysis.
- 3.114 ComReg is of the view that services over the PSTN, narrowband FWA and ISDN BRA currently belong in the same relevant market, for lower level narrowband access. They are products which offer the same functionality, for the same end use, and operate under similar price constraints.
- 3.115 ComReg also considers that there is a separate market for higher level access including access via ISDN FRA and PRA. Functional substitutability is limited. It is unlikely to be cost effective for low volume users to switch to higher level access products in response to small price changes in the lower level access services given the significant price differentials involved. Furthermore, there is limited scope for prompt or immediate supply-side substitution from lower level to higher level access and vice versa in response to a small but significant and non-transitory increase in price.

ComReg maintains that services over the PSTN, narrowband FWA and ISDN BRA are in the same relevant market for lower level narrowband access. The higher level narrowband access market comprises services over ISDN FRA and PRA.

Are there separate relevant markets for residential and non-residential customers?

CONSULTATION PROPOSAL

- 3.116 In the initial review, ComReg suggested that its separation of the markets for higher and lower level access usefully captured the different needs of larger and smaller users of access, primarily by defining them in terms of the services they use, rather than in terms of other features that they may have in common. ComReg noted in the current consultation paper that consumers in the higher level access market were likely to be non-residential users, while the lower level access market contained residential and

¹¹⁵ ComReg Document 06/51, Retail Calls Market Review – Call for Input on an Assessment of the Three Criteria. See pages 31-42.

- non-residential users. The issue of separate markets for residential and non-residential users was only of relevance to the lower level access market since the higher level access market contained only business customers.
- 3.117 ComReg proposed that it was more appropriate to define the market in terms of product type rather than user type, and that residential and non-residential access were not in separate markets since it was demonstrated that no differentiation was present between residential and non-residential users in terms of pricing for connection or rental and there was no difference in the conditions of supply. Further, residential and non-residential access were found to be functionally homogenous with regard to quality of service in terms of the lower level access market.
- 3.118 From a supply-side perspective, it was considered relatively simple for a supplier to supply both residential and non-residential customers, in response to a hypothetical price increase for one type of customer.
- 3.119 From a demand-side perspective, a small business customer would buy access in the same way, on the same terms and for the same purpose as a residential customer.
- 3.120 As such, ComReg suggested that its separation of the markets by product type (as discussed above in the analysis of whether all forms of fixed narrowband are in the same market) rather than user type was more appropriate in the context of the Irish access market.
- 3.121 While in the initial Recommendation, a distinction was identified by the European Commission between residential and non-residential access, the draft revised Recommendation noted that operators across member states did not generally seek to classify different demand categories and did not normally register what category of customer access was supplied to. Additionally, suppliers could generally substitute their services between user categories in the event of a lasting price increase. On this basis, the Commission proposed to define a single market for retail narrowband access for both residential and non-residential services.

VIEWS OF RESPONDENTS

- 3.122 One respondent disagreed with ComReg's analysis and expressed the view that, based on the differences in demand characteristics (from calling patterns to price elasticities) and supply terms, ComReg should conclude that a distinction be drawn between residential and non-residential customers. In particular, they refuted ComReg's analysis of business and residential customers acquiring retail narrowband access that indicated that there is no differentiation in terms of pricing for connection or rental, and there was little differentiation in the conditions of supply. They asserted that regulation prohibited the incumbent from offering differential pricing based on customer segment and maintained that if the market for retail access were defined in the absence of retail regulation it would not come to the same conclusion. Different product requirements between residential and business customers, and differential usage patterns on products common to both markets, led to different cost drivers which in turn engendered the requirement for differing approaches to pricing.
- 3.123 The respondent also put forward a view of a growing divergence between the telecommunications needs of residential customers and those of business customers over time. It suggested that residential customers demanded telephony, entertainment and information services whereas business customers required high capacity voice and data access, electronic commerce and ICT solutions. It proposed that the requirement for differentiation increased further up the spectrum.

CONCLUSION

3.124 While ComReg recognises some differentiation between the telecommunications needs of residential and non-residential customers it considers that this issue is of relevance in relation to elements further up-stream. Retail narrowband access - a product at the bottom of the value-chain - offers no differentiation between that which is provided to residential and non-residential customers. As noted in the current consultation paper, demand considerations for access differ from demand for calls. For example, a small business customer would buy access in the same way, on the same terms and for the same purpose as a residential customer. However, the calling pattern of a small business customer may be very different to that of a residential customer, and the types of call packages supplied may reflect this difference. Accordingly, while ComReg has proposed separate markets for residential and non-residential calls customers¹¹⁶, it is not appropriate to do so for the access market.

3.125 It is of note that there was broad support among respondents for ComReg's proposal not to further divide the lower level market into residential and non-residential markets. Respondents acknowledged that there was no real product differentiation between access provided to residential and non-residential users. They recognised that there was no clear and consistent method among operators of defining a residential or business customer in Ireland and customers could effectively choose their classification. In addition, the view was expressed that there are no significant supply-side barriers to serving residential customers when already supplying non-residential customers or visa versa. ComReg notes that the retail regulation in place only applies to the incumbent. As such, it is notable that analysis showed no difference in terms of the pricing of access between residential and non-residential sectors offered by OAOs in the market.

ComReg considers that a single market should be maintained for residential and non-residential customers.

What is the geographic scope of the market?***CONSULTATION PROPOSAL***

3.126 In the initial review, ComReg noted that the conditions of supply of access services were homogeneous across Ireland. In particular, while the access services provided by some entities other than eircom were not available across the whole of Ireland, they all compete with eircom's access services where they were available. eircom's access services were provided on the same terms and conditions, including price, across Ireland. ComReg added that the General Authorisation¹¹⁷, which was required of any undertaking which intended to provide an electronic communications network or service in Ireland, was national in scope. As a result, any operator authorised to provide access services could do so on a national basis which would suggest a national market.

VIEWS OF RESPONDENTS

3.127 In response to the 'Call for Input' and response to consultation, one operator strongly contended that in the period since the initial review there was an increasing incidence of property developers entering into what it described as "exclusive" agreements for

¹¹⁶ See Retail Calls Market Review – Call for Input on an Assessment of the Three Criteria, ComReg Document 06/51.

¹¹⁷ European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003.

operators to provide access networks. It suggested that there were agreements with property developers for the purpose of providing customised access and call services and which precluded other operators from servicing customers located in these developments. The respondent suggested that sub-geographic markets should be defined and that the delineation of the market should be where there were no competing sources of supply, i.e. the scope of the operator's network.

- 3.128 ComReg notes that three respondents agreed with the proposal that the geographical scope of the retail narrowband access markets should be Ireland. One of these respondents noted further that while it agreed the market was national, ComReg should continue to monitor closely the impact of exclusive agreements to provide access networks in certain locations as service quality, customer care, billing, and reliability of service may be adversely affected by such agreements. The respondent which did not agree put forward a detailed case. ComReg has considered this carefully below after first setting out its proposed approach to this issue.

PROPOSED APPROACH

- 3.129 Following established European case law and guidance, ComReg approaches the definition of the relevant geographic market by identifying “a clearly defined geographic area in which [the product] is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated”¹¹⁸ and “which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”¹¹⁹.
- 3.130 Similar to product market definition, defining relevant geographic markets involves first identifying possible demand and supply-side substitutes for the relevant or focal area by way of the SSNIP or hypothetical monopolist test. In that regard, ComReg considers whether a price increase by a hypothetical monopolist of electronic communications infrastructure in a property development would induce customers to switch to access providers located outside the relevant area/development or if providers located elsewhere could easily switch to supplying customers in the relevant area/development. If such demand/supply-side substitution is possible and likely to occur in response to small price changes, then it would appear appropriate to expand the scope of the geographic market.
- 3.131 In some instances customers may not be able to easily switch their purchases and suppliers may not be able to easily switch their supplies across geographic areas. Notwithstanding this, it may be appropriate to delineate a broad geographic market if the conditions of competition are sufficiently similar across a broad geographic area and suppliers' commercial behaviour at the local level is significantly influenced by competition at the broader regional or national level. For example, it may be possible to determine the boundaries of the geographic market by looking at pricing and other commercial behaviour and identifying whether common constraints apply across such commercial behaviour in different areas such that they should be included in the same geographic market.
- 3.132 A key issue which would indicate that the markets for retail narrowband access are likely to be national is that some operators who have entered into these agreements appear to set prices and market their service offerings on a national basis, regardless of the cost of provision in an individual development. Billing and marketing systems

¹¹⁸ *United Brands v. Commission*, Case 27/76 [1978] ECR 207, [1987] 1 CMLR 429, Para. 11.

¹¹⁹ European Commission, Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5. See paragraph 8.

would also appear to pose an obstacle to certain operators offering a more localised pricing policy. Some OAOs suggested that while local pricing could be implemented, there would be a number of hurdles to overcome including reworking billing and marketing systems. The relatively low incidence of “exclusive” agreements would further suggest that any costly changes to billing and marketing systems may not be practical for these operators at present. For example, ComReg has received evidence from one OAO to suggest that revenues from “exclusive” access infrastructure represent only a very small proportion of their overall revenues. Thus, in terms of cost and expected benefit it would appear unlikely that operators would adopt such a differential pricing strategy for a small segment of customers, indicating that the market is national in scope. It is further suggested by ComReg that any operator that attempted to offer higher prices in a specific area would potentially suffer negative media exposure, which might have a negative effect on its brand. Accordingly, this makes it less likely that such differential prices would occur.

3.133 As outlined above, the operators also have General Authorisations to operate throughout the State and while one operator is correct to note that it would be inappropriate for ComReg to define national markets on that basis alone, it is relevant that there is nothing to prevent an operator from operating on a national basis. This is further underlined by the fact that operators’ competitive behaviour also appears to be determined at the national level.

3.134 Given that the competitive conditions in these developments do not appear sufficiently distinct from the national markets and that the operators engaging in these agreements appear to determine their commercial terms and conditions largely at the national level, ComReg is of the view that the relevant geographic markets are likely to be national.

3.135 As outlined in the consultation, ComReg will keep this issue under review and assess any complaints it may receive in respect to consumer choice and service levels in any such developments on a case-by-case basis.

KEY ARGUMENTS RAISED BY RESPONDENT

3.136 One respondent disagreed with ComReg’s view and pointed to the emergence of “islands of monopoly” in private property developments where they maintained “exclusive supply” arrangements were being established with OAOs for the provision of communications services, including retail narrowband access. The respondent outlined its view that sub-national markets should be defined contiguous with the access network of any exclusive-supplying OAOs.

3.137 In particular, they expressed concerns regarding:

- i) Apparent inconsistencies between ComReg’s approach and an expert report carried out on behalf of the European Commission¹²⁰;
- ii) An alleged lack of evidence-based conclusions;
- iii) Barriers to supply-side substitution via amendments to billing procedure were apparently unsubstantiated;
- iv) Alleged insufficiency of ComReg’s proposal to monitor “exclusive” access arrangements; and

¹²⁰ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006.

- v) Alleged incompatibility with Ofcom's approach in the Hull area.

Further detail on each issue and ComReg's response is presented below.

i) Apparent inconsistencies between ComReg's approach and EC expert report

3.138 The respondent asserted that ComReg's finding that the conditions of supply of access services were homogeneous across Ireland appeared to be based on the fact that all providers of fixed access, regardless of the geographic scope of their offerings, competed with the incumbent whose services were provided on the same terms and conditions across Ireland. It further claimed that ComReg's view was based on the fact that the General Authorisations were national in scope. They referred to the Cave, Stumpf and Valletti report¹²¹ to support the contention that such findings did not justify the conclusion that the market was national in scope.

3.139 In relation to this point, firstly, ComReg notes that it is not relying solely on the fact that licensing is national to support the finding of a national market. Rather, it has examined the particular competitive conditions that prevail in these developments and concluded that they do not diverge significantly from those that apply nationally. Secondly, the excerpts that the respondent has taken from the geographic market definition section of the expert report do not wholly reflect the underlying argumentation of that section. The report primarily critiques reliance on price uniformity that results from non-SMP regulation, namely USO regulation.

3.140 ComReg's approach to geographic market definition in this instance, however, is not based on the fact that the operators in question are subject to a uniform price obligation. Rather, it focuses on the fact that OAOs, who are not subject to universal service obligations, are nonetheless pursuing a business policy of pricing uniformly on a national basis, thus suggesting that competitive conditions are homogeneous nationwide. Moreover, while the report notes that "the interpretation of homogeneity of conditions of competition is not straightforward" and critiques over-reliance on price uniformity that results from non-SMP regulation, it does accept that the case is stronger where such "price uniformity is the result of business policy, rather than regulation" as is the case in this instance.¹²²

ii) Lack of evidence-based conclusions

3.141 The respondent expressed dissatisfaction with ComReg's statement concerning the significant level of uncertainty regarding the actual level of exclusivity conferred by these agreements followed by the conclusion that the conditions for competition were sufficiently homogeneous, without apparently trying to resolve the issue.

3.142 In relation to this, ComReg wishes to underline that it made all due endeavours to obtain information from operators regarding "exclusive" access agreements. A detailed Data Direction was sent to all relevant operators in relation to the extent of

¹²¹ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006.

¹²² The report notes the merits of this approach where it states "When price uniformity is the result of business policy, rather than regulation – for example, the advantage of being able to market a single service nationwide – the case for the linking condition may be more reliable..." It cites two potential caveats to this as follows: i) the obligation of a dominant supplier may be implicit rather than explicit and ii) the apparently uniform 'headline' price may in fact be significantly amended on a regional basis by persistent special offers, which respond to local competitive conditions. ComReg does not consider these two potential caveats apply here.

exclusivity afforded by such arrangements.¹²³ In addition, documented conference calls were held with a number of operators.

- 3.143 Based on the information provided by both OAOs and eircom, the level of exclusivity afforded by the access agreements was not clear. OAOs indicated that, although there may be instances where they currently were the only operator providing network infrastructure in certain developments, these were not under “exclusive” access agreements as requests for access may, for example, be dealt with through commercial arrangements.
- 3.144 Furthermore, according to submissions made by the incumbent their standard process of designing an access network and supplying fixed line services in response to requests from property developers was being followed in approximately 1800-2000 new housing estates each year. The respondent identified only 6-10 housing estates¹²⁴ where it claimed it had been denied access or had experienced protracted commercial negotiations.¹²⁵ In any case, ComReg remains of the view that where common pricing constraints continue to apply nationwide and there are obstacles to operators switching to a more localised pricing policy in respect of those developments, then there is no obvious break in the competitive conditions sufficient to define separate or sub-national geographic markets. Furthermore, no evidence has been provided to suggest that this situation is likely to change over the period of the review.

iii) Barriers to supply-side substitution via amendments to billing procedure

- 3.145 The respondent did not accept ComReg’s argument that marketing constraints or billing systems would prevent alternative operators from engaging in more localised pricing policies. With regard to this, ComReg is still of the view that the operators in these developments continue to price their services on a national basis, strongly suggestive that they are subject to national competitive constraints. Furthermore, the responses to the Data Direction¹²⁶ indicated that billing and marketing arrangements could constrain the extent to which operators could readily switch to imposing differential pricing in these developments. It was further established from one of the responses to the Data Direction that developments which, to a certain extent, might be characterised by such arrangements account for only a small proportion of that operator’s overall customer base and revenues. Thus, the reworking of billing and marketing systems is unlikely to be justified for a small segment of customers. ComReg also suggests that it is possible that any operator that attempted to offer higher prices in a specific area would suffer negative media exposure which may adversely affect its brand. Accordingly, this renders it unlikely that such differential prices would occur.
- 3.146 To date, no evidence has been provided to suggest that operators engage in sub-national pricing strategies or that they are likely to over the period of the review.

¹²³ Direction to Provide Information, Interconnection Market Review, 9 June 2006.

¹²⁴ The respondent noted that the list of “exclusive” access areas it provided may not be exhaustive but furnished no evidence to suggest that there were a significant number of new areas yet to be identified. ComReg is of the view that the actual number of such areas is unlikely to be much greater than those already identified by the respondent. ComReg has no reason to believe that the full list of actual locations exhibiting these characteristics would be any greater than a fraction of a percentage of overall developments in Ireland.

¹²⁵ Direction to Provide Information, Interconnection Market Review, 9 June 2006

¹²⁶ Direction to Provide Information, Interconnection Market Review, 9 June 2006.

iv) Insufficiency of ComReg's proposal to monitor issue

- 3.147 The respondent indicated that it did not take much comfort from ComReg's proposal to keep the issue of "exclusive" access under review in light of potential implications with regard to consumer choice and service levels.
- 3.148 ComReg wishes to underline that it is of the view that the relevant operators active in these developments continue to be subject to national pricing constraints and there is insufficient evidence to suggest that they would act independently of their national competitors. ComReg does accept, however, that should this situation change it may need to review its approach. Furthermore, it will continue to monitor the situation and examine any possible complaints it receives regarding consumer choice or service levels within these developments on a case-by-case basis. In relation to quality of service, ComReg would further note that all operators (not just the SMP operator/Universal Service Provider) are mandated under Regulation 18 of the Universal Service Obligations to ensure the integrity of their network. This is something ComReg will continue to monitor, and intervene in, if necessary.

v) Incompatibility with Ofcom's approach in the Hull area

- 3.149 The respondent called upon ComReg to consider imposing appropriate regulatory obligations (e.g. CPS, WLR and LLU) on OAOs in the geographic areas where they have effectively "exclusive" control of access infrastructure for the provision of electronic communications networks and services. It contended that this would be consistent with the position taken in other jurisdictions, notably in the UK where Ofcom has designated Kingston Communications as having SMP in a defined geographic market of the Hull area and has imposed regulatory obligations.
- 3.150 In relation to the comparisons drawn by the respondent between the "exclusive" access areas and the Hull geographic market defined in the UK, ComReg notes that the Hull area has a population of over 250,000 representing approximately 0.5% of the UK population. As such, a geographic area in Ireland with a similar proportion would require a population of approximately 17,500 people. It is of note that one of the key areas identified in the Irish context includes no more than 500 dwellings. ComReg is of the view that to define multiple geographic markets of such small size and impose SMP obligations in each case could not be considered practical, proportionate or justified. Furthermore, the competitive conditions within these developments do not appear sufficiently distinct to those prevailing at the national level to warrant the definition of separate geographic markets.
- 3.151 Ofcom's definition of a separate geographic market in the Hull area was based on the fact that Kingston was isolated, largely by virtue of a different network topology in the region, from the competitive constraint deriving from the operation of BT's geographical averaging. As such, if a hypothetical monopolist were to raise the price by a small but significant amount, a provider outside the Hull area would not likely enter the market in the short term, as the cost of the required investment would be significant and would be unlikely to be justified in response to small price changes. However, in Ireland there is no corresponding situation where providers offering services in "exclusive" access areas are isolated from the competitive constraint deriving from the pricing of operators active in the national market. On the contrary, these operators continue to price at a national level in competition with other operators active in the national market. In this way, the operators participating in these arrangements continue to be subject to a national competitive constraint and the relevant geographic market can accordingly be regarded as national in scope.

3.152 Furthermore, while Kingston provides services exclusively in the Hull area, operators serving particular developments in Ireland also provide services outside of these areas. Importantly the service providers set prices nationally and do not differentiate based on location. Uniform national pricing means that if for example, an operator were to reduce prices in a non-exclusive area in response to competition in that area, then the effects of that competition would be felt throughout Ireland – including those developments where they may currently be the sole service provider. In this way, the market is subject to a national pricing constraint and can be regarded as national in scope.

OVERALL CONCLUSION

3.153 ComReg has noted the submissions made and has examined and analysed each element. ComReg maintains the view that service offerings, pricing behaviour and marketing arrangements within these developments are largely determined at the national level and there are constraints to operators determining these factors on a more localised basis. Insufficient evidence has been provided to suggest that this situation will change over the period of the review.

3.154 ComReg is of the view that so long as the national pricing constraint applies, operators engaging in these arrangements continue to determine their commercial terms and conditions on a national basis and there are constraints on them determining those terms on a more localised level, then the relevant geographic market is national.

ComReg’s conclusion is that the relevant geographic market is Ireland.

Conclusions on market definition

3.155 ComReg concludes that, at present, the access markets and the calls market in Ireland are complementary and are not substitutes. They are therefore defined as separate markets.

3.156 ComReg concludes that fixed and mobile access do not currently belong in the same relevant market. The evidence in the Irish market suggests that, at present, fixed and mobile access do not represent strong substitutes.

3.157 ComReg concludes that services over the PSTN (public switched telephone network), narrowband FWA (fixed wireless access) and ISDN BRA (basic rate access) currently belong in the same relevant market, for lower level narrowband access. They are products which offer the same functionality, for the same end use, and operate under similar price constraints.

3.158 ComReg also concludes that there is a separate market for higher level access including access via ISDN FRA (fractional rate access) and PRA (primary rate access). Functional substitutability is limited. Pricing for connection shows price progression from multiple PSTN lines, but the monthly rental is significantly different.

3.159 ComReg’s analysis of the supply of fixed access to business and residential customers indicated that there is no differentiation in terms of pricing, and that there is little differentiation in the conditions of supply.

3.160 Respondents generally agreed with ComReg’s proposal that there were single national markets for retail narrowband access in Ireland. It was recognised that pricing appears to be determined on a national basis and competitive conditions appear to be sufficiently homogenous throughout the national territory.

3.161 ComReg considers that the geographic scope of the access markets is national in scope. However, ComReg will continue to monitor closely the impact of “exclusive” access arrangements on the market.

Future perspective

3.162 As part of the market definition assessment for the retail narrowband access markets, ComReg has considered the likelihood of relevant competitive and technical developments that may affect these markets in respect to fixed calls, mobile access, ISDN and “exclusive” access agreements. ComReg does not believe that these competitive or technological developments are likely to change to a sufficiently significant extent so as to alter the appropriateness of these market definitions. However, these issues will be monitored and kept under review.

3.163 It is possible that the widespread deployment of fixed access and calls bundled products could affect the definition of a separate access and calls market. However, it is likely that calls will continue to be purchased separately from access and this is unlikely to change within the timeframe of the review i.e. the next two years.

3.164 It was argued by one respondent that future developments in the telecommunications markets, might encourage greater mobile to fixed substitution or take-up of hybrid products (in the context of an increased number of mobile service providers, falling mobile prices and the deployment of UMTS networks). However, it is likely that consumers will continue to be prepared to pay a ‘convenience premium’ associated with mobile access. Furthermore, within the timeframe of the review mobile rates – on the whole – are likely to remain higher than fixed (due in part to a typically higher mobile termination rate). ComReg notes that at present there are no converged products on offer in Ireland. Therefore, it is not feasible to assess whether these products may be technically substitutable, let alone whether there will be sufficient take-up for them to be considered demand or supply-side substitutes. ComReg will keep this issue under review.

3.165 Finally, in respect to geographic market definition in the event that operators began to differentiate their services based on location to an appreciable extent, ComReg will need to re-consider its conclusion that competitive conditions are national in scope. At present ComReg has no information which would indicate that this will occur.

Further Developments

3.166 Since the publication of the consultation paper, eircom has made public a four-phase plan for the roll-out of its NGN¹²⁷, with an overall implementation timeframe of 2007-2015. It is envisaged by eircom that this will progress as follows:

- i) The core NGN programme will expand Ethernet coverage to 240 sites, with deployment scheduled for Q3 2007.
- ii) An initial planned rollout of NGN Access, commencing in exchange areas with a high concentration of customers, two sites will be trialled in Q3/4 2007. It appears that eircom currently considers that few other areas are economically viable.¹²⁸

¹²⁷ Next Generation Network.

¹²⁸ ‘Working to Put Ireland at the Forefront of the Broadband Revolution’, eircom presentation, NGN Forum 2007, 8 March 2007, Ref CP44e. See www.comreg.ie

As such, the impact of these developments in relation to the retail narrowband access markets over the timeframe of this review is likely to be of relatively minor significance.

3.167 Notwithstanding the above, the question arises as to whether these developments may fundamentally change the market definition, particularly in relation to the delineation of the lower level access market. ComReg has carried out an initial assessment of the potential impact of NGNs on the delineation of this market.

3.168 It is recognised that the shift to NGNs may enable an operator to offer existing services more efficiently, and to offer new types of services. Nonetheless, it is ComReg's preliminary view that within the timeframe of this review, a move towards NGNs represents the use of a more efficient technology to offer services which are in fact similar to those that are currently included in the market. The functionality of these particular services will not change to a significant degree.¹²⁹

3.169 Consistent with the principles of market definition and particularly the principle of technological neutrality, the competitive conditions of product and service markets are not likely to change solely due to developments in the delivery technology. From a demand-side perspective, it appears from an initial examination that there would be sufficient substitutability between retail narrowband access services in the lower level access market such as PSTN, narrowband FWA, ISDN BRA to those such as PSTN Emulation Services due to be offered prospectively over NGNs, so as to render them in the same market.

3.170 It should be noted that, as stated by the European Commission in its draft revised recommendation although some market definitions may change in the face of the new service offerings that NGNs could bring:

“The use of more efficient technology to provide existing regulated services does not alter the justification for that regulation; the move to NGNs does not provide an opportunity to roll back regulation on existing services if the competitive conditions have not changed.”¹³⁰

3.171 Although ComReg remains cognisant that its market definition and analysis needs to be carried out on a prospective basis, it is considered premature at this juncture to carry out a detailed analysis in relation to the impact of these developments, in light of their very nascent nature and the absence of detailed information available in relation to them. The implications of the roll-out of NGNs for this market review will be closely monitored and ComReg will if necessary review market conditions. In this regard, the SMP Guidelines note that:

“In accordance with the Framework Directive, market assessments by NRAs will have to be undertaken on a regular basis. In this context, therefore, NRAs will have the possibility to react at regular intervals to any market developments and to take any measure deemed necessary.”¹³¹

¹²⁹ See for further discussion Oxera, “Next generation networks: old generation rules?” Agenda: Advancing economics in business, April 2007.

¹³⁰ Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets. Brussels, 28 June 2006, SEC (2006) 837, page 16.

¹³¹ SMP Guidelines, paragraph 71.

4 Relevant Market Analysis

Introduction

- 4.1 Upon defining the scope of the relevant product and geographic market, ComReg must assess the level of competition within that market. An undertaking will be deemed to have SMP if it is in a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. The SMP Guidelines outline a number of criteria which can be used in the assessment of competition. ComReg has considered the most pertinent criteria in detail and has annexed an overview of the remaining criteria to this document (Annex E).
- 4.2 Recital 27 of the Framework Directive states that a relevant market will not be effectively competitive ‘where there are one or more undertakings with significant market power’. Regulation 25(1) of the Framework Regulations states that:
- ‘A reference in these Regulations ... to an undertaking with significant market power is to an ... undertaking (whether individually or jointly with others) enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers’.
- 4.3 An undertaking which is dominant has the potential ability to influence a range of competition parameters including prices, innovation, output and the variety or quality of goods and services.
- 4.4 In its analysis, ComReg has adopted a ‘modified greenfield approach’ in that (i) all regulations which are unrelated to SMP are assumed to be maintained, (such regulations include specific obligations, which are imposed on the universal service provider, such as a uniform tariff requirement) and (ii) all SMP related regulations which are unrelated to the fixed access value chain are assumed to be in place. This involves looking at competition on the retail markets in the absence of upstream or wholesale regulation. The purpose of this is to ensure that regulation is only applied where there are significant competition concerns in the absence of regulation and there is a significant benefit to final consumers which cannot be achieved via the *ex post* instrument of competition law.

Background

- 4.5 Access to the telephone network may be offered:

Directly - this is where the customer is connected directly to the operator’s network. eircom is the largest provider in the direct access market, and is the only operator offering ubiquitous access (via a combination of copper, FWA and fibre) throughout the country. Other owners of access networks offering direct access are the two significant cable operators: ntl Ireland and Chorus are both owned by UPC Broadband and the integration of the two undertakings is currently taking place.¹³² There are also a number of OAOs offering direct connection and calls to specific types of customer, mainly large businesses.

¹³² Neither cable operators currently offer direct access to narrowband or voice services extensively, other than ntl offering direct access to ISDN PRA.

- 4.6 ComReg considers that access via LLU¹³³ is a form of direct access, which is the process whereby an incumbent operator makes its local network (the connection from the customer's premises to the telephone exchange) available to other companies. Operators are then able to upgrade individual lines to offer services directly to the customer. Where the local loop has been unbundled, it is generally for the provision of broadband services, and not solely narrowband access services. From the information available to ComReg, no operator currently provides higher level narrowband access via LLU.

Indirectly - this is where wholesale inputs are used to offer access services. Products such as single billing wholesale line rental (SB-WLR) mean that, while ownership of assets may not change, access services can be offered to end users by a third party.

- 4.7 In terms of direct access, ComReg recognised in the initial review that development of new or upgraded infrastructure, and the development of products such as LLU, together with increased use of services such as Voice over Internet Protocol (VoIP) and broadband, could eventually have an impact on the level of competition in the market. The current review will assess whether change in the supply of direct access has been significant in the period since the initial review.
- 4.8 At the time of the initial review, indirect access products had recently been launched in the market. ComReg recognised the potential for these products to impact on competition in the retail narrowband access markets by facilitating the provision of access and calls from one operator with single billing.
- 4.9 In the consultation paper, ComReg noted the need to examine what impact indirect access products have had on the market since the time of the initial review and to assess whether and to what extent they now act to constrain eircom's pricing behaviour.

Structure of this section

- 4.10 As this document is a response to consultation, in the following sections ComReg sets out its original position in the consultation document with regards to the existence of single dominance in this market, then a summary of the responses received to each consultation question, and finally ComReg's position having considered all of the views expressed by respondents.

Market Structure

CONSULTATION PROPOSAL

A. Market share

- 4.11 In the SMP Guidelines, it is clear that although a high market share alone is not sufficient to establish the possession of significant market power; it is unlikely that a firm will be dominant without a large market share. The SMP Guidelines further note that:

"...very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position... An

¹³³Local Loop Unbundling.

undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time.”¹³⁴

4.12 However, ComReg recognised that large market shares were not in themselves sufficient to form the basis of a finding of SMP and that other factors that contributed to SMP (and indeed offset it) must also be taken into account. Therefore, ComReg did not view the existence of large market shares as being determinative of the question of whether or not SMP existed in the relevant market.

