



Response to Consultation & Consultation on Draft Decision

Market Analysis: Retail Fixed Calls Markets
(Response to Consultation Document 04/95 & Draft Decision)

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All responses to this consultation should be clearly marked:-
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and sent by post, facsimile, e-mail or on-line at www.comreg.ie
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Response to Consultation, subject to the standard confidentiality
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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*.¹
- 1.2 On 1 September 2004, ComReg issued a national consultation on its market analysis for retail fixed calls (ComReg Document 04/95). ComReg received detailed submissions from the five respondents listed below by the close of the consultation period. A sixth respondent, O2, commented on one specific issue in the market, and its views were considered accordingly.
- 1.3 The five detailed responses to the consultation were provided by :
 - alto
 - eircom
 - energis
 - Esat BT
 - vodafone
- 1.4 ComReg thanks all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its conclusions regarding the market analysis process.

Market definition

- 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)

Market analysis

- 1.6 In the analysis of the markets, ComReg assessed 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 considered 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 Framework Regulations 26 and 27, S.I. No. 307 of 2003.

Remedies

- 1.8 ComReg identified potential competition problems in the retail fixed calls markets, associated with single market dominance, and with vertical and horizontal leveraging. ComReg proposes that remedies are required to address these problems.
- 1.9 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.

Wholesale remedies

- 1.10 The finding that eircom has SMP in the market for fixed retail access services means that ComReg is obliged under the *Universal Service Regulations* to impose an obligation enabling subscribers of the SMP operator to access CA/CS and CPS². The proposal to mandate this obligation is discussed in the consultation on *Market Analysis: Retail Fixed Narrowband Access* (Document Number05/25).
- 1.11 While the implementation of the *Universal Service Regulations* makes provisions for obligations in respect of transparency and non-discrimination at the retail level, with reference to specific end users, ComReg believes that further obligations are required in relation to the inter-operator transactions and processes required to provide CPS facilities.
- 1.12 Therefore ComReg proposes that while the mandated remedy for CA/CS and CPS within the *Universal Service Regulations* imposes the obligation on the SMP operator to provide both CA/CS and CPS products, there is additional justification for supporting obligations to be imposed under the *Access Regulations*.
- 1.13 ComReg believes that appropriate wholesale remedies to address market failure in the domestic and international calls markets are :
 - An obligation of non-discrimination
 - An obligation of transparency
 - An obligation that the SMP operator should maintain a reference offer for the CPS product set and any new offerings
 - An obligation to maintain and develop the existing level of accounting separation obligations pending the outcome of the current consultation³.

Retail remedies

- 1.14 Regulation 14 of the *Universal Service Regulations* allows ComReg to apply other obligations on the retail level where wholesale remedies are not capable of resolving competition problems in the market. Retail remedies imposed aim to both promote competition and to protect consumers.
- 1.15 ComReg believes that the appropriate retail remedies for the retail fixed calls markets are as follows:

² CA (Carrier Access), CS (Carrier Selection) and CPS (Carrier Pre Selection)

³ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

- Maintenance of the current price cap under the New Regulatory Framework, to be applied to the retail domestic calls market
- An obligation of cost-orientation, to be applied to the domestic and international calls markets
- An obligation of non-discrimination, to be applied to the domestic and international calls markets
- An obligation of transparency, such that the SMP operator will be obliged to notify ComReg 20 working days in advance of changes to terms and conditions in the domestic and international calls markets. The SMP operator will be obliged to publish 15 working days in advance changes to terms and conditions in the domestic calls market. The SMP operator will be obliged to publish changes to the terms and conditions in the international calls market when they come into effect.
- An obligation not to unreasonably bundle products and services
- An obligation that the SMP operator should be obliged to set prices in a way which does not inhibit market entry or competition.
- An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of consultation.

1.16 ComReg proposes to impose all of these remedies as of the effective date of the decision.

1.17 ComReg is publishing in Appendixes A and B its proposed Draft Measures to implement the remedies detailed above. ComReg is consulting on the measures as detailed in Appendixes A and B and would welcome comments on the provisions prior to the final adoption.

1.18 ComReg believes the remedies set out in this market review support the objectives outlined in the Communications Regulation Act 2002 as to how ComReg should exercise its functions. Remedies imposed aim to address market failures, to protect consumers against the exercise of market power and to promote competition in the markets for domestic and international calls.

2 Introduction

Objectives under the Communications Regulation Act, 2002

- 2.1 Section 12 of the Communications Regulation Act, 2002 outlines the objectives of ComReg in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities. These objectives are:
- (i) to promote competition
 - (ii) to contribute to the development of the internal market, and
 - (iii) to promote the interests of users within the European Union.
- 2.2 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 greater choice, lower prices and improved quality of service to end users.

Regulatory Framework

- 2.3 Four sets of Regulations,⁴ which transpose into Irish law four European Community directives on electronic communications networks and services⁵ entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the Privacy and Electronic Communications Directive, was transposed into Irish law on 6 November 2003.

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.

- 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*.⁶ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.⁷ 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.⁸ 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).⁹
- 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.¹⁰ 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 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, based on established economic and legal principles, and taking the utmost account of *the Relevant Markets Recommendation* and *the Guidelines*.
- 2.7 This market review has drawn on a wide range of data and information to reach its conclusions. ComReg has utilised data supplied by industry, and has also referred to comparative data from other jurisdictions. ComReg has also used its own experience in the market to form conclusions.
- 2.8 The results of ComReg’s consumer surveys¹¹ 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 Framework Regulation 26.

⁷ Framework Regulation 27.

⁸ Framework Regulation 27(4).

⁹ Framework Regulation 27(3).

¹⁰ Framework Regulations 26 and 27.

¹¹ All surveys are available from ComReg’s website; www.comreg.ie. Relevant surveys will be referenced throughout this document.

commissioned TNS MRBI to carry out surveys on residential consumer telecommunications attitudes, which are referred to in this review.

- 2.9 On 1 September 2004, ComReg issued a national consultation on its market analysis for retail fixed calls (ComReg Document 04/95). Interested parties were asked to submit comments by 5 November 2004 on a number of questions pertaining to the preliminary findings of the analysis. ComReg received detailed submissions from the five respondents listed below by the close of the consultation period. A sixth respondent, O2, commented on one specific issue in the market, and its views were considered accordingly.
- 2.10 The five detailed responses to the consultation were provided by :
- alto
 - eircom
 - energis
 - Esat BT
 - vodafone
- 2.11 ComReg thanks all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its conclusions regarding the market analysis process. Comments relevant to each consultation question are addressed in the relevant sections and Appendix C. All responses received are available for inspection (with the exception of material supplied on a confidential basis) at ComReg's office.
- 2.12 As required by Regulation 20 of the Framework Regulations, any draft measures which ComReg proposes to adopt will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to adopting the measure

Liaison with Competition Authority

- 2.13 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. Appendix D includes the Competition Authority's response to ComReg's conclusion on this market.

¹² ComReg Document No. 03/06

Structure of this document

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

- **Section 3** presents ComReg's conclusions on the definition of the markets;
- **Section 4** presents ComReg's market analysis for the markets defined in Section 3 and presents ComReg's view on whether the markets are effectively competitive;
- **Section 5** presents ComReg's 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 proposes remedies to be implemented under the new regulatory framework;
- **Section 7** outlines the regulatory impact assessment conducted in relation to the proposed regulatory intervention regarding these markets;
- **Appendix A** outlines ComReg's proposed Draft Measure – Domestic Calls;
- **Appendix B** outlines ComReg's proposed Draft Measure – International Calls;
- **Appendix C** provides details of comments from respondents to the consultation, and explains ComReg's reasoning.
- **Appendix D** contains the response of the Competition Authority;
- **Appendix E** contains the Notification of Draft Measures.

3 Relevant Market Definition

Background

- 3.1 The consultation document described the procedures to be followed by ComReg in undertaking market reviews, and outlined the regulatory basis of the exercise. An overview of the market considered the structure and development of fixed access, and identified current and emerging products and services.

Scope of Review

- 3.2 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.

- 3.3 ComReg adopted the European Commission's approach as the starting point for its analysis of the retail calls market. This review is therefore concerned with the ability of customers to make telephone calls on the public telephone network.

- 3.4 The scope of this market review considers the following:

What is the functional scope of the calls market?

- 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 fixed to mobile calls in the same relevant product market as fixed domestic calls?
- 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 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 freephone calls in the same relevant product 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 is the delineation of the calls market?

- are local and national fixed calls in the same relevant market?
- are fixed international calls in the same relevant market as fixed domestic calls?
- are there separate relevant markets for residential and non-residential customers?

What are the relevant geographic markets?

3.5 ComReg notes broad agreement amongst respondents that the correct markets have been identified and reviewed.

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

3.6 ComReg took the view that, at present, the access market and the calls market in Ireland are complementary, and are not substitutes. ComReg, therefore proposed to define separate access and calls markets.

3.7 Key elements of ComReg's reasoning are :

- the basic functionality of calls and access is different. The services are bought for two different purposes, and are not be functional substitutes.
- While all access providers offer calls services, not all call providers offer access services. 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 noted areas of change in the market, such as bundling calls and access, and proposed that it should monitor whether such service offerings change the competitive dynamics of supply.

3.8 ComReg holds that despite there being separate markets for access and calls, these two markets are inextricably linked, as the relevant products are complementary goods. Access can be seen as an input product lying in an upstream market, while calls are the output product positioned downstream. As established in the consultation on *Market Analysis: Retail Access Market (Document Number05/25)*, eircom holds SMP in both the lower level and higher level access markets, due to very high market share¹³ and the lack of any potential competition. Therefore a provider of calls services in Ireland is currently precluded (absent regulation) from being able to provide calls independently of the incumbent access provider.

3.9 ComReg notes broad agreement amongst respondent that the overall direction of change in the markets for fixed access and calls was towards increasing substitutability. The main area of difference among respondents was in their perceptions of how quickly this change would take place. ComReg observed support among respondents, that the need for change in the market was underpinned by previous and continuing regulatory efforts in WLR and CPS. ComReg notes that service based competition via the take up of bundled access and calls packages has

¹³ eircom has currently 99% market share in the lower level access and 77% market share in the higher level access market.

been positive in the Irish market, however not sufficiently significant to justify defining a single market.

