Commission for
Communications Regulation

Consultation Paper

Market Analysis: Retail Fixed Calls Markets

Document No:	**04/95**
Date:	**01 September 2004**

All responses to this consultation should be clearly marked:- "Reference: Submission re ComReg YY/NN" as indicated above, and sent by post, facsimile, e-mail or on-line at www.comreg.ie (current consultations), to arrive on or before 5.30 pm Wednesday 13 October 2004, to:

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Please note ComReg will publish all submissions with the Response to Consultation, subject to the standard confidentiality procedure.

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1 Executive Summary

1.1 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, including relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive and, having identified competition problems, propose appropriate regulatory measures.

1.2 The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes places as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets ("*the Relevant Markets Recommendation*") by the EU Commission.[1] In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Markets Recommendation* and the Commission's Guidelines on Market Analysis and Significant Market Power ("*The Guidelines*").

1.3 ComReg would welcome comments from all interested parties on the questions posed in this market review and will accept written comments on or before 13 October 2004. Under Article 17 of the Framework Regulation and in order to promote further openness and transparency, ComReg will publish the names of all respondents and will make available for inspection responses to the consultation at its offices.[2]

1.4 This consultation is a review of markets identified by the European Commission as publicly available telephone services provided at a fixed location.[3]

1.5 ComReg proposes to define two retail calls markets :

- **Domestic calls** (which includes local and national calls and calls to mobiles and to the Internet)
- **International calls** (which includes all calls to destinations located outside of Ireland)

1.6 In the analysis of the markets, ComReg assesses that eircom has a market share of over 87% in the domestic calls market, and over 68% in the international calls market measured by revenue. ComReg considers other characteristics of the market, including barriers to entry and barriers to switching, and concludes that there is little likelihood of this market share diminishing significantly within the lifetime of this review.

1.7 ComReg proposes to designate eircom as having SMP in the market for domestic calls and in the market for international calls.

[1] Regulations 26 and 27.

[2] This is subject to confidentiality. Respondents are asked to clearly identify material which is to be treated as confidential.

[3] Markets 3,4,5 and 6 of the Relevant Markets Recommendation, 11 Feb 2003 C(2003)497.

1.8 According to the *Guidelines* the purpose of imposing ex ante obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power to restrict or distort competition in the relevant market, or to lever market power into an adjacent market.

1.9 The *Guidelines* make it clear that the designation of SMP, without imposing any regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 27 (4) of the *Framework Regulations.*

1.10 ComReg has identified potential competition problems in the domestic and international fixed calls markets, associated with single market dominance, and with vertical and horizontal leveraging. ComReg proposes that remedies are required to address these problems.

1.11 The *Access Regulations* and the *Universal Service Regulations* provide ComReg with a number of remedies it can apply given its preliminary finding of eircom's SMP in the retail fixed access markets.

1.12 ComReg proposes a range of obligations to be placed on the SMP operator.

1.13 This document is a consultation document. ComReg welcomes comments from all interested parties on the questions posed in this review. Written comments will be accepted up until 13 October 2004. As required by Regulation 20 of the *Framework Regulations*, the draft measure will then be made accessible to the European Commission and National Regulatory Authorities in other member states of the European Community prior to taking a final decision.

2 Introduction

Objectives under the Communications Regulation Act, 2002

2.1 Part 2 Section 12 of the Communications Regulation Act, 2002 outlines the objectives of ComReg in exercising its functions. These are, in relation to the provision of electronic communications networks, electronic communications services and associated facilities:

(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 need to help achieve these objectives. ComReg believes that the interests of users can be promoted by protecting users, among other things, from excessive pricing for retail fixed calls in Ireland. The attention to actual 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,[4] which transpose into Irish law four European Community directives on electronic communications and services[5] entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory

[4] 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*").

[5] 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 the 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.

package, the Privacy and Electronic Communications Directive, was transposed into Irish law on 6 November 2003. The Minister for Communications, Marine and Natural Resources has consulted on the draft regulations[6].

2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, including relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*.[7] In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.[8] Where it concludes that the relevant market is not effectively competitive (i.e., where there are one or more undertakings with significant market power ("SMP")), the *Framework Regulations* provide that it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.[9] Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market. If ComReg has previously imposed sector-specific regulatory obligations, as a consequence of a finding of SMP, on undertakings in that relevant market, ComReg must withdraw such obligations and may not impose new obligations on those undertaking(s)[10].

2.5 The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out subsequent to ComReg defining a relevant market, which is to occur as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets ("*the Relevant Markets Recommendation*") by the EU Commission.[11] In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Market Recommendation and the Commission's Guidelines on Market Analysis and Significant Market Power ("*The Guidelines*").

ComReg procedure

2.6 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services ("ECNS"), 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 Relevant Markets Recommendation* and *the Guidelines*.

2.7 The results of ComReg's consumer surveys are referred to throughout this report. In particular, ComReg commissioned Amárach to carry out research on fixed and mobile users regarding their usage of fixed and mobile services. ComReg has also

[6] ComReg Document No. 03/99 outlines ComReg's response to the draft regulations.

[7] Framework Regulation 26.
[8] Framework Regulation 27.
[9] Framework Regulation 27(4).
[10] Framework Regulation 27(3).
[11] Framework Regulations 26 and 27.

commissioned TNS MRBI to carry out surveys on Residential Consumer Telecommunications attitudes, which are referred to in this review.

Liaison with Competition Authority

2.8 There is a requirement on ComReg under Regulation 27 of the *Framework Regulations* to carry out an analysis of a relevant market that has been defined. This analysis must be carried out in accordance, where appropriate, with an agreement with the National Competition Authorities (NCAs) under Section 34 of the Competition Act, 2002. In December 2002, ComReg signed a co-operation agreement with the Competition Authority for a period of three years[12]. To facilitate market review decision-making, a Steering Group, which included a representative from the Competition Authority, was established by ComReg. Through this forum, the Competition Authority has been informed and involved throughout the market review decision-making process.

Consultation

2.9 All comments to this Public Consultation are welcome. However, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

2.10 The consultation period will run from 1 September 2004 to 13 October 2004 during which time ComReg welcomes written comments on any of the issues raised in this paper.
As required by Regulation 20 of the *Framework Regulations*, the draft measure will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking the measure.

Structure of this document

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

- **Section 3** presents ComReg's preliminary conclusions on the definition of the markets. This section consists of a review of the market definition procedure and its scope, as well as demand- and supply-side assessments at the wholesale and retail level;

- **Section 4** presents ComReg's market analysis for the markets defined in Section 3 and presents ComReg's preliminary view on whether the markets are effectively competitive;

[12] ComReg Document No. 03/06.

- **Section 5** presents ComReg's preliminary view on those undertakings with significant market power in the retail fixed calls markets;

- **Section 6** provides a discussion of the general principles associated with remedies and outlines a range of possible remedies, as well as our likely proposed remedies, under the new regulatory framework;

- **Section 7** outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention regarding these markets;

- **Section 8** provides details with regard to the submission of comments on this consultation document.

3 Relevant Market Definition

Background

Market definition procedures[13]

3.1 The *Framework Regulations* require ComReg to define relevant markets appropriate to national circumstances, in accordance with the market definition procedure outlined in the Framework Regulations. The obligations of the *Framework Regulations* apply to both the markets identified in *the Relevant Markets Recommendation* and to additional relevant markets that ComReg may consider to merit investigation above and beyond these[14]. In accordance with the Framework Regulations, the market definition exercise must be carried out in accordance with the principles of competition rules and must take "utmost account" of *the Relevant Markets Recommendation*, as well as the *Guidelines*.[15]

3.2 The market definition procedures are designed to identify in a systematic way the competitive constraints; they do so in a way which also facilitates subsequent market analysis procedures. According to the European Court of Justice,[16] a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable with its products, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question. In essence, this leads to a definition of the market's boundaries[17]. A key question for the review, therefore, is the extent of the boundaries in light of issues of substitution possibilities.

[13] This subsection is intended to present an overview of the process. It is not intended to be a step-by-step account of all that ComReg did nor is intended to give a legal justification of the process although some references to legislation and case law are given.

[14] These additional markets will occasionally be referred to as "Article 7" markets. This term comes from the article from the Framework Directive that defines the notification procedures that ComReg must following in such cases.

[15] Regulation 27.

[16] See, for example, Case 322/81, Michelin v. Commission [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law ("the Commission Notice on Market Definition"), OJ 1997 C 372/3, and the SMP Guidelines.

[17] One accepted method for determining the boundaries of a market is by application of the Hypothetical Monopolist Test (HMT). This test examines whether it is possible for a hypothetical monopolist to profit by applying a Small but Significant Non-transitory Increase in Price (otherwise known as the SSNIP test) in a candidate market (where candidate market refers to the collection of products or services considered to be in the same economic market). Small is usually interpreted to mean between 5-10%, and non-transitory usually means a year or more. Where a hypothetical monopolist is able to profit by applying a price increase, the boundaries of the candidate market may need to be narrowed. Where a hypothetical monopolist is not able to profit by applying a price increase, the boundaries of the candidate market may need to be widened to include goods regarded as demand- and possibly supply-side substitutes.

3.3 In a market which is not competitive there may be one company- or indeed a group of companies acting together to some extent - that has significant market power (SMP) over the way products are offered to potential customers. In such an uncompetitive market, competition problems of various types may occur. The principle adopted by EU telecommunications law is that where there may be a competition problem, measures may be applied to companies with SMP to remedy these problems. These matters will be considered in later sections of this document.

3.4 Market definition cannot occur without taking into account the specific conditions at play in the market. The process involves considering constraints resulting from demand and supply issues (and indeed their interaction) to consider overall substitutability. If demand and supply issues suggest a lack of current or potential substitutability between different types of product, the overall market will be more tightly defined. If substitutability or its potential exists, a broader definition may be appropriate. The competitive position and problems of each relevant market can then be considered.

3.5 Legislation also requires the geographic coverage of markets to be considered. A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas[18].

Market overview

Background

3.6 Access to public telephony services is currently via an exchange line (usually a twisted copper pair), or by cable telephony or narrowband Fixed Wireless Access. ISDN, where users can add terminating equipment to provide multiple channels and where the call is presented in digital format, is available as well as more traditional analogue PSTN. The different characteristics of access are discussed in the review of the Retail Fixed Access Markets (Document number 04/94). It is emphasised that for the purposes of this review, the form of access is not relevant. All forms offer an equivalent ability to make a call.

3.7 Although the service is considered independent of the underlying infrastructure, the competitive structure of the industry cannot be so easily separated. To access telephone services customers must be connected to the network. The first stage of this physical connection is referred to as the local loop.

3.8 As well as providing calls services on owned infrastructure, an alternative is to provide services over facilities owned by another operator. This is the concept embodied for instance in Carrier Pre Select (CPS). An important feature of CPS is that end customers can purchase access and calls from different companies, so that

[18] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3, ("*the Guidelines*").

end customers perceive that while they have switched calls provider they have not switched access provider.

3.9 The limitation of infrastructure competition can be addressed in a number of ways, including sale, rental or agency billing arrangements for the end user access connection. ComReg recently mandated a new obligation in this regard in 2002. This is the Wholesale Line Rental (WLR) offering which is a wholesale product that allows a service provider to offer a more complete retail offering including both calls and access. The WLR product is offered only in conjunction with the Carrier Pre-Selection (CPS) "all calls" package It also allows the consumer who has chosen an alternative supplier for its calls to receive a single bill from that operator covering all calls and line rental, rather than receiving a separate bill from eircom for the line rental.

3.10 An interim manual solution for WLR was launched in June 2003, a number of Other Authorised Operators (OAOs) participated in product testing, however the manual solution proved too onerous to implement in the marketplace. In parallel, an automated solution was developed and this was launched on 1st April 2004, in line with ComReg's table for development of the product. After extensive testing with selected customers, Single Billing through WLR was launched in the retail market by two OAOs. There are currently over 15,000 WLR lines spanning both of the defined markets for fixed retail access for PSTN and ISDN, which represent approximately 0.4% of all access channels.

<u>Current products</u>

3.11 In Ireland, a customer can purchase:

- calls from one undertaking as part of a total telephony package including access;
- all calls from a separate undertaking to that from which access is purchased;
- some calls from a variety of different undertakings.

3.12 eircom offers access and calls to its customers. Until recently, access and calls were only offered separately, but eircom has recently introduced a package which bundles access, calls and a range of value added services for a monthly flat rate.[19]

3.13 Other access providers, such as the cable companies, offer calls services over the eircom network (through CPS) and some calls services over direct connections[20].

3.14 A number of operators, who do not offer access services, offer calls on a pre-select and call by call basis using Carrier Selection (CS), Carrier Access (CA) and Carrier Pre Selection[21],[22]. Suppliers of CA/CS and CPS services include companies who sell

[19] Eircom talktime & eircom talktime for business

[20] Chorus offers CPS to residential customers, and direct connection to business customers.

[21] Introducing Carrier Pre Selection in Ireland D2/99 ODTR99/29

[22] Carrier Access and Carrier Selection D1/98 ODTR98/18

directly to the user, companies who sell to third parties who then resell the calls package to the user, and companies who do both.

3.15 Pricing for calls has become increasingly complex, as operators package and bundle tariff options in different ways. Some operators differentiate according to time of day, some by distance, and some do not differentiate at all. This makes comparison of prices very difficult, both for the purposes of this market review, and for customers. ComReg has adopted a pragmatic approach in this review, in that it has focussed on the extent to which broad trends in pricing could affect price setting behaviour (*i.e.*, the direction of change in tariffing, rather than individual pricing plans).

Scope of Review

3.16 ComReg is bound by legislation requiring it to follow advice from the European Commission. In relation to public telephone services provided at fixed locations, the European Commission recommends in its *Relevant Markets Recommendation* that NRAs analyse the relevant retail markets for:

- publicly available local and/or national telephone services provided at a fixed location for residential customers;
- publicly available international telephone services provided at a fixed location for residential customers;
- publicly available local and/or national telephone services provided at a fixed location for non-residential customers; and
- publicly available international telephone services provided at a fixed location for non-residential customers.

3.17 These recommendations are based on the European Commission's characterisation of the retail market for public fixed telephone services. Key elements of this characterisation are :

- the retail market at a general level is described as the provision of a connection to and use of the public telephone network at fixed locations;
- fixed telephone services may be supplied by different types of undertakings, using different technologies;
- the distinction between residential and business markets is proposed because the contractual terms of service often vary, and because the economics of serving the residential and business markets may be very different;
- access and calls may be supplied as a package by a single undertaking, or may be acquired separately from different undertakings. This is the basis for identifying separate retail markets for access and calls;
- while there is no perceived demand side substitution between local, national and international calls, an increase in the price of calls in one of these categories by a hypothetical monopolist could induce service providers in one of the other categories to purchase the wholesale elements, provided they are available, to

supply the relevant services. However, the ability to purchase all the wholesale elements may be restricted in the international calls market[23].

- The EC recommends a distinction between voice services and non-voice (data) services. This does not necessarily suggest that they form separate market however, at the current time they are considered sufficiently different to be analysed separately[24].

3.18 ComReg has adopted the European Commission's approach as the starting point for its analysis of the retail calls market.

3.19 This review is therefore concerned with the ability of customers to make telephone calls on the public telephone network.

3.20 The scope of this market review considers the following:

- are fixed access and fixed calls in the same relevant market?
- are calls from fixed locations in the same relevant market as calls from mobile?
- are there separate relevant markets for residential and non-residential customers?
- are operator assisted calls in the same relevant product market as direct dialled calls?
- are calls from payphones in the same relevant product market as calls from a land line?
- are local and national fixed calls in the same relevant market?
- are fixed to mobile calls in the same relevant product market as fixed domestic calls?
- are calls to Internet in the same relevant product market as calls to fixed domestic calls?
- are other non-geographic numbers such as premium rate and freefone calls in the same relevant product market as fixed domestic calls?
- are fixed international calls in the same relevant market as fixed domestic calls?
- are fixed SMS in the same relevant market as fixed domestic calls?
- are Voice over Internet Protocol calls in the same relevant market as fixed domestic calls?
- what are the relevant geographic markets?

Q. 1. Do you agree with the scope of ComReg's review of the retail fixed calls market? Please elaborate your response.

Q. 2. Are there other elements which should be considered?

[23] Explanatory Memorandum to *the Relevant Markets Recommendation.*

[24] Explanatory Memorandum to *the Relevant Markets Recommendation.*

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

Background

3.21 The European Commission recommends that there are separate markets for fixed access and fixed calls[25], on the basis that the conditions of supply are different for access and for calls, and that there is greater potential for an access provider to enter the calls market, than *vice versa*.

3.22 In analysing the market in Ireland, ComReg has considered demand for access and calls, and has assessed supply conditions.

Demand issues

3.23 ComReg notes the basic functionality of calls and access is different. The services are bought for two different purposes, and cannot be functional substitutes. Historically telephone service was supplied as a package of access and calls, and while each element may have been charged separately, the package was bought from a single undertaking. Until recently, access to the fixed network could be bought only from an infrastructure owner. With the introduction of Carrier Access (CA) and Carrier Selection (CS) in 1998 and then Carrier Pre-Selection (CPS) in 2000, calls could be bought from an alternative undertaking offering a full or partial calls services.

3.24 CA/CS and CPS enables a customer, who has a line with the access provider, to select an alternative carrier to carry their calls, either on a call by call basis[26] or on a pre-defined category of calls. These calls, which originate on the access provider's network are then routed over the access provider's network to the appropriate point of interconnection with the alternative service provider, as agreed between the service provider and access provider.

3.25 ComReg's view is that current market conditions differ significantly between the market for access and the market for calls. As seen in Figure 3.1, an increasing number of customers purchase all or part of their outgoing calls from an undertaking other than the access provider. ComReg notes that this difference may simply reflect the fact that CA, CS and CPS on a calls basis has been available for some time and that until very recently there has not been a similar option for access.

[25] Commission Recommendation of 11 Feb 2003 C(2003) 497

[26] Carrier Access is implemented through a two stage call set up procedure whereas Carrier Selection is implemented as a one stage call set up.

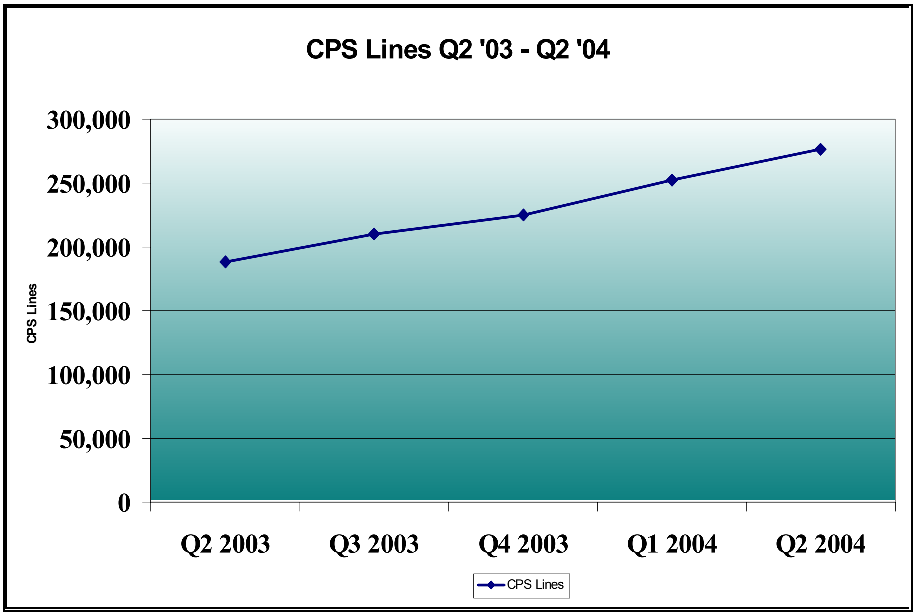

Figure 3.1 CPS Lines Q2 2003 to Q2 2004

3.26 CA, CS and CPS also make switching between calls providers a simpler process than switching access providers, and means that competitive conditions in the markets are different. Number portability ameliorates the potential cost and inconvenience of a number change, but it does not eliminate all potential barriers to switching, particularly given the lack of alternatives to the incumbent for most forms of access. At the end of March 2004, eircom provided over 98% of all direct access channels to end users. As part of its review of the narrowband retail access market ComReg has defined two separate narrowband access markets. One is *lower level narrowband access*, which includes access via analogue exchange lines over copper, cable and FWA and ISDN BRA, also including 'hi-speed'; eircom has over 99% share in this market. The other being *higher level narrowband access,* which includes access via ISDN FRA and PRA; eircom has over 77% market share in this market. (See Market Analysis – Fixed Narrowband Access Markets Document number 04/94).