4.13 It is important to consider the changes in market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may tend towards effective competition over the period of this review. Accordingly, ComReg analysed market share data from the time of the initial review to the present and the view of past market developments is therefore based on a time period of approximately four years.

A (i) Market share: lower level narrowband access

4.14 Market share data was presented in the presence of wholesale regulation and included lines provided via SB-WLR. Before the introduction of SB-WLR, eircom’s share of the lower level retail narrowband access market had remained at over 99% for several years. As shown in Figure 4.1 below, eircom’s market share started to decline from the end of 2004, and by the end of December 2006 it was just over 83%.

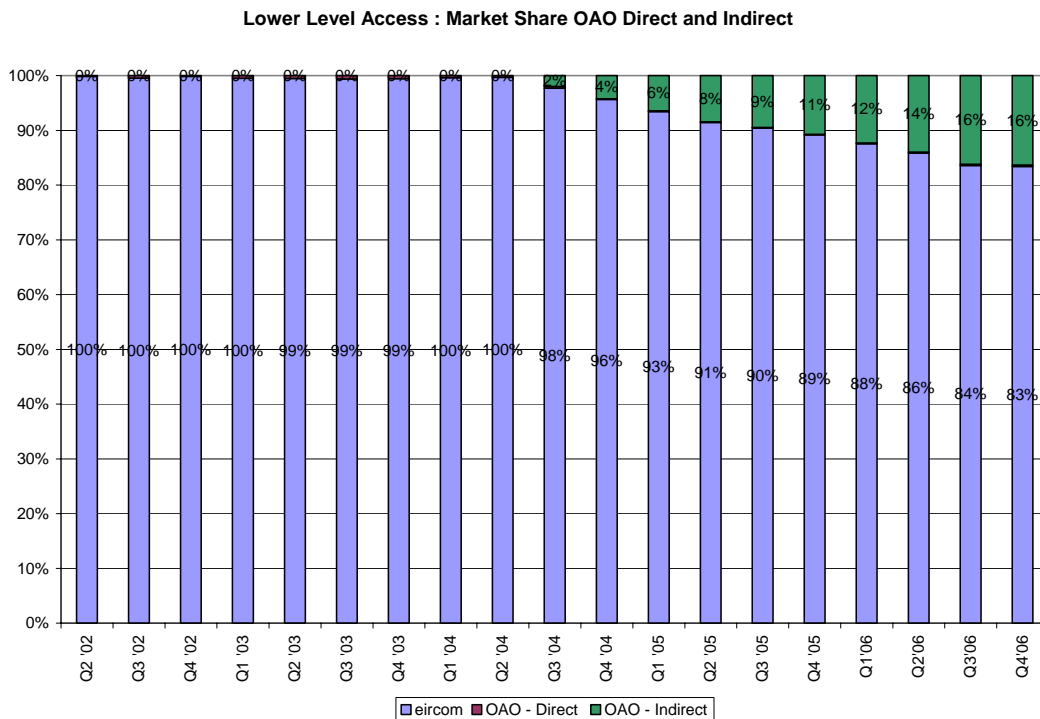


Figure 4.1: Market Share Lower Level Retail Access Market (including direct and indirect access)

4.15 Over the same period, OAO market share associated with direct access had decreased, with over 8,700 access paths at the beginning of 2003, falling to just over 4,500 by the end of December 2006. This decline in access lines was primarily due to a fall in

¹³⁴ SMP Guidelines. See paragraph 75.

take-up of ISDN BRA, Chorus' FWA licence being withdrawn and the cessation of direct cable access for PSTN and ISDN BRA by ntl.

- 4.16 Analysis of market share data indicated an initial rapid take-up of SB-WLR as operators migrated customers from CPS, with slower overall growth in the second half of 2005. It was highlighted that this analysis was carried out in the presence of regulation.

A (ii) Market share: higher level access

- 4.17 A similar pattern of market share behaviour in the higher level retail access market was observed, as shown in Figure 4.2 below. In early 2004, eircom's share on a channel basis of the higher level narrowband access market was 80% and had not fallen below 70% during the preceding four years. At the end of December 2006, eircom's market share was at 66%, unchanged from the beginning of the year.
- 4.18 However, the reduction in eircom's market share in the higher level retail access market was due to a combination of the take-up of SB-WLR, and an increase in direct connection in the period since the last review. As would be expected, the cost differences in supply of multiple lines meant that while direct connection was negligible in the lower level retail access market, the proportion of OAO customers connected directly in the higher level retail access market increased.
- 4.19 As shown in Figure 4.2 below, SB-WLR accounted for around 6% of the higher level retail access market at the end of December 2006, while direct connection increased from 20% of the market at the beginning of 2004, to 28% by the end of December 2006. Nevertheless, while OAOs continued to build and or maintain competing infrastructure, in view of the high barriers to entry, their direct access market share since March 2004 fluctuated within the range of 22% and 29%.
- 4.20 In light of the foregoing, ComReg was of the view that it was unlikely that OAOs' share of direct access would increase significantly within the period of the review. From the information available to ComReg, it was found that no operator provided higher level access via LLU, therefore all direct access was over OAO own build. This suggested that the introduction of SB-WLR had not substituted for OAO direct access customers, but had rather increased the overall OAO share of the market.

Higher Level Access : Market Share OAO Direct and Indirect

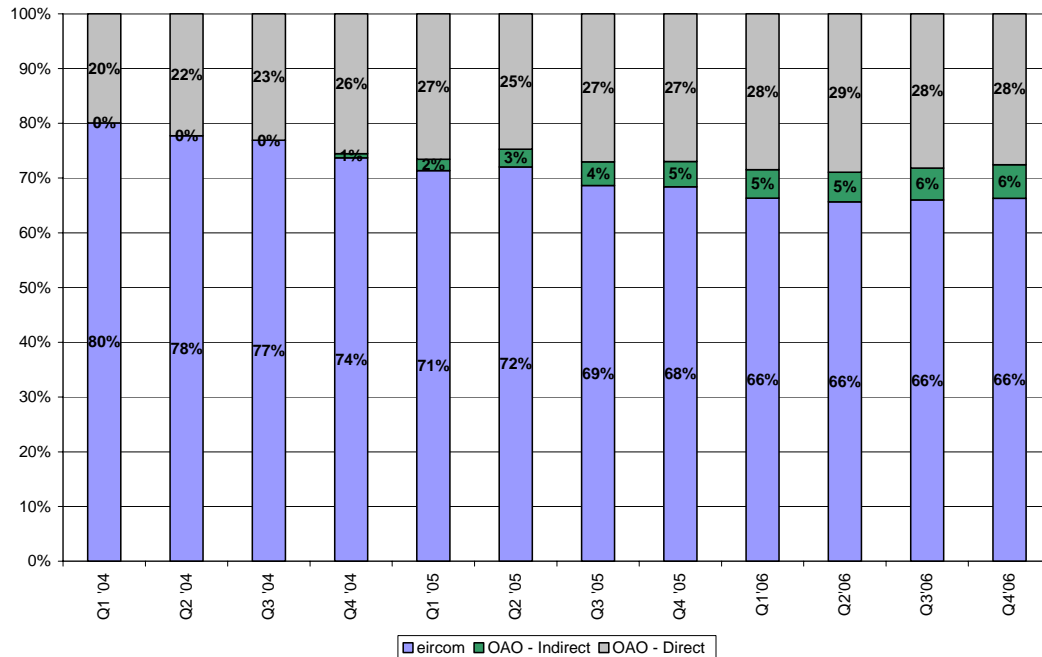


Figure 4.2: Market share Higher Level Retail Access Market (including direct and indirect access)

CONCLUSION

4.21 eircom's market share remains high and consistent in both markets. Both markets exhibit market shares that, by reference to established case-law, remain consistent with a finding of SMP. Further, this is not expected to change significantly within the lifetime of the review.

B. Ability to price independently

4.22 The table below gives a brief overview of developments with respect to the prices of eircom's lower and higher level access products:

Services	2003	2004	2005	% change nominal Feb 03 – Feb 06 ¹³⁵
Rental PSTN	17.5%	5%	0%	23.3%
Rental ISDN FRA/PRA	0%	0%	0%	0%
Connection PSTN	0%	0%	-6.5%	-6.5%
Connection ISDN FRA/PRA	0%	0%	0%	0%

Table 4.1: Overview of percentage price change of currently capped services

4.23 Over a period of one year, from March 2003 to February 2004, there have been significant increases in PSTN line rental, amounting to approximately 23 percent. During this period, eircom maintained its high market share. This indicated that at the time, eircom had the ability to increase its price without being constrained by its competitors. Consumers incurred the price increase rather than switching.

¹³⁵ It is of note that there has been no change in the nominal prices charged for PSTN, ISDN FRA/PRA in the intervening period since February 2006 (excluding temporary promotions).

- 4.24 ComReg notes that there are limited barriers to switching. However, the fact remains that survey data suggests that over 50% of non-residential users have never switched operator.¹³⁶ While 85% of residential users had not switched in the preceding twelve months.¹³⁷ It is ComReg's view that while competitive dynamics may have changed somewhat, eircom still has the ability to increase its prices to an appreciable extent independently of its consumers.
- 4.25 All notified price amendments to ComReg on the part of eircom associated with higher level access (ISDN FRA and PRA line rentals and connections) since 2002 related either to temporary promotions or supplementary service charges. The standard nominal prices of higher level access products remained unchanged in the period. Nonetheless, as ISDN FRA and PRA line rentals and connection prices did not increase in line with annual inflation and/or the consumer price index (CPI) this represented an aggregate real reduction of prices for the consumer. These decreases amounted to only 12.8% (reflecting accumulated overall CPI) over a period of four years (between 2002 and 2005).
- 4.26 ComReg concluded that the above analysis of pricing developments indicated that eircom has not been constrained by its competitors in either the higher or lower level access market.

VIEWS OF RESPONDENTS

- 4.27 One respondent asserted that ComReg's pricing analysis failed to establish that eircom was not being constrained by its competitors. They disagreed with the manner in which ComReg discounted price changes that had occurred as a result of temporary promotions, asserting that such activity was indicative of a response to competitive pressures. They noted that ComReg failed to indicate what level of price reduction for higher level access it would consider consistent with eircom being effectively constrained by its competitors. They also stated that ComReg's preliminary conclusion that pricing suggested a lack of competitive constraint on eircom appeared unwarranted given that the prices analysed had been subject to a regulatory price cap and as such should be expected to act as a proxy for competitive prices.

CONCLUSION

- 4.28 In relation to these issues, ComReg is of the view that the key determinant indicating a real competitive constraint on the incumbent is a permanent price change, temporary promotions are not sufficient in this regard. Further, ComReg considers that it would represent a misguided, mechanistic approach to delineate a level of price reductions that it would consider consistent with competitive pressure being exerted on the incumbent. The price cap acts to constrain the incumbent from exploiting its dominant position in the market by pricing excessively and as such aims to encourage competitive pricing behaviour. However, in this instance, ComReg does not consider that dynamic competitive pricing behaviour has been demonstrated.

C. Existing competition

CONSULTATION PROPOSAL

- 4.29 The analysis of market shares indicated that, at the end of December 2006, eircom's share of the lower level retail access market was 83% and that its share of the higher level retail access market was 66%.

¹³⁶ Millward Brown IMS, H2 2006 survey.

¹³⁷ amárach, Q1 2006 survey.

- 4.30 Direct access was offered by some OAOs, almost exclusively in the higher level retail access market. A total of five operators provided ISDN FRA and PRA by direct access. The largest of which were eircom, BT Ireland, energis and ntl. Direct access may be provided by direct build, cable, fibre, wireless or via LLU (however ComReg indicated that it was not aware of any operator providing higher level access via LLU).
- 4.31 For indirect access, a key change in the structure of the market since the time of the last review has been the development of SB-WLR. This allows an operator to offer customers a calls and access bundle with a single bill. The same group of OAOs offer indirect access products in the lower and higher level retail access markets, although their emphasis may differ, and consequently their significance in each market is different. The main purchasers of SB-WLR are BT Ireland, Cable & Wireless, Access Telecom, Talk Talk, Verizon Business and Energis.¹³⁸ In addition, resellers may purchase indirect access from OAOs and sell on to end-users. No operator other than eircom has more than 10% market share of the lower level access market.
- 4.32 During 2005, the number of SB-WLR lines increased in both markets, while the number of paths associated with CPS decreased. This is consistent with operators migrating customers from CPS to SB-WLR. ComReg indicated that it would expect this trend to continue, with an increase in SB-WLR, but possibly at the expense of a CPS only service, as OAOs continued to migrate customers to single billing.
- 4.33 Looking at the trends in the market so far, it is likely that any competitive pressure in the lower level retail access market arising through direct access will be via LLU¹³⁹ rather than from the alternatives listed above. This is due to the economics of supplying customers who require one or two lines. However, it is unlikely that a growth in the numbers of LLU customers will fully negate barriers to entry into the market.
- 4.34 LLU has been predominantly used to date for the provision of broadband access. ComReg noted that operators have started offering bundled voice and broadband services. While there has been recent growth in the LLU market, (approximately 19,500 lines at the end of December 2006¹⁴⁰, most of which were fully unbundled), it is unlikely that retail narrowband lower or higher level access services provided by OAOs over LLU will offer sufficient potential competition to act as a competitive constraint on eircom over the timeframe of the review. ComReg outlined that it would monitor the impact of LLU on the relevant markets, and revisit its analysis if necessary.

VIEWS OF RESPONDENTS

- 4.35 One respondent expressed the view that ComReg may be underestimating the potential of LLU in fostering increased competition in the retail market, given that this route to market entry was more likely to be undertaken for the provision of combined voice and broadband packages rather than voice alone. While they accepted that there were significant costs associated with such an approach, they contended that this form of entry could be built up incrementally and would not have to mirror the ubiquity of eircom's presence to effectively constrain the proposed SMP operator. They provided no evidence in support of this argument.

¹³⁸ In August 2005, C&W acquired Energis but data is still provided separately.

¹³⁹ LLU has been mandated by Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops. Document number 04/70.

¹⁴⁰ It is of note that this is a decline from the number of approximately 20,000 lines at the end of September 2006. This decrease is primarily due to Smart telecom's exit from the residential telephony market in October 2006.

CONCLUSION

- 4.36 ComReg remains firmly of the view that within the lifetime of the review LLU will not have a significant impact in relation to lessening the incumbent's SMP and maintains that widespread, national coverage would be required to constrain eircom. In particular, ComReg considers that such an approach would not be economically viable for operators since operators face not only the cost of rental but also the investment cost of the connection to the local loop.
- 4.37 Taking together the initial review and its updated analysis, ComReg assessed market shares over the past six years, for the lower and higher level retail fixed narrowband access markets. eircom's market share declined in both markets. In the lower level narrowband access market, this was found largely to be due to the introduction and development of mandated indirect access products. In the higher level narrowband access market, eircom's share declined due to an increase in direct connection combined with the introduction of indirect access. Nevertheless, while OAOs continued to build and or maintain competing infrastructure, in view of the high barriers to entry, their direct access market share between Q1 2004 and Q4 2006 fluctuated within the range of 22% and 29%. Furthermore, it must be noted that eircom's market share remained over 83% in the lower level access market and above 66% in the higher level retail access market and that in both markets the initial reduction on the introduction of SB-WLR has slowed.
- 4.38 It should also be noted that this analysis of market share has been carried out in the presence of regulation. In the absence of regulation, eircom's market share in the lower level retail narrowband access market would be close to 100%, and in the higher level retail narrowband access market would be 72%.
- 4.39 An assessment of existing competition would indicate that, to a sufficient extent, eircom is in a position to act independently of its competitors and consumers.

Barriers to entry and potential competition**CONSULTATION PROPOSAL**

- 4.40 The consultation noted that while high market shares were suggestive of market power, it was important that an overall analysis was carried out in order to determine whether eircom can act independently of its competitors and customers in the access markets.
- 4.41 In the initial review, ComReg analysed actual and potential barriers to entry in the retail narrowband access markets. In the current consultation paper, ComReg developed this analysis further to take account of developments in the market in the intervening period.
- 4.42 In order to assess the potential for a new entrant to enter these markets and act to constrain eircom, ComReg analysed barriers to entry associated with economies of scale, scope and density; control of infrastructure not easily replicated; and vertical integration. The consultation¹⁴¹ reflected further detailed analysis which had been carried out by ComReg, and concluded that while regulatory intervention helped to somewhat alleviate the barriers associated with economies of scale and scope for OAOs wishing to enter the retail narrowband access markets it was likely that eircom's dominance of the markets would continue.

¹⁴¹ See 06/39 for detailed analysis.

- 4.43 Considering the extent to which control of infrastructure not easily replicated constituted a barrier to entry, ComReg noted that the proportion of direct access offered by OAOs had increased in the higher level retail access market, but remained negligible in the lower level retail access market.
- 4.44 Government-funded Metropolitan Area Networks (MANs) may offer alternative infrastructure. However, the MANs currently operate principally at a wholesale level.
- 4.45 In the consultation, ComReg found that eircom's vertical integration and dominance in upstream markets could potentially deter market entry.¹⁴²

VIEWS OF RESPONDENTS

- 4.46 A respondent drew attention to the need to take into account potential competition using alternative technological platforms such as FWA or the existing MANs given that this offered the prospect of entry at the wholesale level at potentially much lower costs than the route of replicating the existing PSTN. They asserted that even where such alternative platforms were not used, the credible prospect that they would be employed in response to an attempt by the incumbent to implement a small but significant and non-transitory price increase would be an effective competitive constraint.

CONCLUSION

- 4.47 ComReg has considered further the potential for alternative technologies to constrain the ability of eircom to price independently. ComReg notes that it is not aware of any OAO planning to enter the retail narrowband access markets via alternative technologies such as FWA within the lifetime of the review. Where entry has taken place by FWA it is concerned with the provision of broadband access and/or television services, where voice may be offered as an ancillary or secondary service. In most cases where voice is being provided it is via VoB rather than traditional voice services. It is not considered that it would be economically feasible for an OAO to enter the retail narrowband access markets via alternative technologies within the period of the review. Moreover, even if entry did occur, it would be likely to take considerable time for any FWA operator to achieve significant scale and customer size to constrain eircom significantly. This is particularly the case given the current set of spectrum licenses used by FWA operators, which are a set of local licenses, and do not provide coverage of the whole country. In relation to the MANs, take-up to date has been minimal and it is not anticipated that it will have a significant impact within the lifetime of the review. ComReg does not therefore consider that either alternative platform would be sufficient to prevent a small but significant and non-transitory price increase by eircom.
- 4.48 ComReg maintains its conclusion that barriers to entry persist in the retail narrowband access markets. eircom is unlikely to be constrained by a new entrant, particularly due to barriers associated with economies of scale, scope and density, in the context of vertical integration, and with control of infrastructure not easily replicated.

Countervailing Buyer Power

CONSULTATION PROPOSAL

- 4.49 In the consultation, ComReg proposed that countervailing buyer power (CBP) could only be considered as a potential issue for a very small number of very large

¹⁴² See Competition Policy. Theory and Practice. Massimo Motta. Cambridge University Press. 2004.

companies. As such, it could not be seen as a relevant consideration in the lower level access market. ComReg assessed CBP in relation to non-residential users, more specifically those with high spend or a high numbers of employees (most likely to be corporates and Government agencies) rather than SoHos¹⁴³ and SMEs.

- 4.50 ComReg suggested that even if corporate purchasers were in a position to exert bargaining power upon operators, these purchasers did not represent a sufficient influence to diminish eircom's market power in the higher level narrowband retail access market in its entirety. The data available to ComReg indicated that companies with more than 100 employees represented less than 5% of total fixed line voice spend.¹⁴⁴

VIEWS OF RESPONDENTS

- 4.51 In the initial review, two respondents suggested that the existence of countervailing buyer power was a major issue in the retail narrowband access markets, particularly amongst the largest companies in the higher level access market. This view was restated and elaborated in the response to the 'Call for Input' to this updated review.
- 4.52 The argument which was advanced was that very large customers typically tender for telecommunications services and could insist that contracts were held to a minimum term. Further, it was alleged that the tendering process often requested a single voice and data package and that competing suppliers would discount their voice prices to win a data contract. The largest customers were seen as able to insist on a bespoke solution. It can be noted that the evidence which was provided for this referred to one specific case, supplemented by general observations.

CONCLUSION

- 4.53 The assessment of CBP considers whether the behaviour of very large companies is sufficient to constrain eircom's pricing behaviour, and if so, whether this happens to an extent which would negate or reduce a dominant position.
- 4.54 ComReg expressed the view that in the higher level access market the barriers to switching supplier have declined since the time of the last review. This view was supported by survey data which showed that companies with over 100 employees were most likely to have switched their supplier for fixed line services.¹⁴⁵ It was clear that the awareness of alternative sources of supply had increased and that switching barriers were low.
- 4.55 However, despite this eircom's market share remained high and stable. Survey data¹⁴⁶ suggested that eircom's market share was spread across all businesses, even those companies with 100+ employees (who were asserted to be in a position to exert countervailing bargaining power). When asked who their provider of calls was, in most categories of businesses (whether grouped by number of employees or spend) over 70% said that eircom was their supplier. Furthermore, as part of the market analysis data collection, data received showed that eircom's top ten customers' voice spend was significantly higher than that of other operators. This would indicate that even for high end customers, eircom competes successfully. This was also true when the customer base was analysed by business type (e.g. public body or multi-national organization)

¹⁴³ Small office, Home office.

¹⁴⁴ Source: ComReg analysis of consumer survey and CSO data.

¹⁴⁵ Millward Brown IMS. SME and Corporate ICT Research, H1 2006.

¹⁴⁶ Millward Brown IMS Business Survey - H1 and H2 2006.

- 4.56 If CBP was being exercised in this market, ComReg would expect to see more evidence of customers switching supplier and, in particular, more evidence of prices being reduced in response to the threat of switching.¹⁴⁷ However, this does not appear to be the case.
- 4.57 ComReg outlined its belief that the existence of competitive tendering to a proportion of customers did not ‘prove’ the existence of CBP, and nor did the introduction of fixed term contracts. Rather, it was an indication that, in some segments of the market, there was a tendency towards competition. The behaviour which was described to ComReg could be seen as a feature of any market which has more than one player in it. The potential for CBP is limited to a very small number of companies. Given that their purchasing is on an individual basis, it is difficult to see how any one customer could be significant enough to constrain eircom’s pricing behaviour. The evaluation of CBP would have to be done on a case-by-case basis, and perhaps even on a contract-by-contract basis.
- 4.58 ComReg has noted that eircom’s high market shares in both the lower and higher level access markets have not been appreciably mitigated by other factors. Significantly, the analysis indicated that despite the presence of wholesale regulation (e.g. SB-WLR, CPS, supporting measures and wholesale measures in related access markets such as LLU), competition is not yet effective in the retail narrowband access markets nor is it expected to be within the lifetime of the review. It is of note that while in particular these indirect wholesale measures have facilitated the development of limited competition in these markets they have not served to remove eircom’s market power. Further, it should be recognised that absent these measures eircom’s dominant position would be further enhanced. Arising from this analysis, ComReg’s conclusion is that eircom has SMP in both the higher and lower level narrowband access markets.

¹⁴⁷ While there have been real price decreases for lower level narrowband access, there have been no nominal price decreases in response to competitors’ price movements. In addition, there has been no change in the standard nominal prices of higher level narrowband access since 2002.

5 Proposed Designation of Undertakings with Significant Market Power

- 5.1 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the Framework Regulations:
- eircom Ltd should be designated as having SMP in the fixed retail market for **Lower Level Narrowband Access** to the public telephone network.
 - eircom Ltd should be designated as having SMP in the fixed retail market for **Higher Level Narrowband Access** to the public telephone network.
- 5.2 A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6 Market Remedies

Introduction

- 6.1 The initial review¹⁴⁸ outlined the basis for the set of remedies proposed by ComReg. No respondents to the current consultation raised an issue in relation to this.
- 6.2 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the Framework Regulations as having SMP on a given market. ComReg is also obliged, under Regulation 9(1) of the Access Regulations, where an operator is designated as having SMP to impose on such an operator some of the obligations set out in Regulations 10 to 14 of the Access Regulations as ComReg considers appropriate.
- 6.3 Furthermore, in relation to regulatory controls on retail services, Article 17(1) of the Universal Service Directive specifies that where following a market analysis a NRA determines that a given retail market is not effectively competitive and where it concludes that obligations imposed under the Access Directive or Article 19 of the Universal Service Directive (i.e. in this instance CPS, SB-WLR) would not result in the achievement of the objectives laid down in Article 8 of the Framework Directive, NRAs shall impose appropriate regulatory obligations on undertakings identified as having SMP on the given retail market.¹⁴⁹
- 6.4 In this review, ComReg has revisited its analysis of the retail narrowband access markets, and has taken into account any changes in the market since the time of the initial review. Firstly, this section considers the potential competition problems which may arise in the retail narrowband access markets given the structure of these markets (as outlined in section 4). Secondly, ComReg outlines the proposed remedies to address these concerns, taking into account respondents' views. The analysis considers the required regulatory intervention at the wholesale level in the first instance. Only where residual competition problems have been identified, even in the presence of the proposed wholesale measures, are remedies at the retail level justified.

Competition Problems in the retail narrowband access markets

- 6.5 In the initial review, ComReg outlined actual and potential competition problems in the retail narrowband access markets. The approach which was taken to the assessment of competition problems was forward-looking and followed the recommendations of the Guidelines. In line with the Modified Greenfield Approach¹⁵⁰, ComReg must carry out the assessment on competition problems, in the absence of regulation. In relation to its assessment of competition problems, while evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation. As such, ComReg considers that the justification for considering remedies must be broader than if solely

¹⁴⁸ Market Analysis: Retail Narrowband Access Markets (04/94 and 05/25).

¹⁴⁹ This was transposed under Regulation 14(1) of the Universal Service Regulations.

¹⁵⁰ As outlined in the Draft Recommendation and Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, an independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission. July 2006.

based on demonstrable acts of past behaviour. ComReg instead has to anticipate the appearance of a particular competition problem based on the incentives of a SMP undertaking to engage in such behaviour, which in turn will be based on the results of the SMP analysis (section four). In addition, in order to justify remedies at the retail level, in the presence of wholesale regulatory measures, analysis must be undertaken of residual competition problems at the retail level.

- 6.6 In this review, the focus has been on examining development in the market since the time of the initial review, and in considering whether the types of competition problems identified are still evident.
- 6.7 In the initial review, ComReg identified competition problems associated with the potential vertical leveraging/maintenance of a dominant position in the retail narrowband access markets and horizontal leveraging of dominance in these markets into related markets (e.g. retail calls, broadband, LLU).
- 6.8 According to settled case law,
- “dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”¹⁵¹
- 6.9 An undertaking which is dominant has the potential ability to influence a range of competition parameters including prices, innovation, output and the variety or quality of goods and services. Absent regulation, a dominant firm would rationally have the incentive to raise prices, as there would be no competitive pressure to prevent this. In addition, a firm which was dominant in an upstream market could use its market power to leverage into a downstream market. In addition, a firm which was dominant in one market could attempt to leverage power horizontally into a related market.
- 6.10 It is however important to note that in any discussion of competition problems, and of the incentives for an operator to exert its SMP, it is not necessary for ComReg to point to examples of abuse that have occurred. While such examples would be corroborative, the nature of *ex ante* regulation is that it is concerned with guarding against this in advance.
- 6.11 In the initial review, ComReg described the types of competition problem which may arise in the retail narrowband access markets, and provided examples of these problems in the context of the Irish markets. This current review draws on the previous analysis, and focuses on assessing any changes in the nature of the competition problems from the time of the initial review. Below, ComReg sets out potential competition problems associated with i) vertical leveraging/maintenance of a dominant position in these markets and ii) horizontal leveraging of dominance in these markets into related markets.

Vertical leveraging/Maintenance of dominant position

- 6.12 Vertical leveraging arises where an operator has dominance at a wholesale level and can potentially transfer this power into the retail markets. In the retail narrowband access markets, a vertically-integrated SMP operator has control of the wholesale inputs (CPS, SB-WLR and LLU) necessary for an entrant to offer an access service, and is in a position to control the use of these inputs and so affect the competitive

¹⁵¹ DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005.

conditions in the retail narrowband access markets, thereby reinforcing or maintaining dominance in these markets.

6.13 In the initial review, ComReg outlined actual and potential ways in which this could happen, and characterised potential vertical leverage/maintenance of dominance within these markets in terms of:

- a) Denial of access;
- b) Leveraging by non-price means;
- c) Leveraging by means of pricing.

(a) Denial of access

6.14 eircom is a vertically integrated operator which has control of the wholesale inputs needed to offer an effective SB-WLR product in the retail access markets. Absent regulation, eircom would have incentives to use or leverage its control over the wholesale inputs to reinforce its dominance in the retail narrowband access markets, thus establishing potential competition problems associated with vertical leveraging/maintenance of a dominant position. It should be noted that a denial of access may be a constructive denial and it is not necessary for it to be an outright and categorical refusal to supply. For example, by way of delaying tactics such as protracted negotiations for new entrants, discriminatory use or withholding of information, quality discrimination, strategic design, disproportionate entry criteria as well as unreasonable terms and conditions associated with access, etc.

6.15 eircom's continuing high market share in both markets, and the limited existence of other factors which would act to significantly dilute eircom's potential market power within the timeframe of the review (e.g. CBP), would suggest that competition problems persist. This indicates a continuing need for regulatory intervention and the need to create an environment where OAOs can obtain the necessary wholesale components on appropriate terms. It is ComReg's view that the provision of CPS and SB-WLR products are necessary to ensure that operators and resellers of OAO products can enter the market by availing of eircom's infrastructure. Certain regulatory safeguards would be required over the period of the review in order to do this.