- 3.10 One respondent proposed that the appropriate timeframe of this review would be at least three years and that the timeframe should be shorter than that which was proposed by ComReg in the initial consultation. ComReg is cognisant of the *SMP Guidelines*¹⁴, which states that the market review should be forward looking, taking into account expected market developments over a reasonable period. The actual period used should reflect the specific characteristics of the market and the expected timing of the next review. ComReg concludes that for the retail calls market the appropriate timeframe may be less than three years, at this point ComReg holds that the appropriate time horizon for this review is approximately two years. ComReg proposes to monitor the market, and holds that where conditions in the market change sufficiently within this timeframe, it may reassess the appropriateness of the current market definition.
- 3.11 ComReg's time horizon for this review is less than the three years assumed by one respondent who proposed a more radical dynamic, but ComReg takes note of the need to monitor developments.
- 3.12 ComReg concludes that calls and access are currently in separate markets, and will remain so for the lifetime of this review.

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

- 3.13 ComReg proposed that the level of substitution at present does not constrain 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 would be unlikely to occur if a hypothetical monopolist fixed calls supplier was to increase prices between 5 and 10%.
- 3.14 The European Commission has, in a number of decisions, found that there is a market for mobile communications services that cannot be seen as being substitutable to fixed communications services. The European Commission notes that the key difference between mobile and fixed services is the mobility inherent in all mobile services (i.e., mobile numbers are associated with individuals on the move, rather than a fixed location). Thus, even though technological advances may mean that similar services could be offered over both fixed and mobile networks, fixed services do not offer this mobility.¹⁵

¹⁴ para 20

¹⁵ See, for example, Commission Decision of 10 July 2002, Case No. COMP/M.2803 – TeliaSonera, Commission Decision of 20 September 2001, Case No. COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia, Commission Decision of 20 September 2001, Case No. COMP/M.1439 – Telia/Telenor and Commission Decision of 12 April 2000, Case No. COMP/M.1795 – Vodafone Airtouch/Mannesmann.

- 3.15 In the consideration of supply-side substitution, ComReg is aware that in several other countries, there are proposals for converged fixed and mobile products¹⁶. Considering supply-side substitution between the fixed and mobile markets, ComReg notes that the development of 3G mobile networks may impact on whether mobile networks can provide a range of converged voice and data services on a single platform. Furthermore, in the future, the emergence of 4G solutions and the technological convergence of WiFi, GSM, 3G and WiMax technologies may provide opportunity for a mobile voice and high band-width data offering that would provide users with a seamless solution as a complete substitute for fixed line services. ComReg notes from the *SMP Guidelines*¹⁷ that supply-side substitution involves no additional significant costs, whereas potential entry occurs at significant costs. ComReg concludes that supply-side substitution is unlikely to take place within the timeframe of the review and should therefore be considered in the assessment of potential competition in Section 4.
- 3.16 ComReg notes that all respondents agreed that the overall direction of change in the markets for fixed and mobile calls was towards increasing substitutability, and that substitution applies to technology, demand and pricing. The main area of difference among respondents was in their perceptions of how quickly this change would come about.
- 3.17 ComReg's most recent market research¹⁸ indicates that when consumers were asked, what was the main reason for *not* having a fixed line telephone in their house, the most common response (which accounted for approximately half of respondents) noted that 'having a mobile subscription' was the primary driver. This response was particularly predominant among respondents in the 25-34 age band. However this research also shows that currently 81% of consumers interviewed had a mobile access and 79% had fixed access which would indicate that from the demand-side the two products are not seen as substitutes. ComReg holds that from the demand-side, pricing and functional characteristics are sufficiently different to define separate markets for fixed and mobile access. ComReg does recognise a trend towards mobile only households (from 12% in 2003 to 15% in 2004¹⁹), however ComReg takes the view that this trend is more indicative of younger age bands, who are more likely to be in rental accommodation, and does not reflect the market as a whole.
- 3.18 ComReg notes that one respondent submitted a list of detailed comments on the analysis, and that this is discussed fully in Appendix C.
- 3.19 ComReg does not agree with one respondent who proposed that substitution had already taken place. ComReg's view is that in terms of functional substitutability, a user who uses a fixed line to access calls and narrowband data would not currently see mobile as a substitute for fixed. ComReg recognises that the roll-out and take-up

¹⁶ Yankee Group Report. Wireless/Mobile Europe, October 2004. Matt Hatton. Cost and convenience will determine the success of fixed mobile convergence.

¹⁷ para 38

¹⁸ Amarach Consulting November 2004

¹⁹ Source: IPSOS survey for the European Commission, 2004.

of 3G may impact on this conclusion for calls, but does not believe that the change will be sufficiently significant within the timescale of this review.

- 3.20 On the question of pricing, ComReg is aware that, for some users making calls to certain numbers (notably on-net mobile phones), mobile calls can compete favourably with fixed calls. However, ComReg does not agree that this process will advance sufficiently within the lifetime of this review to challenge the conclusion that fixed and mobile calls should be in separate markets.
- 3.21 ComReg's conclusion is that, while there is a trend towards increasing substitution, the difference in price between fixed and mobile retail calls services, the lack of functional substitutability, and the inability of other firms, such as fixed operators, to switch to providing mobile services indicate that mobile calls services are in a separate market to fixed calls services. ComReg recognises the nature of change in this market, and proposes to keep it under active review.

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

- 3.22 ComReg proposed that fixed to mobile calls fall within the same relevant market as fixed to fixed calls.
- 3.23 A demand-side analysis would suggest that there is a single market for calls from a fixed location. A customer purchases a cluster of services of calls from a fixed location (to another fixed location, to a mobile or to the Internet). The customer purchases the ability to make calls of any type as part of a cluster of services and does not purchase the ability to make or 'originate' fixed to mobile calls separately. ComReg notes that via CPS the customer may choose to buy international, national (including mobile), or all calls from the 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.
- 3.24 It is at the customer's discretion what type of call it decides to make and this will be based on pricing or functionality considerations. Furthermore, a supply-side analysis shows that there is likely to be supply-side substitution. If a hypothetical monopolist of fixed-to-fixed calls wants to offer calls to mobile, it is just a matter of concluding an agreement with the mobile operator for terminating calls.
- 3.25 ComReg notes agreement from all respondents on the definition of fixed to mobile and fixed to fixed calls within the same market.

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

- 3.26 ComReg proposed that Operator Assisted (OA) calls should be treated as an ancillary service to calls within the relevant product market for calls from a fixed location.
- 3.27 ComReg notes that three respondents asked for clarification of how an ancillary service would be treated under the market review process. It is ComReg's view that ancillary services to the market would attract the same obligations and remedies that may be found to be appropriate to the calls in the market to which they are ancillary.

- 3.28 One respondent proposed that OA calls should be treated as a separate sub-market, as there was no demand-side substitution. Another respondent introduced the issue of Directory Enquiry (DQ) calls, proposing that DQ calls should not be included in the fixed calls market.
- 3.29 ComReg notes that Directory Enquiry calls have not been identified by ComReg or other respondents as potentially appropriate for exclusion from the fixed calls market as a whole. ComReg has considered the view of the respondent which proposed that DQ calls should not be included in the fixed calls market, but maintains its original conclusion that DQ calls fall within the fixed calls market as a whole and do not form a separate market.
- 3.30 ComReg suggested that, 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 to be a service ancillary 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. Rather, operator assisted calls are a product feature which make up a complete service. Operator Assistance calls are therefore best treated as services ancillary to the calls which make up the fixed calls market rather than as a part of that market or as a separate market.
- 3.31 ComReg notes that this section specifically considers OA calls; it does not cover Directory Enquiry (DQ) calls. DQ calls have not been identified by ComReg or respondents as being potentially appropriate for exclusion from the fixed calls market as a whole. While one respondent expressed its strong disagreement with the inclusion of DQ calls in the fixed calls market it did not provide sufficient evidence or a sufficiently compelling argument for ComReg to revise its conclusion that DQ calls fall within the fixed calls market as a whole and do not form a separate market.
- 3.32 Having considered the views of respondents, ComReg agrees with the majority, and confirms its own preliminary conclusion, that OA calls are best treated as services ancillary to the calls which make up the fixed calls market(s), rather than as a part of that market or as a separate market. As ancillary services to the market, they will be subject to the obligations and remedies that may be found to be appropriate for the calls in the market to which they are ancillary.

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

- 3.33 The provision of public payphones is a part of the universal service obligation. 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. Apart from this, such a call is like any other.
- 3.34 ComReg suggested that the varying levels of functionality and pricing would indicate that, on the demand-side, calls from payphones are not in the same market as other landline calls.
- 3.35 In terms of supply-side substitution, 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 be able to enter the market without significant sunk costs. ComReg notes that if a hypothetical monopolist of calls from land lines wants to offer calls from payphones, they could only enter the payphone market by acquiring sites, installing payphones on a wide geographical scale, establish administrative labour resources etc. 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.

- 3.36 ComReg notes broad agreement amongst respondents that calls from payphones were sufficiently distinct in terms of demand and supply characteristics to warrant definition in a separate market. ComReg notes that this means that a separate market review will be carried out, and that this review will consider issues raised by the respondent who believes calls from payphones should be in the same market as other fixed calls.
- 3.37 ComReg's conclusion, based primarily on demand-side substitution, is that calls to/from payphones are in a separate relevant market. A separate market review will be carried out.

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

- 3.38 ComReg proposed that calls to the Internet should be defined in the same relevant market as fixed domestic calls because it would be relatively straightforward for a supplier of fixed domestic calls to switch production, and vice versa, should a hypothetical monopolist impose a price increase for Internet calls.
- 3.39 ComReg's analysis of demand indicated that customers generally purchase a cluster of call types from their supplier and that, therefore, there are no differences in purchasing calls to the Internet that differentiate such calls from any other call type. Pricing, terms and conditions of supply and payment terms for calls to the Internet do not vary substantially from voice calls.
- 3.40 At present, a significant proportion of Internet traffic is excluded from CPS, and so customers are obliged to buy these calls from the incumbent or another operator making use of these codes. It is ComReg's view that there are no inherent differences with such calls, and that the difference is a result of the way in which CPS has developed.
- 3.41 On the supply-side, ComReg considered that within the timeframe of this review, supply-side substitution will increase between calls to Internet and voice calls, and so they are not in a separate market.
- 3.42 ComReg notes that all but one respondent agreed that calls to the Internet and voice calls should be defined in the same relevant market. The respondent who disagreed put forward a series of detailed points, and these are discussed in Appendix C. In summary, the respondent proposed that dial-up access to the Internet should be considered to be substitutable with DSL access, and the respondent noted a decrease

in dial-up minutes carried over its network over the same period as an increase in the DSL connections it had supplied in the same period.