3.27 ComReg notes the introduction of new packages for both residential and business users which effectively bundle access and calls. For a fixed monthly fee, the customer buys an access subscription and a package of calls which can be customised to fit individual call patterns. As this has very recently been introduced, ComReg cannot assess the impact that it might have on the market, but notes that it does suggest that ComReg must monitor whether such service offerings change the competitive dynamics of supply. It will therefore be necessary to keep this matter under review. Examples of these packages can be seen in Annex B.

Supply issues

3.28 While all access providers offer calls services, not all call providers offer access services. As all access providers are currently also offering calls, in terms of supply substitution, ComReg has considered the extent to which calls providers could enter the market for access during the lifetime of this review.

3.29 If a hypothetical monopolist sought to impose a small but significant price increase in the access market, it would not be possible for a calls provider to switch to access provision without considerable investment, or without regulatory intervention to ensure the availability of a viable wholesale offering. ComReg does not believe, in the absence of such regulation, there would be substitution on the supply side. Conversely, if a hypothetical monopolist of call services were to impose a small but significant price increase, in the absence of regulated products such as CS and CPS, an access provider (or any other entity) which wanted to enter the calls market would have to duplicate the existing core network. The core network provides the switching, transmission and signalling elements required to route calls between the termination point of the access network. This would require considerable investment and is unlikely to happen within the timeframe of the review.

Preliminary Conclusion

3.30 ComReg takes the preliminary view that, at present, the access market and the calls market in Ireland are complementary, and are not substitutes. ComReg, therefore, proposes to define separate access and calls markets.

Q. 3. Do you agree that access should be considered to be in a separate market to the market for calls? Please detail your response.

Are calls from fixed locations in the same market as calls from mobile?

Background

3.31 The European Commission has recommended that mobile originating calls be considered as a separate market to fixed originating calls[27]. Our preliminary analysis would suggest that this is the case in Ireland.

3.32 In considering whether mobile calls are in the same relevant market as fixed calls, we need to consider the extent to which a user would choose to make a mobile rather than a fixed call, and the extent to which the user would see a mobile call as a substitute for a fixed call or indeed vice versa.

3.33 There are, therefore, two possible options. In the first, the user can make either a fixed or a mobile call, and chooses one rather than the other (*i.e.*, partial substitution). In the second, a user makes all calls on mobile and does not make fixed calls.

[27] Commission Recommendation of 11 Feb 2003 C(2003)497.

3.34 On the supply side, we need to consider the extent to which an undertaking currently offering mobile calls would enter the market for fixed calls (or vice versa) in response to a price increase.

Demand issues

Functional substitutability

3.35 The European Commission has, in a number of decisions, found that there is a market for mobile services which cannot be substituted for fixed services. The key characteristic is mobility, so that calls are made and received irrespective of location. Thus, even although similar services can be offered by both, fixed services by definition cannot offer mobility.

3.36 However, it may be possible for users to substitute in only one direction, by replacing fixed calls with mobile calls. Technically, mobile can substitute for fixed because users can access the network to make and receive calls just as they would do with a fixed connection.

3.37 The areas of functionality where we see a marked difference between fixed and mobile are in quality of service and transmission bandwidth.

3.38 As an indication of the importance of quality to users, a ComReg survey[28] found that "quality of reception" was second only to price when a user decided whether to make a fixed or mobile call. Over 70% of respondents indicated that quality of reception was either important or very important, and 43% strongly agreed that in terms of quality and scope of services, there is currently no alternative to fixed services.

3.39 The issue of transmission bandwidth is relevant particularly for data services. At present, a user who can make a fixed call can also use dial-up internet access. ComReg notes that the roll-out of 3G is likely to improve the quality and bandwidth of mobile services, but currently and within the timeframe of this review, Internet access over mobile connections is likely to remain considerably slower than over fixed lines.

3.40 At present, it is not likely that a user who wishes to use a fixed line to make voice and narrowband data calls would consider mobile access to be a close substitute.

Call patterns

3.41 Analysis of movement in the volume of calls was carried out to see whether there was evidence of growth in either fixed or mobile at the expense of the other.

3.42 While the rate of increase in volume was stronger for mobile minutes than for fixed minutes, growth in fixed minutes was steady and did not show the decline which would be associated with significant substitution. This can be seen from the graph below.

[28] TNS MRBI Residential Telecom Survey, Feb 2003.

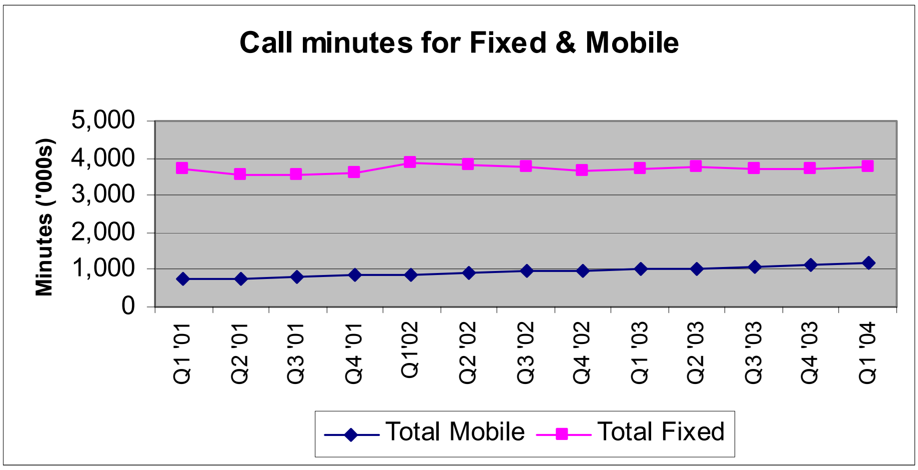

Figure 3.2: Call Minutes from Fixed and Mobile Connections

3.43 The increase in growth of mobile volume must also be related to the increase in mobile penetration over the same period, which has increased substantially over the past four years. ComReg's interpretation is therefore that the analysis of total call minutes shows growth in overall demand for call services, reinforcing the view of fixed and mobile as complementary rather than substitutable services.

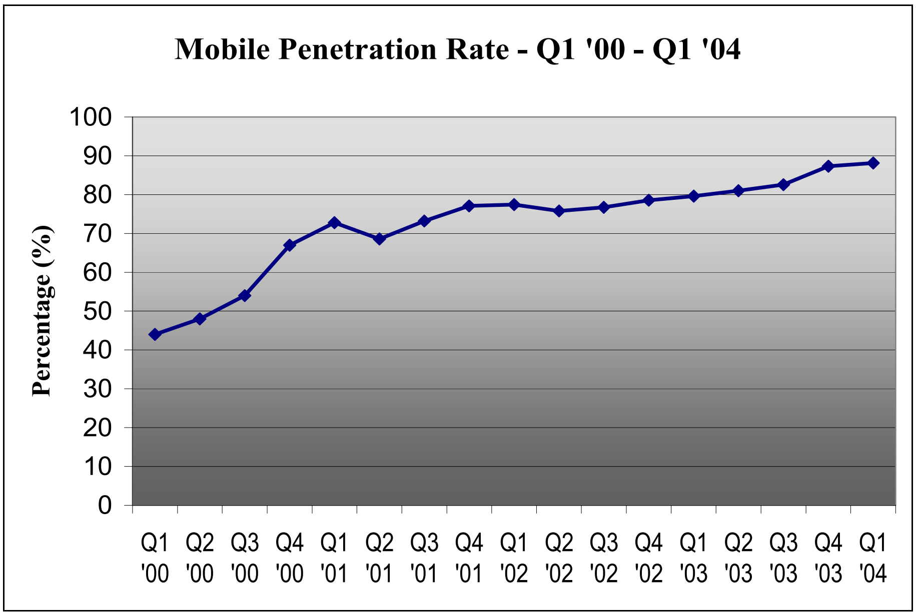

Figure 3.3 Mobile Penetration Rate

3.44 The Residential Telecommunications Survey[29] carried out for ComReg collected data in relation to the manner in which users combine fixed and mobile calls. For users with both fixed and mobile connections, 20% *never* use their mobile when at home,

[29] TNS MRBI Residential telecommunications Survey, February 2003.

and a further 58% *mainly* use their fixed connection to make calls from home. This means that around a quarter of users regularly make mobile calls from home, even when a fixed connection is available.

3.45 ComReg's analysis of the data indicates that a minority of users choose to make only mobile calls. It is ComReg's view that a hypothetical monopolist of fixed calls would not be constrained in imposing a small but significant, non-transitory increase in price by possible substitution away to mobile calls.

Price

3.46 The tables below show that there are significant differences between tariffs[30] structures and prices for a small selection of fixed to fixed calls and mobile to fixed calls.

Fixed to fixed			
Domestic		**International**	
Local		UK	
Eircom	4.9c	**Eircom**	15.4c
EsatBT	3.8c	**EsatBT**	10.0c
National		US	
Eircom	8.2c	**Eircom**	19.1c
EsatBT	3.8c	**EsatBT**	12.0c

Table 3.1: Fixed to fixed Tariffs[31][32]

Mobile to fixed			
Domestic (Local/National)		**International**	
		UK	
Vodafone		**Vodafone**	
Pre-Paid (Work & Leisure)	45c	Pre-paid	102c
Pre-Paid (Minute to Spare)	10c	Postpaid	69c
Post Paid (Light)	50c	**O2**	
Post Paid (Active)	45c	Prepaid	95c
		Postpaid	190c
		US	
O2 mobile - fixed		**Vodafone**	
Pre-paid (early bird)	15c	Pre-paid	102c
Pre-paid (night owl)	55c	Postpaid	92c
Post Paid (Choices 5+)	50c	**O2**	
Post Paid (Choices 10+)	35c	Prepaid	120c
Post Paid (Choices 20+)	28c	Postpaid	92c

Table 3.2: Mobile to fixed Tariffs[33]

[30] Tariffs are standard daytime rates per minute. All tariffs are inclusive of VAT at 21%.

[31] Source: operator websites. The prices quoted are standard daytime prices and are subject to a minimum fee.

[32] Rates are per minute and inclusive of VAT.

[33] Source: operator websites. Rates are per minute and inclusive of VAT.

3.47 The assessment of demand side substitution must consider the impact on the user of an increase in the price of fixed call services, and the extent to which a user would choose mobile call services over fixed call services if the price of fixed call services were to increase between 5 and 10% above cost.

3.48 On a call by call basis, one of the main reasons why a user would choose to make a fixed call rather than a mobile call remains price. It is difficult to compare the cost of calls from a fixed line with the cost of calls from a mobile, as mobile calls are can be sold as a bundle of access and calls, or in the case of pre-paid just on a calls basis. In general, there is a significant price premium associated with calling from a mobile compared with a fixed line. The continuing existence of the price premium suggests that fixed originated and mobile originated are not subject to a common pricing constraint.

3.49 ComReg has considered the current price differentials between fixed and mobile originating call services. The price comparisons are such that even following a 5 to 10% increase in fixed-originating call charges, the fixed rates will remain at levels well below that of mobile- originating charges. For example, fixed-to-fixed charges are currently approximately 10% of the level of mobile-to-fixed charges. Similarly, in relation to calls to international destinations, average fixed- originating charges appear to be approximately 10% of average mobile- originating charges. It is only in relation to calls to mobiles that fixed- originating charges are comparable to (and, in some cases, above) mobile- originating charges.

3.50 A price increase of 5-10% in fixed-to-fixed call prices imposed by a hypothetical monopolist would not result in a shift to fixed-to-mobile calls, because the current price differentials are currently considerably greater than 5-10%. This then suggests that fixed-to-fixed and mobile-to-fixed calls are not substitutes.

3.51 When the various permutations of origination and termination are taken into account, it cannot always be clear to users how individual call options compare. To some extent, the perception of cost is a significant factor. Contract mobile calls generally include “free” minutes, which of course are not really free as they are incorporated in the contract charge, but are perceived by the user to be free at the margin. In this case, price may be a less significant factor in considering substitutability[34].

3.52 It is possible that mobile on-net call charges provide an indication of the impact of lower prices. However, it should be noted that the use of mobile on-net is restricted, in that lower costs are only available for calls on the same network – that is, both the caller and the called party have to be on the same network. The chart below shows a comparison of call volumes for fixed-to-mobile and mobile on-net.

[34] Note that over 70% of mobile customers in Ireland are prepaid, not contract, so the “free” minutes may be less significant.

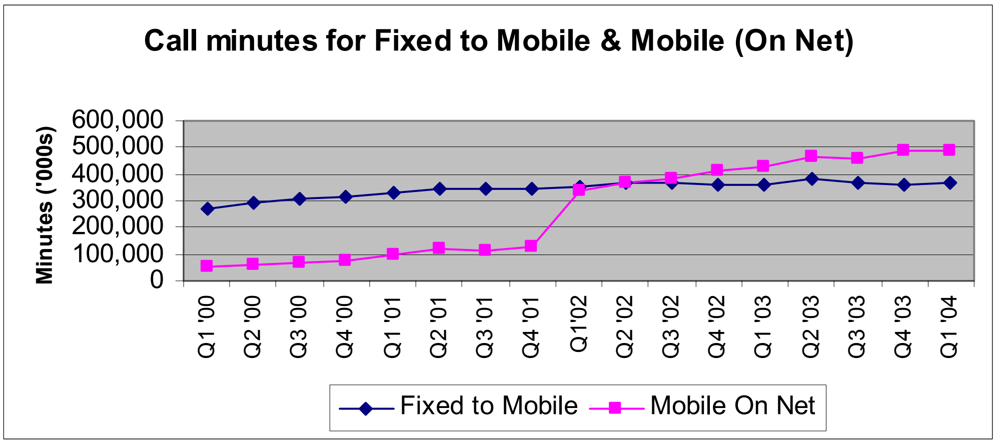

Figure 3.4 Fixed to Mobile Calls & Mobile (On Net) Calls

3.53 The volume of minutes for both call types increased in the period between the beginning of 2000 and the end of 2004, fixed-to-mobile calls by 25% and mobile on-net calls by 90%. There is thus no evidence that users are substituting one type of call for the other, and if anything fixed-to-mobile traffic grew faster than other fixed-originating services during the period, as evidenced by the figures below.

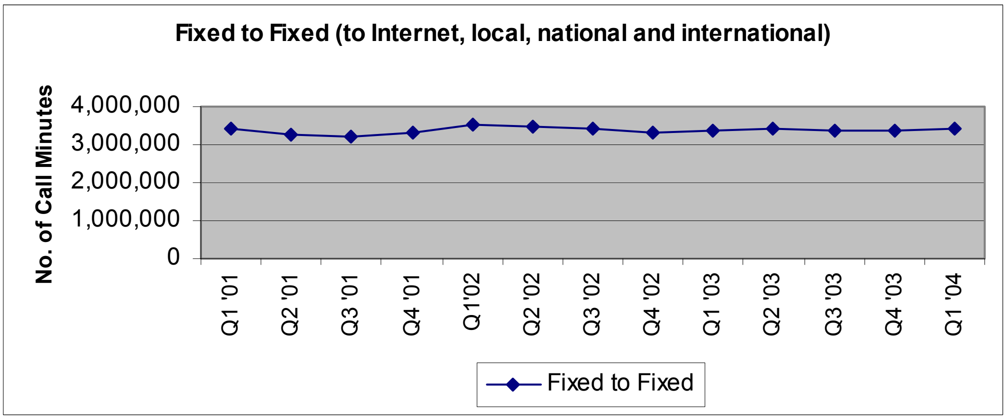

Figure 3.5: Fixed to Fixed Calls

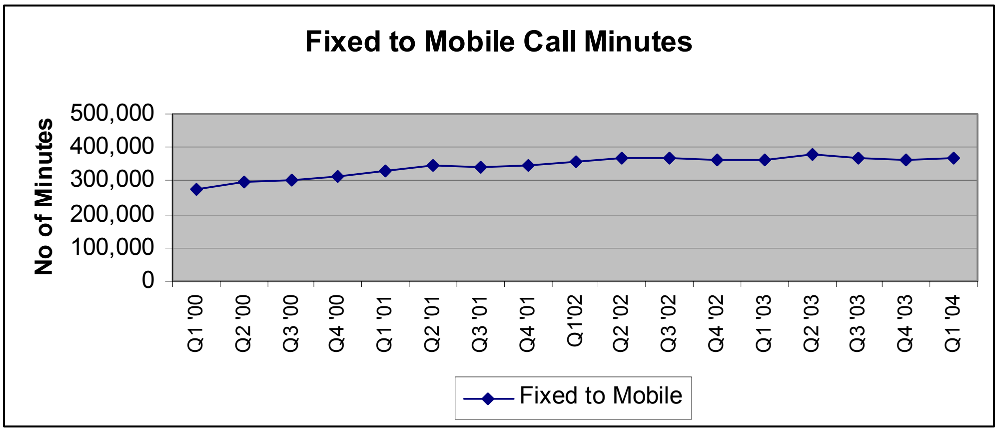

Figure 3.6: Fixed to Mobile Calls

3.54 The key issue in considering demand side substitution is therefore the significantly higher cost of calls from mobile, with quality of reception a strong secondary factor.

Supply

3.55 The key question for fixed- mobile call services supply-side substitutability is whether an existing mobile call service supplier would respond to a 5 to 10% increase by a hypothetical monopolist fixed call service supplier by entering the market.

3.56 The most realistic way for a mobile operator to do this would be to use its network to offer a product which compares favourably with fixed calls in terms of both functionality (primarily quality) and in terms of price.

3.57 In terms of functionality, it is ComReg's view that different levels of quality between fixed and mobile calls mean that, at present, mobile operators cannot offer a substitutable product.[35] However, developments such as 3G could potentially change this.

3.58 ComReg's preliminary conclusion from the analysis of prices is that the difference between fixed originating calls and mobile originating calls is well in excess of the 5-10% increase which would affect the hypothetical monopolist. None of the mobile call service providers currently provide call services that would be priced to compete with fixed call services, even supposing a 5-10% increase. However, ComReg notes that mobile-to-mobile on-net calls can be similarly priced to fixed network calls, but considers that the two services do not compete directly with each other.

[35] In ComReg's view, 3G offers the possibility of higher quality of service on mobile. Three licences were granted to 3G operators (Vodafone, O2 and 3) in 2002. The product is at a very early stage of development in Ireland. Experience from the introduction of 3G in other countries has shown that the price differential between mobile and fixed is increased, at least in the early stages of the product's life. This suggests that while 3G may compare well with fixed on a functional level, it is unlikely, in the short term, to compare favourably on price.

3.59 ComReg is aware of the potential for rapid change in this market, but suggests that on balance, supply-side substitutability will not impose pricing pressure on the hypothetical monopolist fixed call service provider within the two year timeframe of this review.

Preliminary conclusion

3.60 ComReg considers that the level of substitution at present does not act as a constraint on the price setting behaviour of a fixed supplier, and that this is unlikely to change sufficiently in the timeframe of this review. The evidence in the Irish market suggests that, at present, fixed and mobile are complementary products. On the demand side, the key differentiating factor is price. Mobile calls are still significantly more expensive than fixed, and cost is the prime reason to choose fixed over mobile when both are options. On the supply side, the price differential is such that entry is unlikely to occur if a hypothetical monopolist fixed calls supplier were to increase prices between 5 and 10%.

3.61 ComReg is aware that in several other countries, there are proposals for converged fixed and mobile products. ComReg recognises that such a service could be introduced very quickly in Ireland, as it does not involve heavy investment in infrastructure or in product development, and mobile operators can match the ubiquity of the PSTN. However, no such products currently exist in the Irish market, and no proposal to do this in Ireland has been announced. In any case, such a product would represent a form of "added value" to the fixed access network, rather than a substitute for it.