6.16 In the initial review, the specific examples given in illustrating the competition problems were focused largely on the development and implementation phases of the SB-WLR product. This product has been in the market since 2004. The focus of the issues for the industry has shifted from ensuring the basic availability of the SB-WLR product to concerns around its implementation and development, in particular the requirement for open and transparent processes to support product development and service assurance.

6.17 This is of particular significance in relation to the retail narrowband access markets identified since the availability and effectiveness of these mandated products at the wholesale level are critical to facilitate competition by OAOs. As noted above, in the absence of these wholesale remedies the incumbent would have considerable scope and incentives to withdraw access to its network or to provide such access on less favourable terms to OAOs, which would affect their ability to compete in the retail narrowband access markets.

(b) Leveraging by non-price means

- 6.18 ComReg recognises that in the period since the launch of the SB-WLR product there has been considerable take-up. However, ComReg has specific experience of continuing competition problems in relation to the mandated wholesale products which as noted above have a knock-on effect on competition in the retail markets. These problems have been communicated via industry fora and correspondence from operators to ComReg, of which ComReg has records.
- 6.19 There are many kinds of potential competition problems associated with the potential use or leverage of control over the necessary wholesale inputs to reinforce dominance in the retail narrowband access markets. Examples are product development, service delivery and assurance and access to information. These examples are not exhaustive.

(b) (i) Product development

- 6.20 In the current consultation paper, ComReg noted that in relation to product development, OAOs had frequently complained about the lack of transparency around eircom's prioritisation process for wholesale as opposed to retail product development. Most respondents supported ComReg's position that there was a noted lack of visibility regarding the IT development processes which underpin the delivery of wholesale products. OAOs re-iterated that information about eircom's prioritisation of the IT development program was required to enable OAOs to efficiently manage and schedule their internal IT developments. Similarly, respondents agreed that it was not clear that eircom's internal product development process was structured in a way that would facilitate a proportionate influence by eircom Wholesale¹⁵² on the product development roadmap.
- 6.21 ComReg's assessment was that wholesale product development had frequently been a highly burdensome and difficult process, which required significant time and resources to bring even a minor development through to implementation. While it was noted that not all difficulties were due to eircom, most respondents agreed with ComReg's assessment that more constructive engagement by eircom was required. The response by eircom to a reasonable request for access, in the context of product development, relies on constructive engagement by eircom and negotiation in good faith at all times.
- 6.22 ComReg outlined that the net effect of any lack of transparency was that OAOs had no guaranteed influence on the product development process and their role would be largely reactive. ComReg considered that this was unlikely to be the position enjoyed by eircom Retail. It was ComReg's view that if this problem failed to be addressed then there was scope for eircom's Retail requirements to be the main driver for product development and that this would discriminate against OAOs. In addition, the lack of communication regarding product and IT development meant that there was a risk that OAOs would suffer a sufficient delay in implementing changes to their retail offering which would in turn affect their ability to compete at the retail level. As such, respondents reflected the view that the limited scope for OAOs in the product development process negatively impacted on their ability to compete in the retail narrowband access markets.
- 6.23 There was broad support among respondents that ComReg had identified the correct competition problems. It was one respondent's view that the key example of vertical

¹⁵² As a vertically integrated firm, ComReg refers to eircom Retail, an arm of eircom which provides services to end users. eircom Wholesale is considered to be the unit which provides products to other authorised operators. These terms may not reflect the actual structure of eircom Ltd.

leverage was the lack of negotiating power by OAOs and the inability to influence development and prioritisation. They suggested that there was not sufficient transparency of the review process and as a result eircom Retail's proposals for product development could be treated in a more favourable way. It was argued that this resulted in eircom's Retail arm being treated in a preferential manner, thus representing an example of leverage of market power from the wholesale level, thereby affording the incumbent an advantage in the retail narrowband access markets.

(b) (ii) Service Level Agreements (SLAs)

- 6.24 As set out in the consultation paper, ComReg noted that OAOs had continued to identify quality of service issues around provisioning and fault handling which directly impacted upon the competitiveness of their retail offering in the narrowband access markets. Further concerns arose around the lack of visibility of the service guarantees provided to eircom Retail. OAOs had noted a lack of confidence in that it was difficult for them to be sure that eircom Retail did not benefit from a better quality of service than that provided to them.
- 6.25 One example provided by respondents was of eircom Retail being able to provide a retail customer service commitment superior to that provided by the corresponding wholesale SLA. Respondents cited a discrepancy between delivery timelines offered at the wholesale level, and eircom Retail's guarantee (which was significantly shorter). Such an asymmetry would have the potential to hinder OAOs at the retail level in the narrowband access markets. ComReg also notes that eircom's retail offering may not necessarily represent the guarantee afforded to eircom by its wholesale arm and may assume some level of retail risk. However, ComReg considers that in the absence of non-discrimination and transparency obligations, eircom would be in a position to leverage or use its market power over the wholesale inputs to adversely affect competition in the retail narrowband access markets. As such, regulatory intervention requiring published SLAs may be justified.
- 6.26 One respondent noted that the specific service assurance targets offered by the SB - WLR SLA were inadequate to deliver a competitive customer proposition at the retail level. ComReg notes that it is essential for the promotion of effective retail competition in the narrowband access markets that if an effective access obligation is to be imposed access must be of an adequate quality to allow the downstream provider to compete. It is the objective of the SLA mechanism to ensure equivalence, and to guarantee that access provided at the wholesale level is offered in a fair, reasonable and timely manner so that OAOs may be in a position to effectively compete at the retail level.

(b) (iii) Access to information

- 6.27 One respondent to the current consultation raised the issue of access to essential information required to avail of wholesale products in the retail narrowband access markets. It was asserted that a vertically integrated operator would have complete control over wholesale inputs and as such could have preferential access to customer information, which would afford it an advantage in relation to its position at the retail level. Examples of this were the availability of real time access to necessary information which is not available to downstream competitors or reduced functionality. The respondent noted that there should be sufficient transparency in place to ensure that competitors were not disadvantaged, since this would adversely affect their ability to compete at the retail level.
- 6.28 ComReg considers that these problems should be addressed by obligations at the wholesale level in relation to transparency and non-discrimination in order to address

the potential competition problems identified in relation to the retail narrowband access markets.

(c) Leveraging by means of pricing

- 6.29 Price discrimination can be used by a vertically integrated undertaking with SMP on the wholesale market to raise its rival's costs downstream (i.e. at the retail level) and induce a margin squeeze. This may be achieved by charging a higher price for the wholesale input e.g. access to downstream competitors than charged to its retail arm. This serves to raise their rivals' costs impeding their ability to compete in the market. Such behaviour would adversely affect competition in the retail narrowband access markets as it would potentially reinforce the incumbent's dominant position.
- 6.30 In contrast, a vertically integrated undertaking, supplying inputs to its retail competitors might also engage in predatory pricing at the retail level to expose its downstream rivals to a margin squeeze, restrict their sales and ultimately drive them out of the relevant market or the undertaking could price bundled offerings at the retail level in such a way that may facilitate a margin squeeze between the retail price and the price of the wholesale input. This may render regulation of the wholesale access inputs ineffective thereby reinforcing dominance in the retail narrowband access markets.
- 6.31 ComReg is of the view that these problems can be addressed by obligations at the wholesale and retail level via some form of price control. ComReg is firmly of the view that measures at both the wholesale level and retail level are necessary to address potential competition problems in relation to the retail narrowband access markets since as illustrated by the above analysis leveraging by pricing means may arise at both levels of the value chain. As such, measures solely at the wholesale level would be inadequate to address these issues.

(d) Ability to set prices independently of competitors

- 6.32 An operator with SMP in retail markets has the ability to set and/or maintain prices at a level higher than if competition were effective. In the absence of competitive pressure, a firm with market power would be able to sustain prices above cost to the detriment of consumers. As outlined in the market analysis section (section 4), even in the presence of mandated wholesale products (i.e. CPS, SB-WLR), there is sufficient scope for the SMP operator in the retail narrowband access markets to sustain retail prices above competitive levels for the period of the review.¹⁵³ This is because its existing competitors would not be in a position to constrain its pricing behaviour nor would these high prices be likely to attract significant new entry in the retail narrowband access markets within the timeframe of the review, given the identified barriers to entry. Hence remedies at the retail level, such as some form of regulation of the retail price for narrowband access services, are justified in order to address this issue.

Horizontal leveraging

- 6.33 Horizontal leveraging is another form of leveraging and involves an undertaking which is dominant in one market using its market power to exert undue influence in

¹⁵³ It is of note that analysis of eircom's pricing behaviour indicated that it had not been constrained by its competitors in either the lower or higher level access markets. Further, it was found that CBP did not represent a sufficient influence on the incumbent's ability to price independently. It is not expected that eircom's ability to price independently of its consumers and competitors will change over the lifetime of the review.

- other markets. Examples of this in respect of an operator that is dominant in the retail narrowband access markets would be the potential to exert influence in the retail calls market or in the provision of retail broadband services.
- 6.34 eircom's position as a vertically integrated operator (as discussed above) and dominance in the retail narrowband access markets means that, absent regulation, it would have the potential and the incentive to leverage market power into related markets (both horizontally and vertically linked). For instance, in the absence of wholesale remedies in the retail narrowband access markets, competitors would likely not be able to procure the relevant wholesale inputs to provide access with services provided in adjacent markets such as retail calls, which could potentially limit the effectiveness of competition on these related markets.
- 6.35 It is ComReg's view that eircom's dominance in the retail narrowband access markets requires access to a SB-WLR product to overcome the barrier to entry into these markets. However, in relation to the current SB-WLR product, ComReg has observed actual problems associated with the coexistence of this product with other wholesale or retail products relating to other markets, such as the Line Share (LS) product (used to provide broadband services). A specific example of a problem which has been observed was the inability to order the SB-WLR product when another operator was providing a retail service using LS to the customer on the same line, and vice versa. ComReg notes that LS and SB-WLR are now available in combination; however, this required considerable intervention by ComReg. This experience suggests to ComReg that specific remedial obligations need to be imposed to guard against a recurrence of this type of situation in the future.
- 6.36 Whilst eircom has facilitated some product combinations and migrations through industry processes, a number of requests from operators have not been facilitated to date. This includes requests to enable efficient, customer friendly migrations where a customer has SB-WLR provided in combination with another wholesale product to the ULMP¹⁵⁴ product. This has the effect of limiting customer movement to and from the SB-WLR product.
- 6.37 One respondent did not agree with a statement contained in the consultation paper which noted that the combination of LS and SB-WLR required considerable regulatory intervention. They felt that this was not a true reflection of the implementation process of LS and SB-WLR. Two respondents agreed with the competition problems identified by ComReg were appropriate and did frustrate competition in the retail narrowband access markets.
- 6.38 A decision by an OAO to change the wholesale product used to provide retail services (which may be characterised by an OAO moving to a different rung of the investment ladder) or to acquire from another service provider a customer currently served via different infrastructure can necessitate a physical change to the required network, using local loop unbundling. To facilitate sustainable competition it is essential that such a change is seamless, involving high quality processes which aim to minimise any service disruption to the end user.
- 6.39 ComReg proposes that the coexistence and migration (to and from) SB-WLR should be provided to OAOs in a non-discriminatory manner and that the end user experience should be unaffected by the design of the wholesale product. It is evident that failure to facilitate this may dampen competition in the retail narrowband access markets and related markets.

¹⁵⁴ Fully Unbundled Local Metallic Path.

Conclusion

- 6.40 As noted in the market analysis section (section 4), absent wholesale regulation eircom's dominance in the retail narrowband access markets would be further enhanced.¹⁵⁵ The wholesale mandated products (i.e. CPS and SB-WLR) afford OAOs the ability to enter the retail narrowband access markets without having to replicate the access network which is considered to represent a significant barrier to entry, particularly in relation to the lower level access market. However, as outlined in the above analysis potential competition problems persist in relation to these markets requiring additional wholesale remedies to support the provision of these wholesale inputs. For example, issues in relation to non-discrimination, transparency and cost accounting need to be addressed in order to ensure that they are provided on equivalent terms to enable OAOs to compete effectively in these markets and to ensure that the incumbent is not able to exert its market power.
- 6.41 In addition, it is evident with regard to the competition problems identified in the retail narrowband access markets (e.g. leveraging by pricing means) that they would not be adequately addressed by measures solely at the wholesale level and as such regulatory intervention at the retail level is also required. For example, a margin squeeze at the retail level would serve to undermine the effectiveness of the relevant wholesale remedies. Further, as outlined in section 4, even in the presence of the mandated wholesale products there is sufficient scope and incentives for the SMP operator to sustain retail prices above competitive levels over the period of the review, as such high prices would be unlikely to attract significant entry.
- 6.42 ComReg has considered all responses to its assessment of actual and potential competition problems in relation to the retail narrowband access markets. It can be noted that, for the most part, OAO respondents agreed with ComReg's analysis. During the consultation process, further examples have been provided of actual and potential problems in relation to these markets, and the requirement for regulatory intervention at both the wholesale and retail level has been made clear.

Principles in selecting remedies

- 6.43 ComReg is obliged, where a designation of SMP has been proposed, to impose at least one obligation.¹⁵⁶ Therefore some form of *ex ante* regulation is required.
- 6.44 Remedies will be selected based on the nature of the competition problem identified in relation to the retail narrowband access markets and where possible, consideration will be given to a range of remedies so that the least burdensome effective remedy can be selected thus conforming to the principle of proportionality. In the initial consultation¹⁵⁷, ComReg presented alternative regulatory options to address identified competition problems in the retail narrowband access markets. This included a discussion of less onerous alternatives and why these would not achieve ComReg's objectives (as outlined in section 2.1) and a discussion of more onerous alternatives and why they would be disproportionate or overly burdensome. In the response to the initial consultation¹⁵⁸, ComReg adopted a preferred option. The current review focused on the preferred option and assessed whether market conditions justify an amendment to these proposals.

¹⁵⁵ Analysis indicated that absent regulation eircom's market share in the lower level retail narrowband access market would be close to 100%, and in the higher level retail narrowband access market would be 72%.

¹⁵⁶ SMP Guidelines. See paragraphs 21 and 114.

¹⁵⁷ Retail Access Market Review – National Consultation, Document no. 04/94.

¹⁵⁸ Retail Access Market Review – Notification, Document no. 05/25.

- 6.45 ComReg proposes to impose appropriate obligations that will encourage efficient investment and innovation, protect consumers and further promote competition in the retail narrowband access markets in line with ComReg's obligations as set out in section 12 of the Communications Regulation Act, 2002.
- 6.46 In choosing remedies, ComReg has also taken account of their potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg has conducted *inter alia*, a Regulatory Impact Assessment (section seven) in accordance with the Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in line with section 13 of the Communications Regulation Act, 2002) published in February 2003.
- 6.47 In considering which remedies are warranted, it is important to firstly examine the extent to which wholesale remedies are sufficient to address the competition problems which have been identified. Only if the wholesale remedies are considered insufficient to address the competition problems identified in relation to the retail narrowband access markets should any additional remedies at the retail level be considered.
- 6.48 Finally, the remedies chosen will be incentive compatible. This means that the remedies will be selected and designed in a manner that ensures compliance with regulation outweighs the benefits of evasion. Remedies must be based on the nature of the problem identified, proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act, 2002.
- 6.49 One respondent believed that ComReg had incorrectly defined eircom's retail arm as an OAO, and the respondent noted that when designing remedies, it was appropriate to refer to an assessment of replicability. ComReg notes that, as part of the market definition and market analysis process, replication of eircom's network is viewed as infeasible over the timeframe of the review. ComReg is certain to take this into consideration in designing remedies. Furthermore, when assessing the scope of any obligation, ComReg believes that efficient OAOs should be able to compete effectively with the incumbent's retail arm.

Sufficiency of regulation in related markets

- 6.50 One respondent, who did not oppose the imposition of indirect access obligations, suggested that it was important to firstly consider the sufficiency of LLU as a remedy to competition problems in the retail narrowband access markets. They recommended an examination of LLU and SB-WLR access remedies as being complementary remedies, and suggested that a time limit should be provided as to their concurrent availability. They felt that this was important from a theoretical¹⁵⁹ and empirical perspective¹⁶⁰.
- 6.51 ComReg agrees that it is indeed appropriate to assess the sufficiency of SMP obligations imposed in markets outside the scope of this review but which are related to the fixed narrowband access value chain. It should be noted that analysis was carried out earlier in this paper (section four) to assess whether eircom's market power was diminished by virtue of the availability of LLU. It was determined that LLU did

¹⁵⁹ M. Cave, "Making the ladder of investment operational", paper presented to European Commission December 2004; M. Cave and I. Vogelsang, "How access pricing and entry interact". *Telecommunications Policy*, Vol.27 (10-11), 2003, pages 717-727.

¹⁶⁰ J. Hausman and G. Sidak, "Did Mandatory Unbundling Achieve its Purpose? Empirical Evidence from Five Countries", *Journal of Competition Law and Economics*, 1(1), 2005, pages.173-245.

not have an appreciable impact on the competitiveness of the retail narrowband access markets.

- 6.52 Looking at the trends in the market to date, it is more likely that any competitive pressure in the lower level retail access market arising through direct access will be via LLU¹⁶¹ rather than from other alternatives. This is due to the economics of supplying customers who require one or two lines. However, this is unlikely to have a significant impact on the market over the period of this review. Further, it is unlikely that a growth in the numbers of LLU customers will fully negate the requirement for a SB-WLR product. SB-WLR can enable an operator to extend its reach to the rural and suburban areas whereas initially LLU penetration is likely to be focussed around the large exchange areas in big cities and town centres. It is likely that a larger operator that wanted to offer service with national coverage would require a combination of wholesale inputs including SB-WLR. Furthermore, there are considerable barriers to entry into the voice market associated with LLU in terms of time and costs to provide physical connectivity to each of those exchanges.
- 6.53 ComReg notes that no operator used or has begun to use LLU for the provision of higher level access, while there is limited use in the lower level market. The number of fully unbundled lines¹⁶², being provided was close to 18,500 at the end of December 2006 which represented less than 1% of all access channels. LLU has been predominantly used to date for the provision of broadband access. ComReg recognises that operators have started offering bundled voice and broadband services.
- 6.54 ComReg considers that obligations set out in the LLU market review were aimed at addressing competition problems in other downstream markets, including the market for wholesale broadband access.¹⁶³ ComReg also notes that the effectiveness of LLU as a remedy to competition problems in the retail narrowband access markets is significantly impaired by the current difficulties associated with OAOs' inability to migrate efficiently from wholesale products and product combinations to ULMP.
- 6.55 All of the above analysis suggests that LLU is not a sufficient remedy to address competition problems identified in the retail narrowband access markets at this time.
- 6.56 On this basis, ComReg considers that SB-WLR - as another level of access - is required as a remedy to the competition problems identified in relation to the retail narrowband access markets, in particular, the potential leverage or maintenance of the incumbent's dominance in these markets. ComReg notes the positive impact SB-WLR has had in the relevant markets to date in terms of introducing limited competition. As illustrated by the analysis in section 4, competition in the retail narrowband access markets, particularly the lower level market, is nearly totally dependent on the availability of indirect access products. Only in the event of a market shift to a high proportion of retail narrowband access via alternative direct access could ComReg consider the removal of SB-WLR as an obligation. However, there is no evidence of such a development within the lifetime of this review (i.e. the next two years).
- 6.57 ComReg believes that concurrent obligations to provide LLU and SB-WLR are reasonable, justified and proportionate in addressing competition problems in the retail narrowband access markets at this juncture. Further, ComReg notes that out of the

¹⁶¹ LLU has been mandated by Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops, Document number 04/70.

¹⁶² Line share as a form of LLU is also available however this is limited to the provision of broadband services.

¹⁶³ For reasons set out in section 4.

twenty NRAs that have notified these markets to the European Commission, thirteen have imposed an obligation of both LLU and SB-WLR.¹⁶⁴

- 6.58 The reason for mandating the two products is to facilitate entry and movement up the 'ladder of investment'. In line with ComReg's Strategy Statement 2005-2007¹⁶⁵, it is hoped that, in addition to platform competition, new entrants can take-up indirect access products and with time move towards LLU. ComReg suggests that competition in the retail narrowband access markets is at the early stages of development. In particular, it is of note that SB-WLR was first introduced in 2004 and there has been little take-up of LLU to date. It is anticipated that LLU will impact the retail narrowband markets (among other markets) to a greater extent beyond the timeframe of this review.
- 6.59 One respondent referred to analysis carried out by Indepen¹⁶⁶, particularly its assessment of the ladder of investment. The report proposed an alternative theory which would mandate access at a single access point; that being where (i) bottlenecks occur; (ii) private negotiated terms of access are an inadequate solution; and (iii) competition law remedies are insufficient. They noted that this access point may differ based on geographic locations. In the context of the Irish market and in line with the European Commission, ComReg maintains support for the ladder of investment approach. ComReg considers that even where LLU is available it does not yet adequately address eircom's market power in the retail narrowband access markets. Arising from this, there remains a continued need for an obligation to provide SB-WLR. The ladder of investment approach conceptualises ComReg's strategy for imposing remedies.
- 6.60 A respondent requested a timetable for the withdrawal of obligations on one or both of LLU and SB-WLR. In view of the continued dominance or lack of effective competition identified in the retail narrowband access markets in section 4, ComReg believes that it is too early to set time-limits for these products. However, consideration will be made of the inter-relationship between LLU, SB-WLR and other forms of access when setting price points for the respective products. In the interim, if there is a sufficiently significant increase in the take-up of LLU for the provision of retail narrowband access, ComReg will review the appropriateness of the obligations imposed.

REGULATORY CONTROLS AT THE WHOLESALE LEVEL

6.61 In this updated review of the retail narrowband access markets, ComReg's analysis has concluded that replication of eircom's access network is not a feasible option. This suggests that remedies should be designed in the first instance to provide OAOs with sufficient access to wholesale inputs, so that equivalent retail services may be offered by OAOs in the retail narrowband access markets using eircom's network. As such, the proposed regulatory measures at the wholesale level arise from the earlier identified competition problems in the retail narrowband access markets (sections 6.5-6.42).

6.62 ComReg's consideration of remedies are discussed below in terms of :

¹⁶⁴ See CIRCA - Communication & Information Resource Centre Administrator.htm for Notifications and Comments from individual NRAs in respect of the relevant markets.

¹⁶⁵ ComReg Strategy Statement 2005-2007. Document number 05/77.

¹⁶⁶ Restoring European economic and social progress: unleashing the potential of ICT", A report for the Brussels Round Table by Indepen, (January 2006), Appendix F "The 'ladder of investment' revisited", page 37.

- a) Continuing need for wholesale products;
- b) Regulatory intervention in product development and implementation; and
- c) Supporting remedies to these wholesale remedies.

(a) Continuing need for wholesale products

- 6.63 Given the finding of SMP in the retail narrowband access markets and the above assessment of the loci of competition problems in relation to these markets, ComReg is obliged to impose obligations to ensure that subscribers of the SMP operator have access to CA/CS and CPS¹⁶⁷.
- 6.64 It is of note that Regulation 16 (1) of the Universal Service Regulations makes it mandatory for ComReg to impose an obligation for the purpose of enabling subscribers to access the services of any interconnected provider of publicly available telephone services -
- On a call-by-call basis by dialling a carrier selection code, and
 - By means of pre-selection, with a facility to over-ride any pre-selected choice on a call-by-call basis by dialling a carrier selection code.
- 6.65 The CPS product as it stands now has been defined as per the current suite of industry agreed documentation in order to give effect to Regulation 16 (1) of the Universal Service Regulations. As such, ComReg notes that it has no legal discretion with regard to the imposition of obligations for the purpose of ensuring the SMP operator's subscribers can access CA/CS and CPS.
- 6.66 It was therefore concluded that obligations should be maintained to ensure that the SMP operator's subscribers have access to CA/CS and CPS.
- 6.67 In addition to the CPS product, in the initial review ComReg proposed that eircom should be obliged to provide a SB-WLR product at the wholesale level for the provision of a single billing retail offer to consumers in accordance with requirements as determined by ComReg. SB-WLR enables the OAO to provide both access and calls to the end user with a single bill, thereby promoting the effectiveness of the CPS product.
- 6.68 ComReg believes that the market analysis and identification of competition problems carried out in this market review indicate a clear need for the continuation of SB-WLR as a remedy in the market for fixed lower level narrowband access market and the market for fixed higher level narrowband access. In particular, in its absence the incumbent would likely have considerable scope and incentives to withhold access to this wholesale input which could contribute to reinforcing its dominance on the retail narrowband access markets and also potentially reducing competition on related markets such as retail calls. The provision of SB-WLR enables competitors to replicate the service offering of the incumbent, thereby enabling them to compete in the retail narrowband access markets and related markets. ComReg noted in the assessment of SMP that the level of competition in the higher level retail access market was greater than that in the lower level retail access market. However, it is proposed that the competitive conditions in both markets continue to require the provision of the wholesale elements necessary to offer a single billing product.
- 6.69 In order that the SB-WLR product can continue to be offered and developed in accordance with industry agreed requirements, ComReg proposes to require eircom to

¹⁶⁷ Carrier Access (CA), Carrier Select (CS) and Carrier Pre Select (CPS).

provide a SB-WLR offering. An access remedy¹⁶⁸ is the only remedy which allows OAOs to make reasonable requests for products according to their specifications.

- 6.70 All respondents to the current consultation agreed that it was appropriate to impose the obligation on eircom to offer a SB-WLR product. One respondent noted that in the absence of mandated products, competition in the retail narrowband access markets was unlikely to develop, highlighting the importance of this wholesale remedy in addressing the competition problems in these markets. Another underlined that these obligations were insufficient in themselves and in the absence of supporting obligations to ensure equivalence.
- 6.71 It should be noted that for the avoidance of doubt the access obligation set out below includes the migration from another wholesale product to CPS and/or SB-WLR. It is evident from the foregoing analysis that failure to facilitate this would adversely affect competition in the retail narrowband access markets and potentially affect competition on related markets.

Conclusion

Obligations should be maintained on the SMP operator to ensure that its subscribers have access to CA/CS and CPS.

The SMP operator should be required under the Access Regulations to ensure that a SB-WLR product will continue to be offered and its detailed development should be supported with both a non-discrimination and transparency obligation.

(b) Requirement for regulatory intervention in product development and implementation

Carrier Pre Select

- 6.72 CPS was mandated in Ireland in 2000 to ensure the proper functioning of the CPS product. However, ComReg has found it necessary to intervene on a number of occasions to address various competition problems of the type described earlier in this review (sections 6.5-6.42). ComReg believes that, in addition to the imposition of the obligation for CA/CS and CPS on eircom, it is necessary to ensure continuity in relation to the provision of CA/CS and CPS by eircom in order to promote competition in the retail narrowband access markets. ComReg therefore proposes that eircom should be required to continue to comply with the various requirements imposed on it, as set out in the current suite of industry agreed product documentation (as amended) which deals with the following key product areas:

- Inter-operator processes,
- Network and IT specifications,
- Service level agreements,
- Fault handling, and
- Disputes.

- 6.73 ComReg also recognises that further interventions may be required in the future to continue to develop the CPS product and it will consult with industry fully on the specific details of such developments. It is ComReg's view that intervention has been

¹⁶⁸ Imposed under regulation 13 of the Access Regulations.

essential in the past, and that a workable competitive CPS product which serves to facilitate the development of a competitive environment in the retail narrowband access markets would not be available through commercial negotiation alone.

- 6.74 ComReg explained in the current consultation document that it considers failure to impose obligations on eircom would mean that the effective operation of CPS in the market would likely be limited, and, accordingly, the ability of subscribers to avail of CPS services would be greatly hindered. This in turn would mean that ComReg would be failing to give effect to, and defeating the purpose and intention of, Regulation 16 of the Universal Service Regulations. It would further have a detrimental impact on the development of competition in the retail narrowband access markets which has been effectively dependent on the provision of indirect access products to date, in particular, in relation to the lower level access market.
- 6.75 Arising from the above, ComReg believes that obligations are necessary in relation to the inter-operator transactions and processes required to provide CPS facilities. These are detailed below.

Wholesale Line Rental

- 6.76 ComReg's analysis of competition problems set out in sections 6.5 to 6.42 above indicates that regulatory intervention continues to be required at a detailed and operational level in the development and implementation of SB-WLR in order to facilitate competition in the retail narrowband access markets and in related markets such as retail calls. Specifically this entails:
- i. Access to wholesale products,
 - ii. Open access, and
 - iii. Withdrawal of access.
- 6.77 Each of these obligations is considered in turn below.

(i) Access to wholesale products

- 6.78 In the consultation paper, ComReg noted that in order to avail of SB-WLR, OAOs needed to acquire the relevant wholesale products as was set out in Service Schedule 401 of eircom's Reference Interconnect Offer (RIO)¹⁶⁹, which is amended from time to time. ComReg considered that these products were an essential requirement for the provision of SB-WLR and in turn to promote competition in the retail narrowband access markets. Following on from this, ComReg proposed pursuant to Regulation 13 of the Access Regulations, that eircom be required to provide such access.
- 6.79 There was support among respondents that ComReg was correct in imposing this obligation in order to allow OAOs compete in the retail narrowband access markets.

Conclusion

The SMP operator should be obliged to permit access to relevant wholesale products.

(ii) Open access

- 6.80 ComReg set out in the consultation paper that, insofar as it was required to provide access, the SMP operator should also grant open access to relevant information,

¹⁶⁹ See http://www.eircomwholesale.ie/regulatory/reg_details.asp?id=37.