- 3.43 ComReg does not consider that a chronological correlation of rapid growth in one product with a decline in another is necessarily an indication that the two products are in the same market. ComReg maintains that ‘always on’ is a most significant functional difference between DSL access and dial-up; a further key difference is the difference in the speed (bit rate) of the connection. These functional differences and the underlying differences in delivery technology are reflected in pricing differences between broadband and dial-up access. Price and performance differences together make it quite clear that dial-up access and DSL access are distinct and exist in different markets. This view is supported by ComReg’s conclusion of its review of the wholesale broadband access market (*Market Analysis: WBA – Document Number 04/83*), where narrowband and broadband services were identified to be in separate markets from the demand-side due to functional and pricing characteristics.
- 3.44 ComReg notes that this consultation is concerned with the supply of telephone calls and the issue is whether dial-up Internet access calls form part of the same market as other calls from a fixed location. All operators provide Internet access calls to all of their directly connected customers and supply these services as part of an overall cluster of calls. Calls to ‘pay as you go’ numbers (e.g. 1892) unambiguously form part of these overall packages as the whole service is charged for on the basis of the individual calls made. The introduction of a subscription element for the 1891 service, and its extension on the 1893 code does not fundamentally alter the telephone call through which access is made. Taken together these services form a continuum of increasing flat rate payments in return for lower call charges, which charging options have long been available from mobile phones and which have now entered the fixed market.
- 3.45 ComReg noted in the discussion of demand-side substitution the general point that end users want to be connected to the number that they dial, and at that level any one call cannot usually be a substitute for any other call, so that the consideration of demand-side substitution must be analysed using a higher level approach. It is this higher level analysis that ComReg has undertaken and which leads to the conclusion that Internet access calls and domestic calls, both made from a fixed location, form part of the same relevant market.

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

- 3.46 ComReg proposed that there is supply-side substitution between calls to non-geographic numbers and domestic voice calls. As such they do not fall within separate market.
- 3.47 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.

3.48 ComReg notes agreement from all respondents with its proposal that calls to other non-geographic numbers are in the same market as fixed voice calls.

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

3.49 ComReg holds that from the demand-side fixed SMS and calls from a fixed location are not included in the same market. ComReg notes that not all handsets used for fixed calls can facilitate the SMS functionality (currently an SMS enabled phone is required). It is difficult to assess whether a lasting price change of a fixed call will have an impact on the take up of fixed SMS. While calls are charged on a per minute basis, text messages are charged by number of characters (or capacity)²⁰, therefore the two services can not easily be compared in terms of price alone.

3.50 ComReg notes that fixed SMS is covered through the Wholesale Line Rental provision for non-discrimination. However this is more appropriately examined at the wholesale level and will be considered in ComReg's review of the Interconnection market²¹.

3.51 ComReg proposed that, given the nascent level of development of the service²², it is not appropriate to broaden the market definition to include fixed SMS. ComReg does not have sufficient information to suggest that demand-side substitution has taken place within the market to justify such a conclusion.

3.52 ComReg maintains that fixed SMS and calls should not be defined as falling within in the same relevant market as voice calls at this time.

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

3.53 ComReg considered whether calls made using Voice over Internet Protocol (VoIP) are in the same market as other retail calls. It was concluded that where VoIP is over PSTN, then it forms part of the market for domestic calls. ComReg did recognise that a VoIP call may be of a lower quality; however this is generally reflected in a lower price charged. Therefore VoIP may be a demand-side substitute to a publicly available call at a fixed location.

3.54 However 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. Developments will be monitored by ComReg during the timeframe of this review.

3.55 One respondent asked for clarification on the definition of a voice call, and questioned whether the device used to originate the call was the defining feature. ComReg notes that, for the purposes of this market review, the key issue in

²⁰ eircom's fixed SMS services costs 8c (inc. VAT) to send an SMS from a landline to a landline and costs 10c (inc. VAT) to send an SMS from a fixed line to a mobile. The length of the SMS is limited by a specified number of characters.

²¹ This is examined in the national consultation on the Market Analysis of the Interconnect Market – Document number 04/106.

²² Fixed SMS was introduced in Ireland by eircom at the beginning of 2003. http://mmm.eircom.ie/press/PressRelease_Target.asp?id=240&y=2003&archived=1

considering whether VoIP should form part of the fixed calls market is the extent to which calls are considered to be carried on the PSTN.

- 3.56 ComReg notes agreement amongst all respondents that VoIP calls (unless carried over the PSTN) were not currently part of the same market as fixed voice calls. ComReg agrees that this is a developing market, and should be monitored closely.

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

- 3.57 ComReg proposed that local and national calls should be defined in the same market. Customers are increasingly buying packages of types of call which best reflect individual call patterns. Through CPS a customer may choose to buy international, national (which include local calls), or all calls from the 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. It is very unlikely that a customer would use one operator exclusively for local calls and a different operator exclusively for national calls. ComReg notes that a number of operators are providing single tariffs for both local and domestic calls.
- 3.58 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 avenue for market entry or expansion, but that this is changing. ComReg also notes that there is a commonality of wholesale inputs required for the provision of local and national calls.
- 3.59 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.
- 3.60 ComReg notes that all respondents agreed that local and national calls should be defined in the same relevant market.
- 3.61 ComReg maintains therefore that local and national calls should be considered to fall in the same market.

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

- 3.62 ComReg proposed that international calls and domestic calls should be defined as falling within separate markets. Customers view international services differently from domestic services not least because of the relatively higher cost and the lack of functional substitutability. On the 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 for the provision of international calls has become far more dynamic

than for domestic calls, in a relatively short time, and it appears that the conditions of competition are, therefore, different.

- 3.63 ComReg considered whether the international market should be further divided. It concluded that, while different international routes are promoted differently and have different competitive structure, domestic and international interconnection mean that the range of routes offered can be extended with relative ease and without significant cost. There are no perceived barriers to switching services from one route to another (where the necessary inputs at the terminating end are available). It was, therefore, proposed that the international market should not be sub-divided further.
- 3.64 ComReg notes that all respondents agree that international calls are in a separate market from domestic calls.
- 3.65 One respondent has proposed that the market should be narrower, and that separate markets should be defined for residential and business customers. ComReg refers forward to its discussion of the issues relating to the separation of business and residential markets, and notes that the respondent's analysis again refers to a segment of the market described as large corporate users. While there may be large corporate users who share certain characteristics in relation to demand for international calls, ComReg does not believe that this segment can be defined in any practical way according to the market definition principles to be followed in this market review.
- 3.66 ComReg concludes that domestic calls and international calls constitute separate relevant markets.

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

- 3.67 In its assessment of whether there is a single calls market for residential and non-residential users, ComReg has considered whether there is a price progression between different tariff packages, such that, if a hypothetical monopolist of services e.g. residential calls raised its price, consumers have the ability to switch to a different package (non-residential calls) and the price increase would not be profitable.
- 3.68 In Ireland there is no industry consensus on what is the appropriate categorisation of residential and non-residential users (which would indicate in itself that there is no obvious demarcation), therefore there is an inherent difficulty in comparing prices universally between the different sectors. There is no consistent definition, the boundaries are fluid and subject to self-selection, arbitrarily allocated, and subject to change.
- 3.69 Some operators do differentiate residential and non-residential users and the main basis for delineation of prices is based on volume. eircom, for example offers volume discounts to both residential and non-residential users, which kick in after a monthly spend on calls of €12.50 and €18.15 respectively. The level of discount increases with the number of calls. ComReg noted that the residential discount is effective after a lower volume of calls; however there is a definite correlation between high volume and non-residential users so it is likely that a greater proportion of all calls will be subject to a discount. Additionally, there is

considerable overlap between low volume non-residential and high volume residential users. To get the lowest priced calls, an end user will be likely to self select themselves as being a residential or non-residential user based on their call pattern rather than actual user type.

- 3.70 Unlike other member states, where differentiation may be based the possession of specific characteristics such as having a VAT or social security number, there are no barriers to switching based on user type. ComReg also notes that residential and non-residential calls are functionally homogeneous in terms of quality of service and means of provision. ComReg therefore concludes from the demand side that there is not a sufficiently significant price or functional difference between residential and non-residential calls to justify the definition of separate calls markets and if there were a price increase of non-residential calls, a non-residential user would be likely to switch to a residential package and vice versa. This would indicate that there is a single market for calls not differentiated by user type.
- 3.71 ComReg also concluded that there is supply-side substitution between the provision of residential and non-residential calls. A hypothetical monopolist of non-residential users could not profitably increase the price of its calls, as providers of residential calls could easily enter the market without additional significant cost to provide non-residential services. ComReg further notes that generally in Ireland operators which provide residential calls also provide non-residential calls and vice versa. While in other member states there may be differences in the quality of services demanded from the non-residential users who may also be less price sensitive, in Ireland this differentiation does not exist, therefore ComReg concludes that the barriers to entry are the same for residential and non-residential sectors. While the European Commission suggested that the economics of supply may differ between the residential and non-residential markets, ComReg takes the view that once issues relating to the cost of access (either through direct provision or the access of wholesale products) have been addressed, a current supplier of calls can supply either business or residential customers²³.
- 3.72 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.
- 3.73 In its analysis of the retail calls market, ComReg proposed that the scope of the Irish markets for retail calls was sufficiently distinctive to warrant definition in the manner that differs from that suggested by the European Commission. All but one respondent agreed that there was little differentiation between residential and non-residential fixed calls, and that generally this applied both to demand and to supply characteristics. The respondent who did not agree put forward an analysis which was based primarily on a distinction between the largest users and the rest of the market.
- 3.74 ComReg has considered whether competitive conditions vary by customer group, and so whether, the market definition should be narrowed to reflect particular customer types. ComReg's approach to market definition is such that the relevant market is defined by determining the boundaries established by the existence of a constraint on the price setting behaviour of firms.