Q. 4. Do you agree that fixed and mobile call services are complements and should be considered to be in separate markets? Please detail your response.

Are there separate relevant markets for residential and business customers?

Background

3.62 The European Commission's *Relevant Markets Recommendation* proposes a distinction between the residential and business markets based on possible variation in contract terms, and the potential for the economics of supply to vary between the two markets. In proposing that there is not, at present, a distinction between the business and residential markets in Ireland, ComReg has considered whether there is at present, a differences between the residential and business markets for fixed calls in terms of demand and the conditions and economics for business and residential supply. It should be noted, that there are a large number of SMEs within the Irish economy especially those at the lowest end of the SME range. This would indicate that there are a large number of businesses that require only a single line and may, furthermore, be relatively light users.

Demand

Customer classification

3.63 There is generally not a clear and consistent method among operators of defining a business or a residential customer. During the course of this review, ComReg conducted a number of interviews with service providers, in an effort to identify criteria that are used to differentiate residential and non-residential customers. The results of these interviews indicate that operators either operate systems that rely exclusively on 'self-nomination' or adopt flexible criteria that are not necessarily consistent across the industry for differentiating between residential and non-residential customers. Criteria may be determined and applied on a case-by-case basis. A number of operators use relatively simplistic revenue-based criteria for identifying customer groups. However, in addition to variation in the thresholds adopted, there are 'rules of thumb' that are varied on a case-by-case basis.

3.64 ComReg notes that, although the data collected during this review attempted to designate customers as residential and non-residential, another operator might have designated the same customer differently because of the variation between designation criteria. Care should therefore be taken in reviewing data.

3.65 In terms of classification, therefore, most operators do classify customers as business or residential. However, given the fluid manner in which the categories are used, this should be seen primarily as a marketing tool, as in most cases, there is a strong element of customer choice in the category to which they are assigned.

Pricing

3.66 Irrespective of classification, it is appropriate to consider pricing as all operators offer pricing schemes for calls which implicitly or explicitly differentiate between business and residential customers. This can be, for example, differences in the actual tariff per type of call, or it can be in the manner in which calls are bundled.

3.67 The main area of differentiation on price is by volume. Eircom for example offers volume discounts to residential and business users. For a residential user, discounts kick in after a monthly spend on calls of €12.80 has been reached. For business users, discounts are applied after monthly call spend has reached €18.15[36]. The level of discount increases with the number of minutes.

3.68 ComReg notes that, while most operators publish different prices for residential and business users, some do not. In practice, variation on pricing is to do with volume of calls rather than category of customer. This obviously correlates to some extent with residential versus business call use; in that most very high volume users will be businesses. However, there is a substantial overlap between low volume business users and high volume residential users.

3.69 ComReg notes also that there is a high degree of chain substitutability between tariff and contract options as volume discounts associated with higher usage augment incrementally as volumes increase; this can be seen along the scale of tariff options which are targeted at larger business customers.

[36] Prices include VAT.

Supply

Conditions of supply

3.70 The conditions of supply for calls are similar for business and residential users. There is generally a different emphasis in sales and marketing to the business and residential sectors. However, there is a lack of a consistent determination as to who has access to what, which means that in practice the business/residential differentiation is extremely fluid, and there are no substantial differences in the product.

Economics of supply

3.71 The European Commission has suggested that there may be variation in the economics of supplying the business and the residential markets. We should therefore assess the extent to which a supplier to the business calls market would seek to enter the residential call market (and vice versa) in response to a price increase.

3.72 ComReg suggests that once issues surrounding the cost of access (either through direct provision or the access of wholesale products) have been addressed, it is relatively straightforward for a current supplier of either business or residential calls to enter the other market. While there are variations in consumer densities, there are no local charge areas that are entirely business or entirely residential. Coupled with the geographic averaging of interconnection prices, this means that, if calls are offered to one group, the same interconnection facilities could be used for the other. This means that factors such as customer density do not restrict opportunities in the calls market to one particular group of customers.

3.73 This is seen in practice through the different strategies of OAOs. For example, CPS is being marketed to, and used by, both business and residential customers. One cable operator (ntl) markets CPS to its business customers, while another (Chorus) markets CPS to residential customers, but direct connection to business users. For these operators, the decision about which product to offer where is a marketing decision – they are both able to offer CPS and direct connection if they so wish, and if customers so demand. For one of these suppliers to shift to supply the other market would involve little change to the product, and would primarily involve a change in marketing. This shows a high level of substitutability, where the same product can be offered by a similar supplier to either residential or business users, and where a supplier could easily shift into the other market in response to a price change.

Preliminary conclusion

3.74 ComReg's preliminary view is that residential and business fixed calls in Ireland are in a single market. While we can see the beginnings of differentiation resulting from some differences in the level of competition within this market, it is not yet sufficient – and will not become sufficient within the timeframe of the review – to identify residential and business calls as separate markets.

3.75 ComReg's analysis indicates that there is a differentiation in pricing on the basis of the volume of calls made, and high volume users tend to be businesses. However, the offering of preferential pricing for volume is not restricted by a strict and clear-cut residential/business classification. Rather, it is based on volume itself.

3.76 The impact of any differentiation is modified by the way in which residential and business customers are defined. There is no consistent definition, and the boundaries are fluid and subject to self-selection, arbitrary allocation, and change. The economics of supplying the business and residential markets are of a magnitude which suggests that it is relatively simple for a supplier to the residential market to enter the business market (and vice versa) in response to a hypothetical price increase.

3.77 ComReg therefore considers that the high level of supply side substitution, and the fact that categorisation is often a matter of customer choice; indicate that at present, there are not separate markets for business and residential calls in Ireland.

Q. 5. Do you agree that business and residential calls should be considered to be in the same relevant market? Please detail your response.

Are operator assisted calls in the same relevant product market as other calls?

3.78 Clearly, from a demand perspective an operator assisted (OA) call is not a substitute for a direct-dialled call; it can be considered to be a supplementary product feature which aids in the completion of calls (where a fault is making connection difficult, for example). From the supply side, operator assisted calls can be considered as an ancillary service to providing direct-dialled calls. Operator assisted calls are not considered to be either in the same relevant market as a substitute for direct-dialled calls, nor are they a complement and hence in a separate market. Rather, operator assisted calls are a product feature which make up a complete service of call provision.

Q. 6. Do you agree that operator assisted calls should be considered to be an ancillary service to direct-dialled calls? Please detail your response.

Are calls from payphones in the same product market as other fixed line calls?

3.79 The provision of public payphones is a part of the universal service obligation and so calls from public payphones need to be considered in that context. However, the fundamental point is that payphone calls can only be made through the facilities of a public payphone service provider. Once the specific universal service features of the payphone service have been addressed, such a call is like any other.

Demand

3.80 ComReg has considered whether calls from payphones are in the same relevant market as other landline calls from a demand side perspective. In the case of payphones, it is difficult to separate calls from access, since payphone call prices is a bundle of access and calls and include an element of both, similar to the pricing of mobile access and calls. ComReg considers that there may be two types of relevant demand for making calls from a payphone – from users who make no calls from a landline or mobile and use a payphone to wholly substitute for a landline or mobile; and from users who have their own landline or mobile but use a payphone either for convenience or for certain types of call. ComReg believes that most payphone usage is likely to be of the latter type, implying that calls from payphones tend to complement calls from landlines and mobile rather than be substitutes for them. For example, 24% of consumers who have used a payphone in the last three months used it for convenience. A further 33% used a payphone because they had no credit on their mobile phone[37]. Customers who do substitute payphone usage for landline usage are likely to be taking a decision based on assessing the combined costs of access and calls, which will depend on both the volume of calls made and the types of call made.

3.81 From a functional point of view, a land line is more likely to offer a greater range of services and functionality; including value added services such as call barring or call waiting; fixed SMS; fax and Internet. Landlines also offer more convenience in terms of receiving calls.

3.82 For those customers who rent a landline, the bundled pricing for calls and access means that calls from payphones are more expensive at the margin than calls from a land line. For example, where there is a 5-10% price increase by a hypothetical monopolist, for a call from a land line; it is unlikely that consumers would switch to using payphones. Not only are prices for calls from payphones significantly higher, but the functionality and intended use of calls from a payphone, are different. The demand side analysis, would not suggest that these calls are in the same market, due to the varying levels of functionality and hence pricing.

Supply

3.83 It is useful to consider the SSNIP test in terms of supply side substitution. On this basis, the pertinent question is whether a hypothetical monopolist supplier of fixed calls to/from land lines were to raise its prices by 5-10%, would this result in entry from suppliers of calls to payphones. In order to enter the market for the supply of calls from a land line, a supplier of calls from payphones would need to rely on CPS in the same way as any other new entrant into this market. ComReg does not believe it likely that such a supplier of calls from payphones would have any material advantage in entering this market relative to any other potential entrant. As a consequence, ComReg believes that supply side analysis suggests that calls from a payphone and calls from a land line are not in the same market.

3.84 ComReg therefore will consider whether a separate market for payphones, for both access and calls, is appropriate. However, under the transitional provision of the

[37] TNS MRBI Residential Telecom Survey January 2004.

Framework Regulations any obligations relating to payphones remain until such time, as that review of payphones is complete.

> **Q. 7. Do you agree that calls from payphones should not be considered to be in the same relevant market as other land line calls? Please detail your response.**

Are local and national fixed calls in the same relevant market?

Background

3.85 The *Relevant Markets Recommendation* notes that end-users do not perceive local and national fixed publicly available telephone services to be substitutes for each other. It goes on to note, however, that a price increase for one service by a hypothetical monopolist could induce service providers in the other category to, subject to availability, purchase the necessary wholesale inputs to enter the market and supply the relevant service. This means that supply side substitutability could imply that local and national calls are in the same relevant market.

Demand

Functional substitutability

3.86 A strict assessment of demand-side functionality would indicate that for the end user, local and national fixed voice telephone services are not substitutable for each other. Indeed, a call to any particular number could be regarded as not being substitutable by a call to any other number. However, ComReg is of the view that, as calls are not sold on an individual basis, the narrowest feasible relevant product market definitions are for local or national publicly available telephone services, respectively. The question to be answered in considering demand side substitution is whether local and national calls belong in the same market or in separate markets.

Pricing

3.87 The core issue in considering the extent to which pricing could contribute to demand side substitution is whether an increase by a hypothetical monopolist in the price for one type, but not the other, of call would cause the customer to switch to another operator just for the call type where the price was increased or whether they might do so for both types of call. If the customer was likely to switch only for the call type where the price had been increased, we would be more likely, subject to supply-side considerations, to conclude that there were separate markets. However if, at least some of these customers switched for both call types, we would be more likely, subject to supply-side considerations, to conclude that there were a single relevant market.

3.88 ComReg notes that several operators currently have a single rate for domestic calls. For these operators, local and national calls already constitute a single market.

3.89 The recent Esat BT introduction a flat fee of €25.00 (Vat Incl) per month, for which end-users can make an unlimited number of calls to any fixed line in the Republic of Ireland (for calls of up to one hour in duration) and the other 'packaged' products on offer, have an impact on this issue. The EsatBT pricing structure combines flat rate domestic charging with virtually unmetered calling. With such an option, a switching customer would not differentiate between call types. This indicates that suppliers compete for the totality of calls not a single type and customers will respond to such offerings.

3.90 Aside from this new structure, ComReg notes that the purchase of calls is becoming increasingly complex and, accordingly difficult for customers to compare prices. Operators are seeking ways to attract users by offering customisation, and by bundling types of calls into specific packages. For the purposes of this review, ComReg notes that customers do not buy individual calls, and the trends in the market suggest a move towards buying a package which is weighted to reflect a particular call pattern and one that increasingly distinguishes less between local and national calls. Consumers purchasing patterns and the product bundles being offered by the operators, suggest that local and national are part of a cluster of products which are bought together. Therefore, there are no distinct differences in purchasing local or national calls.

Supply

3.91 To enter the calls market, there are two options available to an OAO. The first option requires the OAO to have its own infrastructure, at minimum switching capacity and an interconnection agreement with eircom. Alternatively, an OAO can enter a commercial agreement for resale, with an operator who can provide capacity on its infrastructure. There are three offerings available to the reseller; 'all calls', 'national calls only' and 'international calls only'. Once the relevant agreements are in place the operator can then provide calls to the customer through wholesale services or on its own infrastructure.

3.92 There are, therefore, no technical reasons why an operator providing national calls should not provide local calls or *vice versa*. Profit margins for different types of call will, however, vary depending on tactical pricing decisions made with due regard to the location of the customer base, the OAO's switch and its points of presence and/or interconnect and interconnection prices. These factors will also influence the extent to which the OAO targets particular opportunities. However, we note that a decision not to target a call type (for example local calls) is not the same as declining to handle any calls of that type. The operator could, for example, adopt an 'airline pricing' strategy aimed at filling capacity even if the margin per call is small in relative terms.

3.93 ComReg notes that eircom's standard rates for national calls have been decreasing much faster than its rates for local calls. This can be seen from the figure below.

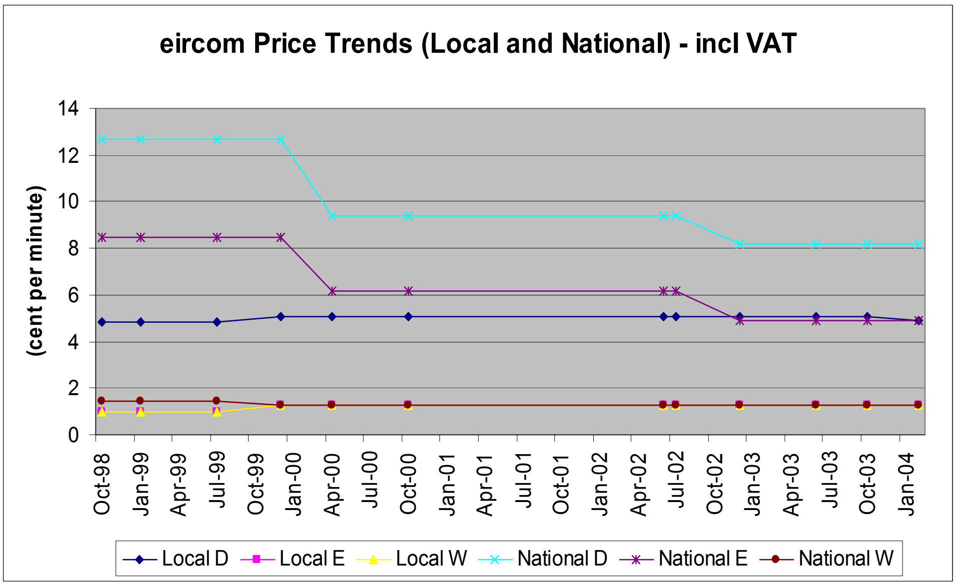

Figure 3.7: Price Changes for Local and National Tariffs[38]

3.94 The assessment of supply-side substitutability for local and national fixed publicly available telephone services considers whether an existing local service provider would respond to a 5 to 10% increase by a hypothetical monopolist national service supplier by entering the market, and *vice versa.*

3.95 It is ComReg's view that, should a hypothetical monopolist impose a price increase in local or national calls, it would be relatively straightforward for a supplier of one type of calls to switch production to the other.

Preliminary Conclusion

3.96 Customers are increasingly buying packages of types of call which best reflect individual call patterns. It is very unlikely that a customer would use one operator exclusively for local calls and a different operator exclusively for national calls.

3.97 The mechanics and economics of supply are such that ComReg sees a strong possibility of supply side substitution in response to a 5-10% price increase. While this applies to a provider of national calls entering the local market, and a provider of local calls entering the national market, ComReg recognises that the competitive conditions have been such that the market for national calls was considered a more attractive option, and a more likely route for market entry or expansion, but that this is changing.

3.98 However, the differences between the competitive dynamics for each call type are not sufficient to warrant definition as separate markets, and this argument is strengthened when trends are considered. ComReg's preliminary conclusion is therefore that local and national calls should be defined in the same market.

[38] D=daytime, E= evening and W= weekend. All charges are inclusive of VAT

Q. 8. Do you agree that local and national calls should be considered to be in the same relevant market? Please detail your response.

Are fixed to mobile calls in the same relevant market as fixed domestic calls?

Demand

3.99 ComReg has considered whether calls from a fixed line to a mobile are in the same market as all other calls from a fixed line. From a demand side analysis, whilst there may be some circumstances where a call from a fixed line to a mobile can be substituted by a call to another fixed line and vice versa, ComReg believes that it is unlikely that they are sufficiently strong substitutes for the price of calls to mobile to constrain the price of calls to another fixed line. Pricing data, for example, shows that fixed to mobile calls are significantly more expensive than fixed to fixed calls. At this level, there appears to be little potential demand side substitution.

Fixed to Mobile			
eircom		EsatBT	
eircom to O2	23.7c	**EsatBT to O2**	22.5c
eircom to Meteor/Hutchinson	29.19c	**EsatBT to Meteor**	27.5c
eircom to Vodafone	23.07c	**EsarBT to Vodafone**	22c
Fixed to Fixed			
eircom		EsatBT	
Local	4.9c	**Local**	3.8c
National	8.2c	**National**	3.8c

Table 3.4: eircom's domestic rates and rates to mobile[39]

3.100 In spite of the lower prices for fixed to fixed calls, there is no evidence that volumes for these calls increased at the expense of fixed to mobile calls. As shown in Figure 3.5 and Figure 3.6 above, both call types are demanded by the consumer and not at the expense of either category of calls.

3.101 In reviewing customers' purchasing ability and patterns, ComReg notes that operators offer customers the entire range of call types, including calls to mobile numbers. In other words, customers generally purchase a cluster of call types from their supplier and therefore there are no distinct differences in purchasing calls to mobile numbers rather than any other call type. ComReg is not aware of any offers of CPS for calls to mobile only and so usually customers will buy these calls from the same operator from whom they purchase other domestic calls. Terms and conditions of supply and payment terms for calls to mobile do not vary significantly from fixed to fixed calls, as they are generally supplied as part of a cluster of call types.

[39] Tariffs are standard daytime rates per minute. All tariffs are inclusive of VAT at 21%.

Supply

3.102 It must be noted that, in the absence of regulatory obligations, a hypothetical monopolist of domestic voice calls would automatically be a monopolist also of calls to mobile numbers. In this situation the incumbent operator would have the same infrastructure advantage for calls to mobile numbers as it has for domestic voice calls, in that its ubiquitous network gives control of call origination and the barriers to entry associated with sunk costs and economies of scale and scope would severely limit the possibility of entry and hence of supply side substitution.

3.103 In the presence of current regulatory obligations ComReg has to consider whether a hypothetical monopolist of voice calls would be able to profitably increase prices above competitive levels without providers of calls to mobile numbers being able to enter the market and undermine the price increase. If a provider of calls to mobile numbers is already using CPS to provide these calls, then it will have already invested in the infrastructure required to provide all calls CPS, and so would be well placed to enter the market for domestic voice calls. Barriers to substitution are likely to be similar in the case of a provider of voice calls entering the market for the provision of calls to mobile numbers in response to a price increase.

3.104 ComReg therefore considers that there is supply side substitution between calls to mobile numbers and domestic voice calls, and hence they are not in a separate market.

Preliminary conclusion

3.105 A demand side analysis would suggest that fixed to mobile calls are not substitutes for fixed to fixed calls and vice versa. However, consumers purchase the ability to make calls of any type as part of a cluster of services and do not purchase fixed to mobile calls exclusively. Furthermore, a supply side analysis shows that there is likely to be supply-side substitution. ComReg's preliminary conclusion is that fixed to mobile calls fall within the same relevant market as fixed to fixed calls.

Q. 9. Do you agree that fixed to mobile calls and fixed to fixed calls should be considered to form part of the same relevant market? Please detail your answer.

Are calls to internet in the same relevant market as fixed domestic calls?

Background

3.106 ComReg has considered the issue of whether calls to internet should be considered as a separate market from other call types. Calls to internet can be provided in a number of alternative ways, with varying contractual relations between the customer, the originating network and the ISP. Historically calls to internet were made using geographic numbers (where the ISP typically had a point of presence in each local number area) where the customer would pay the originating operator for a local call and pay a subscription to the ISP. Over time calls to internet have been migrated away from geographic numbers to non-geographic number codes which has allowed a differentiation in charging models.