- technical interfaces, protocols, or other key technologies to support the effectiveness of the wholesale input. In particular, the SMP operator should be required to provide a mechanism to allow appropriate access, by OAOs, to OSS¹⁷⁰. Alternatively OAOs should be allowed access to the data available through OSS which OAOs require for the efficient provision of access and services and which is currently available to the SMP operator's retail arm. ComReg considers this necessary to ensure fair competition in the provision of services and to allow efficient competitors to compete effectively.
- 6.81 It was considered that while a SB-WLR product had been made available, inadequacies in its provision had resulted in many referrals to ComReg. ComReg was of the view that significantly it was the quality of wholesale inputs that determined the quality of the downstream competitors' retail offering. As such, it was considered that this was an important issue to address in order to promote competition in the retail narrowband access markets. Arising from this ComReg proposed that the effectiveness of open-access should be supported by a mechanism to prevent discrimination.
- 6.82 In proposing these measures, ComReg has examined the incentives for the SMP operator to engage in discriminatory behaviour. ComReg considers that there is sufficient incentive for the SMP operator to restrict access to relevant information, interfaces, protocols and key technologies and limit the downstream competitors' ability to influence product development. Such behaviour may be construed as a constructive refusal to deal. This in turn would undermine the effectiveness of the mandated wholesale inputs and could reinforce the incumbent's dominance in the retail narrowband access markets.
- 6.83 Respondents were asked whether they agreed with the above proposals. One believed that the current systems were adequate to allow OAOs to operate, however this was not supported by other respondents who supported the imposition of a specific obligation in order to address this issue.
- 6.84 ComReg maintains that while eircom has gone some way towards meeting industry requirements by facilitating access to OSS through the provision of a Universal Gateway for wholesale products, this would not have happened without direct and frequent intervention by ComReg. In addition, as evidenced by submissions received as part of the consultation the level of access provided to date has not satisfied industry needs, in particular to allow effective competition by OAOs at the retail level. In addition, OSS requirements are likely to evolve over time which could result in the need for an amendment to the current open access obligation. ComReg considers that it is likely that regulatory intervention may be required to facilitate such an adjustment, particularly if the industry does not reach agreement without such intervention. ComReg accepts that it is a fundamental requirement that OAOs are able to access the supporting elements necessary to provide an effective retail offering based on SB-WLR. ComReg considers that at present it is too early in the development of SB-WLR product to be able to justify the removal of this obligation.
- 6.85 ComReg acknowledges that the existing mechanisms available through the SB-WLR Steering Committee provides a platform for industry to raise requests for access and a forum through which detailed requirements can be discussed. Notwithstanding this, there is still a requirement for an obligation of open access on eircom to ensure fair competition in the downstream retail markets and to address potential maintenance of dominance in these markets.

¹⁷⁰ Operational Support Systems.

- 6.86 One respondent set out in detail what they viewed as the competition problems associated with product development and the data contract processes. This was supported by another respondent who also considered the current system to be ineffective. The key issues raised were the lack of negotiating power of OAOs and the lack of transparency in prioritising and implementing a suggested amendment. It was their belief that there was a discrepancy between how eircom Retail and OAOs were treated which would clearly have an impact on their respective abilities to compete in the retail narrowband access markets.
- 6.87 The respondent suggested that several changes were necessary. They wanted to formalise the existing system to include *inter alia*: (i) fixed response times for OAOs and eircom Retail on suggested product development requirements; (ii) the need to provide reasoning as to why a suggestion may be prioritised or not; (iii) an assessment of whether eircom's response was reasonable or appropriate; (iv) the avoidance of unilateral development changes or amendments to the data contract which may in turn alter the Unified Gateway¹⁷¹; and (v) symmetric notification of any change to the gateway for eircom Retail and OAOs. They strongly requested that a process be established which set out procedures and timescales. It was their view that this was essential for a level playing field between the incumbent and the OAOs at the retail level. Further, they underlined that OAOs' inputs and influences should be equivalent to eircom Retail in all instances. Having considered all responses, ComReg sets out its position in relation to OSS below.
- 6.88 Under 13 (1) of the Access Regulations, ComReg has imposed an access obligation on eircom. In support of this obligation, there is a specific provision under 13 (2), which allows ComReg to require the SMP operator to grant access to technical interfaces, protocols and other technologies, and it is on this basis that ComReg mandates access to the OSS.
- 6.89 ComReg considers that the imposition of an obligation to provide access to OSS in conjunction with the supporting remedies for non-discrimination and transparency, outlined in the later sections, is appropriate to ensure a level playing field in the context of product development. ComReg has also considered that an additional remedy, an obligation to "negotiate in good faith" in relation to request for access is also appropriate. ComReg would like to flag that it will consult separately on the requirement for a separate remedy of negotiation in good faith (in relation to both the CS/CPS and WLR products).
- 6.90 ComReg agrees that when imposing any obligation under 13 (2), all requests for access must be reasonable. ComReg considers that since the systems in question and the technical expertise required for the management and maintenance of these systems are particular to the SMP operator there is a need to ensure that sufficient technical advice and support is made available by the SMP operator to enable OAOs to avail of the regulated product.

¹⁷¹ The Unified Gateway is the order management and fault handling system which serves as the primary technical interface between eircom Wholesale and the OAOs.

Conclusion

The SMP operator should be required to grant open access to relevant information, interfaces, protocols and key technologies, and should be required to provide timely access to OSS or similar systems, to ensure fair competition in SB-WLR. This is to provide information of sufficient and adequate granularity in order to facilitate competition in the retail narrowband access markets.

The SMP operator should provide for input from industry to the development program for the evolution of access to OSS.

ComReg will carry out a future consultation on the requirement for a separate remedy of negotiation in good faith (in relation to both the CS/CPS and WLR products).

(iii) Withdrawal of Access

- 6.91 In the initial and current consultation papers, ComReg set out its proposal that in accordance with Regulation 13 (2) (c) of the Access Regulations, eircom should be mandated ‘not to unreasonably withdraw access to facilities already granted’. ComReg maintains that this remedy is appropriate and justified to ensure that OAOs have sufficient certainty to provide retail services to the marketplace and so compete with eircom and in turn ensure that consumers have certainty in the delivery of services. This remedy is necessary to support the effectiveness of the mandated wholesale inputs since absent this obligation there may be insufficient certainty regarding the provision of access to OAOs and a risk of withdrawal of access to facilities which are required to facilitate effective competition in the retail narrowband access markets. As such, this remedy is required to address potential competition problems associated with the potential leverage or maintenance of eircom’s dominance in these markets.
- 6.92 ComReg noted that there were circumstances where it may be desirable to withdraw access to facilities, for example when a facility was no longer needed and it was an undue burden on eircom to maintain it. ComReg therefore proposed to qualify the obligation on eircom not to withdraw access to facilities already granted, where there existed a ‘clearly defined objective justification’. In this regard, it would be a matter for eircom to demonstrate that such an objective justification actually existed. Thus, withdrawal would be subject to ComReg’s prior approval which would only be granted following consideration of the issue, and, if ComReg felt it was necessary, appropriate consultation. In addition, the Final Decision pertaining to remedies would reflect the qualification (in the case of redundant facilities) regarding withdrawal of access.
- 6.93 ComReg also notes that the SMP operator should notify and consult with industry in a timely manner when proposed developments and improvements to access mechanisms or wholesale processes, such as automation of process elements, allow, in the SMP operator’s view, the removal of existing manual process. This is required in order to ensure that there is clarity on the impact of the proposed changes, both the direct and second order effects, and in order to allow industry to demonstrate whether there may be a reasonable case for the retention of the manual process.
- 6.94 One operator proposed that the concept of using *Consents* (as proposed in the consultation on financial reporting obligations for SMP operators¹⁷²) should be applied

¹⁷² Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. Document no. 05/18.

- similarly to the withdrawal of access to facilities, whereby the SMP operator would issue a notice to ComReg indicating their request in writing and justifying their reasoning. ComReg has considered this, but notes that the concept of *Consents*, as proposed in the case of financial reporting obligations, does not involve any consultation process. ComReg is of the view that a similar process may not be appropriate in this context since operators would be directly affected without being afforded a sufficient opportunity to put forward their viewpoint on the matter.
- 6.95 While most respondents agreed that this obligation was necessary for certainty in the market and the protection of consumers in the retail narrowband access markets, one respondent believed it was inappropriate for a number of reasons; one being that it limited the SMP operator's flexibility in re-designing its network. ComReg re-iterates the point made in the consultation paper, that if a defined objective justification is provided (e.g. *de minimis* demand for the product, opportunity to replace facilities or infrastructure for efficiency reasons) this would be examined in detail by ComReg in the context of its impact on all relevant stakeholders. As highlighted by one respondent, there would have to be robust structures around the removal of access to facilities already granted. ComReg agrees that the dynamic telecommunications sector demands that the reasonableness of requests for access should be monitored over time. However, ComReg does not support the view put forward by another respondent which suggested that by virtue of imposing this obligation, ComReg would fetter its future policy-making decision in respect to amending existing access obligations. ComReg's legal basis for maintaining, amending or imposing such an obligation would not be affected by the imposition of an obligation on eircom not to withdraw access.
- 6.96 The same respondent believed that the obligation was unnecessary because eircom had never unilaterally and without notice withdrawn access to third parties. ComReg suggests that the fact that eircom may not have done so in the past, does not necessarily mean that it would not have an incentive to do so in the future. For legal certainty, transparency and in order to safeguard against potential competition problems associated with the potential leverage or maintenance of dominance in the retail narrowband access markets a specific obligation should be imposed. Additionally, previous compliance with this obligation on a voluntary basis indicates that the obligation would not be overly burdensome on eircom.
- 6.97 A further point which was put forward by the same respondent was that it was unjustified for ComReg to extend the obligation not to withdraw access to 'ancillary services'¹⁷³. It was the respondent's view that these services were outside the scope of the relevant market and should be considered as 'value-add services' and thus not be subject to regulation. ComReg does not support this view. As noted above, ancillary and supporting obligations are essential for the effectiveness of the mandated product. Without access to these services, eircom's downstream competitors would be at a disadvantage which could impede their effectiveness in the retail narrowband access markets and it could in turn serve to maintain eircom's dominance in these markets. Thus, such a remedy is required in order to promote effective competition on these markets.
- 6.98 Another respondent, who agreed with ComReg's proposals, did not believe it to be appropriate to initiate a public consultation, but rather they considered it to be adequate that the SMP operator provided sufficient notice to industry. ComReg would note that dependent on the nature of the issue (i.e. commercial sensitivity of detail, level of impact on stakeholders), ComReg will, if necessary, initiate either an informal

¹⁷³ Ones which appear on eircom's bi-monthly bill.

consultation with affected parties or a full public consultation. It will be at ComReg's discretion to decide whether consultation is needed, and, if so, the appropriate level of such consultation.

Conclusion

The SMP operator should be obliged not to withdraw access to facilities already granted, except where ComReg has approved this withdrawal.

(c) Supporting remedies for CPS and SB-WLR

6.99 In the initial review, ComReg outlined the view that it was not sufficient simply to mandate the requirement to ensure the existence of the necessary wholesale inputs. There was a continuing concern with how these inputs were provided in terms of quality, timeliness and scope since such elements may directly affect the effectiveness of these mandated products which may in turn impact on the ability of OAOs to compete in the retail narrowband access markets. ComReg therefore proposed a set of supporting obligations designed to assist in the implementation and development of indirect access products.

6.100 Given the degree of success of SB-WLR and CPS in the period since the initial review, ComReg has considered whether there may be scope to withdraw some supporting obligations. Such a decision would need to be based on evidence that the identified markets are closer to being effectively competitive. This updated review has considered changes in the retail narrowband access markets since the time of the previous analysis, and has established that the core competition problems previously identified persist. However, ComReg has illustrated how the expression of these problems has shifted to reflect the more mature product requirements. ComReg, having assessed the evidence, is of the preliminary view that the retail narrowband access markets appear not to be effectively competitive and in particular considers that there remains sufficient incentive for eircom to act in a manner which mitigates against fair and competitive conditions for OAOs. ComReg also notes that as the CPS product forms a fundamental element of the SB-WLR product, the industry requirements and regulatory justification for supporting remedies are applicable for both the CPS and SB-WLR products.

6.101 In support of the obligations for CPS and SB-WLR as outlined above, ComReg has concluded that there are a number of additional obligations which are necessary to fully address the competition problems identified in relation to the retail narrowband access markets, in particular, the possible leverage or maintenance of eircom's dominance in these markets. ComReg considers that each of the following remedies is necessitated in order to promote effective competition in these markets:

- i. Non-discrimination
- ii. Transparency;
- iii. Price control;
- iv. Accounting separation; and
- v. Cost accounting systems.

(i) Non - Discrimination**Obligation not to discriminate**

6.102 ComReg proposes to impose a non-discrimination obligation on the SMP operator.

It should be stressed that ComReg is concerned with instances of discrimination that are without objective justification.¹⁷⁴ A non-discrimination obligation is the appropriate remedy to target competition problems such as withholding of information, delaying tactics, undue requirements, low or discriminatory service or product quality, strategic design of product in a manner that disadvantages competitors in relation to the retail narrowband access markets, and discriminatory use of information.

6.103 The key elements are as follows:

- ComReg considers that an obligation of non-discrimination is an essential remedy to target the kinds of actual and potential competition problems which have been identified in the retail narrowband access markets.
- ComReg proposes that an obligation of non-discrimination is necessary to provide the same ability to OAOs as is afforded to eircom Retail to purchase wholesale access to eircom Retail lines, specified network elements and associated facilities under terms and conditions that are at least as equivalent as would apply to the SMP operator's retail arm. This should help to ensure that OAOs can compete effectively in relation to the retail narrowband access markets.
- A non-discrimination obligation would oblige the SMP operator to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and to provide services and information to others under the same conditions and of the same quality as it would provide for its own services or those of its subsidiaries or partners.
- Information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least equivalent with those provided to the SMP operator's retail arm and associates. It is important that information about an OAO gained by eircom as a result of its provision of wholesale services is not used to the advantage of that operator in the retail narrowband access markets.

6.104 When setting out the relevant competition problems (sections 6.5-6.42), ComReg has referred to several situations in which there is a considerable incentive for eircom to act in a discriminatory manner to reinforce its dominance in these markets and therefore the potential for serious competition problems leading to foreclosure in the retail narrowband access markets justifies the remedy of non-discrimination.

6.105 When asked whether it was appropriate to impose an obligation not to discriminate, all but one respondent agreed. One respondent who agreed with the proposal stressed that the non-discrimination obligation was key since eircom was a vertically integrated, dominant operator, and could deter competition in the retail narrowband

¹⁷⁴ In Article 82 cases for example, exclusionary conduct may escape the prohibition of Article 82 in case the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence will be on the dominant company. It should be for the company invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.

access markets using price and non-price means. The respondent who did not agree with the imposition of a non-discrimination obligation considered competition law to be sufficient. However, it is ComReg's view that a non-discrimination obligation is both justified and necessary to ensure the effectiveness of the regulated wholesale products and in turn to facilitate competition in the retail narrowband access markets.

- 6.106 In general, an obligation to provide non-discriminatory access will rarely operate as a standalone obligation. Instead it is likely to be accompanied by a transparency obligation in order to provide certainty and confidence to industry participants that the former obligation is being adhered to. This will be considered in further detail below.

Conclusion

An obligation of non-discrimination should be imposed on the SMP operator.

Approach to SLAs

Proposals set out in consultation

- 6.107 In its consultation document, ComReg proposed that under a non-discrimination obligation, Service Level Agreements ("SLAs") should be required in respect of those products mandated pursuant to an access obligation i.e. CPS and SB-WLR. This was proposed in order to address competition problems which were identified as arising in relation to the retail narrowband access markets. In particular, it was suggested that SLAs were necessary in order to allow OAOs the ability to effectively compete in the retail narrowband access markets by giving them appropriate certainty in relation to the supply and repair of the necessary wholesale inputs.
- 6.108 ComReg suggested that one of the key purposes of SLAs was as a means of ensuring that there was no discrimination regarding quality of service between one wholesale customer of the SMP operator and another, which could afford one operator a competitive advantage over another on the retail narrowband access markets. It was also argued that SLAs could ensure that the SMP operator would be committed to supplying that product according to a particular time-scale or quality, or be committed to repairing faults within an agreed time period. ComReg argued that SLAs were the appropriate mechanism to dictate the quality of wholesale inputs available to OAOs and that significantly, they shaped the service which could be offered by OAOs to their retail end users.
- 6.109 ComReg considered that the provision of SLAs and consistent and timely reporting on service levels was essential to the market. It was also ComReg's view that the SLA was key to making products fit-for-purpose and ensuring that consumers served by all operators (including eircom Retail) received a service of the highest possible standard. As such, ComReg considered that the SLA was a vital instrument in providing this certainty to OAOs in relation to the mandated wholesale products, ensuring that they were provided on terms and conditions allowing them to compete effectively in the retail narrowband access markets.

Summary of respondents' views

- 6.110 One respondent argued that SLAs should only encompass those transactions that were key to the functioning of the wholesale offering in a non-discriminatory manner, and that the performance targets of the SLA must be reasonable and potentially achievable. In this regard they also suggested that service level targets should be reduced. The respondent argued that SLAs were designed to monitor the effective

implementation of the obligation of non-discrimination and as such, they were not intended as a vehicle to drive issues such as speed of provisioning or repair as suggested in the consultation document.

- 6.111 Another respondent suggested that new SLA targets should be set, so as to ensure that OAOs would have the necessary wholesale commitments to offer retail customers equivalent SLAs to those provided by eircom Retail, thereby facilitating competition in the retail narrowband access markets. One operator made the complaint that there was no transparency in relation to the arrangement which existed between eircom Retail, eircom Wholesale and the Networks operations in terms of internal arrangements for provisioning and repair. Two respondents recommended that ComReg should monitor eircom's compliance in meeting conditions set out under SLAs. One respondent went further to suggest that eircom should be directed to publicly report SLA metrics, in particular, whether same had been achieved with respect to OAOs and eircom's retail arm.

ComReg's views and next steps

- 6.112 ComReg has considered all responses and proposals on SLAs and after careful consideration has arrived at the view that firstly, the current SLA arrangements are inadequate and that secondly, this is hindering the emergence of properly functioning markets with sustainable competition. ComReg believes that these views are supported by the evidence in relation to the difficulties associated with the current SLA process which are hindering OAOs' ability to compete in the retail narrowband access markets.
- 6.113 In particular, ComReg is taking very seriously the concerns expressed by OAO respondents to the effect that SLAs are not fit-for-purpose and that they do not serve to enable OAOs to compete effectively in these markets.
- 6.114 In relation to one respondent's view that performance targets must be reasonable, ComReg wishes to underline that while it concurs that the performance targets underlying SLAs should be reasonable; it does not consider that a reduction in the current level of targets would be consistent with reasonableness. ComReg notes that although 100% adherence may be required with the performance target in many of the SLAs (as noted by the respondent) critically, the performance target itself is not set at 100% as outlined further below.
- 6.115 In responding to ComReg's proposals one respondent argued that SLAs were designed to monitor the effective implementation of the obligation of non-discrimination and as such, they were not intended as a vehicle to drive issues such as speed of provisioning or repair as suggested in the consultation. Other respondents opposed this view and argued that SLAs should be strengthened, to include more effective penalties, improved delivery times, greater assurances and an efficient reporting mechanism.
- 6.116 ComReg considers that addressing issues such as the speed of provisioning and repair are absolutely critical for the development of a fit-for-purpose product. In this regard, ComReg also considers that such requirements are consistent with conditions covering "fairness, reasonableness and timeliness" that may be attached to access obligations under Regulation 13 of the Access Regulations.
- 6.117 ComReg does not consider that the end-to-end SLA process currently in place for CPS and SB-WLR properly meets the needs of the OAO community. This is primarily because there is insufficient transparency in relation to the operation of the process and also because of the very poor performance that is being achieved. For example,

ComReg has considerable evidence in relation to persistent failure by eircom to achieve certain fault repair targets contained in the SB-WLR SLA.¹⁷⁵

- 6.118 Some of the targets in question are not considered by ComReg to be onerous. Indeed, they arguably may need to be revised upwards. In any event, it is self-evident that the failure to achieve targets on an ongoing basis is unacceptable, both to OAOs and a normally functioning and competitive market. ComReg is firmly of the view that because of this, regulatory intervention is both warranted and proportionate.
- 6.119 The current SLA arrangements evidently lack the means for OAOs to adequately address critical issues such as fault repair. Properly addressing these issues is vital for the continuity, predictability and overall credibility of OAOs' commercial operations. The persistent failure by eircom to meet performance targets has the obvious potential to weaken the ability of OAOs to maintain customer confidence and loyalty and to compete effectively at the retail level. ComReg has a duty to protect and promote competition and can not permit this state of affairs to continue unremedied.
- 6.120 Given the evidence of the problems that an unregulated SLA regime has contributed towards, ComReg considers that the current position, whereby there is no effective regulatory overview of the SLA process, is unsatisfactory. Forbearance from regulatory intervention has simply not worked. Absent regulatory enforcement or oversight, the operation of SLAs in practice seems to be wholly ineffectual in relation to achieving a fit-for-purpose product within adequate timelines for OAOs' business operations. Under the current regime, it appears that eircom has little or no incentive to improve standards. Furthermore, it also appears that OAOs have inadequate incentives and mechanisms available to them under the current SLA arrangements to seek adequate redress against eircom.
- 6.121 As noted by the European Regulators' Group ("the ERG")¹⁷⁶ there is a natural linkage between any access obligation and a transparency requirement to make publicly available any critical information in order to make access obligations feasible. Similarly, there is a logical link between the transparency requirements and non-discrimination.¹⁷⁷
- 6.122 In relation to payments under SLAs, the ERG noted that to underpin an obligation to provide access on reasonable and non-discriminatory terms, it may be appropriate for the NRA to oblige the SMP operator to make compensation payments to reflect any failure to provide the agreed level of service. The ERG suggested that this could be justified as a reasonable condition as it would be common commercial practice in a competitive market.¹⁷⁸
- 6.123 Arising from the above analysis, ComReg considers that it has identified actual and potential competition problems which need to be addressed in order to facilitate effective competition in the retail narrowband access markets. In particular ComReg considers it essential to put in place measures to ensure that there is no discrimination in terms of the quality of service between one wholesale customer of the SMP operator and another (since this would serve to give one operator a competitive advantage over another in these markets). However, ComReg considers that in view of the complex nature of some of these issues that they can only be adequately and

¹⁷⁵ Source: Confidential and commercially sensitive e-mails to ComReg in relation to performance during Q4 2004, Q1 – Q4 2005 and Q4 2006.

¹⁷⁶ For electronic communications networks and services.

¹⁷⁷ Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework. Final Version, May 2006.

¹⁷⁸ Ibid.

comprehensively addressed in further consultation in relation to the detailed contents of SLAs.

Conclusion

ComReg has decided that:

- i. eircom shall be obliged to conclude a legally binding and fit-for-purpose industry SLA with OAOs in respect of the CPS and SB-WLR products;**
- ii. This industry SLA shall contain provision for service credits arising from a breach of the SLA;**
- iii. Until further notice from ComReg, the levels of service credits shall be a matter of negotiation between eircom and OAOs and enforcement shall be in the first instance, a matter for OAOs and eircom. However, this shall not preclude the possibility of ComReg exercising its dispute resolution powers or of intervening on its own initiative. ComReg shall monitor negotiations carefully in order to assure itself that eircom does not unfairly leverage its superior bargaining position;**
- iv. eircom shall negotiate in good faith in relation to these matters;**
- v. The industry SLA shall be updated as required and such updates may be required by ComReg to be so updated;**
- vi. The industry SLA (and any updates thereto) shall be published on eircom's wholesale website;**
- vii. The details, including performance metrics, of the existing CPS and SB-WLR SLA shall be maintained. In addition, eircom shall provide on a monthly basis, performance statistics to ComReg in respect of the services provided to OAOs for PSTN and ISDN services. ComReg may at its discretion publish the results in its Quarterly Report. In addition, ComReg will examine the necessity of conducting audits of the reported performance statistics;**
- viii. The detailed operation of the SLA is to be the subject of further review with industry and eircom and consultation by ComReg. Where appropriate and reasonable, the SLA will be amended and/or supplemented, following further engagement with industry and following consultation. In particular, ComReg is of the view that a number of issues may need to be addressed by the consultation, not limited to the following:**
 - Service metrics relating to standards may need to be revised,**
 - Related service credits may need to be revised, and**
 - The reasonableness of the exclusions which may apply for the purpose of calculating service credits may need to be reviewed.**
- ix. ComReg is of the view that SLA service credits may not provide sufficient incentive to eircom to provide a quality wholesale product. It believes that persistent failure to meet service metrics should be viewed as a breach of the conditions covering fairness, reasonableness and timeliness attached to eircom's access obligation. ComReg considers that the achievement of such metrics is an integral part of a fit-for-purpose product. Under such**

circumstances, ComReg should be able to make a finding of non-compliance and take appropriate enforcement action to compel compliance with eircom's access obligation and any related conditions of fairness, reasonableness and timeliness that are imposed. Accordingly, ComReg believes that metrics of this nature should form part of the product specification. However, as previously indicated ComReg will consult separately in relation to the specific details relating to service metrics and service credits.

(ii) Transparency

6.124 The discussion of transparency is presented under the following headings, each of which are considered in turn:

- a) Transparency in support of non-discrimination;
- b) Approach to product documentation;
- c) Approach to CPS and SB-WLR Code of Practice; and
- d) Approach to price amendments.

(ii) (a.) Transparency in support of non discrimination

6.125 A transparency obligation ensures that OAOs have access to the information which they need to enter into and operate in the lower and higher level retail narrowband access markets. Transparency also provides a method of ensuring compliance with a non-discrimination obligation, as the information needed to measure compliance would not otherwise be available. As such, this remedy should help to ensure that OAOs can compete effectively in the retail narrowband access markets. ComReg notes support among respondents that there was a lack of transparency in these markets, and that, coupled with the potential for the SMP operator to be less transparent than is necessary, justifies the imposition of a transparency obligation. ComReg notes the continuing requests for intervention by OAOs in relation to process modification and development as further evidence justifying the need for a transparency obligation.

6.126 All respondents agreed that a transparency obligation was justified and proportionate in order to verify that the SMP operator was not engaging in discriminatory practices. It was suggested that transparency should be provided to the industry in order to have confidence in equivalency of treatment, thereby assisting in the development of a competitive environment in the retail narrowband access markets.

Conclusion

An obligation of transparency should be imposed on eircom in support of the obligation to provide wholesale products on a non-discriminatory basis.

(ii) (b) Approach to product documentation

6.127 ComReg notes that eircom currently publishes product documentation in relation to CPS and SB-WLR, including the following:

- Reference Interconnect Offer (RIO) (CPS Service Schedule 102, SB-WLR Service Schedule 401) ,
- Inter-Operator Process Manuals,

- Product Descriptions,
- Data Contract, and
- Service Level Agreements (SLA).

- 6.128 However, despite the availability of the listed publications, it is difficult to find objective evidence that OAOs receive the equivalent level of service as that enjoyed by the SMP operator's retail arm in relation to the retail narrowband access markets. As such, the OAOs have requested progressive improvements in the level of detail of product related information. The details of any additional information should be agreed with industry, and be published in parallel with the existing documentation.
- 6.129 Regulation 10 (2) of the Access Regulations permits ComReg to require the SMP operator to publish a reference offer that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. This would include a description of the retail narrowband access markets' relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.
- 6.130 ComReg believes that this obligation should be maintained. Regulation 10 (3) of the Access Regulations allows ComReg to specify the precise information to be made available, the level of detail required and the manner of publication. ComReg also notes that the product documentation does not in any way constrain the obligation and expects that any new offerings developed pursuant to Regulations 11 and 13 of the Access Regulations should also be detailed in the appropriate documentation.
- 6.131 ComReg considers that greater procedural transparency in the delivery of wholesale products is required in order to provide confidence to market participants that there is equivalence of treatment between OAOs and eircom Retail and guard against the possible leverage or maintenance of eircom's dominance in relation to the retail narrowband access markets.
- 6.132 All respondents agreed that it was appropriate to maintain the obligation to publish the current product documentation and any new documentation which may develop. ComReg suggests that the obligation should cover any document or information which is required for the implementation of the wholesale product.
- 6.133 ComReg notes that subject to further review it may direct at a future date in relation to eircom publishing and keeping updated a Data Contract for CPS and SB-WLR, including a description of the associated terms and conditions. Since eircom already publishes same on a voluntary basis this is not considered to represent an onerous obligation.

Conclusion

The current product documentation (including reference offers) should be maintained in respect of the CPS and SB-WLR products and any new documentation should be developed in accordance with Regulations 10 to 13 of the Access Regulations with prior approval of ComReg.

(ii) (c) Approach to CPS and WLR Code of Practice

- 6.134 In May 1999, ComReg (then the ODTR) issued a decision notice.¹⁷⁹ This Decision Notice directed that the CPS committee should put in place an industry Code of Practice for CPS to ensure that operators would develop adequate customer information and consumer protection procedures to assist the public in understanding the choices they had, and how the new CPS services would operate. The Code of Practice¹⁸⁰ would also protect customers from potential operator misuse of the CPS facility, most notably ‘slamming’¹⁸¹. Slamming was thought not to be a practice in which reputable operators would engage but nevertheless safeguards needed to be put in place.
- 6.135 In the Decision Notice D13/02 (as supplemented by D2/03), eircom was required to offer CPS Single Billing products and allow operators to offer a single bill to end users. A code of practice was developed by industry for the SB-WLR product to address the same issues of consumer protection. This code of practice, the ‘Code of Practice for Single Billing’ was an extension of the CPS code. Any operator wishing to provide SB-WLR was also required to sign the ‘Code of Practice for Single Billing’.
- 6.136 As the Code (i.e. CPS or SB-WLR Code of Practice) is based upon the legislative provisions of the Old Framework, it will fall away following this market review and the imposition of any SMP obligations under the review (Regulation 8 of the Access Regulations). Obligations which result from a market review can only be applied to a SMP operator. On the other hand, for the Code to operate effectively it should apply to all operators.
- 6.137 While the Code deals with a range of consumer issues, ComReg considers that the clause pertaining to ‘slamming’ is of particular importance in protecting consumers. However, upon termination of the Code it is suggested that, consumer protection is offered via consumer acquisition forms (CAFs) linked to CPS and SB-WLR, in addition to that afforded by consumer protection and advertising standards legislation.
- 6.138 The Code also contained a ‘winback’ provision which prevented a losing operator¹⁸² from contacting the consumer for a given period. This was aimed at allowing the gaining operator¹⁸³ to offer access and calls for a given time, thereby enabling the consumer to have a sufficient period of time to evaluate the service without external pressure. This was thought to be essential to the effectiveness of the CPS and SB-WLR products because at that time there had been little or no user experience of alternative operators.