²³ Relevant Market Recommendation page 17

- 3.75 ComReg has considered whether it is possible to define distinct markets on the basis of a measure such as turnover, or number of employees, or total telecoms spend. ComReg's consideration is that the use of any criterion, or combination of criteria, would need to be arbitrary. It is ComReg's view that, while there may indeed be distinctive characteristics shared by the largest users of calls services, however there is no obvious way of defining the boundaries of such a group.
- 3.76 ComReg notes, further, that other NRAs have considered ways in which a narrower definition of the largest users of calls services could be constructed. However there was no consensus that it is feasible within the standard market definition principles used by NRAs and the European Commission²⁴.
- 3.77 In conclusion, ComReg notes that historically and currently operators tend not to offer different services for residential and non-residential users. Given this, if there were a lasting price increase of a non-residential call it is very likely that a non-residential user would switch to a residential package and vice versa. Having said this, ComReg recognises that it is conceivable to define two separate markets in accordance with the *Relevant Markets Recommendation*, in the event that operators *started* to a sufficient extent to offer differentiated residential and non residential services (as is the case in other member states), it may be appropriate for ComReg to take this approach. At present there is nothing to indicate that this is likely to happen within the timeframe of the review, however ComReg will monitor the market for such developments. ComReg further notes that that regardless of whether the calls market was sub divided into a residential and non-residential market or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power. ComReg therefore proposes to undertake its analysis under a single market.
- 3.78 In conclusion, ComReg notes that historically and currently operators tend not to offer different services for residential and non-residential users. Given this, if there were a price increase of a non-residential call it is very likely that a non-residential user would switch to a residential package and vice versa. Having said this, ComReg recognises that it is conceivable to define two separate markets in accordance with the *Relevant Markets Recommendation*, in the event that operators *started* to a sufficient extent to offer differentiated residential and non residential services (as is the case in other member states). At present there is nothing to indicate that this is likely to happen within the timeframe of the review, however ComReg will monitor the market for such developments. ComReg further notes that that regardless of whether the calls market was sub divided into a residential and non-residential market or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power. ComReg therefore proposes to undertake its analysis under a single market.
- 3.79 ComReg concludes that, in Ireland, residential and non-residential calls are defined in the same relevant market.

²⁴ Ofcom's Review of Fixed Narrowband Retail Markets, 17.03.03

The relevant geographic market

- 3.80 ComReg proposed that the relevant geographic market for the markets considered in this review is the state of Ireland.
- 3.81 ComReg has considered whether competitive conditions were sufficiently different in some urban areas to warrant their definition as separate geographical markets. One respondent was of the view that conditions of competition differ across Ireland. ComReg concludes that this is not sufficient to define a separate geographic market, as defining a market solely on this basis is likely to result in multiple markets differentiated by tenuous criteria. ComReg further notes that even if multiple geographic markets were defined based on competitive conditions, it would be unlikely to affect the SMP designation established in Section 4.
- 3.82 ComReg's view remains that eircom offers its services for fixed calls on a national basis, on the same terms and conditions; functionally the service provided is nationally homogeneous. ComReg recognises that prices are geographically averaged due to regulation and commercial reasons; however evidence suggests to ComReg that eircom's regulated prices are in essence a benchmark which competitors set prices. Generally prices among operators are standardised nationally and are based on time spent rather than geographic location from where the calls is made. Where other services are or might be offered by other operators on a less than national basis, such services will compete with eircom's national services. For this reason, the relevant geographical market is the state of Ireland. Should circumstances change, whether through commercial developments or regulatory intervention, this conclusion would be reviewed.

Summary of conclusions

- 3.83 ComReg proposes to define two markets for retail calls from a fixed location :
- Retail domestic calls from a fixed location ('domestic market'; and
 - Retail international calls from a fixed location (international market')
- 3.84 ComReg notes broad agreement from all but one respondent regarding these market definitions. ComReg has responded to issues raised relating to OA and payphone calls, and does not believe that there is sufficient reason to change its position on market definition to reflect these issues.
- 3.85 ComReg notes wider ranging disagreement from one respondent. Some aspects of this respondent's objections derive from differences of opinion regarding the rate of change in the market. For example, ComReg agrees that substitution between fixed and mobile originating calls is growing, but does not agree that such calls are substitutable for any but marginal customers already, and does not believe that this will become the case during the lifetime of this review.
- 3.86 ComReg has discussed the respondent's proposal to segment both the domestic and international markets by customer type, namely by 'Large business and other' ComReg understands the respondent's characterisation of large users of calls services, whether corporate or government, but does not believe that this

characterisation can be translated into a meaningful distinction when defining relevant markets.

4 Relevant Market Analysis

Background

4.1 ComReg has identified two markets for publicly available telephone services provided at a fixed location. These are publicly available domestic telephone services (which include local and national calls, calls to non geographic numbers and calls to mobiles within Ireland) and publicly available international telephone services. ComReg is 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.²⁵

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*.²⁶

Assessment of Significant Market Power

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.
- 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), or all calls from the alternative operator, or to buy on a per call basis. According to ComReg’s market information, the

²⁵ Framework Regulations, Regulation 25(3).

²⁶ Framework Regulation 25(2).

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 The larger CPS operators are EsatBT, MCI, SMART and energis.. In addition, CPS operators support a host of service providers (resellers) offering call services through CA, CS and CPS. All service providers offering a calls package, including resellers, are authorised through the notification process²⁷ to ComReg and are required to comply with the conditions of a general authorisation²⁸. While resellers do not have a direct interconnect relationship with eircom, they manage their customer's calls service through their host operator.
- 4.6 Furthermore, the market also includes providers of calling cards, which provide a prepaid means of making an international call, and providers of 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

Domestic Market

- 4.7 At the time that the market analysis was carried out, eircom's market share of the domestic calls market was 87% based on revenue. No OAO had a market share in excess of 10%.²⁹ This is evidenced in Figure 4.1 below.
- 4.8 ComReg has defined a single market for residential and non-residential calls in which eircom has a market share of 87%. Due to variance among operators in their interpretation of the residential and non-residential categorisation, there is an inherent difficulty in assessing eircom's share in either market in isolation. However ComReg notes that OAOs (who also categorise user by residential and non-residential based on their own criteria) have a market share of 13% of the total market which would indicate that even if the market was split (into residential and non-residential) eircom is likely to have a market share in excess of 50%. ComReg concludes that potentially, due to prevailing market conditions, the two markets could be identified with the same dominant operator and competition issues. However this would not render any significant benefit (over a single market) to the regulatory outcome.

²⁷ 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.

²⁸ Regulation 8(3) of the Authorisations Regulations: European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 – S.I. No. 306 of 2003.

²⁹ Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

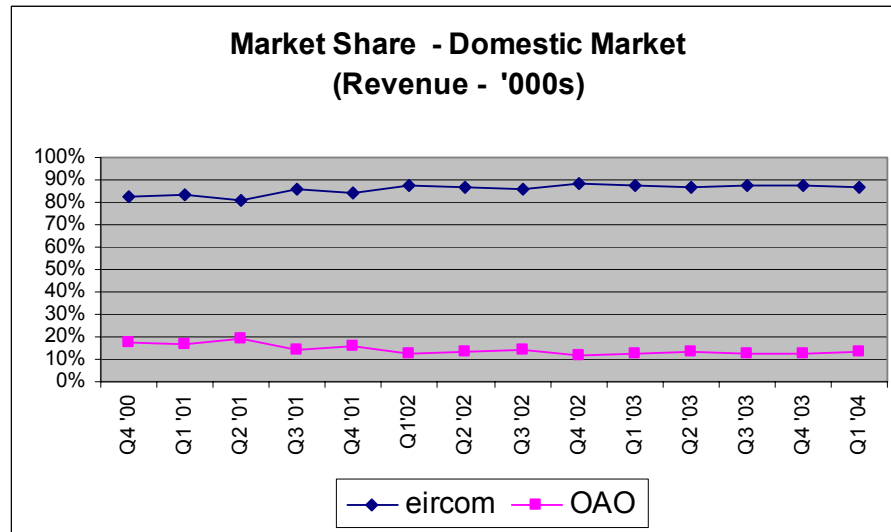


Figure 4.1: eircom domestic market share (Revenue)

- 4.9 eircom's market share has remained largely static over the last two years, following an initial decline with the introduction of CPS. Over the same period, Esat BT's market share has also slightly declined. Although the number of CPS subscribers grew during 2003, the churn rate was high and regulatory intervention was necessary. During 2004, growth in CPS was 8-10% per quarter³⁰. In December 2004, CPS accounted for 17% of total PSTN lines, and 18% of total ISDN lines³¹. This suggests that, over the last year, eircom's market share by revenue stabilised following the introduction of CPS, and, although a number of entrants entered the market, none has yet established a material market presence.
- 4.10 ComReg expects that the rate of take-up of CPS will increase, and expects that the roll-out of WLR will drive such increase. Since the launch of the automated version of WLR in April 2004, almost 79,000 lines have been transferred. This figure includes CPS customers who have migrated to WLR. While this indicates strong early adoption of the product, WLR customers still constitute a very small part of the overall market, in that they account for just over 1.3% of all fixed access channels. To date, much of the take up of WLR is accounted for by operators switching their existing customers to WLR and that it remains to be seen what the growth rate of WLR is when the process is completed.
- 4.11 ComReg notes that two respondents suggested – for different reasons – that market share should be measured by volume instead of, or as well as, by revenue. One respondent suggested that users may be prepared to pay a premium for quality, and that this may inflate the revenue data. Another respondent presented its own market data, and suggested that analysis by volume would show a decrease in the market share of the SMP operator.

³⁰ Irish Communications Market - Quarterly Key Data December 2004 (Document number 04/121).

³¹ Irish Communications Market - Quarterly Key Data December 2004 (Document number 04/121).

4.12 ComReg's choice of data for its analytical reviews is necessarily limited by availability and reliability. Where revenue data is available, ComReg's experience indicates that it is more robust than volume data. Additionally, ComReg has taken account of the *SMP Guidelines* which note³² that, in the case of differentiated products (i.e. branded products) sales in value and their associated market share will often be considered to reflect better the relative position and strength of each provider. ComReg further notes that analysis of market share by volume and by revenue both indicate that eircom has significant market power.

International Market

4.13 At the time of the market analysis, eircom's share of the international calls market was 68% based on revenue. All other operators had individually market shares of under 15%, based on revenue³³.