3.107 Calls made using the 1891 number range are very similar to the calls using geographic numbers in that the customer pays the network operator a per minute fee (of less than a local call) and pays a subscription to the ISP. Calls made using the 1890 or 1892 number ranges are generally "pay as you go" services where the customer pays the originating operator a per-minute fee for the call (of around the cost of a local call) and pays nothing to the ISP (who shares the revenues with the network operator(s)). Calls made using the 1893 number range are "flat rate" services where the customer pays a monthly fee to the network operator/ISP and so long as they do not exceed a usage cap they do not incur any per minutes fees (and the network operator recovers the costs of carrying the call at the wholesale level). Currently the 1891 and 1892 number ranges are excluded from CPS.

3.108 All the variants of calls to internet using non-geographic number ranges discussed above are currently being actively sold, and ComReg believes that all are substitutes for each other.

Demand issues

3.109 It is important at this stage to note that this paper adopts a starting point which recognises that any one call cannot usually be a substitute for any other call, and so demand side substitution must be analysed using a higher-level approach.

3.110 Both calls to Internet and voice calls are obviously distinct from 'always-on' products such as DSL. However, most consumers would obviously not regard Internet calls and voice calls as substitutes for each other, particularly as only 46%[40] of those with a fixed line have access to the Internet at home[41].

[40] It should be noted that a variation of 3% is within the margin of error of this survey.
[41] Irish Communications Market - Quarterly Key Data June 2004 ComReg Document Number (04/71).

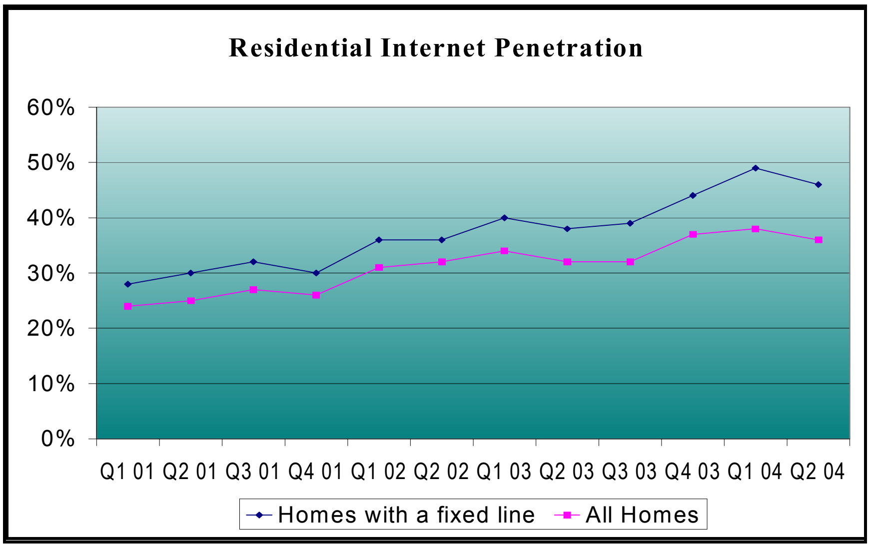

Figure 3.8 Residential Internet Penetration

3.111 Demand side analysis shows that there are other functional differences as internet calls may offer different functionality than voice calls, for example it may be possible to add an attachment to an email such as a picture. Another distinction between voice calls and calls to internet is that the user originating the call must always have a contractual relationship with the terminating party (the ISP). Termination arrangements also differ in that calls to Internet connect a computer to an Internet Service Provider (ISP) rather than carry voice traffic.

3.112 However, reviewing customers' purchasing ability and patterns, ComReg notes that operators offer customers the entire range of call types, including calls to Internet. In other words, customers generally purchase a cluster of call types from their supplier and therefore there are no distinct differences in purchasing calls to Internet rather than any other call type. Pricing, terms and conditions of supply and payment terms for calls to Internet do not vary substantially from voice calls, and indeed as mentioned previously are generally supplied as part of a cluster of call types. Moreover, the fact that a significant proportion of Internet traffic is excluded from CPS means that customers are obliged to buy these calls from the incumbent, and cannot make separate arrangements to purchase them from another supplier, as they can with international calls.

3.113 From a demand side analysis, ComReg therefore considers that calls to Internet and voice calls can be regarded as falling within the same relevant market.

Supply issues

3.114 It must be noted that, in the absence of regulatory obligations, a hypothetical monopolist of voice calls would automatically be a monopolist also of calls to internet. From a technical point of view, both voice calls and calls to Internet are originated in similar ways. In this situation the incumbent operator would have the same infrastructure advantage for calls to internet as it has for voice calls, in that its ubiquitous network gives control of call origination and the barriers to entry associated with sunk costs and economies of scale and scope would severely limit the possibility of entry and hence of supply side substitution.

3.115 In the presence of current regulatory obligations ComReg has to consider whether a hypothetical monopolist of voice calls would be able to make a small but significant non-transitory price increase, independent of other providers of calls to internet entering the market.

3.116 The use of geographic numbers for calls to internet has been superseded in Ireland by the use of non-geographic numbers. If a provider of calls to internet is using the 1893 number range they will have made significant network investment as the call traffic needs to be taken off at the primary exchange level. However, this infrastructure is dedicated to carrying Flat Rate Internet Access Call Origination traffic and would not assist entry into the voice calls market. Calls to internet using 1891 and 1892 can only be provided using a network operator's own originating infrastructure.

3.117 As previously discussed the high sunk costs and economies of scale available to eircom are such that it would not currently be feasible for a provider of calls to internet to enter the market for voice calls. However, with the introduction of WLR and ongoing work to extend the range of calls suitable for CPS this situation is likely to change within the timeframe of the review. If a provider of calls to internet is using the 1890 number range (which is not specifically an internet call number range) via all calls CPS, it will have already invested in the infrastructure required to provide all calls CPS, and so would be well placed to enter the market for voice calls.

3.118 There are no significant barriers to substitution in the case of a provider of voice calls entering the market for the provision of internet calls in response to a price increase. However, with the introduction of WLR and ongoing work to extend the range of calls suitable for CPS this situation is likely to change within the timeframe of the review.

3.119 ComReg therefore considers that within the timeframe of this review supply side substitution will increase between calls to Internet and voice calls, and hence they are not in a separate market.

Preliminary conclusion

3.120 The assessment of supply-side substitutability for calls to internet considers whether a supplier of calls to internet would respond to a 5 to 10% price increase by a hypothetical monopolist of fixed domestic calls by entering the market, and *vice versa.*

3.121 It is ComReg's view that, should a hypothetical monopolist impose a price increase on internet calls, it would be relatively straightforward for a supplier of fixed domestic calls to switch production.

Q. 10. Do you agree that calls to Internet and fixed domestic calls should be considered as sufficiently similar to form part of the same relevant market? Please detail your answer.

Are calls to other (i.e. non Internet) non-geographic numbers and fixed domestic calls in the same retail market?

Background

3.122 ComReg has already discussed the issue of whether calls to mobile phones and calls to internet (whether by way of geographic or non geographic numbers) should be considered as separate markets from other call types. ComReg has also considered whether calls to other non-geographic numbers should be considered as a separate market from other domestic call types.

3.123 Calls to other non-geographic numbers included a range of call types including freephone numbers, premium rate numbers and directory enquiry. They generally involve a commercial relationship between a service provider and the operator, whereby the service provider either makes a contribution to the cost of the call (e.g. freephone numbers) or receives a portion of the revenue from the call (e.g. premium rate numbers). These call types are usually included within CPS.

Demand issues

3.124 It is important at this stage to note that this paper adopts a starting point which recognises that any one call is not usually a substitute for any other call, and so demand side substitution must be analysed using a higher-level approach.

3.125 From a technical point of view, both geographic calls and calls to non-geographic numbers are originated in similar ways, and are switched services carried through the network. Customers may regard some non-geographic calls as substitutes for geographic calls, particularly where the non-geographic calls are low tariff calls aimed at encouraging customers to call the service provider – for example, customer care numbers or sales/marketing numbers. However, most consumers would not normally regard some other non-geographic calls, such ***as*** premium rate services, and domestic voice calls as substitutes for each other. Nevertheless, in reviewing customers' purchasing ability and patterns, ComReg notes that operators offer customers the entire range of call types, including calls to non-geographic numbers. In other words, customers generally purchase a cluster of call types from their supplier and therefore there are no distinct differences in purchasing calls to non-geographic numbers rather than any other call type. ComReg is not aware of any offers of CPS for non-geographic call types only and so usually customers will buy these calls from the same operator from whom they purchase other domestic calls.

3.126 ComReg therefore considers that calls to non-geographic numbers and domestic voice calls can be regarded as falling within the same relevant market.

Supply issues

3.127 It must be noted that, in the absence of regulatory obligations, a hypothetical monopolist of voice calls would automatically be a monopolist also of calls to non-geographic numbers. In this situation the incumbent operator would have the same infrastructure advantage for calls to non-geographic numbers as it has for voice calls, in that its ubiquitous network gives control of call origination and the barriers to entry associated with sunk costs and economies of scale and scope would severely limit the possibility of entry and hence of supply side substitution.

3.128 In the presence of current regulatory obligations ComReg has to consider whether a hypothetical monopolist of voice calls would be able to profitably increase prices above competitive levels without providers of calls to non-geographic numbers being able to enter the market and undermine the price increase. If a provider of calls to non-geographic numbers is already using CPS to provide these calls, then it will have already invested in the infrastructure required to provide all calls CPS, and so would be well placed to enter the market for voice calls. Barriers to substitution are likely to be similar in the case of a provider of voice calls entering the market for the provision of calls to non-geographic numbers in response to a price increase.

3.129 ComReg therefore considers that there is supply side substitution between calls to non-geographic numbers and domestic voice calls, and hence they are not in a separate market.

Q. 11. Do you agree that calls to other non-geographic numbers and voice calls are sufficiently similar so as to be included in the same relevant market? Please detail your answer.

Are fixed international calls in the same relevant market as fixed domestic calls?

Background

3.130 ComReg has to consider whether international calls should be defined within the same relevant product market as domestic calls. The European Commission's *Relevant Markets Recommendation* notes that users do not perceive local, national and international calls to be substitutes for each other. However, there is potential for market entry by existing suppliers of local and/ or national calls services in response to a price increase by a hypothetical monopolist, subject to the limitations resulting from the need to purchase additional wholesale elements for the supply of international calls (including international capacity to the country of destination and an agreement for call termination within that country).

3.131 This means that, while there is unlikely to be demand side substitution between domestic and international calls, there may be supply side factors which need to be taken into account when considering whether domestic and international calls are within the same market.

3.132 ComReg has previously concluded, in its Price Cap consultation[42] that international calls are in a different market to domestic calls. Traditionally, international call prices have been higher than domestic calls and competitive conditions were different. ComReg considers whether this differentiation still holds.

3.133 ComReg has also considered whether the market for international calls is itself a single market, or whether it is appropriate to define narrower markets within it.

Demand

Functional substitutability

3.134 From the strictest demand side perspective, calls to a particular international destination cannot be substituted by calls to another destination, whether domestic or international. This is reflected in the European Commission's *Relevant Markets Recommendation.* At this level, there is no potential demand-side substitution and would suggest that domestic calls and international calls are in a separate market.

3.135 When examining international calls on a route by route basis, however, as per the discussion on national/local split, calls are neither sold nor bought on individual routes. Given international transit arrangements, it is largely unreasonable to assume that operators would offer services to only one country and we are unaware that any do so[43]. It seems unlikely, therefore, that individual routes constitute separate markets, although we do consider this possibility and, indeed, the possibility that groups of countries fall within distinct markets.

Price

3.136 Traditionally, prices for international calls have been relatively higher than prices for domestic calls, suggesting again that international calls should be in a separate market to domestic calls.

3.137 For some operators, international calls can be a multiple of the price of domestic calls. This noticeable difference suggests that domestic and international markets may be separate. However, it should be noted that prices have fallen over time. As detailed in the Market Analysis section, competing operators have achieved a far greater market share in international calls than in domestic calls (between three and four times as great).

3.138 Another argument to suggest that international calls are different to domestic calls is that a number of operators price international calls by grouping destinations in charging bands. There is some variation amongst operators in how the countries are grouped, and in the relative variation between charging bands.

3.139 There is consistency amongst operators in adopting lower prices on the busiest routes. Calls to the UK account for over half of all international traffic, and this is the cheapest tariff for all operators. Ireland to USA is the next busiest route, and this is the second lowest charging band for all operators. Next come calls to France and Germany, and both countries fall in the next charging band for all operators.

[42] ComReg Document number 02/57

[43] Even most calling card operators do not restrict service to the home country.

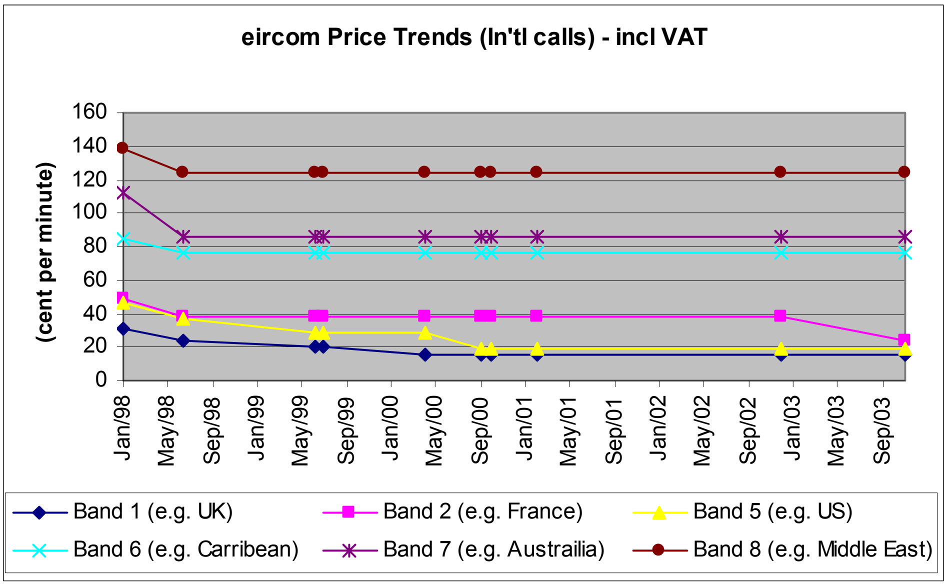

Figure 3.10 International Tariffs and Trends

3.140 Prices are much higher to destinations which have less traffic on the route. For example, in eircom's charging schedule, a call to China or Saudi Arabia would cost up to seven times more than a call to the USA.

3.141 As we would expect, there is therefore a strong correlation between low prices and routes with most traffic. There are several factors which could contribute to this. The most significant is that the busiest routes are the most commercially attractive, and so the most competitive, and that this pushes prices down. Secondly, it may be that the destinations with most traffic are also liberalised, and that it is easier for service providers to enter into arrangements for termination. Thirdly, operators may be more likely to be able to negotiate better settlement rates to destinations where they are sending more traffic. Fourthly, higher traffic volumes allows common costs to be allocated more broadly.

3.142 ComReg notes that eircom's standard prices for some international calls have come down over the last two years. The level of reduction varies between 20% and 40% depending on time of day and destination.

3.143 The differential price bands could suggest a further break down of the overall international market from a demand perspective.

Supply

3.144 There are two pertinent questions to consider. Are international calls separate to domestic calls; and is there more than one market for international calls?

3.145 Considering the first, we note that a decision to offer international service generally relates to having access to international facilities or transit and termination services at a favourable cost as this provides the key competitive-edge. Often this occurs because the operator has a parent or partner company operating in another jurisdiction. A purely national organisation may not have this and thus may encounter barriers to entry. Furthermore, whilst a purely international service provider could in theory purchase the wholesale elements needed to provide domestic service many of them have a strictly limited physical presence in Ireland that would result in barriers to entry. On the other hand, from a service point of view, CPS providers can differentiate their service offering to provide an international calls only service (international calls can also be provided in combination with a national calls package). Indeed, it should be noted that there are CPS providers which concentrate almost exclusively on international calls. Furthermore, there are providers of international calling cards which offer calls to international destinations only. This indicates that the competitive conditions between domestic calls and international calls are different; since the introduction of CPS, new entrants have achieved a considerably greater market share (of the order of three times as large) in international calls as in domestic calls (see market analysis section).

3.146 The distinction between international and domestic calls was examined during the review of the Price Cap[44]. ComReg proposes that this distinction is still appropriate and that international calls are in a separate market to domestic calls.

3.147 Overall we conclude that there are supply-side issues that could limit a domestic operator from entering the international market and vice versa so we conclude that international is a separate market.

3.148 In relation to whether there are one or more international services markets, we note that any existing national or international service provider will already be acquiring the Irish wholesale domestic services that they require to provide international call services. To supply call services terminating in a country to which a service provider does not currently send international traffic, it will need to enter into the necessary agreements for international capacity to, and termination in, the relevant jurisdiction. However this can be done through transit agreement and in this regard, ComReg notes that the majority of international call services are transited through the United Kingdom. As such, an assessment of the availability of international transit services from Ireland must take into account the additional sources of supply presented by entities providing international transit services from the United Kingdom. Most UK operators will be able to offer a package of transit services and therefore it will be easy for an Irish operator to extend its range. Thus, the market should not be further divided.

Preliminary conclusion

3.149 Customers appear to view international services differently from domestic services not least because of the relatively higher cost and the lack of functional substitutability. From a supply side, competitive conditions are different to those for the provision of domestic calls, which further substantiates the conclusion that international calls are in a separate market. There are CPS operators which concentrate almost exclusively on the international market and there are international calling card providers, operating in the international market only. Competition has made far greater inroads in international calls than in domestic calls, in a relatively

[44] ComReg Document number 02/57

short time, and it appears that the conditions of competition are therefore different. We therefore conclude that the domestic and international markets are separate.

3.150 However, while different international routes are promoted differently and have different competitive structure, domestic and international interconnection mean that range of routes offered can be extended at relative ease and not significant cost. There are no perceived barriers to entry to switching services from one route to another. We therefore do not propose to sub-divide the international market further.

Q. 12. Do you agree that international calls should be considered to be in a separate relevant market to local and national calls? Please detail your response.

Are fixed SMS calls in the same relevant market as fixed domestic calls?

3.151 ComReg has considered whether fixed SMS falls within the fixed calls market. Fixed SMS has recently been introduced and traffic volumes are relatively small at this stage of market development. Given, the nascent level of development of the service, ComReg does not believe that it is appropriate to regulate this services at the retail level. However ComReg believes that in order to promote the development of competition, it may be appropriate to propose regulatory obligations at the wholesale level. These will be addressed through ComReg's *Retail Fixed Narrowband Access* and *Interconnection* Market reviews.

Q. 13. Do you agree with ComReg's analysis of fixed SMS calls? Please detail your response.

Are Voice over Internet Protocol calls in the same relevant market as all fixed calls?

3.152 ComReg has considered whether calls made using Voice over Internet Protocol (VoIP) are in the same market as other retail calls. In responses to ComReg's consultation on VoIP (Document 04/72 Numbering for VoIP services) respondents suggested a variety of uses for VoIP. Some of these would lead to VoIP being considered in the retail calls relevant market; for example a call from Dublin to New York originated and terminated on an IP network may be a direct demand side substitute for a standard international call between the same two destinations. In other words it may be that VoIP calls on managed IP networks are in the same market as all fixed calls; this is also determined by their relative prices. However there are instances where it is less clear whether VoIP calls are substitutes, for example where the call uses an address that does not impinge on the PSTN (i.e. a non-E.164 address), such as those currently used by Skype and Free World Dialup.

It should be noted, however, that where VoIP is over PSTN, then it forms part of the market for domestic calls. ComReg therefore considers that the particular application used by VoIP determines whether or not it is to be included in the domestic calls market.

3.153 Given the current negligible take-up of VoIP in Ireland and the fact that this is unlikely to change significantly during the timeframe of this review, ComReg does not consider it to merit further analysis at this point in time. However, developments will be monitored by ComReg during the timeframe of this review.