¹⁷⁹ Introducing Carrier Pre Selection in Ireland, Document Number 99/29 and Decision Number D2/99. This Decision Notice was issued pursuant to the European Communities (Interconnection in Telecommunications) Regulations, 1998 (SI 15 of 1998), as amended by the European Communities (Interconnection in Telecommunications) (Amendment) Regulations, 1999 (SI 249 of 1999).

¹⁸⁰ The Code was binding on all parties engaged in CPS and addressed the following areas of consumer interaction: (i) customer contracts, (ii) use of customer information and win-back activities, (iii) promotion of CPS, (iv) the order handling process, (v) billing and bill payment, (vi) fraud and bad debt and (vii) complaint and inquiry handling.

¹⁸¹ Slamming means any activity undertaken by an operator that dishonestly attempts to initiate a service change without the explicit permission of the customer.

¹⁸² The losing operator is the operator which provided CPS services to the customer prior to the customer electing to change to the gaining operator.

¹⁸³ The gaining operator is the operator which the customer has chosen to provide CPS services in the future.

- 6.139 In the response to current consultation, respondents had mixed views on the appropriateness of the win-back provision. One respondent raised the question of whether the win-back provision of the Code was anti-competitive. They suggested that a provision which shielded gaining operators dampened the intensity of competition and limited customer choice, which may preclude the choice of a superior product. It was their view that successful winback provisions were based on a voluntary decision by the customer to switch as a consequence of being persuaded of superior value and that the customer was the best judge of the length of time that was necessary to make an assessment of the service provided. They felt that the customer was not likely to consider alternatives until such time had passed and that by setting a fixed period, this would either prove unnecessary or detrimental to competition, where the customer required a shorter period than that imposed under a winback provision.
- 6.140 Despite the existence of the winback provision, in terms of regaining customers, eircom has been effective through intensive advertising campaigns. The table below, reproduced from eircom's 2006 results presentation provides detail on the numbers of customers who returned to eircom during the period April 2005 to March 2006. For the year, eircom indicated that it had won back 81.9% of the customers that it had lost in the past to OAOs.¹⁸⁴

Apr-05 to Mar-06 Winback – No. Of Subscribers	
Gross losses YTD	-176,203
Winback YTD	144,303
Net losses YTD	-31,900

Table 6.1: eircom winback

- 6.141 This situation is not limited to Ireland. The European Commission noted that across Europe intensifying competition is leading incumbent operators to deploy defensive strategies aimed at protecting their voice revenue streams. This included aggressive win-back campaigns.¹⁸⁵ A number of NRAs¹⁸⁶ have imposed restrictive measures on the incumbent such as a withdrawal period, during which the incumbent is prevented from undertaking any win-back action aimed at pre-selected customers.
- 6.142 It was noted in the consultation paper that barriers to switching in relation to the retail narrowband access markets have reduced since the time when the Code was first introduced. Survey evidence supporting this view has been presented in section three of this paper. Although this data would suggest that there may not be any barrier if a consumer proactively decides to switch, ComReg has noted a certain level of reluctance among consumers to switching in practice i.e. consumer inertia.¹⁸⁷ However, ComReg considers that it would be inappropriate to shield OAOs or penalise the incumbent for customer apathy via a SMP obligation, as this cannot be considered to be a competition problem.
- 6.143 Also, ComReg examined whether as a result of eircom's position as the dominant incumbent and with control of the highest number of lines, there may be an

¹⁸⁴ Source: eircom presentation on preliminary 2006 results, 15 May 2006.

¹⁸⁵ Commission Staff Working Document Annex to 11th Implementation Report, SEC (2006)193, Volume I.

¹⁸⁶ ANACOM, CMT and EETT: the Portuguese, Spanish and Greek regulatory authorities respectively.

¹⁸⁷ As the incumbent operator, eircom may have an advantage in this respect. ComReg notes that over 50% of non-residential users have *never* switched operator (Millward Brown IMS H2 2006). While 85% of residential users had not switched in the preceding twelve months amárach, Q1 2006 survey.

- asymmetry of costs between eircom and OAOs. It was considered whether this might be mitigated by preventing the incumbent from targeting switching customers for a fixed period to allow consumers time to evaluate the alternative offering. However, ComReg's analysis has shown that the number of CPS and SB-WLR lines acquired has increased and that switching barriers have reduced since the time of the last review. Further, it is considered that the win-back provision is not appropriate for remedying this possible asymmetry.
- 6.144 ComReg suggests that where wholesale inputs are available on a non-discriminatory basis there is no evidence to suggest that an alternative operator could not replicate eircom's retail offering or marketing campaign. No respondent provided any evidence as to why eircom may have a competitive advantage in this respect.
- 6.145 Under this review, ComReg notes that a no winback provision could *only* be imposed on the SMP operator. This would only prevent eircom – and not other operators – from contacting the lost customer. Therefore, ComReg considers that to impose such a provision solely on eircom would be disproportionate, and would not achieve the desired result.
- 6.146 Also, it should be noted that consumers, if satisfied with their service, can express their preference not to receive direct marketing calls by including their name on the 'Opt Out' register of the National Directory Database (NDD) for a period as determined by them.
- 6.147 Additional protections are covered under Regulation 5 of the Access Regulations which provides that an undertaking (which includes non-SMP operators) shall not pass any information (i.e. information obtained from another undertaking before, during or after the process of negotiating access or interconnection arrangements) on to any other party, in particular, other departments, subsidiaries or partners of the undertaking for whom such information could provide a competitive advantage. The undertaking must use the information solely for the purpose for which it was supplied. As a result, such information cannot be used in an effort to win the customer.
- 6.148 Furthermore, by virtue of data protection legislation, there are certain restrictions as to how a company may use the personal data of a customer, once that customer has ceased to have any contractual relationship with that provider. These two provisions will remain.
- 6.149 In summary, ComReg recognises the benefit of the Code to date and believes that it has been integral to the effectiveness of the CPS and SB-WLR products. There was support for the maintenance of the Code which was considered to be an important element of the framework under which CPS and WLR operate. One respondent recommended that ComReg should mandate provisions in a CPS/WLR supporting document e.g. in the process manual or service schedule. However, as this would apply to all operators, it is outside the scope of the review. It is also ComReg's wish to carry forward such a provision, which may be done on a voluntary basis applying to all operators. However, as outlined above the Code cannot be imposed under this review as a SMP obligation. ComReg is currently carrying out a review of the CPS and SB-WLR Code of Practice, which will consider *inter alia* the implementation of a voluntary mechanism.

Conclusion

ComReg would support the continuation of the current Code of Practice applying to all operators on a voluntary basis. However, a specific obligation may not be imposed by virtue of SMP in the retail narrowband access markets.

(ii) (d) Approach to price amendments

- 6.150 In the consultation paper it was outlined that in order to implement the retail-minus price control currently applied to SB-WLR, eircom publishes wholesale changes to prices in advance of their coming into effect and that this was done on a voluntary rather than a regulated basis. As such, eircom's current practice is to publish changes to wholesale prices twenty one calendar days before they come into effect. This is necessary to allow OAOs to update their billing systems. An additional five days' notification is provided to ComReg, again on a voluntary basis.
- 6.151 ComReg proposed that eircom's current voluntary work practice should be formalised by a specific obligation imposed under the Access Regulations for legal certainty and in order to provide transparency to market participants i.e. that eircom should be required to publish changes to wholesale prices fifteen working days before they came into effect and that eircom should notify ComReg of changes five working days before publication (i.e. 20 working days before they came into effect).
- 6.152 ComReg invited respondents to comment on whether current practice was sufficient and satisfactory.
- 6.153 In response to this, one respondent – who opposed the proposal - suggested that to have to publish and adhere to standard pricing facilitated the practice of price-following by competitors. It could be argued that this would serve to lessen competition by facilitating the creation of a tacit focal pricing point in the market. ComReg would respond by noting that this issue relates to transparency of retail rather than wholesale prices. Furthermore, not to provide pre-publication of wholesale price amendments would result in uncertainty for OAOs in forecasting costs and expenditure which may negatively impact on their ability to compete in the retail narrowband access markets.
- 6.154 The necessity for pre-publication in order to facilitate effective business operation by OAOs at the retail level was highlighted by one respondent who noted that operators providing services via SB-WLR needed to modify their products and provide customers with one month's advance notice of any amendment to the retail offering (should such an amendment be deemed necessary by that operator on foot of a change to the wholesale price). Following on from this, ComReg has further considered its proposed approach.
- 6.155 In particular, ComReg has considered the compatibility between its proposal and the requirement outlined under section 17(4) of the Universal Service Regulations which requires undertakings to notify their subscribers not less than one month prior to the date of implementation of any proposed modification in the conditions of the contract for that service.
- 6.156 In the circumstance where a retail-minus price control is applied, ComReg suggests that it is essential that changes to the wholesale price are published sufficiently in advance in order to ensure that OAOs have an opportunity to amend their own retail access price and notify their customers of this change (in line with their obligations under the Universal Service Regulations) in response to the wholesale input price increase should they wish to do so.
- 6.157 ComReg therefore proposes that eircom should notify ComReg of any proposed change to wholesale prices two months prior to the retail price amendment and notify OAOs of the change at least seven weeks before the proposed change in retail prices will take place in order to give OAOs adequate time to notify their customers in line with the Universal Service Directive.

- 6.158 This proposal would allow OAOs time to incorporate changes to prices into their billing systems and would allow ComReg to examine and monitor the implementation of the retail-minus price control.
- 6.159 However, it is of note that in relation to amendments to the CPS product, where charges are set on a cost-oriented basis (as is currently the case with CPS) it may be that the calculation of such charges can not be satisfactorily concluded in advance of the period to which they relate (in particular, where costs are derived from those actually incurred in a period). As such, pre-notification is rendered impossible. In such instances, eircom will be required to follow existing practice i.e. to publish interim prices with subsequent publication of final prices once available. No respondent disagreed with this approach.

Conclusion

- 6.160 **In circumstances where a retail-minus price control is in place, eircom should notify ComReg two months prior to the actual retail amendment and notify OAOs of the change at least seven weeks before the proposed change will take place in order to afford OAOs the same notification timing as eircom Retail to their customers, i.e. one month.**

(iii) Price Control

CPS

- 6.161 ComReg notes that the mandated remedy for CA/CS and CPS within the Universal Service Regulations imposes the obligation on the SMP operator to ensure that pricing for access and interconnection related to the provision of CA/CS and/or CPS facilities is cost oriented. Input prices for CPS are currently governed by the Interconnect Regulations and are subject to review, as part of the Interconnection Market Review.¹⁸⁸ This cost oriented price control for CPS serves to provide OAOs with a degree of certainty in relation to the price of this wholesale input which in turn helps foster competition in the retail narrowband access markets. As such, it supports the effectiveness of the access obligations as it helps to ensure that CPS is provided on terms which would enable efficient OAOs to compete. Thereby, it assists in protecting against a possible constructive denial of access and/or margin squeeze in the retail narrowband access markets. It is of note that no respondent disagreed with this approach.

Conclusion

The application of the cost-orientation price control should continue for CPS.

SB-WLR

- 6.162 ComReg has justified the imposition of SB-WLR above. In mandating a wholesale charge for line rental, the mechanism must support a competitive product, and must provide incentives for investment in order to facilitate effective and sustainable competition in the retail narrowband access markets. Research indicates that the wrong price signals might either frustrate investment by operators, and the potential to

¹⁸⁸ Market Analysis – Wholesale Call Origination and Transit Services, National Consultation (07/02), and Call Termination, National Consultation (07/03).

- build sustainable competition, or lead to a situation where positive effects on competition will not emerge because the product may not be competitive.¹⁸⁹
- 6.163 ComReg suggests that setting an access price is a function of encouraging efficient entry and preserving the incentive to invest. Access prices that are too high could exclude efficient entrants and access prices that are too low could enable inefficient firms to enter and undermine long-term investment in the market. It is important that the need to encourage long-term investment is balanced by the requirement to promote entry into the retail narrowband access markets. Therefore careful consideration must be given to the calculation of the minus element.¹⁹⁰ Further, it is of note that such a price control would also help to ensure that SB-WLR is provided on terms which would enable efficient OAOs to compete, thereby helping to guard against a possible constructive denial of access and/or margin squeeze in the retail narrowband access markets.
- 6.164 ComReg has considered two forms of price control which can be used to encourage efficient entry and preserve the incentive to enter:
- Cost-orientation on the basis of the forward looking long run incremental costs (FL-LRIC¹⁹¹), and
 - Retail-minus.
- 6.165 At the beginning of June 2003, ComReg set the price for SB-WLR at retail-minus 8.5%.¹⁹² In April 2004, access to eircom's SB-WLR product was set at retail price less 10%.¹⁹³
- 6.166 ComReg suggested that to preserve incentives for investment, a retail-minus price control should be maintained. The current price control of retail-minus 10% was seen at the time to be a reasonable contribution towards retail costs of OAOs availing of this product while also allowing for a margin.
- 6.167 ComReg has considered the effectiveness of SB-WLR and take-up relative to other member states.¹⁹⁴ Since the launch of SB-WLR there has been:
- significant migration from CPS to SB-WLR,
 - an increase in the number of operators (including resellers) providing retail services via SB-WLR,
 - an increase in the number of lines purchased by OAOs and
 - a slight increase in the take-up of LLU.¹⁹⁵
- 6.168 These factors coupled with gradually decreasing market shares for eircom in the lower and higher level retail access markets suggested that an appropriate price point had been achieved over the past few years. However, the responses from alternative

¹⁸⁹ Yankee Group. WLR Regulatory Developments – September 2005.

¹⁹⁰ Analysis of wholesale line rental (WLR), conducted by WIK as part of the analysis of the market for fixed telephony, 10/27/2004.

¹⁹¹ Forward looking Long Run Incremental Cost.

¹⁹² Wholesale Line Rental - Pricing Issues. ComReg Document 03/24.

¹⁹³ Wholesale Line Rental - Pricing Issues, Margin. ComReg Document 04/34.

¹⁹⁴ Source: Internal ComReg data and the Status of Wholesale Line Rental in Europe, Ovum, September 2005. Analysys: "Wholesale line rental: a hedge against unbundlers?", June 2005.

¹⁹⁵ This data is presented in section six of this consultation paper. At the end of December 2006 SB-WLR accounted for approximately 66% of all indirect access lines.

- operators have generally disagreed with this, and indicated that alternative operators believed that a higher margin was required to cover retail costs associated with providing SB-WLR. They believed that they were currently at a disadvantage when compared to the incumbent operator due to the benefits of economies of scale and scope arising from a much larger retail customer base and also that the current margin was not a fair representation of retail costs. One operator also highlighted that the margin available in the Irish market was significantly lower than that available in other European states.
- 6.169 ComReg considers that the retail-minus at 10% should be maintained until such time as a more detailed review of the costs associated with retail access has taken place. Currently there is considerable analysis and review of relevant retail costs taking place in ComReg as part of the retail Price Cap Review and this will help inform any future decision in relation to the appropriateness or otherwise of the current price control.
- 6.170 In response to the initial review, respondents were asked whether they believed that FL-LRIC was more appropriate. They were also asked whether it was correct to continue with the application of a retail-minus price control for SB-WLR.
- 6.171 There was support for the view that FL-LRIC would be inappropriate in the period of the review. One respondent however noted that they were unable to provide a response in the absence of what the eventual cost based FL-LRIC prices for SB-WLR and related services would be.
- 6.172 Two respondents to the current review suggested that ComReg should move towards a cost based price control for SB-WLR and in the interim adjust the margin available.
- 6.173 ComReg believes that SB-WLR has not reached saturation to date and that there is sufficient justification for the imposition of the price control. ComReg notes that in the higher level retail access market, SB-WLR has not supplanted direct access and this helps to confirm this approach to the market. The proposed price control would further support the effectiveness of the SB-WLR measure and in turn help to promote competition in the retail narrowband access markets. However, ComReg is mindful that the correct margin must be in place to ensure sustainable competition. Based on comments from other operators and on the comparative margins available in other European states, ComReg believes that it is now necessary to review the current margin available in order to ascertain whether the current margin is correct going forward or whether any amendment is required.
- 6.174 Comments raised in relation to the price cap order are addressed in the separate consultation on the price cap order.

Conclusion

The application of the retail-minus price control should continue for SB-WLR at this time, pending a further detailed consultation by ComReg on the margin available to other operators during the period of the review.

(iv) Accounting Separation

- 6.175 ComReg has required eircom to supply financial information either on request to support investigations and pricing reviews and/or on an annual basis in order to support regular monitoring of its decisions since liberalisation of the market. Such data is crucial for effective regulation.

- 6.176 The obligation of accounting separation would support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting the wholesale prices and internal transfer prices for services. As such, it will help support the other wholesale obligations and to foster competition in the retail narrowband access markets.
- 6.177 ComReg notes that, if it were to withdraw the accounting separation obligation, it would not have any means of monitoring the non-discrimination obligation or of having any information on margins in the retail business.
- 6.178 ComReg maintains its position that without the information which can be supplied from appropriately separated accounts it is not possible to implement the formal aspects of accounting separation. ComReg therefore believes that the need for accounting separation is clearly established and justified.
- 6.179 In circumstances where retail-minus is imposed as a form of price control and for the accounting separation remedy to be effective, further information on the associated retail costs will be necessary to enable the calculation of the retail-minus price control. ComReg proposes that further consultation is required on this issue.
- 6.180 When asked whether respondents agreed that it was appropriate to maintain the existing level of accounting separation in the interim period all respondents agreed. Further, it of note that all respondents supported the need for a further consultation.

Conclusion

The existing level of accounting separation obligations should be maintained and developed, pending the outcome of the consultation on accounting systems and associated methodologies for their support.

(v) Cost Accounting Systems

- 6.181 ComReg considers that the obligation of cost accounting systems supports the obligations of price control and accounting separation. As such, this obligation contributes towards creating a more competitive environment and serves to protect against the potential leverage or maintenance of the incumbent's dominant position in relation to the retail narrowband access markets. ComReg does not believe that it will constitute an unreasonable burden on eircom, as the organisation already has management accounting systems in place to support internal business decision-making.
- 6.182 ComReg is currently consulting in more detail on this issue in a consultation on Accounting Separation and Cost Accounting.¹⁹⁶ In the interim, ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it, until such time as any further consultations are completed.
- 6.183 All respondents supported the proposal to maintain the existing levels of cost accounting pending further consultation. While ComReg agrees with one respondent that the proposed obligation should apply to the monitoring of a retail-minus price control obligation in relation to SB-WLR, it does not agree that the obligation should be limited to this in order to reduce the regulatory burden. ComReg considers that the

¹⁹⁶ [Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations](#). ComReg Document Number 05/18.

scope of this obligation may need to be more far reaching than that proposed by this respondent and will consider this issue further in its consultation on Accounting Separation and Cost Accounting obligations. Further, ComReg notes that eircom already has systems in place which facilitate the provision of this information, therefore, it can not be considered that the obligation is overly burdensome.

Conclusion

Existing cost accounting systems should be maintained and suitably developed, pending the outcome of further consultation on accounting systems and associated methodologies for their support.

REGULATORY CONTROLS AT THE RETAIL LEVEL

Introduction

- 6.184 In the initial review, it was proposed that wholesale measures were necessary but not sufficient to address competition problems in the retail narrowband access markets. The case was made that additional retail measures were needed. The retail measures which were proposed included price controls and obligations relating to non-discrimination, transparency, not to unreasonably bundle and cost accounting.
- 6.185 This updated review has considered the impact of changes in the retail markets, and has noted the successful development of SB-WLR, which together with CPS has stimulated some level of competition in these markets. At the end of December 2006, SB-WLR accounted for 16% and 6% of lower and higher level access lines respectively. However, in spite of the strong growth of this product, eircom has retained market power in the provision of access to end users: ComReg's analysis (section 4) found that eircom had SMP in both the lower and high level retail narrowband access markets.
- 6.186 The previous section outlined ComReg's analysis of the wholesale remedies necessary to address the potential competition problems it has identified. It is ComReg's view that some of the competition problems identified persist in spite of regulatory measures at the wholesale level. For example, even in the presence of the mandated wholesale products there is sufficient scope and incentives for the SMP operator to sustain retail prices above competitive levels over the period of the review (as such high prices would be unlikely to attract significant entry) or potentially to engage in an anti-competitive margin squeeze facilitated by bundling which would serve to undermine the effectiveness of the relevant wholesale remedies. Accordingly, there remains the need to consider additional remedies at the retail level in order to prevent eircom from potential vertical leverage or maintenance of its dominance in the retail narrowband access markets and/or possible horizontal leverage into related markets. As such, ComReg needs to intervene where appropriate at the retail level, while remaining cognisant of measures in place at the wholesale level.
- 6.187 ComReg has considered potential retail remedies under the following headings:
- a. Price control,
 - b. Obligation not to show undue preference,
 - c. Transparency,
 - d. Bundling and
 - e. Cost accounting.

(a) Price control

- 6.188 The retail price control will be considered under (i) the price cap order and (ii) cost-orientation.

(a) i. Price Cap Order

- 6.189 Further to the proposed SMP designation of eircom in both the lower and higher level retail narrowband access markets (set out in section 4) and ComReg's finding in the competitive problems section above (sections 6.5-6.42) that eircom has considerable scope and incentives to sustain prices above competitive levels, ComReg considers that some form of a retail price control measure may still be required in these markets. The current price cap order is maintained pending the final outcome of the consultation on a retail price cap as a potential remedy on the fixed narrowband access markets (ComReg Document 06/41). For the avoidance of doubt, nothing in the Draft Decision Instrument in this document (Annex A) shall in any way (either expressly or by implication) affect the continuing validity of the Telecommunications Tariff Regulation Order, 2003, which remains in full force and effect, unless expressly amended or revoked by ComReg pursuant to section 7 of the Telecommunications (Miscellaneous Provisions) Act, 1996.
- 6.190 ComReg has outlined in the relevant consultations¹⁹⁷ that it is appropriate to consult on the possible scenarios for applying retail price controls (RPC) to the identified retail narrowband access markets in order to determine the most appropriate and proportionate regulatory response as a result of any SMP designation that might be made in these markets pursuant to the market review process. ComReg is currently reviewing carefully and in detail all responses to consultation 06/41 on a potential retail price control remedy. If ComReg ultimately determines, following the above consultations, that a RPC is appropriate, a regulated retail access price(s) would be set for those markets and/ or individual services which ComReg decides should be subject to a RPC on a CPI +/- X formula, where "X" is in part some efficiency factor. ComReg plans to issue a further consultation document on the RPC in the second quarter of 2007. This will report on the first consultation (06/41) and will invite views from stakeholders on ComReg's final proposals on which markets and/or individual services, if any, should be included in a RPC. In addition, it will consult on the methodology to be used in setting a level for any RPC and if applicable the level and structure to be utilised. A future price cap on fixed retail narrowband access markets, if applied, will constitute a remedy flowing from Regulation 14 of the Universal Service Regulations.

Conclusion

Some form of a retail price control measure may still be required in the retail narrowband access markets where eircom has SMP. The current price cap order is maintained pending the final outcome of the market review process.

¹⁹⁷ ComReg Document 06/41 and ComReg Document 06/39.

(a) ii. Cost orientation of Retail Prices

- 6.191 In the initial review, it was noted that while the existing Price Cap Order¹⁹⁸ addresses the upper limit of pricing for a “basket” of services (including access and calls), cost-orientation was a more general obligation that can prevent the SMP operator from charging excessive prices for specific services to end users, such as line rental. A cost orientation requirement can also ensure that a SMP operator does not restrict competition, for example, by charging unreasonably low or predatory prices to consumers. Concerns relating to the ability of the SMP operator to set retail prices without being constrained by its competitors or consumers and/or having an opportunity to foreclose competition via predatory pricing are outlined in the competition problems section (section 6.5-6.42).
- 6.192 ComReg has considered further the need for a specific cost-orientation obligation at a retail level, in particular taking into account proposed regulatory measures at the wholesale level and within the context of the overall suite of proposed retail remedies.
- 6.193 Absent any retail price control on access there is a risk that eircom with SMP will increase access prices to the detriment of consumers. Some form of a retail price control (cost orientation and/or a retail price cap) would represent a proportionate response given both the lack of effective competition identified in these markets (section 4) and that the proposed regulatory measures at the wholesale level alone would not be sufficient to adequately protect consumers. Nevertheless, a retail cost orientation requirement applied in conjunction with a retail price cap to ensure that eircom does not exploit its market power by raising prices in markets concerned to the detriment of consumers would appear unjustified and disproportionate. If ComReg ultimately concludes that a retail price cap (RPC) is appropriate, necessary and justified or that such a measure is no longer warranted in the retail narrowband access markets, the cost orientation requirement should no longer be necessary.
- 6.194 While a cost orientation obligation may no longer be appropriate in the presence of a RPC to control access prices, the question of whether or not eircom should continue to be subject to a RPC and if so, for which narrowband access markets and individual services, remains subject to consultation. On the 21 August, 2006, ComReg issued a consultation document in relation to the potential need for a RPC, in the event that ComReg concludes that eircom has SMP in these markets and, on possible options concerning its structure.¹⁹⁹
- 6.195 In that document ComReg considered whether a cost orientation obligation at the retail level obviates the need, if any, for a price cap or whether it could be a more effective alternative to a price cap remedy on lower and/or higher level narrowband access services. ComReg notes that the process of determining cost orientated prices may potentially prove to be complex and/or protracted. If there are shared and common costs, a cost orientation obligation as an upper limit constraint may not be appropriate. Where there are uncertainties in allocating costs to specific services a more effective remedy may be to include the retail narrowband access services in a RPC to guard against excessive prices and reward efficiency gains.

¹⁹⁸ The current price cap mechanism is set out in the Telecommunications Tariff Regulation Order 2003, S.I. 31 of 2003.

¹⁹⁹ Document no 06/41 “Retail Price Cap as a Potential Remedy on Fixed Narrowband Access Markets – Part 1”. This consultation document was the first of two consultations in relation to this issue.

- 6.196 From above, the current Price Cap Order is maintained, pending the outcome of ComReg's consultations on a RPC as a potential remedy on the retail fixed narrowband access markets. If ComReg determines as final, following consultation, that a RPC on these markets continues to be necessary and that the identified competition problems and regulatory objectives are best served by implementing a RPC in addition to the proposed wholesale measures, it is envisaged that the retail cost orientation obligation would be superfluous to such a control and would likely be removed. In Consultation 06/41 ComReg had formed the provisional view that the objective of protecting against potential excessive pricing would be better addressed directly through a RPC.
- 6.197 In addition, a retail-minus approach to WLR pricing should be sufficient to minimize concerns in relation to the SMP operator charging an unreasonably low price that may harm competition. While one respondent believed that there was a sufficient price constraint at the retail level, in the presence of wholesale obligations and direct connections, two respondents believed that there was a continued need for the cost-orientation obligation. They suggested that, without a cost-orientation obligation, eircom would have the freedom to increase its retail prices and its competitors' input costs. They also noted that the removal of this obligation could potentially lead to a margin squeeze of LLU based products as a result of line rental reduction.
- 6.198 From above, where the risk is one of excessive pricing, a cost orientation obligation may no longer be appropriate in the presence of a RPC remedy to control access prices, if deemed necessary. In particular, in the presence of a retail-minus approach to WLR pricing any concerns about predatory behaviour should be addressed by this method. An examination of a potential margin squeeze obligation could more appropriately be dealt with at the wholesale level. In conjunction with the retail-minus control, other supporting wholesale obligations, such as non-discrimination, accounting separation and cost accounting obligations should be sufficient to mitigate such a risk. ComReg envisages a separate consultation on the WLR retail minus control which will review the current margin available and ascertain whether the current margin is appropriate going forward or whether any amendment is required.
- 6.199 One respondent requested further clarity on how current practices of pricing of eircom's narrowband access products would change. In the event that the existing cost orientation obligation were removed, subject to the outcome of the consultations on a possible RPC in the retail narrowband access markets, eircom would no longer be obliged to strictly cost justify its retail price. However, it is ComReg's expectation that where appropriate to do so eircom would submit cost data and information to allow ComReg monitor the effective application of the WLR price control. This would also allow for a more informed view to be taken on the application of any future access price control(s) where relevant. The current compliance requirements of the retail Price Cap Order oblige eircom to submit annually actual results of recovery against the retail price cap regime in place which enables ComReg to monitor the proper implementation of that price control. Any practical elements or implementation issues concerning a possible RPC will be set out in a Final Decision instrument in relation to this matter, should ComReg ultimately conclude that a RPC is appropriate, necessary and justified.
- 6.200 There will necessarily be a transitional period from the date of publication of a Final Decision in relation to this market review and any Decision by ComReg, following further consultation in the second quarter of 2007, on whether or not a RPC would continue to be necessary and justified in relation to these markets. In the interests of clarity and certainty and to ensure adequate control over any price movements for

access services in the intervening period, the existing cost-orientation obligation²⁰⁰ is to be maintained, pending the outcome of ComReg's consultations in relation to the need for and justification of a RPC remedy on narrowband access markets and/or individual services. .