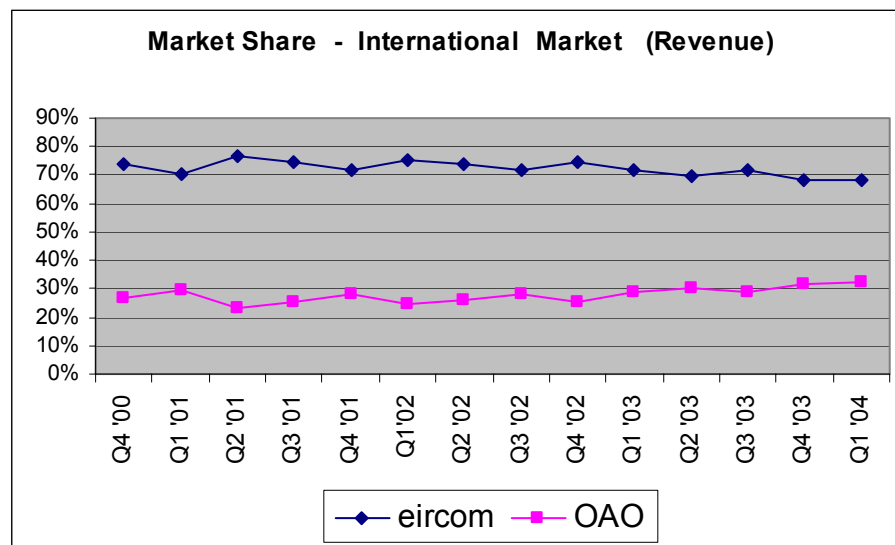


Figure 4.2: eircom international market share (Revenue)

4.14 ComReg notes that eircom's market share declined sharply with the introduction of CPS in 2000. During 2003, the decline continued, but was less marked and in some quarters ComReg notes that eircom's market share increased. eircom's market share declined from 75% to 68% based on revenue, between the end of 2002, and the end of 2003. The *SMP Guidelines* note³⁴ that 'according to established case-law, very large market share, in excess of 50%, are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time'. ComReg notes that eircom's market share has been consistently in excess of 50% over the past four years and that it is unlikely (due to factors considered below) that any competitive

³² para 76

³³ Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

³⁴ para 75

constraint will diminish eircom's market share below 50% within the timeframe of the review.

- 4.15 In the same period, the two largest OAOs (EsatBT and MCI) showed a small increase in their shares in the international calls market, however ComReg notes that presently there is no single operator which has an ability to prevent eircom from acting independently of its competitors. As noted above no OAO alone has over 15% of market share.
- 4.16 One respondent presented market data based on volume, which indicated that in particular segments of the international market, eircom's market share was lower than that calculated by ComReg. The respondent was particularly concerned about market share in a market it defined as 'corporate international'; however it also recognised that even if the market were split into separate residential and non-residential markets, it was its view that eircom would still have a market share in excess of 40% in both markets. As noted in Section 5, ComReg reiterates that the assessment of demand and supply-side characteristics indicates that it is appropriate to define a single market for international calls.
- 4.17 Another respondent suggested that the international market was significantly more competitive than the domestic market.
- 4.18 As noted above, ComReg based its assessment of market share on revenue, because it was felt that this was the most stable and most representative measure, reflecting pricing power as well as volume.
- 4.19 ComReg recognises that market share is a generalised measurement, and that there will be segments within a market where the market share is higher or lower than the overall figure. In the market definition section of this review, ComReg explained why it did not consider it appropriate to narrow the definition of the international market particular customer categories.
- 4.20 ComReg agrees with respondents who noted that the international calls market was more competitive than the domestic calls market. ComReg recognised this in the consultation, and this view is reflected in the remedies proposed for each of the calls markets.

Barriers to entry and potential competition

- 4.21 Considering both the domestic calls market and the international calls market, ComReg examined 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.
- 4.22 ComReg analysed actual and potential barriers to entry in the fixed calls markets in terms of economies of scale and scope; provision of combined calls and access packages; and vertical integration of eircom.
- 4.23 The *SMP Guidelines* state that barriers to entry exist where entry into the market requires large investment. As noted:
Entry barriers are exacerbated by further economies of scope and density which generally characterise such [electronic communications] networks. Thus, a large

*network is always likely to have lower costs than a smaller one, with the result that an entrant in order to take a large share of the market and be able to compete would have to price below the incumbent, making it thus difficult to recover sunk costs*³⁵.

- 4.24 ComReg does not agree with one respondent who suggested that the effect of economies of scale and of scope had been exaggerated. ComReg noted in the consultation that the effects of economies of scale and scope were less in the calls markets than in the access market.
- 4.25 ComReg holds that despite there being separate markets for access and calls, these two markets are inextricably linked as the relevant products are complementary goods (as explained in Section 3). Access can be seen as an input product lying in an upstream market, while calls are the output product positioned downstream. ComReg notes that due to eircom's historical incumbent position as a vertically integrated provider, it enjoys great economies of scale and scope in terms of access. Economically it is not feasible for any other operator to replicate eircom's network; this is clearly evident in the Irish context where there is very limited alternative direct access to users. As established in the consultation on *Market Analysis: Retail Access Market (Document Number 05/25)*, eircom holds SMP in both the lower level and higher level access markets, due to very high market share³⁶ and the lack of any potential competition. Absent regulation, these barriers to entry are very unlikely to be overcome by a competitor of eircom.
- 4.26 ComReg does recognise that through regulatory intervention through the provision of WLR/CPS (which can only be imposed upon the designation of SMP in the relevant markets), eircom's market share has fallen (more evidently in the international market). However ComReg is of the firm view that in the absence of regulation the market would be likely to revert to its incumbency position. Therefore ComReg does recognise that economies of scope and of scale have been mitigated by regulatory intervention, however absent regulation eircom would clearly be in a position to act independently of its competitors and customers.
- 4.27 Respondents who commented on this issue generally agreed that eircom benefited from economies of scale and of scope, and from vertical integration. The provision of combined calls and access packages was seen as less significant due to the introduction of CPS/WLR. ComReg notes that without regulatory intervention (via mandating of CPS/WLR), eircom would be in a position to enjoy significant economies of scale and scope.
- 4.28 It was proposed by one respondent that economies of scale and scope may be achieved by operators other than eircom, where these operators are part of international organisations. From the information available to ComReg, it is difficult to see what, if any, benefit a subsidiary operator can enjoy (in terms of economies of scale and scope) from being part of a wider organisation group. The respondent did not substantiate how operators in the Irish market enjoyed a competitive advantage from being part of the wider group.

³⁵ Footnote 85 – The SMP Guidelines refers to *Hoffmann-La Roche v Commission*, op. cit., at paragraph 48

³⁶ eircom has currently 99% market share in the lower level access and 77% market share in the higher level access market.

- 4.29 ComReg agrees that the introduction of WLR will reduce the extent to which the provision of combined calls and access packages constitutes a barrier to entry. ComReg notes that this introduction was mandated by regulatory intervention, and maintains its view that, while early signs of market development are encouraging, it is still too soon to consider the development of this market without obligations on eircom. ComReg firmly holds that absent regulation, barriers to entry would be too high to preclude market entry at a sufficiently significant rate to diminish eircom's market power.
- 4.30 ComReg concludes that economies of scale and scope, and the vertical integration of eircom continue to constitute barriers to entry in the fixed retail calls markets. The ability of eircom to offer combined calls and access packages should become less significant as WLR develops, but its development continues to be dependent on regulatory obligations.

Barriers to switching

- 4.31 Low barriers to switching would indicate that, even when market share suggests otherwise, market power is reduced. ComReg analysed actual and potential barriers to switching in terms of customer awareness and number portability.
- 4.32 One respondent commented on customer awareness, suggesting that it did not constitute a barrier to switching, and could be overcome by more widespread marketing by operators. ComReg notes that its most recent market research indicated that 50% of residential consumers³⁷ and 40% of non-residential consumers³⁸ were still unaware of the availability of single billing, and while this may be addressed by operator marketing, ComReg maintains that persistent low customer awareness continues to constitute a barrier to switching. ComReg does recognise that there is a greater awareness among business users however when asked in the same survey, only 16% of users had actually switched supplier for their fixed line within the previous 12 months. Additionally, despite being aware of single billing, only 25% of respondents would be very likely or likely to be influenced by this to switch supplier.
- 4.33 ComReg concludes that eircom's position in the domestic and international calls markets is not mitigated by low barriers to switching.

Countervailing buyer power

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

³⁷ Amarach Consulting, November 2004

³⁸ TNSmrbi: SME survey December 2004

- 4.35 ComReg notes that two respondents identified this as a major issue, particularly amongst the largest companies in the international calls market. These respondents provided anecdotal evidence of the existence of countervailing buyer power. In their view, countervailing buyer power would act to constrain eircom's pricing, reducing market power. ComReg notes that both respondents agreed that countervailing buyer power was not an issue in relation to residential users, and was not likely to be an issue for small or even medium sized business users. The issue, therefore, potentially applies only to a very small number of very large customers, in both the private and the public sectors. ComReg recognised in the consultation that it was possible that the largest users could influence eircom's behaviour, but noted it had been provided with no evidence that this happens to a material enough extent to change its conclusions.
- 4.36 ComReg concludes that there is no substantive indication of the existence of countervailing buyer power in the markets for retail calls. While purchasers of high volumes of calls may be more able to exert buyer power, ComReg has seen no evidence to indicate that this happens in a way which could significantly constrain eircom's pricing behaviour.

Conclusions of the market analysis

Domestic calls

- 4.37 eircom should be designated as having SMP in the relevant retail market for domestic telephone calls, not differentiated by residential and non-residential users. ComReg further notes that that regardless of whether the domestic calls market was sub divided into residential and non-residential markets or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power.
- 4.38 ComReg does not believe that it is likely that any current service provider can impose a competitive constraint on eircom, and does not believe that this situation will change significantly within the lifetime of this review
- 4.39 The market definition for retail fixed domestic calls and the subsequent assessment of market power shows evidence that eircom is in a position to act independently of its competitors and customers, in that they are unable to constrain eircom's pricing of domestic calls services.

International calls

- 4.40 eircom should be designated as having SMP in the relevant retail market for international telephone calls not differentiated by residential and non-residential users. ComReg further notes that that regardless of whether the international calls market was sub divided into residential and non-residential markets or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power.

- 4.41 This conclusion 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 in the presence of regulation that CPS is having an impact. ComReg notes that there is greater competition in the market for international calls than in the market for domestic calls, but considers that competition has not yet eroded eircom's significant market power. ComReg has taken this into consideration in its assessment of appropriate remedies (see Section 6)
- 4.42 The market definition for retail fixed international calls and the subsequent assessment of market power shows evidence that eircom is in a position to act independently of its competitors and customers, in that they are unable to constrain eircom's pricing of internationalcalls services.
- 4.43 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 eircom's pricing of international calls services.
- 4.44 ComReg notes that respondents have commented on its approach to the market analysis, on the analysis itself, and on the conclusions.
- 4.45 ComReg concludes that the retail markets for domestic and international fixed calls are not effectively competitive, and that eircom has SMP in both markets.

5 Designation Of Undertakings With Significant Market Power

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

6 Proposed Market Remedies

Introduction

- 6.1 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.
- 6.2 Where ComReg concludes that obligations imposed under the *Access Regulations* or Regulation 16³⁹ 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.
- 6.3 The section of the consultation discussed actual and potential competition problems in the defined markets, and proposed remedies to address these problems.