Q. 14. Please give your views as to whether calls over VoIP should form part of the market for all fixed calls. Please detail your response.

The relevant geographic market

3.154 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.[45]

3.155 According to *the Guidelines,* the definition of the geographical scope of the relevant market is generally determined with reference to the area covered by a network, and to the existence of legal and other regulatory instruments.

3.156 On the basis of this definition, ComReg takes the view that the relevant geographic market for the markets considered in this review is the state of Ireland.

3.157 ComReg believes that the conditions of supply of calls services are homogeneous across Ireland. In particular, while the calls services provided by some entities other than eircom do not cover the whole of Ireland, they all compete with eircom's calls services. eircom's calls services are provided on the same terms and conditions, including price, across Ireland. As a result, the conditions of supply are effectively homogeneous.

Q. 15. Do you agree that the relevant geographic market for the retail fixed calls markets is Ireland? Please detail your response.

Summary of preliminary conclusions

- ComReg proposes that, currently, the market for fixed access and the market for fixed calls are separate.

[45] See the Commission Notice on Market Definition, SMP Guidelines, [ComReg's Market Data Information Notice] and United Brands v. Commission, [1978] ECR 207, for additional guidance.

- ComReg concludes that fixed originating calls and mobile originating calls do not currently belong in the same relevant market. The evidence in the Irish market suggests that at present fixed and mobile are complementary products. However, ComReg notes that a small minority of users have chosen to use mobile exclusively. ComReg believes that this trend is likely to increase and intends to monitor such developments closely.
- ComReg's analysis of the business and residential markets for fixed calls indicates that there is a high level of supply side substitution, and that customer categorisation is often fluid. This suggests that, at present, both business and residential are in the market for fixed retail calls in Ireland.
- Operator assistance calls are considered to be an ancillary service offered to assist the completion of calls and hence form part of the market.
- ComReg's preliminary conclusion, based on demand side substitution, is that calls to/from payphones are in a separate relevant market. A separate market review will be completed.
- Local and national calls are not yet perceived to be substitutes by a sufficient margin of users. However, due to the potential for supply-side substitution, local and national calls should be defined in the same market.
- ComReg's preliminary view is that fixed to mobile calls are in the same relevant product as domestic calls. Although, there is limited demand side substitution for fixed to mobile calls and fixed to fixed calls, services are sold as a cluster of services. Moreover, there is substitution on the supply side and thus ComReg concludes that they are in the relevant product market.
- ComReg's view is that there is very limited demand side substitution for non-geographic calls in particular, calls to Internet, premium rate numbers and freephone numbers. However, as services are sold as a cluster of services and as there is substitution on the supply side ComReg concludes that they are in the same relevant product market.
- Demand-side factors suggest that there is no substitution between national and international fixed calls, and that calls to one destination cannot be substituted by calls to another. However, supply-side factors indicate that a broader market definition is appropriate. The conditions of supply suggest that international calls are not in the same market as domestic calls since, while suppliers in one market could enter the other market, the competitive dynamics are different.
- ComReg's preliminary conclusion is that it is not appropriate to regulate this fixed SMS services at the retail level, given the nascent development of the market. ComReg believes that it is addressed in the review of the *Retail Fixed Narrowband Access* and *Interconnection* markets.
- ComReg's preliminary view given the current negligible deployment of take-up of VoIP in Ireland, ComReg does not consider it to merit further analysis at this time.
- ComReg proposes that the geographic market is Ireland
- ComReg therefore proposes to define two markets in retail calls from a fixed location :
    - Retail domestic calls from a fixed location
    - Retail international calls from a fixed location

Q. 16. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.

4 Relevant Market Analysis

Background

4.1 ComReg has identified two markets in publicly available telephone services provided at a fixed location. These are publicly available domestic telephone services and publicly available international telephone services. ComReg is now required to conduct an analysis of whether these markets are effectively competitive by reference to whether any given undertaking or undertakings is/are deemed to hold SMP in these markets. 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".

4.2 Accordingly, an undertaking may be deemed to have SMP either individually or jointly with other undertakings in a relevant market. In addition, where an undertaking has SMP on a relevant market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.[46]

4.3 ComReg is obliged under the *Framework Regulations* to assess SMP in accordance with European Community law and to take the "utmost account" of the SMP Guidelines.[47]

Market structure

4.4 Calls can be supplied in two ways :

- by an access provider, who uses their own network to carry calls.

  In Ireland, eircom is the largest operator in this part of the market. The cable operators provide calls over owned networks, in areas where the cable networks are able to offer telephony services. Some OAOs offer direct connection and calls to particular types of customer, mainly large SMEs and corporates.

- by a Carrier Access, Carrier Selection or Carrier Pre Selection Operator who sells calls to the customer, or to a reseller. The customer may choose to buy international, national (including mobile) and international, or all calls from the

[46] Framework Regulations, Regulation 25(3).
[47] Framework Regulation 25(2).

alternative operator, or to buy on a per call basis. According to ComReg's market information, the majority of customers who opt to take their calls from an alternative calls provider choose to buy an all calls package through CPS. These calls are initially routed by the access provider and handed over to the alternative operator at the agreed point of interconnection, for routing to the point of termination.

4.5 Operators who are interconnected with eircom and who provide a CPS service require a routing code to identify them. Since CPS was launched in 2000, there have been 24 routing codes allocated to alternative operators to provide a CPS service. The larger CPS operators are EsatBT, MCI, SMART and Energis, though some cable operators also offer CPS services (as well as direct access). In addition, these operators support a host of service providers (resellers) offering call services through CA, CS and CPS. All services providers offering a calls package, including resellers, are authorised through the notification process[48] to ComReg and are required to comply with the conditions of a general authorisation[49]. While resellers do not have a direct interconnect relationship with eircom, they manage their customer's calls service through their host operator.

4.6 Further, resellers can also be seen to include providers of calling cards, which are a prepaid means of making an international call, and providers in service centres such as internet cafes. As this segment is generally not regulated, it is very difficult to estimate the size of this part of the market.

Market shares

4.7 The SMP guidelines state that the existence of a dominant position cannot be established solely on the basis of large market shares and that NRAs should undertake a thorough and overall analysis of economic characteristics of the relevant market before coming to the preliminary conclusion as to the existence of significant market power[50].

Domestic calls

4.8 Eircom's market share of the domestic calls market is 87% based on revenue. All other operators have market shares of under 10%.[51]

[48] Regulation 4(3) and Regulation 4(1) of the Authorisation Regulations: European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 – S.I. No. 306 of 2003.
[49] Regulation 8(3) of the Authorisations Regulations: European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 – S.I. No. 306 of 2003.
[50] The Guidelines, Paragraph 78.

[51] Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

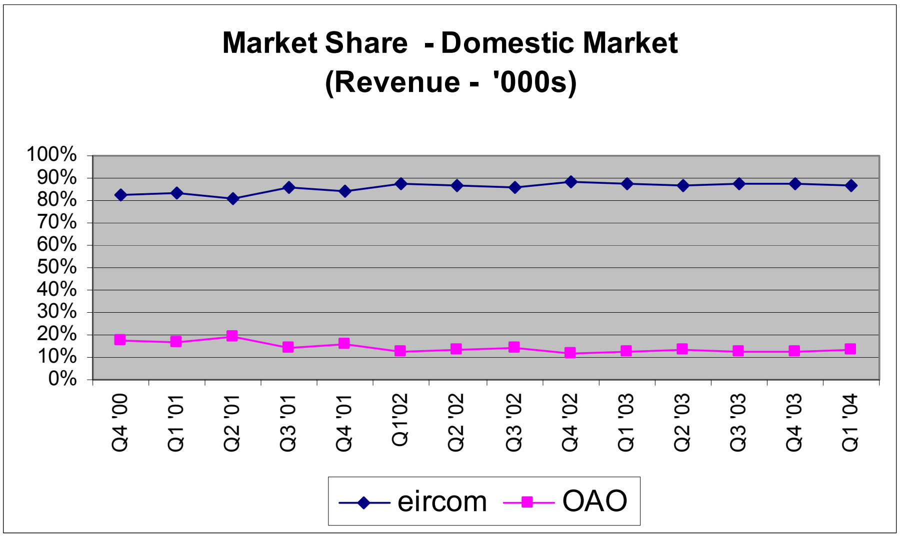

Figure 4.1: eircom domestic market share (Revenue)

4.9 ComReg notes that eircom's market share has remained largely static over the last two years, following a sharp decline on the introduction of CPS. In the same period, Esat BT's market share has also slightly declined. However, during 2003 the number of CPS subscribers rose to 22% of all customers. Although, CPS subscribers grew during 2003, churn rate were high and regulatory intervention was necessary. Growth was concentrated at the end of the year, and over the last two quarters, growth in CPS has been 11-12% per quarter (these tend to be residential customers)[52]. This suggests that over the last year, eircom's market share by revenue has stabilised following the introduction of CPS, and although a number of entrants have entered the market, none have yet established a significant market presence. These recent trends indicate that the rate of take-up of CPS may be increasing and is expected to increase further with the roll-out of WLR.

International calls

4.10 Eircom's share of the international calls market is 68% based on revenue. All other operators have market shares of under 15%, based on revenue[53].

[52] Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).
[53] Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

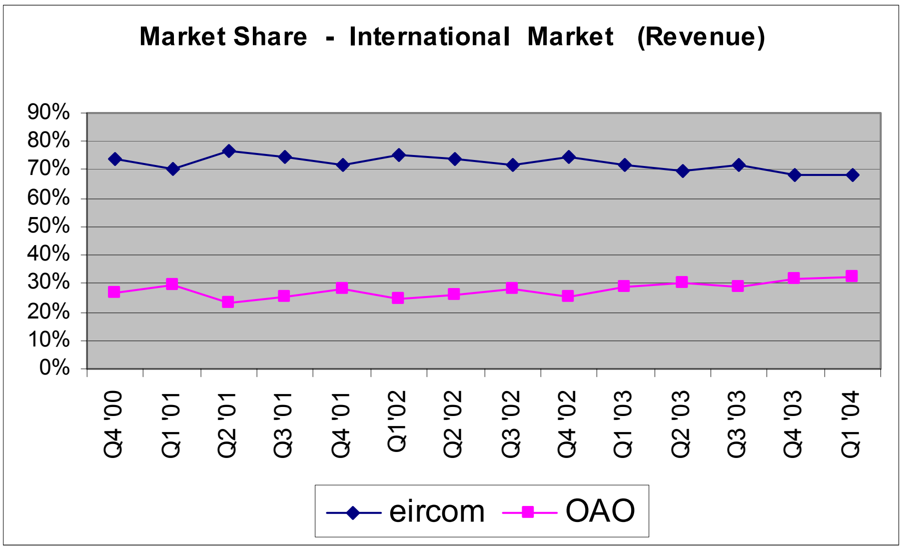

Figure 4.2: eircom domestic market share (Revenue)

4.11 ComReg notes that eircom's market share declined sharply on the introduction of CPS in 2000. During 2003, the decline continued, but was less marked. eircom's market share declined from 75% to 68% in revenue between the end of 2002, and the end of 2003.

4.12 In the same period, the two largest OAOs (EsatBT and MCI) showed a small increase in the international calls market.

4.13 The analysis of market shares alone suggests that eircom's market share is stabilising following the introduction of CPS.

Barriers to entry and potential competition

4.14 Considering both the domestic calls market and the international calls market, ComReg examines the threat of market entry, which is one of the main potential competitive constraints on incumbent firms. The threat of market entry may prevent a dominant incumbent from raising prices above competitive levels. However, if there are barriers to entry, then the threat of entry will be reduced.

Economies of scale and of scope

4.15 Sunk costs are costs which are required to enter a market, but which cannot be recovered on exit. A new entrant must consider whether there is potential to cover sunk costs as well as costs of service provision, whereas an incumbent has already covered sunk costs. Sunk costs inevitably create a market power asymmetry between existing suppliers and potential new entrants. This asymmetry is likely to deter market entry.

4.16 In the retail calls markets, the existence of eircom's access network means that, without regulatory intervention, eircom would typically incur lower network costs than competing network operators, and would be able to provide an end-to-end call at a lower cost than other operators. For an operator seeking to use owned facilities to offer access services, the effect of economies of scale is that such an operator is likely to have costs which are higher than those of the incumbent, but would have to price below the incumbent in order to gain market share. This makes it even more difficult to recover sunk costs.

4.17 Eircom also has a cost advantage from economies of scope arising due to the existence of common costs in the supply of different services. Economies of scope come into play the greater the range of services sharing costs, so that an operator which is present across a wider range of communications services is better able to recover common costs from any one service.

4.18 ComReg notes that the effects of economies of scale and of scope, while still very significant, are somewhat less in the calls markets than in the access market. This is because wholesale inputs have been in place for longer, which means that an OAO could make use of the incumbent's network, and did not have to incur the investment costs associated with new infrastructure. However ComReg notes that OAOs have only gained market share in calls market as a result of the introduction of wholesale regulatory measures enabling them to obtain the relevant wholesale inputs at cost-oriented charges.

Single provision of calls and access

4.19 ComReg considers that eircom has had advantages in the way in which it can offer access and calls, and that this may constitute a barrier to entry. Given the recent introduction of WLR, an calls provider is now able to offer access services, so that a customer can choose to purchase a single service from a single supplier, and will receive one bill for access and calls. Until very recently, a customer who had chosen CPS for calls received two bills, a calls bill from the CPSO, and an access bill from the access provider.

4.20 As an indication of the importance of this for customers, when asked in a recent survey if they would change supplier if they could have a single bill for calls and access, 51% of respondents said yes, compared with 38% who would not[54].

4.21 One of the ways in which ComReg has addressed this issue is by introducing Wholesale Line Rental, through which a calls provider will be able to offer a single calls and access package to customers. ComReg considers that WLR offers not only the possibility of single billing, but also offers the provider the opportunity to devise varied and flexible tariff structures and access/calls bundles.'

Vertical integration

4.22 A vertically integrated provider of electronic communications services may be dominant at the wholesale level as well as the retail level. The issue of wholesale dominance will be considered in the Review of the Interconnection market. For the purposes of this review, potential dominance in the market for wholesale inputs means that market power may be leveraged into the retail market, and so adversely affect competition.

[54] TNS MRBI, Residential Telecommunications Survey, January 2004.

4.23 This means that competition problems related to vertical leverage identified at the retail level may need to be addressed partially by wholesale remedies, because a vertically integrated provider may be able to use wholesale dominance to control the price of inputs needed to compete in the retail market. In the market for retail fixed calls, a barrier to entry could be constituted if a market entrant could not obtain suitable wholesale inputs at cost oriented prices.

Barriers to switching

4.24 Low barriers to switching would indicate that, even when market share suggests otherwise, market power is reduced.

4.25 In a recent survey in the residential market, 40% of all respondents were aware of CPS. This is an increase over the last year from 33% of respondents[55]. Almost two thirds of respondents had been approached by a telecommunications supplier other than eircom. For those customers who had switched from eircom, three quarters made the decision based on price. For those who had not considered switching supplier, around one third were comfortable with current service, and the other two thirds were largely subject to customer inertia.[56]

4.26 ComReg's market analysis suggests that customer awareness of alternative calls providers is increasing, but has not yet reached half of the potential market. As price is a significant factor in customers deciding to switch, it would seem likely that a new entrant would have to offer substantial discounts or a highly differentiated service to gain market share. This then has implications for the extent to which expected revenues could cover entry and possible exit costs.

4.27 ComReg notes also that the facility to retain a telephone number when switching access provider is important in reducing potential barriers to switching. Number portability (NP) is essential to maximise the benefits of a competitive telecommunications market. Operator portability provides significant benefits:

- for the porting user it eliminates the cost of informing others of a number change, reprinting stationery and revising advertising etc.
- it eliminates the need for callers to consult directory enquiries and/or change entries in their address books or computer systems
- it increases competition, with significant benefits for all users, by lowering the cost to users of switching operator or service provider.

4.28 ComReg's preliminary conclusion is that many of the elements which are necessary to allow customers to switch call provider are now in place. This includes the existence of alternative call suppliers, and awareness of this is growing. However, awareness is not yet at a level which would suggest a significant reduction in switching as a barrier to entry.

[55] TNS MRBI Residential Telecommunications Survey, March 2004

[56] TNS MRBI Residential Telecommunications Survey, March 2004.

Countervailing buyer power

4.29 If an operator engages in practices that are potentially exploitative, customers might be able to exert countervailing buyer power against such practices. Where buyers are large and powerful, they can effectively respond to any attempt to increase prices by sellers.

4.30 However, countervailing buyer power can only exist where large customers have the ability (within a reasonable timeframe) to resort to credible alternatives (e.g. not to purchase or to switch supplier) in response to a price increase or threatened price increase.

4.31 ComReg has seen no evidence that supports the existence of countervailing bargaining power in the markets for domestic or international calls.

Preliminary conclusions

<u>Domestic calls</u>

4.32 eircom should be designated as having SMP in the relevant retail market for domestic telephone calls. ComReg does not think it is likely that any current service provider can currently impose a competitive constraint on eircom, and does not see this situation as changing significantly within the lifetime of this review

4.33 The market for retail fixed domestic calls and its subsequent market analysis shows evidence of a market failure, in that market forces are unable to constrain the pricing of domestic calls services.

<u>International calls</u>

4.34 eircom should be designated as having SMP in the relevant retail market for international telephone calls. This is primarily because of the persistence of eircom's high market share in the international calls market. However, ComReg recognises that competitive conditions in the market are changing, and that CPS is having an impact. ComReg notes that competition in the market for international calls is more open than in the market for domestic calls, but considers that even in international calls, competition is not yet well established.

4.35 The market for retail fixed international calls and its subsequent market analysis shows evidence of a market failure, in that market forces are unable to constrain the pricing of international calls services.

Q. 17. Do you agree with the above preliminary conclusions regarding market analysis of the domestic calls market? Please provide a reasoned response.

Q. 18. Do you agree with the above preliminary conclusions regarding market analysis of the international calls market? Please provide a reasoned response.

5 Designation Of Undertakings With Significant Market Power

5.1 This market review has defined two markets in Ireland which are concerned with retail calls on the public telephone network. For each market, ComReg has analysed the market characteristics, and has concluded that eircom has SMP in both markets.

5.2 Having regard to the sections above, particularly sections 3 and 4 ComReg is of the view that, in accordance with the *Framework Regulations:*

- Eircom should be designated as having SMP in the market for retail domestic calls from a fixed location.
- Eircom should be designated as having SMP in the market for retail international calls from a fixed location.

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 Proposed Market Remedies

Introduction

6.1 This market review has defined two markets in Ireland that are concerned with telephone calls on the public telephone network. For each market, ComReg has analysed the market characteristics, and has concluded that eircom has SMP in both markets.

6.2 ComReg is obliged, under Regulation 9(1) of the *Access Regulations*, 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*, to impose on such operator such of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.

6.3 Where ComReg concludes that obligations imposed under the *Access Regulations* or Regulation 16[57] 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*, Regulation 14 of the *Universal Service Regulations* obliges ComReg to impose such obligations as it considers appropriate to achieve those objectives, on undertakings having SMP.

6.4 The purpose of this section is therefore to discuss actual and potential competition problems in the defined markets, and to propose remedies to address these problems.

Competition Problems in the retail calls markets

6.5 ComReg believes that potential competition problems arising due to SMP in the retail calls markets fall into three broad categories :

- single market dominance;
- vertical leveraging;
- horizontal leveraging.

6.6 ComReg notes that its experience in introducing wholesale calls products and in particular the CPS product has provided many examples of the types of competition problems experienced in the calls markets in Ireland. These problems are discussed in terms of each of the following categories:-

<u>Single market dominance</u>

6.7 Single market dominance may give rise to the following types of problem :

[57] Regulation 16 of the USO refers to mandating CA/CS and CPS, details of which are discussed below.

- Entry deterrence, where economies of scale and/or of scope act as a barrier to entry.
- Exploitative behaviour, where for example market power enables an SMP undertaking to sustain prices which are higher than would be expected in a competitive market.
- Productive inefficiencies, where there is a lack of investment, and/or excessive costs, or where quality is compromised.