Conclusion

The current cost-orientation obligation on eircom is to be maintained pending further consultation on a retail price cap as a potential remedy for narrowband access markets.²⁰¹

(b) Obligation 'not to show undue preference to specific end-users'

- 6.201 There is a risk that an undertaking with SMP may use its market power to apply dissimilar conditions to transactions which are equivalent. For example, this could be, in the form of price offers, information or conditions of supply. A dominant undertaking can always increase its profits by setting an excessive price and thus may have an incentive to do so. ComReg suggests that in the context of the retail narrowband access markets, eircom is in a position to discriminate between its customers and could potentially offer more favourable pricing or conditions to certain users. In such a situation, the SMP operator may be able to exploit certain segments of consumers by virtue of its position of SMP. This may include the targeting of discount schemes or other terms and conditions at parts of the market that are, or are more likely to become, more competitive. Regulation 14 (2) of Universal Service Regulations enables ComReg, in appropriate circumstances, to require SMP operators 'not to show undue preference to specific end-users'.
- 6.202 The obligation 'not to show undue preference to specific end-users' prevents an operator with SMP from charging differing prices in markets, depending on the competitive conditions of the market and price sensitivity to products in the markets. Alternatively, the SMP operator may have an incentive to differentiate its conditions of supply.
- 6.203 ComReg notes that an obligation 'not to show undue preference to specific end-users' does not mean that the SMP operator must offer identical terms and conditions to every customer, but rather that any differences must be justified in an objective way. ComReg proposes that the prohibition on discrimination would apply to any differences that may have the effect of harming competition in light of the goals of the Communications Act; this will be assessed on a case by case basis. This would apply to the current market and to emerging competition in the market. The obligation will be supported by the retail transparency obligation, where eircom is obliged to pre-notify changes to changes in its tariffs to ComReg.
- 6.204 ComReg proposes that the emergent state of competition in the retail narrowband access markets indicates that *ex post* regulation alone would not be sufficient, and that there will need to be a requirement for an obligation 'not to show undue preference to

²⁰⁰ Under Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations, 1999.

²⁰¹ In the event that a RPC were imposed, following further consultation on the issue, it is likely (but not definite) that ComReg would remove the current cost orientation obligation once that relevant measure was fully and effectively implemented. However, the necessity or not of a RPC is currently the subject of consultation.

specific end-users' for the lifetime of this review. It was noted also that measures which are taken at the wholesale level may not prevent undue discrimination at the retail level. As such, intervention at the retail level is required.

- 6.205 While two respondents did not agree that it was appropriate to impose a specific obligation on eircom, two strongly agreed that the obligation was justified. ComReg does not support one opposing respondent, who suggested that ComReg should have identified separate markets for residential and non-residential users and that eircom should be able to differentiate retail narrowband products and pricing between these types of users to reflect different price elasticities. As set out in section four, examination of demand and supply-side factors precludes the definition of markets differentiated by user type.
- 6.206 The same respondent suggested that eircom should be permitted to offer bespoke solutions and targeted prices to specific and larger business customers, where ComReg could set a financial or other threshold to limit the base of customers for which this pricing freedom would be allowed. While ComReg agrees that there are different purchasing dynamics for retail narrowband access, this is most appropriately captured by the split at the product level (i.e. between higher and lower level access) rather than by user type. Further, it was noted by the respondent that the obligation to make available to all, a product offering demanded by a given customer, was disproportionate as it resulted in a considerable lengthening of timeframes. ComReg however notes that the risk of eircom being able to leverage market power from and to different types of users, possibly subsidising lower priced offerings in the more competitive elements of the relevant markets from the less competitive areas, justifies this obligation.
- 6.207 Ensuring that all product offerings are available to all prevents leverage of market power which could result in less price-sensitive or vulnerable users being charged excessive prices and alternative operators not being able to match the SMP operator's offering where end users are more price sensitive and informed. Therefore, in the interest of consumer welfare and in order to foster competition in the retail narrowband access markets it is necessary to impose an obligation of non-discrimination. ComReg would reiterate that eircom can discriminate among users: however any differences must be justified in an objective way and must be available to all in that category of user.

Conclusion

The SMP operator will be subject to an obligation not to show undue preference to specific end-users.

(c) Transparency: Publication and notification of terms and conditions

- 6.208 In accordance with Regulation 18 of the Universal Service Regulations, ComReg has a role in ensuring that transparent and up to date information on applicable prices and tariffs for all operators is available to end users and consumers. ComReg may specify information to be published such as the standard tariffs covering access, usage charges, discounts and special or targeted tariff schemes. ComReg has already directed on printed tariff information and tariff information on websites.²⁰²

²⁰² Users' Rights to Communications Services (Protecting Users in a Developing Communications Market) - Decision Notice D16/03. ComReg Document 03/86.

Accordingly, all service providers shall provide tariff information in response to a reasonable consumer request and provide a direct link from the homepage of their website to the tariff information section of their website.

- 6.209 In the initial review, ComReg considered whether additional transparency obligations other than the general requirement to publish standard terms and conditions together with the applicable tariffs needed to be imposed on eircom (in light of its designation with SMP in the retail narrowband access markets). At present, eircom notifies ComReg and publishes any changes to retail tariffs, terms and conditions 21 working days before they come into effect. Current practice is that eircom has usually (and voluntarily) provided an additional five working days' notification to ComReg before publication. eircom was obliged to supply such services at the published prices and in accordance with the published terms and conditions. This allowed ComReg to monitor compliance with principles of transparency, cost-orientation and non-discrimination.
- 6.210 The obligation of transparency is not confined to the publication of tariffs. Publication without implementation of what is published would not be in accordance with the transparency requirement. In that regard, it is proposed that eircom will be required, in respect of the lower and higher level narrowband access markets, to supply services only:
- at those prices published in accordance with those obligations described above and
 - in accordance with any other terms and conditions for the relevant services published in accordance with Regulation 18 of the Universal Service Regulations.
- 6.211 In the current market review, ComReg has noted a degree of change in the access markets since the initial review. It is ComReg's view that there is no longer justification for requiring advance publication of changes to tariffs, terms and conditions in the retail narrowband access markets. ComReg therefore proposes to withdraw the obligation to publish retail changes before they come into effect. Public notice of changes to retail prices and terms and conditions should be given on the day they come into effect in eircom's public offices and on the eircom website. ComReg does not consider it necessary to request wider publication of changes.²⁰³
- 6.212 ComReg is obliged under Regulation 8(1) of the Universal Service Regulations (i.e. the 'Affordability of tariffs' provision) to monitor the evolution and level of retail tariffs provided by designated universal service undertakings. In order to fulfil this obligation, it is proposed that eircom notify ComReg five working days in advance of publishing changes to retail prices, terms and conditions. ComReg suggests that this constitutes no extra burden on eircom, and allows ComReg to monitor changes and ensure compliance with the principles of transparency and non-discrimination.
- 6.213 ComReg would expect the SMP operator to ensure that planned changes to terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.
- 6.214 ComReg notes the support from one respondent for the reduction of this obligation, which in their view – in the past - had facilitated the practice of price-following by competitors which may have inadvertently resulted in anti-competitive behaviour.

²⁰³ Currently, changes are required to be published also in *Iris Oifigiuil* and a national newspaper.

6.215 ComReg notes that eircom currently complies with this obligation on a voluntary basis, however for legal certainty and transparency it is important to impose this as a specific obligation under Regulation 14 (1) of the Universal Service regulations.

Conclusion

It is proposed that:

- **The SMP operator should be obliged to publish changes to retail prices, terms and conditions in the lower and higher level narrowband access markets when they come into effect.**
- **The obligation that the SMP operator should publish changes in its public offices and web site should be retained.**
- **The SMP operator should be obliged to notify ComReg 5 working days in advance of the publication of any changes to retail prices, terms and conditions.**

(d) Retail Bundling

6.216 In the consultation ComReg considered whether it was appropriate to impose an obligation not to unreasonably bundle services via Regulation 14 of the Universal Service Regulations. This provision transposed Article 17(2) of the Universal Service Directive. As outlined above (section 1.15), Article 17(1) outlines the circumstances under which regulatory controls on retail services may be imposed by a NRA. Article 17(2) specifies that such obligations may include requirements that the SMP operator does not unreasonably bundle services. ComReg suggested that a reason for considering this as a possible remedy was that while bundling had the potential to provide net benefits to end users, it could also in certain circumstances be used to foreclose and/or dampen competition in the retail narrowband access markets, and possibly related markets (e.g. retail calls).

6.217 ComReg acknowledged that the bundling of end-user services could be, and usually was, welfare-enhancing. Bundling was not anti-competitive *per se*, and indeed may generate significant efficiencies for consumers, for example, in terms of lower prices, increased choice, lower transaction costs, etc. Consumers may value receiving multiple services from one provider, with only one bill. Also, the price of a bundle would generally be less than buying the elements individually, and this price may simply reflect productive efficiencies that should be encouraged.

6.218 However, bundling could have some negative consequences. There may be the potential for operators, notably dominant operators, to leverage strong market and branding positions and to use bundling strategies for anti-competitive reasons. This may allow an operator already dominant in one market to leverage its dominance into closely related markets. Bundling could also be used to potentially protect and indeed enhance a position of dominance in the retail narrowband access markets. The inability of new entrants to compete profitably with the dominant operator's bundled offerings may increase entry barriers in these markets. For instance, eircom might offer access bundled with a package of free, or heavily discounted, call minutes (including both fixed and mobile calls). In that context, and where alternative suppliers were constrained in offering the same kind of bundles as the incumbent operator, the bundling of retail products could potentially distort competition by leveraging into closely related markets and by distorting pricing in such markets.

However, it is suggested that where the relevant wholesale inputs are available and in the absence of anti-competitive pricing, alternative suppliers should be capable of replicating those bundles.

- 6.219 There is nonetheless a risk that eircom may induce a margin squeeze through bundled pricing. This occurs when equally, or more, efficient operators are unable to profitably replicate eircom's bundled offering, and are effectively foreclosed from competing with eircom in respect of its bundled products. For example, if eircom were to apply a margin squeeze in respect of the retail narrowband access element of a bundled offering this may undermine the effectiveness of the mandated wholesale inputs since OAOs may not be able to effectively replicate the access element of that bundle (due to an insufficient margin). Should eircom engage in such behaviour it could have the effect of i) reinforcing its dominance in the retail narrowband access markets and/or ii) leveraging that dominance into related markets due to an inability on the part of OAOs to effectively replicate the access part of the bundle.
- 6.220 Also, when certain products are bundled together then it may be difficult to distinguish the relevant price or cost of each input, which may create problems in ensuring that the dominant operator is complying with its wholesale obligations. This is particularly important when eircom is also supplying the wholesale inputs that allow other operators to compete in the retail narrowband access markets. It is important that the price differences including discounts between bundled services and services offered separately should be transparent, objectively justified and reflect underlying costs. As such, this obligation is required to ensure the operability of the price control remedy at the wholesale level.
- 6.221 This issue is of particular importance when considering bundles where some of the products are being supplied on a wholesale basis via a "retail-minus" mechanism. It is important to determine what the actual retail price of each element of the bundle is, so that the appropriate wholesale price of that element can be established in a manner that is clear and justifiable.
- 6.222 These concerns were such that ComReg considered imposing a requirement not to unreasonably bundle. It should be noted that this requirement would be applied in the context that the competition concerns referred to above would not be adequately addressed by remedies solely at the wholesale level.
- 6.223 It seems clear that consumers should be allowed purchase any element of a bundle separately. Restricting such freedom would limit consumer choice and would also cut across the requirements of the Universal Service Regulations. Therefore, ComReg proposed that all services sold as part of a bundle should be available for consumers to buy separately. This would also enable alternative operators to compete on one aspect of a bundle rather than the bundle as a whole and thus help facilitate new entry in relation, in particular, to the retail narrowband access markets and adjacent markets such as retail calls.
- 6.224 Other aspects of this requirement could include the dominant operator pre-notifying ComReg of new bundles. ComReg would then assess, on a case-by-case basis, whether the bundle had any anti-competitive effect. The timelines required for pre-notification would be the same as those under the general transparency obligation set out above. ComReg therefore proposed that the SMP operator should be required to: (i) offer all retail narrowband access services as stand-alone products and (ii) pre-notify the introduction of new bundles which include retail narrowband access services.

- 6.225 In their response to the proposals set out above, one respondent who did not agree with the obligation suggested that competition problems relating to tying were sufficiently covered by parallel competition law provisions under Article 82.²⁰⁴ In addition, they suggested that the Universal Service obligations which precluded tying negated the requirement for a specific obligation. ComReg notes that under Regulation 3 of the Universal Service Regulations, the USP²⁰⁵ is obliged to provide access at a fixed location and Regulation 9 provides the consumer is not obliged to pay for facilities which are not necessary or not required for the service requested. ComReg considers that these provisions sufficiently cover PSTN services, however a specific obligation, 'not to unreasonably bundle' should be imposed in relation to ISDN (BRA, FRA and PRA), such that they must be made available as stand alone products.
- 6.226 In respect of the proposal contained in the consultation paper that the SMP operator would be obliged to pre-notify new bundles, two respondents suggested that it was appropriate for ComReg to require eircom to give advance notification of any new bundles. This would allow ComReg to ensure that equivalent wholesale products were available to enable OAOs to compete effectively and that there would be no margin squeeze. The respondents recommended that ComReg should be able to order the suspension of announcement or sale of new bundles in the event that anti-competitive practices were identified. However, another respondent, who disagreed with the proposal, put forward the view that an *ex post* test was more appropriate and that to require advance notification of every potential bundle would be unduly bureaucratic and costly for the SMP operator and ComReg.
- 6.227 In response, ComReg supports the latter view and in order to foster the introduction of new bundled and innovative products, ComReg believes that it would be more appropriate to impose an *ex post* obligation on the SMP operator due to the specific market conditions and potential competition problems identified in relation to the retail narrowband access markets.²⁰⁶ This would consist of an obligation not to price the retail bundle below the total costs of the regulated wholesale elements. If it is established that the bundle is being sold at a discount to the sum of the price of regulated wholesale components, it is envisaged that ComReg would be able to intervene. It is believed that such a provision would leave competitors with a sufficient margin for profitable entry with a similar service. As such, where there is sufficient evidence of anti-competitive use of bundling, such as to disguise potential margin squeeze behaviour which represents a real risk of foreclosure, ComReg would consider intervention on an *ex post* basis.
- 6.228 ComReg would point out that, by the terms of ComReg document D1/06 (which specifies a remedy in the wholesale broadband access market), any eircom product including a broadband component must be pre-notified to ComReg. This is considered appropriate given that the broadband market is new and evolving rapidly, and thus any measures that may affect it may need to be considered carefully in advance. As such, any bundle that includes broadband will need to be considered on

²⁰⁴ Competition Law and Article 82 (2)(d) of the EC Treaty which prevent "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the nature of such contracts."

²⁰⁵ Universal Service Provider.

²⁰⁶ An *ex ante* obligation has been applied in relation to bundles in the wholesale broadband access market due to the specific market conditions and potential competition problems identified in relation to this market. As such, this *ex ante* obligation applies to the broadband element of any bundled offering. See Retail minus wholesale price control for the WBA market, D01/06, Document 06/01.

an *ex ante* basis; those bundles involving narrowband access products which do not include broadband will be analysed on an *ex post* basis, if needed. It should be noted that the conditions of D1/06 continue to apply generally.

- 6.229 ComReg does not believe that the application of competition law alone would adequately address potential market failures. As noted in section 3 of this paper, ComReg believes that bundled services will become more prevalent – which is welcomed. However, in the event that bundled services impeded compliance with the wholesale obligations of non-discrimination and/or transparency, ComReg believes that timely action may be required. As set out above, as a vertically integrated undertaking, the SMP operator may have the incentive to leverage its market power. ComReg believes that it is the appropriate body to monitor and if necessary intervene in a timely manner, because of its expertise in the market and the overlap with other retail obligations in the retail narrowband access markets. Further, it is of note that as outlined above, ComReg recognises the welfare enhancing effects that may be associated with bundling. In addition, the proposed regulatory approach comprises the least interventionist and onerous means of addressing the aforementioned competitive concerns, in particular, as it would be applied on an *ex post* rather than an *ex ante* basis.
- 6.230 Another respondent, which did not support any specific obligation, noted that provided elements of a bundle were available on a non-discriminatory basis at the wholesale level it should be possible for ComReg and OAOs to identify whether the bundled product is being offered in an anti-competitive manner. ComReg broadly supports this view however it notes that a specific retail control is necessary to ensure that retail narrowband access products are provided by the SMP operator in isolation. Additional controls are also justified to ensure compliance with wholesale pricing and non-discrimination obligations.
- 6.231 ComReg does not support the view that wholesale bundles should be mandated, as the individual wholesale products should be perfectly sufficient to ensure equivalence. This requirement would be overly burdensome on eircom and disproportionate. Additionally, it is likely that ComReg would have to identify an equivalent wholesale market on which to impose such an obligation. However, while we do not consider that wholesale bundles should be mandated, as discussed in 1.6 above, it is important that the operation of the retail minus price control to bundled products does not result in discriminatory treatment at the wholesale level. ComReg may consult on the appropriate treatment of such controls across a number of telecoms markets in the near future.
- 6.232 In conclusion, ComReg reiterates that it views bundling as generally a positive development for consumers. ComReg does not intend to determine the content of a bundle. However, there is a need for some obligation to prevent bundling being used for anti-competitive purposes, in particular where it may be used to disguise a possible margin squeeze in respect of the retail narrowband access element of the bundle and thereby potentially reinforce eircom's dominance in the retail narrowband access markets and providing scope for leveraging into related markets. As a result, ComReg proposes to impose an obligation on an *ex post*-basis on the SMP operator 'not to unreasonably bundle'.
- 6.233 Two specific instances of where ComReg interprets 'unreasonable' in the context of bundling are: (i) where the elements can only be purchased together and (ii) where the bundle is sold below cost for regulated fixed access elements. To remedy this, eircom:

- Will be required to offer all retail narrowband access services as stand-alone products; and
- Should not price a retail bundle, which includes retail narrowband access and other products which may not be subject to price regulation, at a price which is below the costs of the fixed wholesale regulated elements. ComReg will take into account issues such as short-run promotions in this regard.

6.234 In addition to these examples, ComReg will assess on an *ex post* case-by-case basis whether any bundle has anti-competitive effects. ComReg may investigate allegations of anti-competitive behaviour where there is sufficient evidence. The SMP operator must ensure that any bundle avoids a margin squeeze and passes a net revenue test. Furthermore, ComReg would have authority to initiate proceedings in respect of any breach thereof. Finally, any retail bundle involving broadband will be required to be notified on an *ex ante* basis, in accordance with D1/06. In addition, ComReg is likely to consult on other aspects of bundling - including how retail-minus price controls should apply to bundled products - going forward.

Conclusion

The SMP operator shall not unreasonably bundle. Two specific prohibitions under this obligation are that:

- (a) The SMP operator is required to offer all retail narrowband access services as stand-alone products.**
- (b) The SMP operator should not price a retail bundle, which includes retail narrowband access, at a price which is below the costs of the fixed wholesale regulated elements. This will be enforced on an *ex post* basis. Except for bundles with a broadband component, which will continue to be analysed on an *ex ante* basis.**

A further detailed consultation will consider how the retail-minus price control for SB-WLR applies in the presence of retail bundling.

(e) Cost accounting

6.235 The Universal Service Regulations provide that ComReg must ensure that, where an undertaking is subject to retail tariff regulation or other retail controls, the necessary and appropriate cost systems are implemented. ComReg may specify the format and accounting methodology to be used, and must cause a statement of compliance to be published annually. Overall compliance with the cost accounting system should be verified by ComReg or another suitably qualified independent body.

6.236 A cost accounting system is a set of rules to ensure the attribution and allocation of revenues, costs, assets, liabilities and capital employed to individual activities and services. More precisely, it is a means of establishing a record keeping mechanism in order to keep track of costs. This results in a transparent illustration of the relationship between costs and prices, as the system should be able to analyse costs to a greater level of granularity in order to ensure that costs allocated to regulated services do not result in cross subsidies, excessive prices and, in general, that costs are efficiently incurred.

- 6.237 ComReg is currently consulting further on this issue in a consultation on Accounting Separation and Cost Accounting.²⁰⁷ In the interim, ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as any further consultations are completed.
- 6.238 ComReg maintains its position that, it requires appropriately separated accounts and cost accounting systems (which can suitably relate costs to products and services) in order to fulfil the obligation of non-discrimination which is required, in particular, to ensure equivalence of treatment between OAOs and eircom's retail arm in the retail narrowband access markets. ComReg notes that all respondents agreed with its proposals in relation to cost accounting and accounting separation.

Conclusion

The existing level of cost accounting systems and accounting separation obligations should be maintained, pending the outcome of further consultation on accounting systems and associated methodologies for their support.

²⁰⁷ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

7 Regulatory Impact Assessment (RIA) – Retail Fixed Narrowband Access

- 7.1 According to ComReg’s consultation on its Approach to Regulatory Impact Assessment (RIA), ComReg Document 06/69, the purpose of a RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. ComReg’s proposed approach to RIA is that in the future it will continue to conduct RIAs in respect of any proposed statutory instruments which would impose regulatory obligations, or in respect of any market analyses which propose to impose, amend or withdraw obligations, through the finding of SMP or effective competition. Appropriate use of RIA should ensure the most effective approach to regulation is adopted.
- 7.2 In conducting RIAs, ComReg will take into account the RIA Guidelines adopted under the Government’s Better Regulation programme.²⁰⁸ The RIA Guidelines are not formally or legally binding upon ComReg, however, in carrying out RIAs ComReg will have regard to them, while recognising that regulation by way of issuing decisions (e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation) may be different to regulation exclusively by way of enacting primary or secondary legislation. In conducting a RIA, ComReg will take into account the six principles of Better Regulation that is, necessity, effectiveness, proportionality, transparency, accountability and consistency. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards RIAs. As decisions are likely to vary in terms of their impact, if after initial investigation a decision appears to have relatively low costs, then ComReg would expect to carry out a lighter RIA in respect of those decisions.
- 7.3 The Government’s RIA Guidelines set out the stages it believes are necessary for minor impact regulations and a more detailed set of steps for more comprehensive or full RIAs. ComReg has taken these steps into consideration and has come up with a five step approach as follows which will be used:
- (a) Description of policy issue to be addressed and identification of objectives;
 - (b) Identify and describe the regulatory options;
 - (c) Determine the impact on stakeholders;
 - (d) Determine the impact on competition; and
 - (e) Assess the impacts and select the best option.
- 7.4 In determining the impacts of the various regulatory options, current best practice appears to recognise that a full cost benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review will be taken when necessary.
- 7.5 The following sections in conjunction with the rest of this document represent a RIA. It sets out an assessment of the potential impact of proposed SMP obligations for the

²⁰⁸ See “RIA Guidelines: How to conduct a Regulatory Impact Analysis”, October 2005, www.betterregulation.ie

retail narrowband access markets. It also sets out an assessment of the potential impact of the proposed withdrawal of some SMP obligations on the relevant markets.

- 7.6 In their response to consultation, all but one respondent supported the analysis put forward by ComReg. The opposing respondent did not specify its concern in relation to the RIA but rather referred ComReg to its response to earlier consultation questions. These have been addressed in the preceding sections of this document.

The RIA

1. Description of policy context and objectives

- 7.7 The European Commission, in its adoption of a new common regulatory framework for electronic communications networks and services on 7 March 2002, acknowledged the need for *ex ante* regulatory obligations in certain circumstances in order to ensure the development of a competitive communications market. The Commission's Recommendation on Relevant Markets identifies electronic communications markets, the characteristics of which may be such as to justify the imposition of such regulatory obligations.²⁰⁹ Regulation 26 of the Framework Regulations requires that, as soon as possible after the adoption by the Commission of this Recommendation, ComReg shall define relevant markets in accordance with the principles of competition law including the geographical area within the State of such markets. Regulation 27 requires that, as soon as possible after ComReg defines a relevant market, ComReg should carry out a market analysis of the identified market. Where ComReg determines that a recommended market is not effectively competitive, it shall designate undertakings with significant market power (SMP) on that market, and it shall impose on SMP undertakings such specific obligations as it considers appropriate. Regulation 27 also requires that, where ComReg concludes that a relevant market is effectively competitive and an undertaking had previously been designated as having SMP on that market and SMP obligations already exist, ComReg shall withdraw such obligations from the undertaking concerned.²¹⁰
- 7.8 Regulation 9(1) of the Access Regulations states that, "*Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate*".²¹¹ Furthermore, paragraph 21 of *The Guidelines* states that, "*if NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations, in accordance with the relevant Directives and taking into account the principle of proportionality*".²¹² ComReg is therefore obliged to impose at least one obligation where an undertaking is designated as having SMP.

²⁰⁹ Commission Recommendation of 11/02/2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

²¹⁰ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S. I. No. 307 of 2003.

²¹¹ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I No. 305 of 2003.

²¹² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

- 7.9 ComReg can impose any or a combination of obligations from those obligations listed in Regulation 10 to 14 of the Access Regulations. Under Regulation 9(6) of the Access Regulations, obligations shall be *'based on the nature of problem identified; be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations'*.
- 7.10 Furthermore, Regulation 14(1) of the Universal Service Regulations, allows ComReg, where it concludes that obligations imposed under the Access Regulations and or Regulation 16 of the Universal Service Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, to impose such retail obligations as it considers appropriate to achieve those objectives.²¹³
- 7.11 As part of the process of selecting appropriate obligations which satisfy the requirements of Regulation 9(6), ComReg is conducting, *inter alia*, a Regulatory Impact Assessment in accordance with the Ministerial Policy Direction on Regulatory Impact Assessment.²¹⁴ ComReg is also paying close attention to best practice, and specifically, to the RIA Guidelines.
- 7.12 Having undertaken a market analysis of the retail narrowband access markets (the markets which have been broadly identified in the Recommendation as having characteristics which may be such as to justify the imposition of regulatory obligations), ComReg has found that the markets are not effectively competitive and has proposed to designate eircom with SMP in these markets, as required under Regulation 27 of the Framework Regulations. As such, ComReg is obliged to impose at least one regulatory obligation on eircom in light of this finding.
- 7.13 ComReg's objectives as the national regulator are to promote competition, contribute to the development of the internal market and to promote the interests of end users within the European Union.
- 7.14 ComReg proposes to impose regulatory controls at the wholesale level and retail level in order to achieve these objectives in the context of the retail narrowband access markets. It is of note that the vast majority of the proposed measures are already in place and as such the marginal cost of their imposition is very low. In addition, ComReg proposes to remove some obligations (as detailed below).

I WHOLESALE REMEDIES

7.15 The proposed wholesale obligations are under the following headings:

A. CONTINUING NEED FOR WHOLESALE PRODUCTS

- (i) CPS, and
- (ii) SB-WLR.

B. REQUIREMENT FOR REGULATORY CONTROL IN PRODUCT DEVELOPMENT AND IMPLEMENTATION

- (i) Access to wholesale products,

²¹³ This transposes Article 17(1) of the Universal Service Directive into national law.

²¹⁴ Section 6 of the Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under Section. 13 of the Communications Regulation Act 2002, published in February 2003.

- (ii) Open access, and
- (iii) Withdrawal of access.

C. SUPPORTING REMEDIES FOR CPS AND SB-WLR

- (i) Non-discrimination,
- (ii) Transparency,
- (iii) Price control,
- (iv) Accounting separation, and
- (v) Cost accounting systems.

A. CONTINUING NEED FOR WHOLESALE PRODUCTS

- 7.16 **Access to and use of specific network facilities:** An obligation can be imposed on SMP operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, which is justified as a means of increasing competition. In particular, in its absence the incumbent would likely have considerable scope and incentives to withhold access to wholesale inputs (e.g. CPS, SB-WLR) which could contribute to reinforcing its dominance on the retail narrowband access markets and also potentially reducing competition on related markets such as retail calls. The provision of the mandated wholesale products allows competitors to replicate the service offering of the incumbent, thereby enabling them to compete in the retail narrowband access markets and related markets.
- 7.17 In terms of the Regulations, this is by far the most extensively described of any of the regulatory obligations, reflecting the importance of this obligation and its central role in promoting competitive markets. The key competition concern in these markets is the denial of access to facilities or the application of unreasonable terms and conditions by eircom. In the absence of regulation, eircom would be free to deny access to its narrowband access services or at the least offer such access on uncompetitive terms.
- 7.18 Given that eircom owns the PSTN network, the option of not mandating access would permit a return to the monopoly outcome of one supplier being the only provider of retail narrowband access services. This would further entrench the dominance of the SMP operator, and allow a return to full monopoly pricing. The introduction of competition in the sector has seen a downward trend in prices, with consequent gains for consumers. Given that both SB-WLR and CPS/CA are now well-established products in common use by a large number of operators, the provision of such products does not impose substantial regulatory costs as it involves only continuation costs, and such costs should be easily exceeded by the benefits of enhanced competition in relation to the retail narrowband access markets.
- 7.19 Furthermore, ComReg notes that where SMP is established in the retail narrowband access markets, it is obliged to mandate CPS/CA so in this respect the option of forbearing is not something ComReg can consider. SB-WLR was introduced to allow operators to offer a single bill to end users, as separate bills were seen to act as a barrier to switching in these markets.

B. REQUIREMENT FOR REGULATORY CONTROL IN PRODUCT DEVELOPMENT AND IMPLEMENTATION

- 7.20 As a vertically integrated operator, eircom has control over the development of the wholesale inputs used to provide retail narrowband access services.
- 7.21 If ComReg did not impose obligations relating to product development and implementation, OAOs providing services via CPS and SB-WLR might be disadvantaged in terms of a fit-for-purpose product. If eircom unilaterally made amendments to the wholesale products, in the absence of these controls there is nothing ComReg could do to intervene. It is likely that they would not be informed or given sufficient lead-time to react to any amendments which could delay the implementation of an improved Information System. This could hinder the competitiveness of OAOs' retail offering in relation to these markets. Additionally, if ComReg chose to forebear, eircom could unilaterally decide to make amendments, which may be advantageous to them but would have a detrimental affect on OAOs.
- 7.22 Not to impose these obligations would raise the risk that end users of eircom's downstream competitors may not be provided with an equivalent product, potentially an inferior product to eircom Retail.
- 7.23 ComReg believes that, in addition to the imposition of the obligation for CA/CS and CPS on eircom, it is necessary to ensure continuity in relation to their provision in order to provide a level of certainty to OAOs to enable them to compete in the retail narrowband access markets. ComReg does not consider that the imposition of these obligations poses any practical, incremental cost burden on eircom at this time given that these services are in place.