Competition Problems in the retail calls markets

- 6.4 ComReg set out the type of competition problems that it considered may arise due to the presence of a vertically integrated operator having SMP in the retail fixed calls markets.
- 6.5 ComReg indicated 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 noted 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.
- 6.7 In line with the *SMP Guidelines*, ComReg has conducted its market analysis on a forward-looking basis, similar to that carried out in a merger analysis, rather than ex post, as would be carried out under Article 82 of the EC Treaty or Section 5 of the Competition Act 2002. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation.

³⁹ Regulation 16 of the USO refers to mandating CA/CS and CPS, details of which are discussed below.

- 6.8 ComReg considers that the justification for considering *ex ante* remedies must therefore be broader than if solely based on demonstrable acts of past behaviour. ComReg will instead have to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. ComReg suggests that this is a key difference in approach between *ex ante* and *ex post* analysis, and ComReg notes that its approach has been developed in line with other NRAs.
- 6.9 ComReg does not agree with the assertion made by one respondent that the competition problems identified were purely theoretical. ComReg has used the evidence gathered through market analysis, its own experience in regular meetings with both eircom and OAOs, and its regulatory interventions over recent years to identify these competition problems. ComReg also participated, in collaboration with other NRAs, in a ‘stock taking’ exercise to feed these into the ERG Common Position on Remedies⁴⁰.
- 6.10 One respondent characterised ComReg’s analysis as biased, unbalanced and misleading, and disputed a number of paragraphs. The respondent provided an alternative interpretation of several of ComReg’s documents used as reference in this section of the consultation, and an alternative interpretation of the development of the CPS product.
- 6.11 ComReg notes that respondents from the OAO community have stated that the competition problems identified by ComReg were entirely reflective of the issues in this area and have provided evidence to support the existence of these problems. ComReg has provided analysis of the proportionality and justification of remedies when setting out the detailed remedies and in the accompanying Regulatory Impact Assessment.
- 6.12 ComReg believes that its interpretation and analysis of competition problems reflects its experience, and that of OAOs, in the domestic and international calls markets.

Principles in selecting remedies

- 6.13 ComReg noted its obligations under the Communications Regulation Act 2002, the *Framework Regulations*, the *Access Regulations* and the *Universal Service Regulations*.
- 6.14 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. ComReg believes it is unlikely that within the period of this review without regulatory intervention 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

⁴⁰ ERG Common Positioning on the approach to Appropriate remedies in the new regulatory framework (ERG (03) 30rev1) – page 88
http://erg.eu.int/documents/index_en.htm#ergdocuments

the retail calls markets. Furthermore, the proposed remedies aim to protect consumers in the relevant retail markets.

- 6.15 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.
- 6.16 In choosing remedies, ComReg will also take account of potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg conducted, inter alia, a Regulatory Impact Assessment (see Section 7) 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.
- 6.17 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.
- 6.18 ComReg notes general agreement with the principles which were laid out in the consultation as a basis for selecting remedies. Two respondents raised issues to do with the implementation of a Regulatory Impact Assessment. This is dealt with in Section 7.
- 6.19 ComReg agrees with respondents that the duration of the review period will affect the view taken of likely changes in the market, and notes that one respondent rightly pointed out that a 3 year horizon may produce different conclusions to an 18 month horizon. ComReg has based its market assessment on a time horizon of around 2 years. ComReg wishes to emphasise that this timescale is to aid market assessment and in no way commits ComReg to a rigid review timetable. As noted in the *SMP Guidelines* the market review should be forward looking, taking into account expected market developments over a reasonable period. The actual period used should reflect the specific characteristics of the market and the expected timing of the next review. ComReg proposes to monitor the market, and holds that where conditions in the market changes sufficiently it may reassess the appropriateness of the market definition.
- 6.20 This is particularly important given the qualification throughout this response noting areas which require close monitoring.
- 6.21 ComReg does not agree with one respondent's assertion that it has failed to substantiate market failure. The nature of an ex ante analysis is that actual and potential instances of abuse of dominance must be considered, and ComReg notes that several respondents concur with ComReg's presentation both of actual and of potential examples.
- 6.22 ComReg does not agree with one respondent's criticism of its overall approach. ComReg is obliged, where a designation of SMP has been proposed, to impose at least one obligation⁴¹. Therefore some form of ex ante regulation is required.

⁴¹ SMP Guidelines paras. 21 and 114, the Universal Service Regulations and the Access Regulations.

ComReg notes that dominance in these markets is not marginal. eircom's market share is 87% of domestic calls, and 68% of international calls. It is ComReg's view that, based on its analysis of competitive conditions in the markets, it is highly unlikely that any current service provider could impose a sufficient competitive constraint on eircom. ComReg cannot see this situation as changing significantly within the lifetime of this review.

6.23 ComReg concludes that the appropriate principles to use in selecting remedies have been identified.

Proposed Market Remedies

6.24 ComReg in exercising its functions in relation to the provision of electronic communications networks / services has the twin objectives of promoting competition whilst protecting the interest of consumers. Indeed a number of elements of the relevant statutory frameworks are directed to encouraging and fostering competition in the industry, having particular regard to the principles of transparency and non discrimination.

6.25 As outlined earlier, competition will not evolve automatically and requires regulatory intervention to achieve the above regulatory objectives. ComReg's proposed package of regulatory measures (including direct wholesale measures such as CPS, WLR and single billing provisioning) aims to give a stable and cohesive framework for consistent incentive. ComReg believes that this proposed approach will not hinder market forces from evolving over time.

6.26 Having identified SMP in the retail calls market at least one regulatory measure must be imposed on eircom. ComReg notes that all regulatory interventions have to be appropriate and justified and should be kept to a minimum. However, removal of regulatory measures too quick where competition in this market is not self sustaining would have a detrimental impact on the development of the market. Until then regulatory intervention is necessary and appropriate to address the market imbalances resulting from the monopoly period and to steer the market towards competition, i.e., to create an environment where market forces can evolve and self sustaining competition is promoted.

6.27 This can be achieved by imposing regulatory measures on the dominant operator such as:

- A wholesale obligation to grant access to essential facilities on non discriminatory terms i.e., CPS.
- Price control
- Prevent the establishment of new economic or strategic barriers to entry
- Prevent price squeeze with regulation on the access/ wholesale level as well as the retail level (price cap)
- Prevent foreclosure and leverage (to stop short anti competitive practices)

- 6.28 As discussed below, all these regulatory instruments are modelled to achieve the objectives of creating a competitive market in addition to protecting consumer interests and are necessary, given the finding of SMP in this relevant market.
- 6.29 ComReg believes that appropriate wholesale remedies to address market failure in the domestic and international calls markets are :
- An obligation of access to and use of specific network facilities
 - An obligation of non-discrimination
 - An obligation of transparency
 - An obligation that the SMP operator should maintain a reference offer for the CPS product set and any new offerings
 - An obligation to maintain and develop the existing level of accounting separation obligations pending the outcome of a consultation currently being carried out on the subject⁴².

Regulatory Controls in the Wholesale Market

6.30 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 into the calls market would be most likely to rely on wholesale inputs, 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.

Access to and use of specific network facilitates

- 6.31 It is ComReg's view that eircom should be obliged to offer WLR product under the obligations under the Access Regulations. ComReg considers that there is a continuing need for regulatory intervention in the direction of product development and implementation.
- 6.32 ComReg noted that under Regulation 16(1) of the Universal Service Regulations it is obliged to impose obligations on an undertaking designated as having significant power in the relevant market for *connection to and use of the public telephone network at a fixed location*. These obligations are to ensure that the SMP undertaking's subscribers can access the services of any interconnected provider of publicly available telephone services by way of CA/CS and/or CPS. Further detail on these obligations is provided in the Response to Consultation on the Retail Fixed Narrowband Access Markets (doc ref 05/25).
- 6.33 CPS was mandated in Ireland in 2000 and to ensure the proper functioning of the CPS product, ComReg has found it necessary to intervene on a number of occasions to address various competition problems of the type described earlier in this section. ComReg believes that, in addition to the imposition of the obligation for CA/CS and

⁴² Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18).

CPS on eircom, it is necessary to ensure continuity in relation to the provision of CA/CS and CPS by eircom. ComReg therefore proposed 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)⁴³ which deals with the following key product areas:

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

6.34 ComReg also recognised that further interventions may be required in the future to continue to develop the CPS product and ComReg expects to consult with industry fully on the specific details of such developments. It is ComReg's view that 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.

6.35 ComReg explained in the consultation that it considers failure to impose 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. This in turn would mean that ComReg would be failing to give effect to, and defeating the purpose and intention of, Regulation 16 of the *Universal Service Regulations*.

6.36 While the implementation of the *Universal Service Regulations* makes provisions for obligations in respect of transparency and non-discrimination at the retail level, with reference to specific end users, ComReg believes that further obligations are required in relation to the inter-operator transactions and processes required to provide CPS facilities.

6.37 Therefore ComReg proposed that while the mandated remedy for CA/CS and CPS within the *Universal Service Regulations* imposes the obligation on the SMP operator to ensure that pricing for access and interconnection related to the provision of CA/CS and/or CPS facilities is cost oriented, there is additional justification for imposing supporting obligations with respect to transparency and non-discrimination.

6.38 In support of an obligation for 'Access to and Use of Specific Network Facilities', ComReg has concluded that there are a number of additional obligations required (as outlined below) which are necessary to address the competition problems identified earlier.

⁴³ 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.

Non- discrimination

6.39 In the consultation, ComReg set out in detail the reasoning behind its proposal to impose a non-discrimination obligation on the SMP operator. The key elements of the argument are as follows:

- The provision of Service Level Agreements (SLAs) and consistent and timely reporting on service levels is essential to demonstrate that eircom is providing equivalent conditions in respect of its downstream retail affiliate and OAOs.
- Provisions requiring payment of compensation should also be included in these SLAs to ensure that the specific service levels 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.
- A non-discrimination obligation is the appropriate remedy to target competition problems such as withholding of information, delaying tactics, undue requirements, low or discriminatory quality, strategic design of product, and discriminatory use of information.
- A non-discrimination obligation would oblige the SMP operator to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and to provide services and information to others under the same conditions and of the same quality as it would provide for its own services or those of its subsidiaries or partners.
- Information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least as good as those provided to the SMP operator's retail arm and associates. In particular, it is important that information about an OAO 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.

6.40 ComReg agrees with most respondents that an obligation of non-discrimination is an essential remedy to target the kinds of actual and potential competition problems which have been identified in the retail calls markets. ComReg believes that there is evidence of past discrimination in these markets, and that, coupled with the potential for the SMP operator to discriminate, justifies the imposition of non-discrimination as an obligation. ComReg notes that its interpretation of developments in the calls markets is supported by OAOs.