6.8 Entry deterrence - ComReg notes that eircom's market share of over 98% in the total access market, and 87%[58] in the domestic calls and 68% in international calls markets, represents control of a ubiquitous network of exchange lines which could not easily be replicated. Economies of scale are evident not only in the sunk costs required to construct an access network, but are achieved also in exchange line support services. This means that an SMP operator can achieve economies of scale both in the physical network and in the management of the network, and that these economies may act as a barrier to entry.

6.9 Exploitative Behaviour – The Telecommunications (Miscellenous Provisions) Act, 1996 enables ComReg to protect consumers against excessive prising by capping the prices of a basket of telecommunications services. At present the price cap covers PSTN access, ISDN access, fixed and mobile calls, local calls, national calls, operator assisted calls and payphones. The price cap is set at CPI-0%.

6.10 Productive inefficiencies – Regulations set out in Regulation 15 and Schedule 3 of the Universal Service Regulations and Regulations 13 (Access), 11 (Non Discrimination), 10 (Transparency), 12 (Accounting Separation) and 14 (Price Control and Cost Accounting) of the Access Regulations allow ComReg to intervene on these issues.

Vertical leveraging

6.11 Vertical leveraging arises where an SMP operator has dominance at a wholesale level and can potentially transfer this power into the retail markets. Vertical leverage:

"may arise when a firm controls an input that is essential for a potentially competitive downstream industry. The upstream bottleneck owner can then alter downstream competition by denying access or limiting access to its input."[59]

6.12 Because the SMP operator has control of the wholesale inputs necessary for an entrant to offer calls services, it may be in a position to control the use of these inputs and so affect the competitive conditions in the downstream retail markets. This is of particular importance where an alternative service provider's only feasible route to market is via the eircom access network.

[58] Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).
[59] Patrick Rey and Jean Tirole (2003, p.8) "A Primer on Foreclosure", forthcoming Handbook of Industrial Organization, volume III, editors Mark Armstrong and Bob Porter.

6.13 ComReg considers that there is evidence of and potential for vertical leveraging in the retail calls markets. This can happen in the following ways :

- Denial of access/Refusal to Deal
- Leveraging by non-price means
- Leveraging by means of pricing

Denial of access/Refusal to Deal

6.14 An operator which has SMP in the wholesale markets may attempt to leverage its market power by denying access to or refusing to deal with undertakings operating downstream and competing with the SMP operator's retail divisions or affiliates. The SMP operator may also attempt to leverage its market power by being unprepared to supply a good or a service on reasonable terms. At the wholesale level, SMP in the interconnection markets is likely to continue and thus require regulatory intervention[60]. Obligations which are appropriate for addressing competition problems at the wholesale level, would not however address all competition problems which may emerge in the retail market, thus requiring regulatory intervention.

6.15 ComReg notes that access refers not just to the physical network but also to the associated facilities, OSS and information.

6.16 The SMP operator may also attempt to leverage its market power by being prepared to supply a good or a service only on unreasonable terms that could be construed as refusal to deal.

6.17 Evidence available to ComReg indicates that problems of refusal to deal leading to constructive denial of access have occurred in the markets under review in the past. ComReg points to its many interventions during 2000 – 2003 mandating and shaping the CPS products terms and conditions and processes[61,62,63,64,65].

6.18 In cases where denial of access gives rise to competition concerns in downstream retail markets, Regulation 13 (Access) of the *Access Regulations* enables ComReg to impose an obligation of access to, and use of, specific network facilities on an undertaking designated with SMP in the relevant markets. Regulation 11 (non-discrimination) can also be used to mandate access in certain circumstances.

Leveraging by non-price means

[60] ComReg is currently reviewing the interconnection markets and a consultation will be published shortly.

[61] Introducing Carrier Pre-Selection in Ireland – Decision Notice D2/99 ODTR99/29.

[62] Introducing Carrier Pre-Selection in Ireland: Switching and Routing Requirements for Local Calls – D13/99 ODTR99/62.

[63] The Role of Resellers in Carrier Pre-Selection & the block transfer of customer accounts – Decision Notice D17/01 ODTR01/86.

[64] CPS in Ireland 2002 – D13/02 02/64 .

[65] CPS in Ireland 2003 – Decision Notice D20/03 – ComReg 03/115.

6.19 An SMP operator could engage in one or more of the following non-price leveraging strategies:

Discriminatory use or withholding of information

6.20 This occurs where the SMP operator provides its retail arm with information which it does not provide to other downstream undertakings, or where it refuses to supply information which is necessary to take up the wholesale product and/or to sell the retail service. As an example, this would occur if eircom refused to provide its retail competitors information about changes in its network topology.

6.21 ComReg has had to intervene on occasions to ensure that OAOs were given clear sight of CPS processes and procedures via the industry agreed product documents.

6.22 In the case of CPS, the development of an SLA regime stemmed from the fact that OAOs were not in a position to manage customer expectations regarding delivery or service in the same way as eircom Retail could through its dealings with eircom Wholesale Operations.

6.23 Regulations 13 (Access), 10 (Transparency) and 11 (Non-Discrimination) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging.

Delaying tactics[66]

6.24 This is where an SMP undertaking supplies an upstream input to downstream competitors at a later date compared to the retail affiliate of the SMP undertaking. Such behaviour could give an SMP undertaking a first-mover advantage in the potentially competitive downstream retail market and can amount to constructive refusal to deal.

6.25 In the case of CPS, the SLA regime was introduced at the request of industry to prevent delays in delivery times for OAO orders.

6.26 Regulations 10 (Transparency) and 11 (Non-Discrimination) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging. Regulation 13 (Access) also allows ComReg to set conditions under which access must be provided.

Bundling/Tying

6.27 Bundling/Tying – bundling is generally used to describe the practice of conditioning the sale of one product on the sale of another product. We consider tying as a special case of bundling, where one or more of the products in the bundle is only available as part of the bundle.

6.28 ComReg has had to ensure that the CPS product was designed in such a manner that OAOs could potentially use as much of their own infrastructure as possible and purchase only access to required elements from eircom in as efficient a manner as possible.

66 Also known as a 'provisioning squeeze'.

6.29 Regulations 13 (Access), 11 (Non- Discrimination) and 10 (Transparency) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging.

Undue requirements

6.30 This typically occurs as contract terms which require a particular behaviour of a downstream competitor but are unnecessary and have the effect of raising rivals' costs or restricting rivals' sales. Examples may include security payments, bank guarantees, and information about the competitors' customers beyond the extent which might be economically or technically justified.

6.31 In respect of CPS, ComReg has been required to chair and make decisions in industry to agree terms and conditions so as to ensure they are not overly onerous. OAOs have requested that ComReg intervene on specific terms and conditions and have rejected eircom's proposals on numerous occasions.

6.32 Regulations 13 (Access), 10 (Transparency) and 11 (Non-Discrimination) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging.

Quality discrimination

6.33 The effect is to raise rivals' costs and/or restrict its rivals' sales. This may arise for example where an SMP undertaking gives priority to its own traffic at network bottlenecks.

6.34 ComReg has been forced to intervene to require eircom to deliver a resilient CPS product to give OAOs the service assurance available to eircom's downstream arms. Also in the case of CPS, ComReg has had to intervene to ensure the additional requirements such as a dedicated fault handling facility for OAOs.

6.35 Regulations 13 (Access) 11 (Non- Discrimination) and 10 (Transparency) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging.

Strategic design of product characteristics

6.36 This occurs where an SMP undertaking may, for example, apply standards that are easier for its own retail affiliate to meet than for its downstream competitors. This may also occur where the SMP operator does not allow the OAO to specify the requirements most suitable for them and instead confines the product to that offered to a retail arm or designed by the SMP operator.

6.37 ComReg has had to intervene on numerous occasions to ensure OAO requirements are taken into account when designing products and processes for CPS. As an example, ComReg intervened to mandate specific amendments to the product description where OAOs have expressed dissatisfaction with existing processes e.g. fault handling procedures. ComReg has also had to intervene to mandate availability of particular information.

6.38 Regulations 13(Access) 10 (Transparency) and 11 (Non-Discrimination) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging.

Undue use of information about competitors

6.39 This may occur where an SMP undertaking on the wholesale market uses information about rival's wholesale demands to influence its marketing strategies in its own retail affiliate. This could have the effect of raising rivals' costs and/or restricting competitors' sales.

6.40 In the case of wholesale products, eircom's wholesale arm has information about customers of OAOs this should not be shared with eircom's retail arm as to do so would provide eircom's downstream arm with an advantage in the retail market. When mandating the product description for CPS, ComReg was forced to intervene to prevent such a situation arising.

6.41 ComReg was also required to intervene in response to OAO reports that eircom had misused customer information to implement aggressive win back sales campaigns. Since CPS was introduced in January 2000, there have been numerous examples of complaints of potentially anti-competitive behaviours by the SMP operator[67.] Many of these issues have been investigated and the results published on the ComReg website.

6.42 Regulations 13 (Access) 11 (Non- Discrimination) and 10 (Transparency) of the *Access Regulations* enable ComReg to impose obligations that deal with this problem of non-price leveraging.

Leveraging by pricing means

6.43 A vertically integrated SMP undertaking could pursue the following strategies:

Margin squeeze

6.44 A vertically integrated operator dominant in an upstream wholesale market may engage in pricing that gives rise to a 'margin squeeze'[68]. A margin squeeze may harm competition in the downstream market in several ways. First, the integrated operator might choose a combination of input and downstream prices that meant that an efficient downstream competitor could not earn a normal profit and so exited the market. Second, a margin squeeze could undermine a downstream competitor's ability to compete even without forcing exit. This might occur, for

[67] Carrier Pre Selection in Ireland 2003 ComReg 03/76.

[68] A margin squeeze is sometimes referred to as a price squeeze. It occurs when a dominant provider supplies an upstream (e.g. wholesale) product A which is used in combination with a downstream (e.g. retail) component B to produce a final service or product A+B; where undertakings competing against A+B would provide their own alternative to B; and the implicit charge by the dominant provider to itself for B (i.e. the difference between the prices at which it supplies A+B and A only) is so low that an efficient competitor cannot profitably compete against A+B.

example, where the downstream arm of the integrated operator and the downstream competitor produce differentiated products. In this case the integrated operator might profit from setting an input price high enough to weaken downstream competition (thereby raising profits) but not high enough to force exit, as that might entail fewer sales of the inputs (and thereby damage profits upstream).

6.45 In the case where the vertically integrated operator is able to access economies of scale and scope that are not so readily available to operators competing at the downstream level, then the availability of those economies to the integrated operator may bring extra pressure to bear on the margins available for competing downstream operators. Similarly, if the vertically integrated operator is a multi-product firm operating in several markets, it may have incentives to set prices in such a way as to ensure that the product in question is making little or no contribution to common costs. Downstream competitors with smaller product ranges may have to recover a much large proportion of common costs from this product and so be unable to compete on price.

6.46 The prevention of margin squeeze, with the aim of promoting competition, may require the application of remedies from the *Access Regulations* and in particular Regulation 14 (price control and cost accounting) and may also require Regulation 10 (Transparency) and Regulation 12 (accounting separation) as ancillary remedies.

Price discrimination

6.47 A margin squeeze can sometimes be considered as a form of price discrimination, where the vertically integrated operator is charging a higher price to downstream competitors than implicitly charged to its own retail affiliate, i.e. discrimination between internal and external provision.

6.48 ComReg notes that prices for CPS in relation to the provision of interconnection are cost oriented. However, ComReg believes that in the absence of such specific regulatory intervention, the prices charged to OAOs for access and interconnection in the provision of CPS would have been, and would continue to be, open to discriminatory behaviour by the SMP operator.

6.49 Regulation 14 (price control and cost accounting) of the *Access Regulations* together with Regulation 12 (accounting separation) may be required to address such competition problems. In addition Regulation 11 (non-Discrimination) is also relevant to address the problem of vertical leveraging as it enables ComReg to impose obligations that deal with the problem of price discrimination.

Predatory pricing

6.50 In the extreme, the integrated operator might set downstream prices below the cost of end-to-end production, in which case a margin squeeze might also amount to predation. Predation "occurs, inter alia, where a dominant firm sells a good or service below costs of production for a sustained period of time, with the intention of deterring entry, or putting a rival out of business, enabling the dominant firm to further increase its market power and later its accumulated profits."[69] Three conditions are required to be satisfied to demonstrate predatory pricing:

- Price is below costs
- Competitors driven out of market or excluded
- Undertaking able to recoup its losses

6.51 In practice it is difficult to prove predation, especially in markets where there is considerable change, high fixed costs, multi-product firms and long-run business cases. Regulation 11 (non-Discrimination) of the *Access Regulations* enables ComReg to impose obligations that deal in part with the problem of predation. However, to be effective it would likely require as an ancillary remedy, Regulation 10 (Transparency) and furthermore, to assess whether prices may lie below cost it is likely that Regulation 14 (price control and cost accounting) as well as Regulation 12 (accounting separation) would be required.

Cross-subsidisation

6.52 An operator that is pricing below cost is also engaging in cross-subsidisation by charging higher prices in another market, or by anticipating higher prices in the same market. Regulation 11 (non-Discrimination) of the *Access Regulations* enables ComReg to impose obligations that deal with cross-subsidisation where it may harm competition through enabling a margin squeeze or predatory pricing. However, to be effective it may require as an ancillary remedy, Regulation 10 (Transparency). Furthermore, the need to assess whether prices may lie below cost is likely to require the application of Regulation 14 (price control and cost accounting) as well as Regulation 12 (accounting separation).

6.53 Currently the charges which eircom can apply are regulated both at a wholesale and a retail level and ComReg believes that this regulation has to date ensured that the competition problems set out above are mitigated. However any removal of such obligations would provide incentives for eircom to engage in the behaviour described above.

Horizontal leveraging

6.54 Horizontal leveraging involves the dominant undertaking using its position in one market to leverage into related markets. ComReg considers that an SMP operator could be able to use its dominance in the retail calls market to exert undue influence on other markets.

Cross-subsidisation

6.55 An SMP operator could use dominance to set a low price in one market, or in one product, and seek to recover costs from another market or product. For example, an SMP operator could set a price above cost in a SMP market, and set a price in another non-SMP market below cost. If the reduced price is predatory, in that it is intended to foreclose the related potentially competitive market, this can result in a leverage of market power.

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[69] See Notice on the application of the competition rules to access agreements in the telecommunications sector (98/C 265/02) p.16.

6.56 Regulation 11 (non-Discrimination) of the *Access Regulations* enables ComReg to impose obligations that deal with cross-subsidisation where it may harm competition through enabling a margin squeeze or predatory pricing. However, to be effective it may require as an ancillary remedy, Regulation 10 (Transparency). Furthermore, the need to assess whether prices may lie below cost is likely to require the application of Regulation 14 (price control and cost accounting) as well as Regulation 12 (accounting separation).

6.57 Currently the charges which eircom can apply are regulated both at a wholesale and a retail level and ComReg believes that this regulation has to date ensured that the competition problems set out above have been mitigated. However any removal of such obligations would provide incentives for eircom to engage in the behaviour described above. Even with regulated pricing, ComReg was forced on several occasions to intervene and direct prices for CPS order handling charges.

Q. 19. Do you agree with the competition problems identified by ComReg, as outlined above? Please provide evidence in support of your response.

Available Remedies

6.58 The *Access Regulations* and the *Universal Service Regulations* provide ComReg with a number of remedies it can apply given its preliminary findings of eircom's SMP in the retail fixed calls markets.

6.59 Regulatory controls on retail markets should only be imposed if ComReg concludes that obligations imposed under the *Access Regulations* or Regulation 16 of the *Universal Service Regulations* would fail to achieve the objectives set out in section 12 of the Communications Regulation Act, 2002.

6.60 This means that where ComReg has determined, as result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market is not effectively competitive, it must first assess the extent to which the competition problems it has identified in that given retail market would be addressed by imposing obligations under the *Access Regulations* or under Regulation 16 of the *Universal Service Regulations,* on any undertaking it has identified under Regulation 27(4) of the *Framework Regulations*, as having significant power on that retail market . The type of obligations that may be imposed under the *Access Regulations* include potential obligations on an operator regarding:

- Transparency (Regulation 10)

ComReg can oblige an SMP operator to publish information such as accounting information, technical specifications, network characteristics, terms and conditions of supply and use and prices in relation to interconnection and/or access, and can specify the precise information to be made available. ComReg can oblige the SMP operator to publish a sufficiently unbundled reference offer and can direct changes to that offer.

- Non-discrimination (Regulation 11)

ComReg has the power to impose non-discrimination in relation to interconnection and/or access.

- Accounting separation (Regulation 12)

ComReg has power to impose accounting separation on an operator in relation to specified activities related to interconnection and/or access. ComReg can oblige a vertically integrated company to make transparent its wholesale prices and its internal transfer prices to prevent unfair cross-subsidy.

- Access to and use of specific network facilities (Regulation 13)

ComReg has the power to impose on an operator an obligation to meet reasonable requests for access and attach conditions of fairness, reasonableness and timeliness to the obligation.

- Price control and cost accounting (Regulation 14)

ComReg has a range of powers including the ability to impose cost orientation of prices and obligations concerning cost accounting systems for the provision of specific types of interconnection and/or access. ComReg may oblige the SMP operator to justify prices, and can direct changes to prices.

6.61 Regulation 16 (1) of the *Universal Service Regulations* requires ComReg, where 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, to impose obligations on an undertaking designated under Regulation 27(4) of the *Framework Regulations* as having significant market power in such relevant market for the purpose of enabling subscribers of such undertaking to access the services of any interconnected provider of publicly available 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 code on a call-by-call basis by dialling a carrier selection code.

6.62 Regulation 16 (2) of the of *Universal Service Regulations* stipulates that the Regulator may, subject to a designation of SMP pursuant to a market analysis under regulation 27 of the *Framework Regulations*, determine that user requirements for the facilities described above (that is CA/CS and CPS) should be implemented on other networks or in other ways. Any such determination shall be implemented in accordance with Regulation 13 of the *Access Regulations* (access to and use of specific network facilities).

6.63 In addition, Regulation 16 (3) of the *Universal Service Regulations* requires that ComReg should impose obligations to ensure that pricing for access and interconnection related to the provision of the CA/CS and CPS facilities described above should be cost oriented and that direct charges, if any, do not act as a disincentive for the use of these facilities.

6.64 Where ComReg concludes that obligations imposed under the *Access Regulations* 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, ComReg is required by Regulation 14(1) of the *Universal Service Regulations* to impose such obligations as it considers appropriate to achieve those objectives on an undertaking identified by it under Regulation 27(4) of the *Framework Regulations* as having significant market power on that relevant retail market.

6.65 Particular competition problems identified in the *Universal Service Regulations* include :

- Excessive pricing
- Predatory pricing
- Show undue preference to specific end-users
- Unreasonably bundle services.

6.66 Where ComReg has identified problems of this nature in a given retail market, and where it concludes that obligations imposed under the *Access Regulations* and 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, ComReg may consider the following retail remedies:

- Appropriate retail price cap measures
- Measures to control individual tariffs
- Measures to orient tariffs towards costs or prices on comparable markets

6.67 Further, an undertaking that is subject to retail tariff regulation or other relevant retail control, in accordance with Regulation 14 of the *Universal Service Regulations*, is required to operate and maintain a cost accounting system that is, *inter alia*, suitable for ensuring compliance by the undertaking with the obligations imposed on it in accordance with Regulation 14 of the *Universal Service Regulations*.

Principles in selecting remedies

6.68 ComReg is obliged under Regulation 9(6) of the *Access Regulations* to ensure that any obligations imposed on an operator, in accordance with Regulation 9 of the *Access Regulations*, '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 Communications Regulation Act, 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the *Framework Regulations'*.

6.69 Furthermore, in accordance with Regulation 14(2) of the Universal Service Regulations, ComReg is obliged to ensure that any obligations imposed on an operator pursuant to Regulation 14(1) of the *Universal Service Regulations* be based on the nature of the problem identified pursuant to the market analysis carried out in accordance with Regulation 27 of the *Framework Regulations* and be proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act, 2002.