C. SUPPORTING REMEDIES FOR CPS AND SB-WLR

- 7.24 **Transparency & Non-discrimination:** In general, an access obligation will rarely operate as a stand alone obligation. Rather, it is likely to be accompanied by a transparency obligation. A non-discrimination obligation is also likely to accompany an access remedy as for example where access is required the dominant vertically integrated operator may have the scope and incentives to potentially leverage/maintain their dominant position by using its control of the wholesale access inputs to reinforce its dominance at the retail level. The imposition of a non-discrimination obligation serves to guard against such behaviour.
- 7.25 eircom currently publishes a full suite of reference documentation in relation to interconnect products they provide, including CPS and SB-WLR services. However, in the absence of an enforceable transparency obligation on eircom, there would be no guarantee that they would continue to publish a RIO and as a result ComReg would have no means of remedying any deficiencies in the RIO. In addition, the general non-discrimination obligation currently imposed on eircom requires that third party access seekers are treated no less favourably than eircom's internal divisions. In the absence of a non-discrimination obligation, eircom would be free to treat access seekers less favourably than its own retail arm, thus inhibiting the ability of efficient alternative operators to compete effectively in the retail narrowband access markets. Furthermore, transparency ensures that all operators are able to understand the tariff structures offered to them by the SMP operator, thereby fostering a more competitive environment in these markets.

- 7.26 Out of the five SMP obligations available to ComReg these two obligations are the least burdensome as together they constitute a minimum intrusion on a SMP operator's business. As such, it is appropriate to next assess whether these two obligations together should continue to be imposed to complement an access obligation in these markets. This is considered further below.
- 7.27 **Price Control and Costs Accounting Obligations:** Where a lack of effective competition means that the operator concerned might have the scope and incentives to apply either excessive prices or implement a price squeeze with anti-competitive intent (i.e. to the detriment of end-users) then this obligation may apply. Absent regulation, the current structure of the retail narrowband access markets would appear to allow for such an outcome (as outlined in section 4). As such, it is appropriate to assess whether this obligation should be imposed to complement the preceding obligations in addressing the competition problems identified in relation to these markets.
- 7.28 In order to allow competition to flourish in the retail narrowband access markets, the price at which SB-WLR and CPS are offered to other operators must be similar to their underlying cost; otherwise the SMP operator could charge a monopoly price, which would limit competition in these markets. Accordingly, the option of not implementing a wholesale price control is not reasonable as such an option would have a strong negative effect on both competition and consumers. Again, the direct regulatory costs of implementing this obligation are limited, and indeed, the methodology chosen by ComReg is less burdensome than the calculation of a formal cost-based price.
- 7.29 **Accounting Separation:** NRAs should consider whether sufficient information is available to ensure efficient monitoring of the non-discrimination requirement or whether additional obligations in terms of accounting separation are necessary to ensure effective compliance. In the past, it has been deemed appropriate to impose such an obligation on eircom to ensure effective compliance with the non-discrimination requirement. As such, it is appropriate to next assess whether an accounting separation obligation is required.
- 7.30 ComReg considers these obligations are necessary to ensure appropriate cost recovery mechanisms, monitor margin squeeze issues and retail tariff controls. In addition, the accounting separation obligation can further support the transparency and non-discrimination obligations. If ComReg were not to impose these obligations, it (and other interested parties) would not have any means of monitoring price controls or dealing with margin squeeze issues. As such, it will help support the other wholesale obligations and to foster competition in the retail narrowband access markets.

ComReg considers the marginal costs of compliance associated with these obligations would be minimal as eircom already prepares and publishes regulatory financial statements and has cost accounting systems in place to comply with this obligation. However ComReg accepts there may be a further incremental cost for eircom in redesigning its systems and reporting structure in line with the requirements of the new Directives. ComReg considers that these costs would be minimal since the existing level of accounting separation obligations would be maintained, pending the outcome of the consultation on accounting systems and associated methodologies for their support which will take into account the associated regulatory costs.

II RETAIL REMEDIES

7.31 The proposed retail obligations are under the following headings:

- (i) Price control:
 - Price cap order, and
 - Cost-orientation,
- (ii) Undue Preference,
- (iii) Transparency,
- (iv) Not to unreasonably bundle, and
- (v) Cost Accounting.

7.32 **Price Cap:** The paper details some of the issues surrounding the obligation of a retail price control. However, a separate consultation paper on this is being issued and the regulatory impact of any such order will be considered as part of that consultation.

7.33 **Removing retail cost-orientation:** The current Price Cap Order is maintained pending the final outcome of the consultation on a retail price cap (RPC) as a potential remedy on the retail fixed narrowband access markets. If ComReg determines following consultation that a RPC on these markets continues to be necessary and that the identified competition problems and regulatory objectives are best served by implementing a RPC in addition to the proposed wholesale measures, the retail cost orientation obligation would be deemed to be superfluous to such a control. This would serve to diminish the overall regulatory burden.

7.34 **No undue preference to end-users:** This protects consumers from being unreasonably discriminated against. It does not involve any significant regulatory cost.

7.35 **Transparency:** Previously the SMP operator was required to notify ComReg 21 days in advance of proposed changes to retail prices. ComReg feels that this obligation is now no longer necessary, and proposed to lighten any regulatory burden by ensuring that ComReg is notified 5 days in advance of changes to all retail access prices, and that all other operators are informed by publication of price changes on the day they occur. This reduces any constraint on the SMP operator significantly, while still ensuring competitors will be able to react to any price changes.

7.36 **Bundling:** ComReg proposes to impose a specific obligation in respect to bundling of higher and lower level access products. This will be imposed on an *ex post* basis and as a result will not place a significant regulatory burden on the SMP operator. Except for bundles with a broadband element which will continue to be analysed on an *ex ante* basis in line ComReg document D1/06 (which specifies a remedy in the wholesale broadband access market).

7.37 **Cost Accounting:** ComReg considers this obligation is necessary to ensure appropriate cost recovery mechanisms, monitor pricing issues and retail tariff controls. In order to do this, it is necessary for eircom to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. If ComReg were not to impose this obligation, it (and other interested parties) would not have any means of ensuring the monitoring of price controls or dealing with margin squeeze issues.

- 7.38 ComReg considers the marginal costs of compliance with these obligations would be minimal as eircom already prepares and publishes regulatory financial statements and has cost accounting systems in place to comply with this obligation. However, ComReg accepts there may be a further incremental cost for eircom in redesigning its systems and reporting structure in line with the requirements of the new Directives. ComReg considers that the cost related to the imposition of this obligation would be minimal since it requires eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it, pending future consultation which will take into account the regulatory costs of any additional obligations imposed on the incumbent.

Options

- 7.39 This section attempts to formalise the regulatory options open to ComReg under Regulations 10-14 of the Access Regulations and Regulation 14 of the Universal Service Regulations in order to assess the impact of each option on the incumbent, competition and consumer welfare in line with ComReg's policy objectives (as set out in paragraph 7.13). Following this the overall impact of each option is summarised.
- 7.40 It should be borne in mind that most of the benefits which it is anticipated would accrue to eircom under certain options are private or monopoly benefits i.e. monopoly rents. In addition, the discontinuation or removal of obligations would lead to a reduced regulatory burden for the incumbent however the marginal change in terms of direct costs would be low. As noted above many of these measures are already in place. As such their imposition would not lead to substantial regulatory costs since they involve only continuation costs.
- 7.41 It is of note in this regard that Irish consumers have benefited from declining telecoms prices in recent years and this trend is expected to continue. Recently the Central Statistics Office (CSO) reported that overall communications costs (i.e. both telecoms and postal services) decreased by 0.2% in the year to November 2006²¹⁵, implying that telecoms costs have in fact made a negative contribution to inflation in the past year. Figure 7.1 below demonstrates that since liberalisation Irish telecommunications prices have decreased significantly (as represented by the blue line) in comparison with the overall Consumer Price Index (CPI) (as represented by the red line). This clearly shows the benefits to consumers from increasing competition in the sector, which is facilitated by the regulatory measures in place.

²¹⁵See

http://www.cso.ie/releasespublications/documents/prices/2006/Prices/Consumerpriceindex/cpi_nov2006.pdf

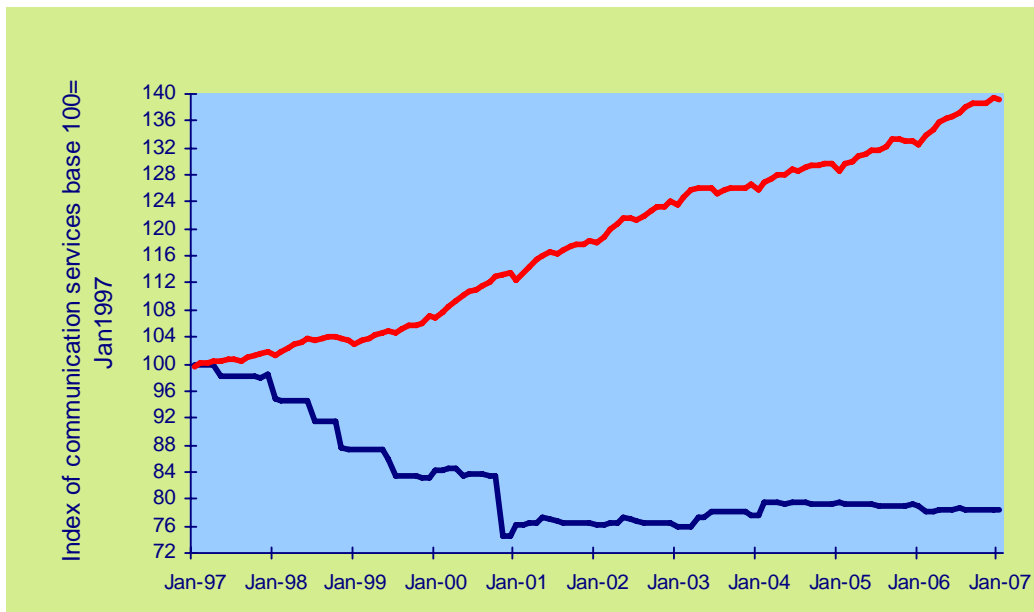


Figure 7.1: Index of Telecoms Prices in Ireland January 1997- January 2007²¹⁶

7.42 Broadly speaking the regulatory options in relation to the retail narrowband access markets are as follows

7.43 Options for Retail Narrowband Access Markets:

- **Option 1:** Do nothing (discontinue all existing SMP obligations);
- **Option 2:** Mandate access to CPS and SB-WLR only;
- **Option 3:** (a) Mandate access to CPS and SB-WLR; and (b) requirements for regulatory control in product development and implementation;
- **Option 4:** (a) Mandate access to CPS and SB-WLR; (b) requirements for regulatory control in product development and implementation; and (c) supporting remedies for CPS and SB-WLR;
- **Option 5:** (a) Mandate access to CPS and SB-WLR; (b) requirements for regulatory control in product development and implementation; (c) supporting remedies for CPS and SB-WLR and (d) retail remedies.

7.44 In relation to the options available to ComReg in achieving the objectives of the proposed regulatory obligations (i.e. to ensure the development of a competitive communications market), ComReg notes that the “do nothing” option (Option 1) is primarily being included for benchmarking purposes only. Therefore, it will not be examined in great detail as part of this RIA because it is not envisaged that this option will be pursued in practice. To impose no regulatory obligations on an undertaking designated as having SMP, or vice versa, would mean a failure to comply with our EU obligations and could result in legal challenge by the European Commission.

²¹⁶ Source: CSO

2. Identification of costs, benefits and other impacts of each option which is being considered

Retail narrowband access markets:

7.45 In relation to retail narrowband access, it is proposed that the obligations set out above (i.e. **Option 5**) are the most proportionate means of addressing the potential competition problems identified in relation to these markets. They are proportionate since they represent the least burdensome means of achieving this objective. ComReg sets out below the reasons why it considers that these obligations are justified for these markets. In choosing obligations, ComReg has taken into account the potential impact of each option on consumers, competitors and eircom as follows:

Option 1 * Do nothing (discontinue all existing SMP obligations)			
eircom	OAOs	Consumers	Overall Impact
<p>Positive impact on eircom: eircom would benefit from a reduced regulatory burden. The incumbent would likely have both the scope and incentives to leverage/maintain its dominant position by using its control of the wholesale access inputs to reinforce its dominance in the retail narrowband access markets.</p>	<p>Negative impact on competition: High risk that, absent regulation, resulting market strategy of the dominant firm would lead to a significant level of foreclosure of the retail narrowband access markets to OAOs.</p>	<p>Negative impact on consumer welfare: Consumers would have much reduced choice of fixed retail narrowband access provider and it would be likely that the prices of fixed telecoms services would increase substantially</p>	<p>Positive impact on eircom; Highly negative impact on both competition and consumers</p>
Option 2: Mandate access to CPS and SB-WLR only			
eircom	OAOs	Consumers	Overall Impact
<p>Positive impact on eircom: eircom would benefit from a reduced regulatory burden. The incumbent would be afforded increased flexibility in setting wholesale and retail prices/ terms and conditions. eircom could also unilaterally amend the wholesale products.</p>	<p>Negative impact on competition: High risk that, even though access is afforded, there would be insufficient regulation for ComReg to ensure that wholesale inputs were effective or fit-for-purpose. Also, lack of control over whether SMP operator was adversely affecting competition through its dominant position, at the retail level thus leading to a high level of foreclosure of the retail narrowband access markets to OAOs.</p>	<p>Negative impact on consumer welfare: End users of operators providing retail services via CPS or SB-WLR may be provided with an inferior or non-equivalent product to eircom. There would be a risk of exit coupled with an absence of new entry in these markets leading to a potentially reduced choice of fixed telecoms provider. Furthermore, it would be likely that price of fixed retail narrowband access would increase significantly.</p>	<p>Positive impact on eircom; Highly negative impact on both competition and consumers</p>

Option 3: (a) Mandate access to CPS and SB-WLR; and (b) requirements for regulatory control in product development and implementation;			
eircom	OAOs	Consumers	Overall Impact
<p>Positive impact on eircom: eircom would benefit from a reduced regulatory burden. The incumbent would have increased flexibility in setting wholesale and retail prices/ terms and conditions.</p>	<p>Negative impact on competition: High risk that insufficient transparency for ComReg to ensure that competition was not adversely affected by the dominant firm; also risk of price squeeze or excessive pricing, leading to some level of foreclosure of the retail narrowband markets to OAOs.</p>	<p>Negative impact on consumer welfare: End users of operators providing retail services via CPS or SB-WLR may be provided with an inferior/ non-equivalent product to eircom. There would be a risk of exit coupled with an absence of new entry in these markets leading to a potentially reduced choice of fixed telecoms provider. Furthermore, it would be likely that the price of fixed telecoms services would increase.</p>	<p>Positive impact on eircom; Negative impact on competition and consumers</p>
Option 4 (a) Mandate access to CPS and SB-WLR; (b) requirements for regulatory control in product development and implementation; and (c) supporting remedies for CPS and SB-WLR			
eircom	OAOs	Consumers	Overall Impact
<p>Positive impact on eircom: eircom would benefit from reduced regulatory burden, where they did not have to comply with retail controls. Increased flexibility in setting retail prices, terms and conditions.</p>	<p>Negative impact on competition: Wholesale controls in themselves insufficient to address potential competition problems at the retail level. Until such time as wholesale controls were deemed sufficient, in the absence of retail regulation there is significant risk of price squeeze or excessive pricing by dominant firm, leading to some level of foreclosure of the retail narrowband access markets to OAOs</p>	<p>Negative impact on consumer welfare: Risk of a significant price increase of retail narrowband access services or some end users being discriminated against. There would be a risk of exit coupled with an absence of new entry in these markets leading to a potentially reduced choice of fixed telecoms provider.</p>	<p>Positive impact on eircom; Negative impact on competition and consumers</p>

Option 5: (a) Mandate access to CPS and SB-WLR; (b) requirements for regulatory control in product development and implementation; (c) supporting remedies for CPS and SB-WLR and (d) retail remedies.			
eircom	OAOs	Consumers	Overall Impact
<p>Negative impact on eircom: Existing regulatory burden on eircom remains.</p>	<p>Positive impact on competition: Existing eircom wholesale mandated products continue to be made available to OAOs on a fit-for-purpose basis, which enables them to compete in the retail narrowband access markets. Thus, allowing efficient alternative operators to compete effectively in the retail narrowband access markets.</p>	<p>Positive impact on consumer welfare: Consumers benefit from increased choice of fixed provider and lower prices in the retail narrowband access markets.</p>	<p>Negative impact on eircom (although regulation already in place); Positive impact on competition and consumers.</p>

* This option would leave ComReg open to legal challenge from the European Commission for not imposing an obligation on a SMP operator

3. Consultation

7.46 This document is subject to formal public consultation procedures.

4. Enforcement and compliance

7.47 This is not relevant as all regulatory procedures for all interested parties are already in place.

5. Review

7.48 The obligations imposed under this market review will be re-examined at the end of the timeframe of the review or if market conditions change sufficiently to render the findings of the current review inappropriate. ComReg is obliged to continue to monitor developments in this market to assess whether the obligations in place remain appropriate.

Conclusion

7.49 The proposed maintaining of regulation in the retail narrowband access markets (i.e. **Option 5**) is justifiable, in that it is required to ensure that eircom does not exploit its market power at the wholesale or retail level to the detriment of competition in the retail narrowband access markets, to the ultimate detriment of consumers. The regulatory obligations chosen do not unduly discriminate against eircom in that, while

they only apply to eircom, the obligations are imposed in order to specifically address the potential competition problems which clearly exist in the retail narrowband access markets. They are proportionate in that they are the least burdensome means of achieving this objective.

- 7.50 ComReg considers that it has met the condition of transparency by setting out the potential requirements on eircom, the justification for the proposed obligations, and issuing a public consultation on same.

8 Submitting Comments on the Draft Decision

- 8.1 The draft text of the proposed decision is presented in Annex A. All comments are welcome.
- 8.2 The consultation period will run from 4th May 2007 to 1st June 2007 during which ComReg welcomes written comments on the question below.

Q. 1. Do respondents believe that the draft text of the proposed decision set out in Annex A is from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed? Please elaborate on your response.

- 8.3 Should confidential information be provided, it should be clearly identified as such.

ANNEX A: [DRAFT] DECISION INSTRUMENT

PLEASE NOTE: The Draft Decision Instrument below is set out for information purposes only and further comment thereon is invited from interested parties.

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument relates to the markets for higher and lower level retail narrowband access from a fixed location²¹⁷ and is made by the Commission for Communications Regulation (“ComReg”):

- i. Having had regard to sections 10 and 12 of the Act of 2002²¹⁸;
- ii. Having taken account, of its functions under Regulation 6 (1) of Access Regulations²¹⁹;
- iii. Having (where appropriate) complied with the Policy Directions made by the Minister²²⁰;
- iv. Having taken the utmost account of the European Commission’s Recommendation²²¹ and the SMP Guidelines²²²;
- v. Having had regard to the market definition, market analysis and reasoning conducted by ComReg in 04/94, the analysis and reasoning set out in Document No. 05/25 and the reasoning and individual decisions set out previously in this document, each of which form part of and shall where necessary, be construed with this Decision Instrument;
- vi. Having taken account of the submissions received in relation to document No. 06/39; and
- vii. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations²²³, Regulations 14 and 16 of the Universal Service

²¹⁷ Higher Level Access – including services over ISDN FRA and PRA. Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA.

²¹⁸ The Communications Regulations Act, 2002.

²¹⁹ S.I. No. 305 of 2003 the Access Regulations which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

²²⁰ Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

²²¹ European Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

²²² Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

2 MARKET DEFINITION

- 2.1 Pursuant to Regulation 26 of the Framework Regulations, the product markets in this Decision Instrument are defined as the markets for higher and lower level retail narrowband access from a fixed location (“the Markets”) and differ from any defined in the European Commission’s Recommendation.
- 2.2 Pursuant to Regulation 26 of the Framework Regulations, the relevant geographic market with respect to the Markets is defined as Ireland.

3 DESIGNATION OF UNDERTAKING WITH SIGNIFICANT MARKET POWER (“SMP”)

- 3.1 Pursuant to Regulation 25 and Regulation 26 (4) of the Framework Regulations, eircom Limited (“eircom”) is designated as having SMP on the Markets.

4 SMP OBLIGATIONS

- 4.1 ComReg is imposing certain SMP obligations on eircom in accordance with and pursuant to Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations, and Regulations 14 and 16 of the Universal Service Regulations as detailed further below.

5 WHOLESALE OBLIGATIONS (1): CARRIER SELECTION AND PRE-SELECTION

Carrier selection (“CS”) and carrier pre-selection (“CPS”)

- 5.1 As required by Regulation 16 (1) of the Universal Service Regulations²²⁵, eircom shall enable its subscribers to access the services of any interconnected providers of publicly available telephone services:
- i. On a call by call basis by dialling a carrier selection code; and
 - ii. By means of pre-selection, with a facility to over-ride any pre-selected choice on a call-by-call basis by dialling a carrier selection code.

²²³ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

²²⁴ S.I. No. 308 of 2003 the Universal Service Regulations which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

²²⁵ ComReg has no discretion not to impose this obligation once it determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a relevant market consisting of the provision of connection to and use of the public telephone network at a fixed location is not effectively competitive.

Additional CS and CPS obligations

- 5.2 Without prejudice to the generality of section 5.1, eircom shall in relation to those services referred to in section 5.1:
- i. Pursuant to Regulation 13 (2) (c) of the Access Regulations, not withdraw access to facilities granted without the prior approval of ComReg;
 - ii. Pursuant to Regulation 13 (2) (e) of the Access Regulations, grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services; and
 - iii. Pursuant to Regulation 13 (2) (h) of the Access Regulations, provide access to operational support systems (“OSS”) or similar software systems necessary to ensure fair competition in the provision of services.
- 5.3 Pursuant to Regulation 13 (2) (e), 13, 2 (h) and Regulation 10 (1) of the Access Regulations, eircom shall consult fully with OAOs (allowing sufficient time for such consultation) in relation to the development programme for the evolution of access to OSS, fully take in to account representations made by OAOs and take all necessary and appropriate measures to fulfil and implement the requirements of OAOs.

Non-discrimination

- 5.4 Pursuant to Regulation 11 of the Access Regulations, eircom shall have an obligation of non-discrimination in respect of the provision of those facilities referred to in section 5.1.
- 5.5 Without prejudice to the generality of section 5.4, eircom shall:
- i. Provide a wholesale equivalent for retail offerings offered by eircom in the Markets;
 - ii. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners; and
 - iii. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to eircom’s retail arm and associates.

Service level agreements (“SLAs”)

- 5.6 Pursuant to its obligation of non-discrimination under section 5.4 and pursuant to Regulation 13 (3) of the Access Regulations, it shall be a condition of the obligations referred to in section 5.1, related to fairness, reasonableness and timeliness, that eircom shall:

- i. Conclude legally binding and fit-for-purpose SLAs with OAOs in respect of those facilities referred to in section 5.1;
- ii. Negotiate in good faith with OAOs in relation to the conclusion of legally binding and fit-for-purpose SLAs;
- iii. Ensure that all SLAs include provision for service credits arising from a breach of the SLA. Until further notice from ComReg, agreed service credits shall be a matter of negotiation between eircom and OAOs and recovery of service credits shall be in the first instance, a matter for OAOs and eircom. This shall not preclude the possibility of ComReg exercising its dispute resolution powers, or of intervening on its own initiative;
- iv. Update the industry SLA as required, which updates may also be required by ComReg;
- v. Publish the industry SLA (and any updates thereto) on the eircom wholesale website;
- vi. Until further notice from ComReg, maintain the detailed contents (including performance metrics) of the existing SLA; and
- vii. Provide to ComReg, on a monthly basis, performance statistics in respect of the services provided to OAOs for PSTN and ISDN services. ComReg may at its discretion publish such statistics in its Quarterly Reports. In addition, ComReg may if it deems necessary, conduct audits of the reported performance statistics.

Transparency

- 5.7 Pursuant to Regulation 10 (1) of the Access Regulations and in furtherance of its obligation of non-discrimination under section 5.4 and for the purpose of ComReg monitoring compliance with that obligation, eircom shall, ensure that it is transparent in relation to interconnection and access.
- 5.8 Without prejudice to the generality of the obligation in section 5.7, ComReg may issue Directions to eircom requiring it to publish specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.

Documentation: Publication of reference offer ("RO")

- 5.9 Pursuant to Regulation 10 (2) of the Access Regulations, eircom shall publish a RO for the facilities referred to in section 5.1. The RO shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and the RO shall include:
- i. A description of the relevant offerings broken down into components according to market needs; and
 - ii. A description of the associated terms and conditions, including prices.

- 5.10 eircom shall publish any proposed changes to the RO text on its website for the purpose of notifying all interested parties of such changes. Comments on the proposed changes by OAOs should be submitted to ComReg within 21 (twenty one) calendar days of any such notice and ComReg will either approve or amend the proposed changes within a further 3 (three) weeks. eircom shall amend and re-publish its RO in accordance with the obligations set out in this section. As provided for by Regulation 10 (5) of the Access Regulations, ComReg may issue directions requiring eircom to make changes to the RO to give effect to obligations imposed in this Decision Instrument and to publish the RO with such changes.

Price Control: Cost-orientation of prices

- 5.11 As required by Regulation 16 (3) of the Universal Service Regulations, eircom shall ensure that its pricing for access and interconnection related to the provision of the facilities referred to in section 5.1 is cost oriented and that direct charges to its subscribers, if any, do not act as a disincentive for the use of those facilities²²⁶.
- 5.12 Without prejudice to the obligations imposed by this Decision Instrument all of the obligations in relation to provision of those facilities referred to in section 5.1, applicable to eircom immediately prior to the effective date of this Decision Instrument, shall be maintained in their entirety and eircom shall comply with those obligations. For the avoidance of doubt, this includes the continued provision of those facilities referred to in section 5.2, of the type, and in accordance with the processes, described in the eircom Reference Offer.²²⁷

Accounting separation

- 5.13 Pursuant to Regulation 12 of the Access Regulations eircom shall have an obligation to maintain separated accounts. All of the obligations in relation to accounting separation applying to eircom and in force immediately prior to the effective date of this Decision Instrument in respect of access and interconnection related to the provision of the facilities referred to in section 5.1, shall be maintained in their entirety and eircom shall comply with all of those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations.
- 5.14 Without limiting the generality of the obligation in section 5.13 to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision Instrument, eircom shall comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:
- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
 - D8/99 – Costing Methodology for use in Accounting Separation.

²²⁶ This obligation is imposed automatically by Regulation 16 (3) of the Universal Service Regulations.

²²⁷ Currently published as Reference Interconnect Offer – Annex C – Service Schedule 120 by eircom at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and eircom.net.
- D7/01- eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by eircom.

6 WHOLESALE OBLIGATIONS (2): WHOLESALE LINE RENTAL (“WLR”)

Access

6.1 Pursuant to Regulation 13 (1) of the Access Regulations, eircom shall meet all reasonable requests for access to and use of such wholesale access products, features or additional associated facilities, by undertakings requesting access or use of such access products, features or additional associated facilities, which enable such other undertakings to provide retail equivalents to the retail products offered by eircom in the Markets.

WLR

6.2 Without prejudice to the generality of the foregoing and, for the avoidance of doubt, eircom shall, pursuant to Regulation 13 (2) (d) of the Access Regulations, provide WLR for resale by third parties of the type, and in accordance with the processes, described in the industry documentation published on the relevant eircom website. The industry documentation includes but is not limited to the following documentation, as from time to time amended and / or supplemented by new industry documentation:

- i. eircom Reference Interconnect Offer – Annex C -Service Schedule 401,²²⁸
- ii. Single Billing through Wholesale Line Rental Code of Practice Version 1.2,²²⁹

²²⁸As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

²²⁹As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrcopv1.2.pdf> and as amended from time to time in accordance with agreed processes.

- iii. Single Billing through Wholesale Line Rental Service Level Agreement 31/03/04;²³⁰
 - iv. Single Billing through Wholesale Line Rental Product Description Version M;²³¹ and
 - v. Single Billing through Wholesale Line Rental Inter-operator Process Manual Version 3.1.²³²
- 6.3 All of the obligations in relation to provision of those facilities referred to in section 6.2, applicable to eircom immediately prior to the effective date of this Decision Instrument, shall be maintained in their entirety and eircom shall comply with all of those obligations. Without limiting the generality of the foregoing, eircom shall continue to comply with, *inter alia*, all of the obligations described in the following Decision Notices previously issued by ComReg:
- i. D13/02 - CPS in Ireland 2002;
 - ii. D2/03 - Implementation of CPS Single Billing Products: Wholesale Line Rental;
 - iii. (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS);
 - iv. D9/03 - Implementation of CPS Single Billing Products – Wholesale Line Rental and Agency Rebilling Updating of Timetable and Formalisation of Product Descriptions; and
 - v. D4/04 - SB-WLR – Requirements for 31 March 2004 Launch Date.

Additional WLR and single billing WLR (“SB-WLR”) obligations

- 6.4 Without prejudice to the generality of sections 6.1 and 6.2, eircom shall in relation to those services referred to in sections 6.1 and 6.2:
- i. Pursuant to Regulation 13 (2) (c) of the Access Regulations, not withdraw access to facilities granted without the prior approval of ComReg;
 - ii. Pursuant to Regulation 13 (2) (e) of the Access Regulations, grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services; and

²³⁰As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrsla.pdf> and as amended from time to time in accordance with agreed processes.

²³¹As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrproddescversionm.pdf> and as amended from time to time in accordance with agreed processes.

²³²As published at <http://www.eircomwholesale.ie/dynamic/pdf/sbwlrinteroproccmanualv.3.1.pdf> and as amended from time to time in accordance with agreed processes.