6.41 ComReg agrees with respondents that an SLA is a means of ensuring that there is no discrimination between the SMP operator's retail arm and the OAOs. It is ComReg's view that the SLA also dictates the quality of wholesale inputs, and that this shapes the service which can be offered by OAOs to the consumer. In ComReg's view, the SLA is key to making the product fit for use. ComReg therefore takes a broader view of the purpose of the SLA.

6.42 In assessing what would be viewed as an equivalent product, ComReg's concern is that OAOs should be able to offer a fit-for-purpose product, and this requires access to the same wholesale products and services as are available to the SMP operator's retail arm.

- 6.43 ComReg does not agree with one respondent's assertion that the SLA already in place for CPS met the needs of the OAO community, in that while its existence could be considered to meet a need for transparency, its implementation requires ongoing review to ensure its effectiveness. ComReg agrees that it is not its responsibility to determine the levels of compensation payable in respect of breach of agreements between operators – this is a contractual matter between the SMP operator and the OAO. However, ComReg confirms its support for provisions requiring payment of compensation as a means of ensuring that SLAs are achieved and implemented.

Conclusion

- 6.44 **An obligation of non-discrimination will be placed on the SMP operator.**

Transparency

- 6.45 Transparency 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.
- 6.46 In the consultation, ComReg considered that an obligation of transparency directly targets the nature of the problem and should be imposed on eircom. The implementation of this obligation would require eircom to publish a reference offer and might also require the publication of other information from time to time.
- 6.47 ComReg believes that a transparency obligation is necessary to support the non-discrimination obligation, and believes that the case for the necessity of such an obligation is made in the market analysis.
- 6.48 ComReg believes that there is evidence of a lack of transparency in these markets, and that, coupled with the potential for the SMP operator to be less transparent than is necessary, justifies the imposition of transparency as an obligation.
- 6.49 ComReg notes that most respondents agreed with these principles. One respondent proposed that the obligation of transparency should be proportionate to the identified market failure.
- 6.50 ComReg does not agree with the respondent who stated that current processes ensured the evolution of the CPS product. OAOs which responded to this consultation did not believe that current processes were adequate. Further, ComReg notes the continuing requests for intervention by OAOs in relation to process modification and development and Code of Practice compliance.

Conclusion

- 6.51 **An obligation of transparency will be imposed on the SMP operator.**

Reference offers

- 6.52 Regulation 10 (2)) of the *Access Regulations* 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.

- 6.53 ComReg proposed in the consultation that the obligation to publish a reference offer for CPS should be maintained, and that any new offerings should also be detailed in a reference offer. ComReg did not propose that any further detail should be added, but asked for comment.
- 6.54 All but one respondent agreed that the SMP operator should be obliged to maintain a reference offer for current and new offerings. The respondent who did not agree indicated that, in its view, processes were already in place to ensure the evolution of CPS.
- 6.55 ComReg reiterates its view of the need for further regulatory support of the evolution of the CPS product, and cites experience with the on-going development of CPS and other wholesale products as evidence of the requirement for this support. ComReg concludes that reference offers should be maintained for the CPS product set, and any new offerings developed in accordance with Regulation 16(2) of the Universal Service Regulations.

Conclusion

- 6.56 The SMP operator will be obliged to maintain a reference offer for the CPS product set and any new offerings.**

Additional information requirements

- 6.57 The current SLA for CPS was developed in order to, inter alia, 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 obligation has proved its effectiveness and its withdrawal would adversely affect all non SMP market players. Therefore, ComReg proposes to maintain this obligation.
- 6.58 The current SLA regime requires eircom to monitor performance metrics in relation to the following activities:-
- order acceptance and completion;
 - hub availability;
 - statistical reporting.
- 6.59 ComReg has considered the proposal that advance notice should be provided of any wholesale price changes. ComReg appreciates the benefit of such publication but notes that its implementation will depend on the circumstances pertaining to any particular charging regime. Where charges are set under a retail-minus arrangement advance publication is both necessary and practical. Where charges are set on a cost oriented basis it may be that the calculation of such charges cannot be satisfactorily concluded in advance of the period to which they relate (in particular where costs are derived from those actually incurred in a period) and that prior publication is impossible. In these instances eircom will be required to follow existing practice,

that is to say the publication of interim prices with subsequent publication of final prices once available.

- 6.60 ComReg does not agree with one respondent's view that it was eircom's responsibility to inform other operators individually of price changes.
- 6.61 ComReg does not, at this stage, propose to require eircom to make public any additional information other than as described in previous sections of this report. However the practicality of these proposals will be kept under active review so as to identify any weaknesses or gaps that may become apparent.

Conclusion

- 6.62 The SMP operator will not be obliged to make available any additional information, over what is required currently under the existing transparency obligation.

Accounting Separation

- 6.63 ComReg has required eircom to supply financial information either on-request to support investigations and pricing reviews and/or on an annual basis in order to support regular monitoring of its decisions since 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 visibility about its cost base. This will help disclose possible market failures and provide evidence in relevant markets of the presence or absence of discrimination and margin squeeze. Such data will make visible the wholesale prices and internal transfer prices of a dominant operator's products and services.
- 6.64 The obligation of accounting separation would 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.
- 6.65 ComReg proposed 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. 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 an obligation of accounting separation only at the market level, it would not be able to identify whether products and services are being provided on a non-discriminatory basis.
- 6.66 In the consultation, ComReg explained that, if it were to withdraw the accounting separation obligation, it would not have any means of monitoring non-discrimination obligation or of having any information on margins in the retail business.

- 6.67 ComReg is currently consulting further on this issue in more detail in a consultation on Accounting Separation and Cost Accounting⁴⁴. In the interim, ComReg is proposing to maintain and develop the existing level of accounting separation, until such time the consultation is completed.
- 6.68 ComReg set out in the market review its reasoning regarding the need for obligations relating to accounting separation. ComReg notes that three respondents agreed with ComReg's principles, and that two did not. However, ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts, it is not possible to implement the formal aspects of accounting separation.
- 6.69 ComReg therefore believes that the need for accounting separation is clearly established and justified.
- 6.70 In circumstances where retail minus is imposed as a form of price control and for the accounting separation remedy to be effective, further information on the associated retail costs will be necessary to enable the calculation of the retail minus price control. ComReg proposes to discuss this issue further in the consultation on accounting separation.
- 6.71 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. ComReg is currently consulting further on cost accounting systems and the accounting separation methodologies which support these systems in more detail⁴⁵. Current systems and obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents support the need for further consultation.

Conclusion

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

Regulatory Controls on Retail Markets

- 6.73 Whereas eircom and OAOs face each other in a vertical relationship in the wholesale market, they are in a horizontal relationship as competitors in the retail market. Thus on the retail level too, a form of price control is necessary to prevent eircom from a price squeeze policy that would hinder market entry of new operators or undermine existing competition. In order to prevent eircom from exploiting its advantages and blocking entry to new operators by using its market power, ComReg needs to intervene where appropriate at the wholesale and retail levels. Additionally, price control is one of the primary means of protecting consumer interests.
- 6.74 There is a risk that eircom having SMP in the relevant market may act in various ways to inhibit entry or distort competition thereby impacting negatively on consumers. For example, by charging excessive prices, setting predatory prices,

⁴⁴ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

⁴⁵ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

compulsory bundling of retail services or showing undue preference to certain customers. Without prejudging the outcome of other market reviews, and although direct wholesale intervention by ComReg (through the continuation of all requirements relating to the provisioning of CA/CS and CPS outlined above) is a necessary condition for the promotion of competition in retail calls, it is unlikely to be sufficient of itself at this time to achieve the objective of ensuring effective competition and protecting consumers.

- 6.75 The impact of direct measures at the wholesale level such as CPS (WLR and single billing) is difficult to predict with any great certainty. Given this uncertainty, ComReg believes that consumers would not be protected adequately if all retail controls, in particular, price controls were removed at this time. As a consequence, retail controls are necessary in the calls market to support direct wholesale measures. Discussed below, ComReg believes that all of the proposed regulatory actions relating to retail controls are necessary to minimise eircom's ability to exercise its market power in the retail calls market or leveraging power into related markets (such as access) due to the fact that it is a vertically integrated operator.
- 6.76 ComReg has consulted on its overall approach to retail control in this relevant market. In light of the consultation responses, ComReg sets out here its final proposed position with respect to appropriate retail remedies.

Price Control

- 6.77 Price controls have provided consumers with protection in markets in which eircom has had monopoly power and continues to have market power. ComReg has imposed price controls on eircom via a price cap mechanism limiting its freedom to increase prices for a group of services, notably access (connection and rentals) and calls (domestic, operator assisted, payphone and fixed to mobile calls). The current Price Cap Order does not apply to all retail call services – for example international calls, calls to the Internet and non geographic calls are not included. For included services, an overall basket price cap of CPI-0% has been in place since February 2003. Additional protection is offered to relatively low users through the Vulnerable User Scheme, which was introduced in order to limit the increases in the size of vulnerable users' telephone bills.
- 6.78 At present the main controls in place that prevent excessive pricing and further protect consumers are the retail price cap (the Price Cap Order)⁴⁶ and the obligation of cost-orientation. It should be noted that as a basket cap 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 Price Cap Order. However, eircom is also subject to the obligation of cost-orientation which provides a further constraint on prices of individual services. In that regard, the obligation of cost orientation ensures that eircom is prevented from charging excessive prices for individual call services, and could also help to ensure that it does not attempt to restrict market entry by charging unreasonably low prices, that may harm competition.

⁴⁶ Telecommunications Tariff Regulation Order 2003

- 6.79 ComReg notes that the Vulnerable User Scheme (VUS) constitutes a means of price control. The VUS was not a subject for consultation, and no respondent commented on it. ComReg expects that eircom will continue to offer this product.
- 6.80 In considering price controls as a remedy for problems identified in the fixed calls market, ComReg identified options in three key areas. Each is discussed in turn below. These are:
1. Price cap
 2. Cost orientation
 3. Margin squeeze

Price cap

- 6.81 ComReg invited comment on whether the state of the market and its likely development in the short to medium term warrants the maintenance of a price cap on domestic calls, its extension or its retraction. ComReg has considered carefully the representations it has received from all interested parties, in response to the consultation which are outlined in detail in Appendix C.
- 6.82 ComReg proposed that the current price cap should be maintained until markets are next reviewed for SMP designation and remedies. At that time the appropriateness of the price cap as a remedy would be reassessed. In addition, ComReg proposed that because of eircom's likely continued strong position in this market and persistent high market share, some form of upper limit price control could continue to be applied to retail call prices. At present, retail international calls are not subject to the current price cap control. ComReg proposed that there was no requirement to reintroduce a price cap on international calls, but that the review of the retail international calls market indicates a continuing requirement for direct wholesale solutions such as CPS and WLR as a means of promoting competition in the retail calls market.
- 6.83 ComReg notes that while all respondents view the current price cap as somewhat unsatisfactory, all but one respondent believed that some form of price cap on retail domestic calls continues to be necessary. Responses to the consultation concur with ComReg's view that there is no current requirement to reintroduce a price cap on international calls. ComReg notes the argument that some segments of the international market may be more competitive than others. However, it is not clear that such segments can be defined and measured in a way which would be consistent with market definition principles for the purposes of this market review.
- 6.84 For two of the respondents, the favoured route would be to maintain a remedy at the wholesale level, and to reduce regulation at the retail level. However, the remaining three respondents favoured an increase in regulation at the retail level via the introduction of a sub-cap on access. Several respondents commented on the increase in access prices over the last year, suggesting that a sharp increase in access prices must be compensated by a decrease in calls prices in order to remain within the price cap limits. This has serious implications for the viability of other operators in the domestic calls market.