6.70 Given the identified actual and potential competition problems arising from SMP in the retail calls markets, ComReg is obliged to impose obligations on undertakings identified by it under Regulation 27(4) of the *Framework Regulations* as having significant power on that market. As set out previously, ComReg believes it is unlikely that within the period of this review there is any possibility of the development of effective competition in these markets. Accordingly, ComReg proposes to impose appropriate obligations on eircom that ComReg believes will encourage efficient investment and innovation and further promote competition in the retail calls markets it is proposing be defined in section 3 of this consultation paper.

6.71 Where problems have been identified in specific markets and an undertaking(s) has been designated as having SMP, ComReg will select remedies based on the nature of the problem identified. 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.

6.72 In choosing remedies, ComReg will also take account of potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg will conduct, inter alia, a Regulatory Impact Assessment in accordance with the Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with section 13 of the Communications Regulation Act, 2002) published in February 2003.

6.73 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.

Q. 20. Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies?

Remedies proposed

6.74 Evidence of the competition problems at the retail level indicates that intervention at the wholesale level will not be sufficient[70]. ComReg has set out the competition problems in the retail calls markets. SMP may give rise to a range of problems associated with single market dominance, and vertical and horizontal leveraging. In this instance, intervention will be necessary at both the wholesale and the retail markets to mitigate potential competition problems.

6.75 ComReg believes that the obligations it is proposing to impose in this section of the consultation paper are based on the nature of the competition problems it has identified in the relevant markets it is proposing to define, and that in light of its

[70] ComReg is currently reviewing the interconnection markets and a consultation will be published shortly.

objectives laid down in section 12 of the Communications Regulation Act, 2002, the imposition of the proposed obligations would be proportionate and justified.

Wholesale remedies

6.76 In the market for retail telephone calls, a significant competition problem is that associated with barriers to entry arising from sunk costs. As discussed in the Retail *Fixed Narrowband Access* review, eircom's market share of the lower level access market is over 99% and 77% of the higher level access market, and it has therefore a large and ubiquitous installed base from which to offer calls services. ComReg's analysis has concluded that replication of the access network is not a feasible option, and that this situation is unlikely to change substantially during the lifetime of this review. This means that a market entrant would be most likely to rely on wholesale inputs to enter the calls market, and indeed that has been the pattern of growing competition in calls. This indicates that remedies should be designed in the first instance to provide OAOs with sufficient access to wholesale inputs.

6.77 ComReg therefore signals that wholesale obligations are required to address this set of retail problems. This review of the retail calls markets identifies problems associated with market failure in the retail markets, and makes the case for regulatory intervention at the wholesale level.

Mandated Remedies

6.78 Regulation 16(1) of the *Universal Service Regulations* requires ComReg, where 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, to impose obligations on an undertaking designated under Regulation 27(4) of the *Framework Regulations* as having significant market power in such relevant market for the purpose of enabling subscribers of such undertaking 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.

6.79 ComReg therefore notes that under Regulation 16(1) of the *Universal Service Regulations* it is obliged to impose obligations on an undertaking, designated under Regulation 27(4) of the *Framework Regulations* as having significant power in a relevant market consisting of the provision of connection to and use of the public telephone network at a fixed location, for the purpose of ensuring such undertaking's subscribers can access CA/CS and CPS. ComReg further notes that this obligation, which was previously imposed on eircom by the European Communities (Interconnection in Telecommunications) Regulations 1998 to 2000, and continues to apply to eircom, notwithstanding the revocation of the Interconnection Regulations, by virtue of Regulation 13 of the *Universal Service Regulations*, would, if eircom is found to have significant market power in the markets ComReg is proposing to define, continue as a wholesale remedy addressing competition problems identified in the retail markets for fixed access and fixed calls.

6.80 ComReg notes that since CPS was initially mandated by it in Ireland in 2000, it has been necessary for ComReg to intervene on a number of occasions to address various competition problems of the type described earlier in this section. Accordingly, it is ComReg's view that in order for there to be sufficient support for the establishment of CPS in Ireland and, accordingly, for ComReg to be in a position to comply with its obligation under Regulation 16(1) of the *Universal Service Regulations* to ensure that subscribers of eircom will be able to avail of CPS, it is necessary for ComReg to impose obligations on eircom which will ensure that inter-connected providers of publicly available telephone services will be in a position to provide customers connected to the eircom network the opportunity to access their services. As such, 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 the provision of CA/CS and CPS by eircom and, accordingly, ComReg proposes that eircom 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)[71] which deals with the following key product areas:

- inter-operator processes
- network and IT specifications
- service level agreements
- fault handling
- disputes

6.81 ComReg also recognises that further interventions may be required in the future to continue to develop the CPS product and ComReg will consult with industry fully on the specific details of such developments. For example, the list of calls included in the CPS "All Calls" option is under review and as a result of that review ComReg may require eircom to extend the current CPS product description to cater for additional inclusions, specifically 189X codes.

6.82 Regulation 16 (2) of the *Universal Service Regulations* also provides that the Regulator may determine that user requirements for CA/CS and CPS facilities shall be implemented on other networks or in other ways and any such determination shall be implemented in accordance with Regulation 13 of the *Access Regulations*. ComReg notes that detailed regulatory intervention has been required in the past, as recorded in the minutes of the industry CPS Committee to ensure specific developments of the CPS product. It is ComReg's view that this intervention has been essential in the past, and that a workable competitive CPS product would not be available in the calls market through commercial negotiation alone.

[71] Some of the key documents are listed here:-CPS 16 – CPS IT Specification, CPS 18 – CPS Process Manual, CPS24 - Excluded Calls List CPS Code of Practice, CPS Service Level Agreement, eircom Reference Interconnect Offer- Service Schedule 120.

6.83 The implementation of Regulation 16(3) of the *Universal Service Regulations* sets out the requirement that pricing for access and interconnection should be cost oriented and that direct charges to subscribers.

6.84 ComReg considers that the failure by it to impose such obligations on eircom would mean that the effective operation of CPS in the market would be limited, and, accordingly, the ability of eircom subscribers to avail of CPS services would be greatly hindered, which 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*.

Proposed Supporting Remedies

6.85 As discussed in the section on available remedies, the type of obligations that may be imposed under the *Access Regulations* include potential obligations on an operator regarding 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). While the implementation of the *Universal Service Regulations* make provisions for obligations in respect of transparency and non-discrimination at the retail level, with reference to specific end users, ComReg believes that such obligations are required in relation to the inter-operator transactions and processes required to provide CPS facilities.

6.86 Therefore ComReg proposes that while the mandated remedy for CA/CS and CPS within the *Universal Service Regulations*, set out above, imposes the obligation on the SMP operator to provide both CA/CS and CPS products, at prices that are cost oriented for access and interconnection and implemented in line with Regulation 13 of the *Access Regulations* (access to and use of specific network services and facilities), there is additional justification for supporting obligations with respect to transparency and non-discrimination, to be imposed under the *Access Regulations.*

Non- discrimination

6.87 In addition to the continuing provision of CPS facilities, as set out above, ComReg also believes it important to provide for Service Level Agreements and consistent and timely reporting on these service levels to demonstrate that eircom is providing equivalent conditions in respect of its downstream retail affiliate and OAOs. The current SLA regime has been developed by ComReg with industry and is understood by ComReg to alleviate the concerns of OAOs about competition problems. Penalties should also apply to these SLAs to ensure that they are achieved and that the non-discrimination obligation is incentive-compatible. To ensure compliance with a non-discrimination obligation it is necessary to apply an ancillary obligation of transparency.

6.88 Non-discrimination can be used as an important supporting obligation where an access obligation is proposed e.g. via Regulation 16 of the *Universal Service Regulations*. With mandated access to wholesale inputs, either through an access remedy or a non-discrimination obligation, ComReg believes that eircom has increased incentives to discriminate on non-price parameters such as withholding of information, delaying tactics, undue requirements, low or discriminatory quality, strategic design of product, and discriminatory use of information and earlier in this paper, ComReg has set out its reasoning for holding this view. ComReg believes that non-discrimination is the only remedy which can directly target these competition problems.

6.89 Therefore ComReg proposes to impose the following obligations to ensure non-discrimination both in respect of the existing CPS product and any additional access obligations imposed under Regulation 16 (2) of the Universal Service Regulations.

6.90 This means that eircom must apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and must 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.

6.91 Information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least as good as those provided to eircom's retail arm and associates.

6.92 In particular, it is important that information gained by eircom as a result of its provision of services to another operator is not used by eircom's downstream arms in any manner. For example in the specific case where an OAO approaches eircom seeking a new CPS product development (pursuant to a reasonable request being made for access), it is important that this OAO is afforded equivalent access to eircom Wholesale as eircom Retail. In other words eircom's downstream arms should not have privileged access to eircom wholesale.

6.93 ComReg also considers that it will be necessary to impose obligations of transparency and accounting separation to monitor non-discrimination and address the competition problems described earlier. For example, part of the effectiveness of the non-discrimination obligation is reliant on the introduction of the obligation of accounting separation to facilitate the verification of compliance that eircom is providing services to other operators under the same pricing conditions as provided for its downstream arms. Similarly a transparency obligation is required to demonstrate that services of equivalent quality are delivered by eircom to other operators and its downstream arm. ComReg sets out further detail on proposed obligations below.

Q. 21. Do you agree that obligations of non-discrimination should be imposed on eircom? Please detail your response.

Transparency

6.94 Following the imposition of the Universal Service obligations to provide CA/CS and CPS facilities, in accordance with Regulations of the *Universal Service Regulations* 16 (1)(2)(3) and in addition to non-discrimination obligations imposed under the *Access Regulations*, ComReg believes that it is proportionate and justified to impose an additional supporting obligation of transparency. This ensures that OAOs have sufficient information and clear processes to which they would not otherwise have access. This assists their entry into the market and hence promotes competition.

Transparency also provides a method of ensuring compliance with a non-discrimination obligation, as the information needed to measure this would not otherwise be available. Therefore ComReg considers an obligation of transparency directly targets the nature of the problem and should be imposed on eircom. The implementation of this obligation will require eircom to publish a reference offer and may also require the publication of other information from time to time.

Q. 22. Do you agree that an obligation of transparency should be imposed on eircom? Please detail your response.

6.95 Regulation 10 (2) provides for the regulator 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 relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.

6.96 Currently eircom publishes, as part of the Reference Interconnection Offer, Service Schedule 120 for the provision of the CPS product72. ComReg believes that this obligation should be maintained. Regulation 10 (3) allows ComReg to specify the precise information to be made available, the level of detail required and the manner of publication. ComReg is not currently of the view that any further detail is required to be added to the reference offer for CPS but would appreciate feedback from interested parties.

6.97 ComReg expects that any new offerings developed pursuant to Regulations 16(2) of the *Universal Service Regulations* should also be detailed in a reference offer.

Q. 23. Do you believe that reference offers should be maintained for the CPS product set and any new offerings developed in accordance with Regulations 16 (2) of the Universal Service Regulations?

6.98 The current SLA for CPS was developed, amongst other reasons, to assuage the concerns of industry as to eircom's compliance with an obligation of non-discrimination. ComReg considers that the current level of transparency attached to this has proved its effectiveness and its withdrawal would adversely affect all market players. Therefore ComReg proposes to maintain this obligation.

6.99 The current SLA regime requires eircom to monitor performance metrics in relation to the following activities:-

- order acceptance and completion;
- hub availability;

[72] See in particular Service Schedule 120.

- statistical reporting.

6.100 ComReg also believes it will be necessary to impose obligations of transparency in support of the non-discrimination and accounting separation obligations because it allows the calculation of costs and price, i.e. internal price transfers, to be rendered visible and allows ComReg to check compliance with obligations of non-discrimination and to address the price competition problems. ComReg considers that the effectiveness of the transparency and non-discrimination obligations is reliant on the introduction of an obligation of accounting separation to facilitate the verification of compliance.

Q. 24. Do you believe that ComReg should require eircom to make public any further information? Do you agree with ComReg that an obligation of transparency is required to monitor non-discrimination? What type of information should be published? Please specify how you believe this should be made available. Please provide support for your response.

Accounting Separation

6.101 ComReg has required eircom to supply financial information either on-demand to support investigations and pricing reviews and/or on an annual basis in order to support regular monitoring of its decisions since deregulation of the market. Such data provides an essential part of regulation by allowing ComReg to perform its duties to ensure prices are not set at an excessive level, to monitor margin squeezes and provide greater certainty about the cost base.

6.102 Separated accounts will help disclose possible market failures and provide evidence in relevant markets of the presence or absence of discrimination and margin squeeze. They will make visible the wholesale prices and internal transfer prices of a dominant operator's products and services.

6.103 An obligation of non-discrimination can require, inter alia, the imposition of financial reporting regimes in order to monitor eircom's compliance with such an obligation. With regard to eircom's designation of SMP in the retail fixed calls market and the identification of the obligation of non-discrimination as a means to remedy the competition problems discussed earlier, ComReg believes it appropriate to impose an obligation of accounting separation upon eircom in this market.

6.104 ComReg is proposing that eircom should have an obligation not to unduly discriminate because where eircom is a vertically-integrated undertaking; it has an incentive to provide wholesale services on terms and conditions that discriminate in favour of its own retail activities in such a way that may have a material effect on competition. The obligation of accounting separation will support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services.

6.105 ComReg intends to implement accounting separation on a by- service and/or product basis. ComReg believes it is not sufficient to implement such an obligation at a market level as it is important to discourage possible cross-subsidisation of pricing at a service level. Operators dominant in relevant markets may provide services in a number of markets and may divide the activities required to supply these services among a number of business units. The division of activities relevant to ComReg for regulatory purposes is the division of services, and the activities which underlie them, between relevant markets. These relevant markets may be regulated markets with an operator having SMP or a non-SMP designated market. Therefore ComReg needs to be able to ascertain to what extent services in non-SMP markets may impact on services supplied in SMP markets. In order to determine the information required for regulatory purposes, it is necessary to explore the nature of the costs incurred by activities undertaken in the course of supplying a service (or combination of services). If ComReg were to impose accounting separation at the market level, it would not be able to identify whether products and services are being provided on a non discriminatory basis.

6.106 As discussed earlier, in deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion, encourages access to the network in order to ensure efficient and sustainable competition and contributes towards maximising consumer benefits. In this regard, the accounting separation obligation is designed to help provide evidence from eircom which may demonstrate the presence or absence of discrimination. In this regard, ComReg believes the imposition of accounting separation upon eircom to be justifiable and based upon the nature of the problem identified.

6.107 If ComReg were to withdraw this obligation, it would not have any means of monitoring non-discrimination or of having any information on margins in the retail business.

6.108 ComReg proposes to consult further on the broader issues of accounting separation but in the interim, ComReg is still proposing that it develop the existing level of accounting separation on eircom, with specific technical improvements, until such time as any further consultations are completed.

Q. 25. Do you believe eircom should have an obligation of accounting separation? Please detail your response.

Retail remedies

6.109 Without prejudging the outcome of other market reviews, ComReg notes that although wholesale intervention (for example through the continuing requirements to provide CA/CS and CPS) is a necessary condition for competition in retail calls, it is unlikely to be sufficient in itself, particularly within the lifetime of this review. For that reason, ComReg proposes to consider additional remedies in the retail calls market.

6.110 The imposition of obligations at a retail level is required 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 retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive and it concludes that obligations imposed under the *Access Regulations* 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 .

Price control

6.111 At present the main controls in place that prevent excessive pricing are the retail price cap and the obligation of cost-orientation. While the price cap addresses the upper limit of pricing for a basket of services including access and calls, cost-orientation is a more general obligation that can prevent the SMP operator from charging excessive prices for specific services, and could also help to ensure that an SMP operator does not attempt to restrict market entry by charging unreasonably low prices, that may harm competition.

6.112 Until February 2003, local calls, national calls, operator calls and payphone calls were all subject to separate sub-caps of CPI+2% within the overall price cap of CPI-8%. The review of the price cap resulted in a revised price cap applied from February 2003. This review removed all sub-caps, including those sub-caps on call services, placing them within an overall price cap of CPI-0%.[73]

6.113 In June 2003 the additional 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. The Vulnerable User Scheme was introduced in order to limit the increases in the size of the vulnerable users' telephone bills, where they had relatively low usage levels.[74]

6.114 It should be noted that the price cap acts as a limited constraint on price increases as it allows eircom the scope to increase prices for specific services within the constraints of the cap. However, eircom is also subject to the obligation of cost-orientation which provides a further constraint. ComReg notes that the price cap does not apply to all retail call services (eg international calls) and since it allows eircom a degree of flexibility, it will not necessarily prevent eircom from charging excessive prices for individual call services even where it does apply. It does

[73] See ComReg 03/14 for a fuller discussion of the price cap decision.

[74] See ComReg 03/48 for more details on issues relating to the Vulnerable User Scheme.

however constrain the overall increase in customer bills for the services subject to the price cap.

6.115 In considering price controls as a remedy for problems identified in the fixed access market, ComReg has identified options in four key areas. Each is discussed in turn below.

6.116 These are:

- Price cap (domestic and international calls considered separately)
- Cost orientation
- Vulnerable User Scheme
- Margin squeeze

Price Cap : Domestic calls market

6.117 In considering the imposition of a price cap, ComReg has identified three options:

Option 1 : Exclusion of domestic call prices from the price cap

6.118 This would mean that ComReg believed that measures at the wholesale level and other retail controls would be sufficient to act as a constraint on eircom's pricing behaviour.

6.119 ComReg's review of the retail domestic calls market indicates a continuing requirement for wholesale solutions such as WLR and CPS as a means of promoting competition in the retail market. However, while ComReg believes that WLR and CPS will reduce eircom's dominance in the market, it does not believe that wholesale remedies will eliminate eircom's ability to raise prices in the retail domestic calls market above the competitive level within the lifetime of this review.

6.120 ComReg therefore concludes that the removal of ex ante control of call prices is an aim to be worked towards, but that the current and short term conditions in the domestic calls market indicate that it is too soon to consider this as an option.

Option 2 : maintain domestic call prices within the price cap basket

6.121 This would mean continuing the current price cap, such that calls prices are subject to overall price control. Domestic calls would remain within the current retail price cap basket, which is currently set at CPI-0%.

6.122 The current price cap allows eircom to adjust individual elements within the price cap, and so offers flexibility to eircom to balance prices and costs. The current basket includes the following services: PSTN access; ISDN access; fixed to mobile calls; local calls; national calls; operator assisted calls; and payphones.

Option 3: introduce a more specific cap on retail call prices

6.123 This could involve, for example, the introduction of a new cap, whether by introducing new sub-caps on calls, or by having separate caps on call services. The current price cap does not on its own prevent eircom from increasing prices for individual call services above the rate of inflation, whereas the introduction of a new cap could provide greater control over changes to call prices. If ComReg were to pursue this option then there would be further consultation on the appropriate level and form of any cap specific to calls.

Preferred option

6.124 ComReg proposes to maintain the current price cap until markets are next reviewed for SMP designation and remedies. At that time the appropriateness of the price cap as a remedy will be reassessed. In addition, ComReg proposes that because of eircom's likely continued strong position in this market and persistent high market share, some form of upper limit price control should continue to be applied specifically to retail call prices. This could, as at present, take the form of a general cost-orientation obligation, discussed below (option 2 above). Alternatively, it could take the form of a sub-cap or separate cap, on retail calls (option 3 above).

Q. 26. Do you agree that the current price cap should be maintained and that some form of additional price control should be applied specifically to retail call prices? Do you believe that this should be an obligation of cost-orientation as at present, or should a price cap specific to calls be introduced? Should this be a sub-cap or a separate cap? ComReg would also welcome respondents views on the other options considered in this section.

Price cap : international calls market

In considering the imposition of a price cap, ComReg has identified two options:

Option 1 : Continued exclusion of international call prices from the price cap

6.125 This would leave measures at the wholesale level and other retail controls as the main constraints on eircom's pricing behaviour.

6.126 ComReg notes that since international calls were removed from the price cap, a number of OAOs have entered the market via CPS and are building market share. Eircom's market share has declined overall. At the same time, prices for international calls have reduced. It is ComReg's view that the trend in the market is towards increasing competition. However, ComReg's review of the retail international calls market indicates a continuing requirement for wholesale solutions such as WLR and CPS as a means of promoting competition in the retail market.