- iii. Pursuant to Regulation 13 (2) (h) of the Access Regulations, provide access to OSS and similar software systems necessary to ensure fair competition in the provision of services. Proposed changes to any of the following shall not be implemented without prior notification to ComReg and OAOs:
- The mechanism for access e.g. the Universal Gateway (or other similar mechanism (s));
 - The detailed specification of the access mechanism e.g. nature, data fields and content; and
 - Development programmes.

Non-discrimination

- 6.5 Pursuant to Regulation 11 of the Access Regulations, eircom shall have an obligation of non-discrimination in respect of the provision of those facilities referred to in section 6.2.
- 6.6 Without prejudice to the generality of section 6.5, eircom shall:
- i. Provide a wholesale equivalent for retail offerings offered by eircom in the Markets;
 - ii. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners; and
 - iii. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to eircom's retail arm and associates.

SLAs

- 6.7 Pursuant to its obligation of non-discrimination under section 6.5 and pursuant to Regulation 13 (3) of the Access Regulations, it shall be a condition of the obligations referred to in section 6.1 and 6.2, related to fairness, reasonableness and timeliness, that eircom shall:
- i. Conclude legally binding and fit-for-purpose SLAs with OAOs in respect of those facilities referred to in section 5.1;
 - ii. Negotiate in good faith with OAOs in relation to the conclusion of legally binding and fit-for-purpose SLAs;
 - iii. Ensure that all SLAs include provision for service credits arising from a breach of the SLA. Until further notice from ComReg, agreed service credits shall be a matter of negotiation between eircom and OAOs and recovery of service credits shall be in the first instance, a matter for OAOs

and eircom. This shall not preclude the possibility of ComReg exercising its dispute resolution powers, or of intervening on its own initiative;

- iv. Update the industry SLA as required, which updates may also be required by ComReg;
- v. Publish the industry SLA (and any updates thereto) on the eircom wholesale website;
- vi. Until further notice from ComReg, maintain the detailed contents (including performance metrics) of the existing SLA; and
- vii. Provide to ComReg, on a monthly basis, performance statistics in writing in respect of the services provided to OAOs for PSTN and ISDN services. ComReg may at its discretion publish such statistics in its Quarterly Reports. In addition, ComReg may if it deems necessary, conduct audits of the reported performance statistics.

Transparency

- 6.8 Pursuant to Regulation 10 (1) of the Access Regulations and in furtherance of its obligation of non-discrimination under section 6.5 and for the purpose of ComReg monitoring compliance with that obligation, eircom shall, ensure that it is transparent in relation to interconnection and access.
- 6.9 Without prejudice to the generality of the obligation in section 6.8, ComReg may issue Directions to eircom requiring it to publish specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.

Documentation: Publication of RO

- 6.10 Pursuant to Regulation 10 (2) of the Access Regulations, eircom shall publish a RO for the facilities referred to in section 6.2. The RO shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:
 - i. A description of the relevant offerings broken down into components according to market needs; and
 - ii. A description of the associated terms and conditions, including prices.
- 6.11 eircom shall publish any proposed changes to the RO text on its website for the purpose of notifying all interested parties of such changes. Comments on the proposed changes by OAOs should be submitted to ComReg within 21 (twenty one) calendar days of any such notice and ComReg will either approve or amend the proposed changes within a further 3 (three) weeks. eircom shall amend and re-publish its RO in accordance with the obligations set out in this section. As provided for by Regulation 10 (5) of the Access Regulations, ComReg may issue Directions requiring eircom to make changes to the RO to give effect to obligations imposed in this Decision Instrument pursuant to the Access Regulations and to publish the RO with such changes.

Price Control: Retail-minus pricing

6.12 Pursuant to Regulation 14 (1) of the Access Regulations, the prices charged by eircom to any other undertaking for access to or use of those facilities referred to in section 6.2 shall be at least 10% less than the retail price charged by eircom to its end-users for retail access to the public telephone network at a fixed location, which is the retail equivalent of such facilities. In addition, eircom shall comply with the obligations described in the following Decision Notices previously issued by ComReg:

- D03/24. Wholesale Line Rental - Pricing Issues.
- D 04/34 Wholesale Line Rental - Pricing Issues, Margin.

Price notification

6.13 eircom shall:

- i. Notify ComReg in writing of any proposed amendments to wholesale prices for the services referred to in section 6.2, 2 (two) months prior to its retail price amendment taking effect; and
- ii. Publish any amendments to wholesale prices for the services referred to in section 6.2, at least 7 (seven) weeks prior to the retail price amendment taking effect.

Accounting separation and cost accounting

6.14 Pursuant to Regulation 12 of the Access Regulations, eircom shall have an obligation to make transparent its wholesale prices and its internal transfer prices by maintaining separated accounts in respect of the facilities referred to in section 6.2. All of the obligations in relation to accounting separation applying to eircom and in force immediately prior to the effective date of this Decision Instrument in respect of access and interconnection related to the provision of the facilities referred to in section 6.2, shall be maintained in their entirety and eircom shall comply with all of those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision Instrument, eircom shall continue to comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.

- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and eircom.net.
- D7/01- eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by eircom.

7 RETAIL CONTROLS ON THE MARKETS²³³

Price control

- 7.1 eircom shall continue to comply with all obligations applicable to it under Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations, 1999 and the Telecommunications Tariff Regulation Order, 2003, pending a decision by ComReg (following further consultation) in relation to price controls on the Markets.
- 7.2 For the avoidance of doubt, nothing in this Decision Instrument is intended to nor shall it in any way (either expressly or by implication) affect, the continuing validity of the Telecommunications Tariff Regulation Order, 2003, which, remains in full force and effect, unless expressly amended or revoked by ComReg pursuant to s 7 of the Telecommunications (Miscellaneous Provisions) Act, 1996.

Undue preference

- 7.3 Pursuant to Regulation 14 (2) (c) of the Universal Service Regulations, eircom shall not show undue preference to specific end-users.²³⁴

²³³ ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that the Markets are not effectively competitive and has concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not alone achieve the objectives set out in s 12 of the Act of 2002.

²³⁴ The term “undue preference” means that any scheme which is introduced must not discriminate between similar users. Therefore, consumers which are of a comparable status should be charged the same prices. However, it is not discriminatory to apply different charges to consumers in different circumstances. In short, as long as there are objectively justifiable reasons for applying different tariff structures to different types of consumers, such a scheme will not be discriminatory. Objectively justifiable reasons could include lower tariffs for vulnerable consumers, such as the elderly and disabled, who have little or no income and who need a telephone connection to contact carers in the event of an emergency. Therefore, an allowance for vulnerable users, which is based on objective criteria and applied equally to all users in similar or comparable circumstances, fulfils the requirement of non-discrimination.

Transparency

- 7.4 Pursuant to Regulation 14 (1) of the Universal Service Regulations, eircom shall notify ComReg at least 5 (five) working days in advance of proposed changes to the terms and conditions of supply within the Markets. In this section, the expression “working day” means any day other than Saturday, Sunday, a bank holiday or a public holiday.
- 7.5 eircom shall publish in its public offices and on its relevant website, all changes in relation to terms and conditions of supply, when such changes come into effect.
- 7.6 eircom shall, in respect of services within the Markets, supply such services only at the published price.
- 7.7 Pursuant to Regulation 18 (1) of the Universal Service Regulations, eircom shall ensure that transparent information in relation to applicable prices and tariffs and standard terms and conditions in respect of access to and use of publicly available telephone services is available to end users and consumers and published.

Unreasonable bundling

- 7.8 Pursuant to Regulation 14 (2) (c) of the Universal Service Regulations, eircom shall not unreasonably bundle services²³⁵.
- 7.9 Without prejudice to the generality of section 7.8, where eircom offers a number of services within a bundle, it shall ensure that end-users are able to purchase an individual service included in any such bundle without being required by contractual or non-contractual means to purchase the entire bundle of services and that tariffs for the individual services comprising any such bundle, reflect the principle that end-users should not be required to pay for facilities which are not necessary for the service requested.

Cost accounting

- 7.10 Pursuant to Regulation 14 (5) of the Universal Service Regulations²³⁶, eircom shall operate and maintain a cost accounting system that is:
- i. Based on generally accepted accounting practices;
 - ii. Suitable for ensuring compliance with the obligations imposed under section 7; and
 - iii. Is capable of verification by ComReg.
- 7.11 eircom shall continue to comply with all of the obligations in relation to cost accounting applicable to it immediately prior to the effective date of this Decision

²³⁵ Guidance in relation to what constitutes “unreasonable bundling” for the purposes of section 7.6 of this Decision Instrument and ComReg’s approach to this issue is set out in paragraphs 6.135 – 6.142 of this document.

²³⁶ This obligation is automatically mandated once regulatory controls markets under Regulation 14 of the Universal Service Regulations are imposed on a retail market.

Instrument, pending a decision by ComReg (following further consultation) in relation to accounting separation obligations and cost accounting obligations.

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 CONTINUATION IN FORCE OF DECISION NOTICES AND DIRECTIONS

- 9.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg relating to CS, CPS, WLR and SB-WLR in force immediately prior to the effective date of this Decision Instrument, are continued in force by this Decision Instrument and eircom shall comply with same. They include but are not limited to the following:

- CPS in Ireland 2002 – Decision Notice D13/02, Document No. 02/64.
- Direction Letter eircom (19/11/02) – Ref. D13/02 – CPS Single Billing through WLR & AR.
- Direction Letter eircom (10/12/02) – Ref. CPS Single Billing Products – Wholesale Line Rental (WLR and Agency Rebilling (AR).
- D2/03: Implementation of CPS Single Billing Products: Wholesale Line Rental (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS): Decision Notice, Document No. 03/07.
- Wholesale Line Rental – Pricing Issues – Information Notice, Document No. 03/24.
- Direction Letter eircom (7/03/03) – Ref. D13/02 - CPS Single Billing through WLR & AR.
- Direction Letter eircom (29/05/03) Ref – CPS Single Billing Code of Practice.
- Direction Letter eircom (7/08/03) - Ref- Telecommunications (Amendment no. 10) Scheme.
- Direction Letter eircom (23/09/03) - Ref – CPS Single Billing Service Level Agreement.
- Direction Letter eircom Ref: CPS Single Billing – Updating of the National Directory Database (NDD).
- Consultation & Draft Direction in relation to order handling charges for Wholesale Line Rental 2003-2004, Document No. 04/15.

- SB-WLR: Requirements for a 31st March 2004 launch date - Decision Notice D4/04, Document No. 04/20.
- Direction Letter eircom (02/02/05) Ref – Single Billing – Wholesale Line Rental – Compliance with Industry Processes.
- Introducing Carrier Pre-Selection in Ireland – Decision Notice D2/99, Document No. 99/29.
- Introducing Carrier Pre-Selection in Ireland: Switching and Routing Requirements for Local Calls – Decision Notice D13/99, Document No. 99/62.
- Introducing Carrier Pre-Selection – Information Notice, Document No. 99/80.
- The Role of Resellers in Carrier Pre-Selection & the block transfer of customer accounts – Decision Notice D17/01, Document No. 01/86.
- CPS in Ireland 2002 – Decision Notice D13/02, Document No. 02/64.
- CPS in Ireland 2003 – Decision Notice D20/03, Document No. 03/115.

10 EFFECTIVE DATE

10.1 This Decision Instrument shall be effective from the [●] day of [●] 2007 until further notice by ComReg.

**MIKE BYRNE
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE [] DAY OF [] 2007**

Annex B: Glossary of Terms

Access Line	A circuit that connects a subscriber to a switching centre.
Analogue	The direct representation of a waveform, as opposed to digital which is a coded representation. An analogue signal is one that varies continuously (eg. Sound waves). Analog signals vary along two parameters, amplitude (strength) and frequency (tone). The unit of measurement is the Hertz, or cycle per second.
Bandwidth	The physical characteristic of a telecommunications system that indicates the speed at which information can be transferred. In analogue systems, it is measured in cycles per second (Hertz) and in digital systems in binary bits per second. (Bit/s).
Bits per second	Basic unit of measurement for serial data transmission capacity; abbreviated as K bps, or kilobit/s for thousands of bits per second; M bps or megabit/s for millions of bits per second; G bps, or gigabit/s for billions of bits per second; T bps or terabit/s or trillions of bits per second.
Broadband	A service or connection allowing a considerable amount of information to be conveyed, such as television pictures. Generally defined as a bandwidth > 2Mbit/s. The capability to integrate any type of communications signals (voice, data, image or multimedia) and carry them over a single broadband channel of 150-mbps and above, 4k regardless of their content.
Cable Modem	A cable modem is a device that enables a PC to be linked to a local cable TV line for internet/data services.
Carrier Pre-selection (CPS)	The facility offered to customers which allows them to opt for certain defined classes of call to be carried by an operator selected in advance (and having a contract with the customer), without having to dial a routing prefix or follow any other different procedure to invoke such routing.
Dial-up	Connections made to a data network using the switched network to provide a voice band or data bearer.
Digital	The coded representation of a waveform by, for example, binary digits in the form of pulses of light, as opposed to analogue which is the direct representation of a waveform.
Digital Subscriber Line (DSL)	A family of technologies generically referred to as DSL or xDSL, which are capable of transforming a normal telephone line into a high-speed digital line. These include ADSL (Asymmetric DSL), SDSL (Symmetric DSL), HDSL (High data rate DSL) and VDSL (Very high data rate DSL). DSL enabled lines are capable of supporting services such as fast Internet access and video or TV on-demand.
Direct Access	The situation where a customer is directly connected to a telecommunications operator by a wire, fibre-optic or radio link to connect that customer to the public telecommunication network.
Directory Enquiry Service (DQ)	Directory information service which is operator assisted and involves the operator looking up entries on a database.
Fibre Optic Cable	A transmission medium that uses glass or plastic fibres rather than copper wire to transport data or voice signals. The signal is imposed on the fibres via pulses (modulation) of light from a laser or a light-emitting diode (LED). Because of its high bandwidth and lack of susceptibility of interference, fibre-optic cable is used in long-haul or noisy applications.
Fixed telephone Services	Means the provision to end-users at fixed locations of a service for the originating and receiving of national and international calls, including voice telephony services and may include, in addition, access to emergency 112 services, the provision of operator assistance, directory services, provision of public pay telephones, provision of service under special terms or provision of special facilities for customers with disabilities or with special social needs but does not include value added services provided over the public telephone system.
Flat Rate Internet Access (FRIACO)	The provision of a Flat Rate Internet Access Call Origination via a wholesale un-metered Internet access product.
Fixed Wireless Access (FWA)	A system that connects subscribers to the public switched telephone network (PSTN) using radio signals as a substitute for copper wires

Retail Narrowband Access Markets

	for all or part of the connection between the subscriber and the switch.
Indirect Access	Where a customer's call is routed and billed through operator A's network even though the call originated from the network of operator B. It is the generic term for both easy access and equal access.
Integrated Services Digital Network (ISDN)	A network based on the existing digital PSTN which provides digital links to customers and end to end digital connectivity between them. ISDN2 provides a maximum bandwidth of 128kbit/s.
Interconnection services	Services provided by one telecommunications organisation to another for the purpose of the conveyance of messages and information between the two systems and including any ancillary services necessary for the provision and maintenance of such services.
Internet protocol (IP)	Packet data protocol used for routing and carriage of messages across the internet.
Internet telephony	A specific type of unmanaged VoIP service that uses the public Internet to carry the IP traffic (also referred to as Voice over the Internet).
ISP	Internet Service Provider
Leased line	Point to point symmetric capacity between network termination points, whether contended or uncontended, which does not include 'on demand switching' or routing functions controlled by the end user'.
Local Loop	The access network connection between a customer's premises and the local exchange. This usually takes the form of a pair of copper wires.
Local Loop unbundling (LLU)	LLU was mandated by the EU in December 2000. It requires those operators designated as having significant market power) to make their local networks (i.e. the telephone lines that run from a customer's premises to the local telephone exchange) available to other telecommunications companies.
Managed services	Managed services include fully outsourced network management arrangements, including advanced features like IP telephony, messaging and call centre, virtual private network (VPNs), managed firewalls, and monitoring/reporting of network servers. Most of these services can be performed from outside a company's internal network.
Modem	A device which converts digital signals from a data-transmitting terminal into modulated analogue signals which can be carried by a public telephone network.
Narrowband	A service or connection allowing only a limited amount of information to be conveyed, such as for telephony. This compares with broadband which allows a considerable amount of information to be conveyed.
Originating network	The network to which a caller who makes a call is directly connected.
Other Authorised Operators (OAOs)	Companies, other than eircom, which operate telecommunications systems.
Premium rate services (PRS)	Services, including recorded information and live conversation, run by independent service providers. All calls to these companies are charged at a higher rate than ordinary calls to cover the companies' costs in providing the content of the call and the operator's cost for the special network facilities needed.
Private circuits	Point-to-point circuits for customers exclusive use covering speech, data or image communications.
Public switched telephone network (PSTN)	A voice-oriented public telephone network. Also known as the Plain Old Telephone Service (POTS).
Public telecommunications network	A telecommunications network used, in whole or in part, for the provision of publicly available telecommunications services.
Resellers	Service Providers who do not have their own network.
Switch	Relates to a telecommunications network comprising at least one exchange and capable of routing signals and messages from one line to all other lines comprised in the network.

Retail Narrowband Access Markets

Telecommunications	Conveyance of speech, music and other sounds, visual images or signals by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical means.
Third generation mobile systems (3G)	A European 3G mobile communications system provides an enhanced range of multimedia services (e.g. high speed Internet access).
Transit	A transit service is a conveyance service provided by a network between two points of interconnection. It is, therefore, a service that links two networks that are not in themselves interconnected.
Trunk network	That part of a telecommunications network which provides connections between.
Voice over Internet protocol (VoIP)	The generic name for the transport of voice traffic using Internet Protocol (IP) technology. The VoIP traffic can be carried on a private managed network or the public Internet (see Internet telephony) or a combination of both. Some organisations use the term 'IP telephony' interchangeably with 'VoIP'.
Voice telephony service	A service available to the public for the commercial provision of direct transport of real-time speech via the public switched network or networks such that any user can use equipment connected to a network termination point at a fixed location to communicate with another user of equipment connected to another termination point.
Virtual private network (VPN)	These are used by a company or private group to make inter-site connections either for telephone speech or data as if there were dedicated leased lines between these sites. The equipment used is located within the public telecommunications operator's premises and forms an integral part of the public network but is software-partitioned to allow for a genuinely private network

Annex C – Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC

Under the obligation in Article 16 of the Directive 2002/21/EC, ComReg, has conducted an analysis of the markets for retail fixed narrowband access i.e. lower level retail narrowband access and higher level retail narrowband access.

Under Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg document 06/39. This consultation ran from 17 August 2006 to 20 October 2006. The responses to this consultation have been taken into consideration and ComReg has now reached decisions in relation to market definition, designation of SMP and regulatory obligations, which are contained in ComReg document 07/26.

ComReg hereby notifies the Commission of its proposed remedies and obligations consistent with Article 7(3) of Directive 2002/21/EC. These remedies and obligations are set out in the attached summary notification form. Under Regulation 27(1), ComReg is required to liaise with the Competition Authority in its definition and analysis of markets. The views of the Competition Authority are attached in Annex D.

Section 1 - Market Definition

Please state where applicable:

1.1	<p>The affected relevant product/service market (s).</p> <p>Is this market mentioned in the Recommendation on relevant markets?</p>	<ul style="list-style-type: none"> • Lower level retail narrowband access (which includes access via analogue exchange lines over copper and FWA and ISDN BRA, also including 'hi-speed'), which is referred to as Lower Level Access; and • Higher level retail narrowband access (which includes access via ISDN FRA and PRA) which is referred to as Higher Level Access. <p>Yes.</p>	Pages 11-36
1.2	The affected relevant geographic market (s)	Ireland.	Pages 36-42
1.3	A brief summary of the opinion of the national competition authority where provided;	The Authority supports the approach and findings of this market definition exercise.	Pages 141-142
1.4	A brief overview of the results of the public consultation to date on the proposed market definition	<p>Four responses to the consultation were provided by :</p> <ul style="list-style-type: none"> • alto, 	

	(for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it)	<ul style="list-style-type: none"> • BT Ireland, • eircom, and • Vodafone. <p>There was general agreement among respondents on the analysis and conclusions reached. However, there was some disagreement relating to the market definition, no robust alternative market definition was put forward. Overall, the proposed conclusions remained unchanged after the consultation.</p>	
1.5	Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified the proposed market definition by reference to section 2 of the Commission's Guidelines on the definition of the relevant market and the assessment of significant market power ²³⁷ , and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and section 3.2 of the accompanying Explanatory Memorandum ²³⁸ .	<p>ComReg has concluded that there are not separate markets for residential and non-residential users in Ireland; this is different to the EU recommendation.</p> <p>ComReg concluded that its separation of the markets for higher and lower level access more usefully captures the different needs of larger and smaller users of access, primarily by defining them in terms of the services they use rather than in terms of other features that they may have in common.</p>	Pages 25-36

²³⁷ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services, OJ C 165, 11.7.2002, p. 6.

²³⁸ Commission Recommendation of 11.2.2003 on Relevant Product and Service Markets with 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 ECNs and ECSs, C (2003) 497.

Section 2 - Designation of undertakings with significant market power**Please state where applicable:**

2.1	The name(s) of the undertaking(s) designated as having individually or jointly significant market power. Where applicable, the name(s) of the undertaking(s) which is (are) considered to no longer have significant market power	eircom Ltd should be designated as having SMP in the fixed retail market for Lower Level Narrowband Access to the public telephone network. eircom Ltd should be designated as having SMP in the fixed retail market for Higher Level Narrowband Access to the public telephone network.	Page 56
2.2	The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power	<ul style="list-style-type: none"> • Market Share, • Potential Competition, • Barriers to Entry, and • Absence of Countervailing Bargaining Power. 	Pages 45-55
2.3	The name of the main undertakings (competitors) present/active in the relevant market.	BT Ireland, Chorus, energis/C&W, Verizon and. ntl.	
2.4	The market shares of the undertakings mentioned above and the basis of their calculation (e.g., turnover, number of subscribers)	<ul style="list-style-type: none"> • In the presence of regulation (i.e. SB-WLR), in total OAO market share is less than 17% for lower level access market, on a channel basis as of the end of December 2006. Own build accounts for less than 1% of all access channels. • In the presence of regulation (i.e. SB-WLR), in total OAO market share is less than 34% for higher level access market, on a channel basis as of end December 2006. Own build accounts for approximately 28% of all access channels. 	

Please provide a brief summary of:

2.5	The opinion of the national competition authority, where provided	The Authority supports the approach and findings of this analysis exercise.	Pages 141-142
2.6	The results of the public consultation to date on the proposed designation(s) as undertaking(s) having	Four responses to the consultation were provided by : <ul style="list-style-type: none"> • alto, 	

	significant market power (e.g., total number of comments received, numbers agreeing/disagreeing)	<ul style="list-style-type: none"> • BT Ireland, • eircom, and • Vodafone. <p>There was general agreement among respondents on the analysis and conclusions reached. Although there was some disagreement relating to the market definition, no robust alternative market definition was put forward. Overall, the proposed conclusions remained unchanged after the consultation.</p>	
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Section 3 - Regulatory Obligations

Please state where applicable:

3.1	The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC (Access Directive))	<p>The following obligations are proposed:</p> <p>Under the Access Regulations which transpose Articles 9 to 13 of Directive 2002/19/EC (Access Directive):</p> <ul style="list-style-type: none"> • Transparency – Regulation 10, • Non-discrimination – Regulation 11, • Accounting Separation – Regulation 12, • Access to, and use of, specific network facilities – Regulation 13, and • Price Control and Cost Accounting – Regulation 14. <p>Under the Universal Service Regulations - Articles 14 and 16.</p>	Pages 119-132
3.2	The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is	Such information can be found in sections 6 and 7 of this document.	Pages 57-103 & Pages 104-117

	to be found		
3.3	<p>If the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC (Access Directive), please indicate which are the 'exceptional circumstances' within the meaning of Article 8(3) thereof which justify the imposition of such remedies.</p> <p>Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found</p>	Not Applicable	

Section 4 - Compliance with international obligations

In relation to the third indent of the first subparagraph of Article 8(3) of Directive 2002/19/EC (Access Directive), please state where applicable:

4.1	Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC (Access Directive)	Not Applicable.	
4.2	The name(s) of the undertaking(s) concerned	Not Applicable.	
4.3	Which are the international commitments entered by the Community and its Member States that need to be respected	Not Applicable.	

Annex D: Competition Authority Letter



The Competition Authority
An tÚdarás Iomaíochta

Gary Healy,
Commission for Communications Regulation,
Abbey Court,
Irish Life Centre,
Lower Abbey Street,
Dublin 1

13th March 2007

Re: Competition Authority comments on ComReg consultation document and market analysis for the "Retail Narrowband Access Markets".

Dear Gary,

1. I have been asked, in my capacity as a Member of The Competition Authority ("the Authority"), to provide the Authority's view with respect to the outcome of review and analysis of "retail narrowband access markets" in Ireland by the Commission for Communications Regulation ("ComReg").

The Process

2. ComReg is obliged under Regulations 26 and 27 of the Framework Regulations to conduct a market analysis of the above market. Under Regulation 27(1) ComReg is required to liaise with the Authority in its process of market definition and analysis of any markets including those recommended by the Commission under the *Relevant Market Recommendation*. In December 2002, a cooperation agreement was signed between the Authority and ComReg in accordance with Section 34 of the Competition Act 2002 to facilitate *inter alia* cooperation in this type of exercise.

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- 2 -

3. Members of staff at the Authority have participated in a Steering Group which also included a senior group of advisors and ComReg staff involved in recommending market analysis decisions to ComReg. The Authority considers that those staff members have contributed fully in the process and that ComReg has duly considered any comments made by them in the preparation of the consultation documents and recommendations in the draft market proposals.

4. In the market analysis ComReg defines two separate fixed narrowband access markets:

A national market for lower level retail narrowband access, including access via analogue exchange lines and ISDN BRA carried over copper, cable or FWA,

and;

A national market for higher level retail narrowband access, including access via ISDN FRA and PRA.

5. The analysis then outlines ComReg's rationale in proposing to designate eircom as having "significant market power" (SMP) in each of these access markets.

Authority comments

6. In the retail fixed calls markets, ComReg concluded that Irish circumstances do not support a delineation of the markets into residential and non-residential customers. The Authority also takes the view, at this time, that ComReg's finding is supported by the market facts.
7. With regard to ComReg's findings that eircom holds a position of SMP in each of the above markets, the Authority is of the view that the analysis carried out by ComReg supports this view, at least for the period under review. Nevertheless, the Authority welcomes ComReg's undertaking to

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Retail Narrowband Access Markets

3

monitor competitive dynamics and review the markets to analyse any such developments.

8. The Authority is of the view that in conducting its market analysis ComReg has defined markets in accordance with competition law and taken due account of the SMP guidelines issued by the EU Commission in accordance with Regulation 27 (3) of the Frameworks Regulation. The Authority is also of the opinion that ComReg's conclusions are appropriate on the basis of the information in its possession.

9. We would note that the Authority's comments are made in the context of the specific provisions of the SMP guidelines relating to the relationship between markets defined for the purposes of ex ante regulation vis-à-vis competition law enforcement. The Authority reserves the right to re-examine any or all of the issues underlying these recommendations in the light of facts and evidence that may arise in specific future cases before it.

Yours sincerely,



Dr. Stanley Wong
Member,
Director, Monopolies Division
The Competition Authority

01-8045456
sw@ca.ie

Annex E: Other SMP Criteria

In paragraph 78 of the *SMP Guidelines*, it is stated that ComReg should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. It is suggested that the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:

SMP Criterion	Explanation of Criterion	ComReg's assessment
Overall size of the undertaking.	This refers to the potential advantages and the sustainability of those advantages that may arise from the large size of an undertaking relative to its competitors.	ComReg suggests that the advantages which eircom enjoys as a result of its larger size are more appropriately considered under economies of scale, which is considered in the consultation paper.
Control of infrastructure not easily duplicated.	This is considered in further detail in the consultation paper.	This is considered in further detail in the consultation paper.
Technological advantages or superiority.	Such advantages may represent a barrier to entry as well as an advantage over existing competitors due to lower production costs or product differentiation.	ComReg considers that eircom does not have any advantage over its competitors in relation to the technology upon which retail narrowband access services are provided. Further, ComReg is of the view that by virtue of the market definition there is no potential competition in the market and therefore whether there are technological advantages is not of relevance.
Absence of or low countervailing buying power.	This is considered in further detail in the consultation paper.	This is considered in further detail in the consultation paper
Easy or privileged access to capital markets/financial resources.	Easy or privileged access to capital markets may represent a barrier to entry as well as an advantage over existing competitors.	ComReg does not consider that this constitutes a significant advantage for the incumbent over other operators, as many of its competitors are affiliated companies belonging to larger groups and thus have access to resources.
Economies of scale.	This is considered in further detail in the	This is considered in further detail in the

Retail Narrowband Access Markets

	consultation paper under potential competition.	consultation paper.
Economies of scope.	This is considered in further detail in the consultation paper under potential competition.	This is considered in further detail in the consultation paper.
Vertical integration.	This is considered in further detail in the consultation paper under potential competition.	This is considered in further detail in the consultation paper.
A highly developed distribution and sales network.	A well-developed distribution systems may be costly to replicate and maintain, and may even be incapable of duplication. They may represent a barrier to entry as well as an advantage over existing competitors.	ComReg does not consider that eircom has a considerable advantage over its competitors in respect to its distribution and sale networks. Further, ComReg suggests that there are not significant barriers which would prevent other operators replicating eircom's distribution and sales network.
Absence of potential competition.	This is considered in further detail in the consultation paper.	This is considered in further detail in the consultation paper.
Barriers to expansion.	While growth and expansion is easier to achieve for individual firms (and in particular for new entrants) in growing markets, it might be inhibited in mature, saturated markets where customers are already locked in with a certain supplier and have to be induced to switch.	ComReg believes that while there are barriers to entry into the retail access markets, eircom does not enjoy market power as a result of barriers to expansion. Switching barriers are sufficiently low and survey data would indicate that consumers do switch to indicate that consumers are not locked in.