Option 2 : Introduce a price cap on international call prices

6.127 This would mean applying a price cap on international calls. ComReg suggests that a reason for considering this option is that eircom still has an overall market share in excess of 60%, and has been provisionally designated as having SMP in the international calls market. There may be a case therefore for increasing regulatory control.

Preferred option

6.128 ComReg proposes that Option 1 is preferred, so that international calls prices would not be subject to a price cap.

Q. 27. Do you agree that the SMP operator should not be subject to a price cap on international call prices?

Cost Orientation for Retail Prices

6.129 In addition to the price cap obligation there is also a general obligation of cost-orientation for retail voice telephony services, including calls. This provides a constraint that can prevent the SMP operator from charging excessive prices for specific call services, and could also help to ensure that an SMP operator does not attempt to restrict market entry by charging unreasonably low prices that may harm competition. In the past this obligation has been interpreted in a less restrictive way than cost-orientation at the wholesale level, where it has often been interpreted as implying LRIC based pricing. This difference in approach has reflected different market conditions and priorities at the wholesale and retail levels. ComReg would expect these differences to continue and would not propose that cost-orientation at the retail level should lead to regulated prices being set at LRIC levels.

6.130 As noted above, a retail cost-orientation obligation could continue to be applied as a means of preventing excessive prices for individual services even where they are included within the price cap. The obligation would have a wider effect than a cap or sub-cap on call services in that it would also apply to services outside of the price cap and it could be used to prevent the restriction of market entry by charging unreasonably low prices that may harm competition. In these markets, however, a margin squeeze obligation as discussed below should be sufficient to minimise concerns in relation to charging unreasonably low prices that may harm competition.

Q. 28. In addition to a price cap (see Q. 26), do you believe that it would be necessary for the SMP operator should ensure that its tariffs follow the basic principles of cost orientation? Please link your response to this question with your response to Questions 26 and 27 above.

Vulnerable Users Scheme

6.131 ComReg expects the cap on the Vulnerable User Scheme to continue as this will contribute to protecting low users from large increases in the cost of their telephone bill as agreed when the previous lower quartile cap was removed.

Margin Squeeze

6.132 In the identification of competition problems, ComReg noted examples of risks to competition associated with the SMP operator's ability to restrict market entry and/or competition in the market by unfairly squeezing the margins of competitors or potential competitors.

6.133 As discussed earlier, there is a current obligation of cost-orientation on the SMP operators, and ComReg uses this as a basis for margin squeeze testing of call services.

6.134 ComReg notes that in order to carry out margin squeeze testing, there must be access to the necessary information on costs, volume and revenue which will allow the assessment of a possible margin squeeze. ComReg has addressed some of these issues in the sections below on transparency and notification, and cost accounting. However, it is ComReg's view that, while these measures address ComReg's ability to monitor and assess margin squeeze, there is an additional requirement for an overall obligation which addresses the act of margin squeeze.

6.135 ComReg proposes to place an obligation on the SMP operator such that retail prices shall not be set in a way which could unfairly inhibit entry into the market, or restrict competition in the market. In making this assessment ComReg will make a judgement of longer term impacts on competition in the market, in line with ComReg's objectives to promote competition. ComReg proposes to issue guidelines on how this obligation will be enforced through margin squeeze tests. These may be amended from time to time. ComReg proposes to consult in detail on the content of those guidelines.

Q. 29. Do you agree that the SMP operator should be obliged to ensure that retail prices are not set in a way which could unfairly inhibit market entry or restrict competition?

Q. 30. What are your views on the most appropriate approach to margin squeeze tests in this market?

Non-Discrimination

6.136 There is a risk that an undertaking with SMP may use market power to apply dissimilar conditions to transactions which are equivalent. This could be, for example, in the form of price offers, or information, or conditions of supply. The *Universal Service Regulations* enable ComReg to require SMP operators not to show undue preference to specific end-users.

6.137 At present, eircom publishes in its Telecommunications Scheme a list of tariffs, terms and conditions which apply to all retail customers in order to fulfil an obligation of transparency; this obligation supports the obligation of non-discrimination. This obligation was imposed on eircom by Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations 1999 (the "VT Regulations") and by virtue of Regulation 13 of the *Universal Service Regulations*, eircom is required to continue to comply with this obligation notwithstanding the revocation of the VT Regulations on 25 July 2003. Under Regulation 21(3) of the VT Regulation eircom was and, by virtue of Regulation 13 of the *Universal Service Regulations*, continues to be, obliged to ensure that tariffs for access to and use of its fixed public telephone network are independent of the type of application which the user implements, except insofar as such user requires different services or facilities.

6.138 The obligation of non-discrimination prevents operators from charging differing prices in markets, depending on the competitive conditions of the market and price sensitivity to products in the markets. ComReg considers that it is a necessary requirement to ensure that eircom adheres to the obligation of non-discrimination.

6.139 ComReg's consideration in this area is whether ex ante regulation should be removed, or whether it is desirable for ex ante regulation to remain.

Option 1 : remove ex ante regulation from the obligation not to discriminate.

6.140 This would mean that any discrimination would be treated ex post as an abuse of a dominant position in a market, and would not be subject to ex ante control

6.141 Earlier in this section, ComReg has discussed at a general level concerns regarding the need for ex ante regulation. Following that discussion, ComReg believes that the emergent state of competition in the calls market indicates that ex post regulation alone will not be sufficient. Further, measures which are taken at the wholesale level may not prevent undue discrimination at the retail level, as the obligation not to discriminate at the wholesale level generally applies to the wholesale relationship.

Option 2 : place a non-discrimination obligation on the SMP operator

6.142 Under this option, the SMP undertaking would be prohibited from discriminating in its treatment of customers.

6.143 ComReg notes that an obligation of non-discrimination 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 will apply to any differences that may have the effect of harming competition. This would apply to the current market and to emerging competition in the market.

Preferred option

6.144 ComReg's preliminary conclusion is that, given the low level of competition in the markets for domestic and international calls, it is too soon to consider the removal of ex ante regulation, and that there is a continuing need for a prohibition on discrimination. ComReg therefore proposes to place an obligation of non-discrimination on the SMP operator.

Q. 31. Do you agree that a non-discrimination obligation should be place on the SMP operator?

Transparency: Publication and notification of terms and conditions

6.145 Regulation 18 of the *Universal Service Regulations* specifies, for all operators, information which must be made available to customers. It states that ComReg has a role to ensure that transparent and up to date information on applicable prices and tariffs is available to end-users. Under Regulation 18(2) ComReg may specify information to be published on standard tariffs covering access, usage charges, discounts and special/targeted tariff schemes.

6.146 In fulfilling our role to ensure transparency ComReg considered it appropriate that service providers should operate under a basic set of principles for presentation of tariff information. ComReg is currently undertaking a consultation on these issues - ComReg document 04/57 sets out a draft direction which contains three broad principles that tariff information should be accurate, comprehensive and accessible to end-users of publicly available telephone services. In relation to each principle, specific guidance is given as an aid, where required, towards implementation. The guidance is also an indication of how ComReg will assess the degree of compliance by service providers. ComReg has already directed on printed tariff information and tariff information on websites in ComReg document 03/86. This states that a service provider shall provide tariff information in response to a reasonable consumer request and provide a direct link from the homepage of their website into the tariff information section of their website.

6.147 In this consultation on the retail calls market, ComReg is reviewing whether additional transparency obligations need to be imposed on SMP operators. At present, an undertaking with SMP is required to notify ComReg and publish any changes to terms and conditions 21 days before they come into effect. Current practice is that eircom has usually and voluntarily provided an additional 7 days' notification to ComReg before publication.

6.148 ComReg believes that these current requirements make it possible for at least some potential anti-competitive behaviour to be identified and addressed before changes to prices or terms and conditions are made. In particular, advance notification gives ComReg the opportunity to raise concerns relating to principles such as transparency, cost-orientation, and non-discrimination before any changes become effective. Advance publication of changes also gives consumers and OAOs the opportunity to raise any concerns with ComReg before price changes take effect.

6.149 Currently, ComReg does not formally approve changes to terms and conditions offered by eircom, but will intervene where ComReg believes that eircom may be in breach of its obligations. This intervention may take place before or after any changes have been applied and so allows for the possibility that some problems are not captured during the advance notification/publication period, but do become apparent later. Some pricing problems, such as margin squeeze for example, can depend on the degree of customer uptake of a pricing scheme and the characteristics of the customers who take it up and so may not become apparent for some time.

6.150 ComReg has identified three main options for transparency obligations for SMP operators.

Option 1: No additional obligations

6.151 Whilst the current proposal in respect of all operators that is set out in 04/57 provides a degree of transparency for end users, it would make it much harder for ComReg and other operators to identify anti-competitive behaviour as set out above.

6.152 However, ComReg notes that there is a risk that clear publication in advance by the SMP operator of terms and conditions, including tariffs, could make it easier for other operators to simply follow the price changes of the SMP operator and might reduce the degree to which they introduce innovative or aggressive price changes.

Option 2: Formalise and maintain current practice

6.153 In this case, the obligation would be to publish changes to terms and conditions (including tariff changes) at least 15 working days[75] before they became effective. In addition, eircom would notify ComReg of proposed changes at least 5 working days before publication, and so at least 20 working days before changes come into effect.

6.154 This approach would maintain the current benefits in relation to identifying potential anti-competitive behaviour, though may run the risks in relation to the intensity of competition from other operators as described above.

Option 3: Remove the advance publication period

6.155 In this case the SMP operator would be obliged to notify ComReg of changes to terms and conditions, including tariffs, 20 working days in advance, but would only be obliged to publish these changes on the day in which they came into force.

6.156 This approach would remove the possibility for customers and/or other operators to make representations about the potential impacts of proposed price changes before they came into effect. Such representations would still be possible after price changes came into effect, though this might cause more confusion to customers if shortly afterwards ComReg required further changes to ensure compliance with obligations.

Other issues

6.157 In order to avoid difficulties at times when public holidays are frequent, ComReg proposes that any requirement to notify and publish changes to terms and conditions should be expressed in terms of working days, rather than calendar days as at present[76].

6.158 Currently, eircom is obliged to publish a statement that there are changes, and details of how further information may be obtained. This has to be done in at least one national newspaper, in *Iris Oifigiuil*, and in its public offices. ComReg proposes to retain these obligations.

Preferred option

6.159 ComReg's current view is to prefer Option 2, which broadly maintains current practice subject to the changes outlined above. ComReg believes that this is likely to provide the best balance between the advantages and disadvantages discussed. The obligation would apply to any product that includes any element of fixed narrowband

[75] Working days are taken to exclude Saturdays, Sundays and public holidays
[76] The 15 and 20 working day periods mentioned in Options 2 and 3 are broadly equivalent to the current practice of 21 and 28 calendar days.

retail access either in whole or in part. ComReg proposes to continue in its current practice of not formally approving changes to terms and conditions offered by eircom, but will intervene where ComReg believes that eircom may be in breach of its obligations. This intervention may take place before or after any changes have been applied.

6.160 ComReg would also expect eircom 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.

Q. 32. Do you agree with ComReg's proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers.

Retail Bundling

6.161 In the assessment of competition problems, ComReg noted that bundling retail products can potentially distort competition, primarily by leveraging into related markets and by distorting pricing.

6.162 ComReg proposes that to remedy this, a bundling obligation should be considered. The main purpose of a bundling obligation is to prevent foreclosure of markets through leveraging of market power which could have a detrimental effect both on operators and consumers. Bundling by its nature can also lead to a lack of transparency as two or more products are sold as a single package. However bundling can lead to economies of scale or scope for operators and this in turn can lead to savings for consumers.

6.163 The requirements for publication and notification set out above, and the general requirements for transparency imposed on all operators under Regulation 18 of the *Universal Service Regulations* , will apply to bundled products and will limit the extent to which bundling can reduce transparency.

6.164 Regulation 9(1) of the *Universal Service Regulations*, which applies to undertakings designated to provide certain 'universal services' which provide facilities and services additional to those 'universal services'(eircom is currently the universal services provider), states, inter alia, that a "designated undertaking shall…., establish terms and conditions for the provision of such additional facilities and services in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested by him or her." In addition, eircom was obliged by Regulation 21(4) of the VT Regulations, and continues, by virtue of Regulation 13 of the *Universal Service Regulations*, to be obliged to ensure that tariffs for facilities additional to the provision of connection to its fixed public telephone network and fixed public telephone services are sufficiently unbundled so that users are not required to pay for facilities that are not necessary for the service requested.

6.165 ComReg issued a Discussion Paper in October 2003 titled "Regulatory Approach to Bundling and Temporary Discounts" (03/120). This paper sought to stimulate debate about how and when it might be appropriate to regulate bundled retail offerings. It discussed the regulatory issues and options for regulatory measures.

6.166 It also raised issues around the need for regulation of bundled products and possible regulatory measures to deal with any anti-competitive effects from bundles. Possible requirements such as the availability of unbundled products, availability of wholesale elements and cost orientation were outlined.

6.167 As a result of the consultation process, ComReg proposes to impose an obligation that the SMP operator shall not unreasonably bundle services. ComReg would consider it unreasonable to bundle products or services in such a way that customers can only purchase any product/service included in the bundle by purchasing the bundled product. In practice this means that ComReg would expect the SMP operator to be offering all the unbundled elements of the bundled product /service as separate products/services.

6.168 ComReg will apply the principles above to all cases of bundling whether they involve bundles only within this market or bundles that include elements from this market and other elements, whether or not they are defined as electronic communications services.

Q. 33. Do you agree that the SMP operator should be obliged to ensure that services are not unreasonably bundled?

Cost accounting

6.169 The *Universal Service Regulations* states 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.

6.170 ComReg considers that in order to demonstrate cost-orientation of a service or product, it is necessary for the dominant provider 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.

6.171 Accounting separation is necessary to fulfil any obligations of cost orientation and cost accounting. Since deregulation of the market, ComReg has required eircom to supply financial information on an annual basis in order to support regular monitoring of its decisions. Such data allows ComReg to perform its duties to ensure that prices are not set at an excessive level, and to provide evidence of the presence or absence of discrimination and margin squeeze and greater certainty about the cost base. This is obviously vital to support the obligations in relation to cost orientation and cost accounting systems.

6.172 In deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion, in order to ensure efficient and sustainable competition and must contribute towards maximising consumer benefits. In this regard, the accounting separation obligation is designed to help provide evidence from eircom which may demonstrate the presence or absence of margin squeeze and ComReg believes the imposition of accounting separation upon eircom to be justifiable and based on the nature of the problem identified.

6.173 If ComReg were to withdraw this obligation, it would not be able to monitor such margin squeeze problems or determine if costs are set at an excessive level, or have any information on margins in the retail business.

6.174 ComReg proposes to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim, ComReg is proposing that it maintain the existing level of cost accounting systems and accounting separation obligations on eircom until such time as any further consultations are complete.

Q. 34. Do you agree that an obligation should be placed on eircom to maintain the existing level of cost accounting systems and accounting separation obligations?

7 Regulatory Impact Assessment

7.1 The Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with section 13 of the Communications Regulation Act, 2002) published in February 2003, directs:

"The Commission before deciding to impose regulatory obligations on undertakings in the market for electronic Communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme."

7.2 ComReg is obliged, under Regulation 9(1) of the *Access Regulations*, 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, to impose on such operator such of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.

7.3 ComReg is obliged under Regulation 9(6) of the *Access Regulations* to ensure that any obligations imposed on an operator, in accordance with Regulation 9 of the *Access Regulations*, '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 Communications Regulation Act, 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the *Framework Regulations*.

7.4 Regulation 14(1) of the *Universal Service Regulations* requires ComReg, when it determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations,* that a given retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive, and ComReg concludes that obligations imposed under the *Access Regulations* 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 obligations as it considers appropriate to achieve those objectives, on undertakings designated by ComReg under Regulation 27(4) of the *Framework Regulations* as having significant power on a given retail market. In accordance with Regulation 14(2) of the *Universal Service Regulations*, ComReg is obliged to ensure that any obligations imposed on an operator pursuant to Regulation 14(1) of the *Universal Service Regulations* be 'based on the nature of the problem identified pursuant to the market analysis carried out in accordance with Regulation 27 of the *Framework Regulations* and be proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act, 2002.

7.5 ComReg will conduct a Regulatory Impact Assessment which will form part of the decision making process and would comments on the proportionality of the remedies listed in section 6 of this consultation paper and the justification of the remedies listed.

Q. 35. Respondents are asked to provide views on whether the remedies in section 6 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality

8 Submitting Comments

8.1 All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

8.2 The consultation period will run to 13 October 2004 which ComReg welcomes written comments on any of the issues raised in this paper.

8.3 ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.

8.4 Having analysed and considered the comments received, ComReg will review the implementation of remedies in the fixed retail calls markets and publish a report on the consultation which will inter alia summarise the responses to the consultation. In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its Offices.

Appendix A – Consultation Questions

Appendix B – Consumer packages bundling access and calls

As mentioned in section 3.29 operators have introduced tariff packages which bundle access and calls. A number of examples of these packages are listed below. ComReg will monitor whether the introduction of these packages has an impact on the market.

eircom Residential Packages

The new tariff plans bundle line rental (either PSTN or ISDN) with calls. eircom Talktime has four levels and is aimed at residential customers and consists of a core package which bundles rental with local and national off-peak calls as well as up to two Phone Services e.g. eircom mailbox, call forwarding. They also offer additional minutes for calls to a nominated local or national number ("Call a friend for free Minutes"). A combined local and national daytime rate applies. Residential PSTN packages are available from €29.99 to €39.99 (inc. VAT). Mobile and international "add-ons" are also available for an additional fee. Carryover over of minutes is allowed into the next billing period, but not thereafter.

Eircom Talktime Core Package (including VAT)

Level	PSTN	ISDN	Local & National Off-peak Mins	Call a Friend for free Minutes	Eircom phone services options
1	€29.99	€43.31	300	120	Eircom mailbox
2	€33.99	€47.31	500	200	Any 2
3	€37.99	€51.31	750	400	Any 2
4	€39.99	€53.31	1200	500	Any 2

Business Packages

eircom offers Talktime for business bundles rental (either PSTN or ISDN) with local and national daytime calls, and Phone Services. There are six levels. Calls outside the bundle are charged on a sliding scale basis with rates similar to those on the eircom optimiser discount scheme. As with Talktime carryover over of minutes is allowed into the next billing period but not thereafter. Business packages range in price from €24.99 to €121.49 (ex. VAT). Local and national off-peak, mobile and international add-ons are also available for an additional fee.

Eircom Talktime for Business Core Package (excluding VAT)

Level	PSTN	ISDN	Local & National peak Mins	Eircom phone services options
1	€25.99	€37.00	150	Eircom mailbox
2	€35.49	€46.50	400	Eircom mailbox
3	€46.49	€57.50	700	Eircom mailbox & 4 Call Forwarding Activations
4	€64.49	€75.50	1200	Eircom mailbox & 4 Call Forwarding Activations
5	€91.99	€103.00	2000	Eircom mailbox & 4 Call Forwarding Activations
6	€122.99	€134.00	3000	Eircom mailbox & 4 Call Forwarding Activations

Gaelic Telecom Residential Packages (including VAT)
The new tariff plans bundle PSTN line rental with calls. There are four levels which bundle rental with local and national off-peak calls, up to two Phone Services e.g. Mailbox, call forwarding as well as cheaper international calls. They also offer additional minutes for calls to a nominated local or national number ("Any friend for free"). Packages are available from €27.99 to €38.99 (inc. VAT).
Mobile "add-ons" are also available for an additional fee.

Level	PSTN	ISDN	Local & National Off-peak Hours	Call a Friend for free Minutes	Phone extras
1	€27.99	€43.31	5	2	mailbox
2	€31.99	€47.31	7	4	Any 2
3	€35.99	€51.31	13	7	Any 2
4	€38.99	€53.31	20	9	Any 2

EsatBT Packages (including VAT)
Current, EsatBT do not bundle PSTN access with calls, however DSL is bundled with calls. For example IOL Broadband costs €39.00 per month, however for customers who also avail of EsatBT's homephone package get IOL Broadband at a reduced rate of €33.15. Similarly for IOL Broadband Plus the standard charge is €47.00, but bundling it with calls the price reduces to €39.95.