- 6.85 As outlined above, ComReg has given due consideration to whether it may be more appropriate to deal with the persistent market failure through direct wholesale measures in the absence of retail price controls. ComReg noted in the consultation that the international calls market was more competitive than the domestic calls market but that eircom's market share remained above 60%. 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. ComReg concludes that, due to increasing competition for international calls, it is not necessary to impose price control via a price cap on such calls. ComReg notes that this conclusion is reached despite eircom's continuing high share of the market for international calls, and agrees with respondents that the situation should be closely monitored.
- 6.86 Again, as at present ComReg does not propose to include calls to Internet and non-geographic calls within the price cap mechanism. As outlined previously such calls are within the scope of the relevant domestic and international calls market. However, ComReg believes that it would not be appropriate to subject such call types to a price cap mechanism at this time. eircom would appear to be sufficiently constrained by competitors and consumers in the provision of Internet and non-geographic calls. In addition, calls to non-geographic numbers (including the "076" range designated for VoIP services and calls to Internet Access numbers) are subject to the National Numbering Conventions (ComReg 04/35) which sets upper retail price limits on charges applicable to such numbers. It would not be justified or proportionate therefore to apply an additional price limit such as the current Price Cap Order to such call types.
- 6.87 One respondent expressed concern that this market review was being used as a means of extending the current price cap. In accordance with Regulation 27, ComReg is required, following the market analysis process, to maintain, amend or withdraw regulatory measures. ComReg maintains that there is a continuing requirement for regulation at the retail level in the markets for domestic calls, and that this regulation should include price control. While competition is developing in these relevant markets, it is not clear that competition is fully protecting consumers at this time. eircom has the ability to maintain higher domestic call prices than would be expected in a competitive market (whilst also having the ability to significantly increase line rental). As outlined above, competition in the retail calls markets is subject to the terms of third party access and consequent degree of competition in the access market. In light of developments within these markets, however, the current retail minus mechanism for WLR would not appear to impose sufficient downward pressure on retail access prices and indirectly on call charges at this time.
- 6.88 ComReg notes specific points raised by respondents on the content of the price cap, to do with the balance between calls and access, and with the inclusion of the retail price of fixed to mobile calls. ComReg notes that the prime purpose of having a single overall price cap was to maintain the level of customers' bills while allowing eircom to better align access prices with costs. ComReg accepted the need to rebalance and in the event that line rental would increase it anticipated significant reductions in call charges. It is still appropriate for changes in rentals and call prices to continue to be linked at this time within a price cap basket. First, to avoid a

volatile series of price changes that may disrupt the market or destabilise present competition but also to further protect consumers at this time. Secondly, to take on board developments in relation to wholesale product offerings (ULL, WLR and CPS) and their potential interactions.

- 6.89 On the issue of the price of fixed to mobile calls, ComReg understands concern over the inclusion of the whole retail price. The whole retail price incorporates the element of wholesale termination, which in relation to fixed to mobile calls, is not within the control of eircom but rather mobile network operators. ComReg notes that currently wholesale mobile termination rates are subject to review and thus it is not appropriate at this point, in the interest of the consumer, to remove fixed to mobile calls from the price cap basket. ComReg will monitor closely developments of the market, and will assess the appropriateness of the inclusion of whole retail prices if necessary. ComReg concludes that to maintain consistency with the inclusion of other calls, the whole retail price is included, and not just that portion of the price allocated to the SMP operator.
- 6.90 The current price cap on *eircom* should be maintained until the full effect of wholesale measures is felt and can ensure lower prices overall through greater choice of product and provider for the consumer. While the price cap mechanism will constrain increases in prices for calls directly, it is envisaged the wider package of wholesale measures such as CPS (together with WLR and single billing) will bring pressure to bear by increasing competition in the calls market. Any withdrawal of the price cap mechanism only makes sense as a response to competition in the calls market. In turn, this can only happen if terms of access are reasonable. ComReg would propose therefore to remove the price cap mechanism only where calls (and access markets) are sufficiently competitive.
- 6.91 As there will be no significant challenge to eircom's dominance within the lifetime of this review there is an overriding case for action to ensure that *eircom* does not exploit its market position unfairly in the retail calls market and disadvantage consumers. ComReg intends therefore to continue to require eircom to comply with its obligations under the current Price Cap Order. The current price cap applies to retail domestic calls and will be the effective upper limit on price for the domestic calls market. This should allow reasonable time for competition to develop sufficiently whilst maintaining incentives on eircom to improve efficiency during the period. ComReg notes increasing competition in international calls and therefore proposes not to include these calls in the price cap as currently is the case. However, taking on board the views of respondent, ComReg will closely monitor developments in this market. A price cap review will be carried out as soon as is practicable
- 6.92 The current price cap did not include a sub cap on line rental (in order to facilitate rebalancing), now that rebalancing is complete it is necessary to constrain excessive increases for consumers in respect of line rental. To ensure that eircom does not raise line rentals in the absence of more significant reductions in call prices, in particular domestic calls, it may be appropriate to introduce a sub cap to limit flexibility in the pricing of particular services in the basket, notably PSTN line rental. In addition, to continuing with the current Price Cap Order, ComReg proposes to introduce an additional sub cap on PSTN line rental of CPI-CPI for a period of one year, effective from the date of the Decision, moving to a cap of CPI-0% in subsequent years where

appropriate. Fuller details are discussed in Market Review: Retail Narrowband Access (*ComReg Document Number 05/25*).

Conclusion

6.93 In light of the foregoing, ComReg is seeking to maintain the current price cap as a retail remedy under this particular market review.

6.94 eircom will continue to comply with the Price Cap Order.

Cost orientation

6.95 In addition to the price cap obligation there is currently 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.

6.96 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 also be used to prevent the restriction of market entry by charging unreasonably low prices that may harm competition.

6.97 ComReg considers that the key issue is the extent to which price control in addition to the price cap is required in the retail calls market. ComReg has noted general dissatisfaction with the current price cap, but for different reasons and with different proposed solutions.

6.98 It is ComReg's view that there is a continuing need for price control at this stage, and part of the reason for proposing a cost-orientation obligation is to apply a level of price control across all services, not just those covered by the price cap. ComReg is particularly concerned about international calls, where it has agreed that, despite eircom's high market share, international calls should not be included in the price cap. ComReg therefore considers that a cost-orientation obligation should be applied to both the domestic and the international fixed calls markets.

Conclusion

6.99 The SMP operator will be obliged to ensure its tariffs follow the basic principles of cost orientation.

Margin squeeze

- 6.100 As outlined earlier, ComReg believes a form of price control is necessary to prevent eircom from a price squeeze policy that would hinder market entry of new operators or undermine existing competition. In the identification of competition problems, ComReg noted examples of risks to competition associated with the eircom's ability to restrict market entry and/or competition in the market by unfairly squeezing the margins of competitors or potential competitors. There is a current obligation of cost-orientation on eircom, and ComReg uses this as a basis for margin squeeze testing of call services.
- 6.101 In consultation, ComReg asked for comment firstly on the principle of requiring eircom not to set prices in an anti-competitive manner i.e., by setting a price or having a price structure that would result in margin squeeze. In addition ComReg sought comments on possible ways of approaching margin squeeze testing if appropriate in the retail calls market. ComReg proposed then to issue guidelines on margin squeeze testing, and to consult further on the content of those guidelines.
- 6.102 ComReg notes that all but one respondent agreed with the principle that retail prices or structure of prices should not be set in a way to engage in a margin squeeze policy which could unfairly inhibit market entry or restrict competition, and that the issue for the respondent who did not agree was to do with a perceived adequacy of wholesale remedies rather than concern over retail price setting per se.
- 6.103 In light of the conclusions of the market analysis and to prevent eircom from exploiting its advantages and blocking entry to new operators by using its market power, ComReg proposes to place an obligation on eircom which would require it to ensure that retail prices or the structure of prices would not be set in a way which would result in a margin squeeze. Such an obligation would allow ComReg to assess the potential for margin squeeze in this relevant market where it receives representations that this was the case. In making this assessment ComReg would make a judgement of longer-term impact on competition in the market in line with ComReg's objective to promote competition.
- 6.104 ComReg welcomes the overall support for the principle of margin squeeze testing, and thanks respondents for their input in considering possible approaches. ComReg is preparing a consultation on margin squeeze testing and will issue this as soon as is practical.

Conclusion

- 6.105 **eircom will not set the structure of its tariffs in such a manner that would result in a margin squeeze or predatory pricing.**

Obligation not to show undue preference

- 6.106 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, in appropriate circumstances, to require SMP operators not to show undue preference to specific end-users.

- 6.107 The obligation of not to show undue preference to specific end-users prevents an operator with SMP from charging differing prices in markets, depending on the competitive conditions of the market and price sensitivity to products in the markets.
- 6.108 ComReg noted that an obligation not to show undue preference to specific end-users does not mean that the SMP operator must offer identical terms and conditions to every customer, but rather that any differences must be justified in an objective way. ComReg proposed that the prohibition on discrimination would 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.
- 6.109 ComReg proposed that the emergent state of competition in the calls market indicates that ex post regulation alone will not be sufficient, and that there will be a requirement for an obligation not to show undue preference to specific end-users for the lifetime of this review. It was noted also that measures which are taken at the wholesale level may not prevent undue discrimination at the retail level. ComReg welcomes support from respondents for the proposal.

Conclusion

- 6.110 Given the emergent state of competition in the market for domestic and international calls, the SMP operator will be subject to an obligation not to show undue preference to specific end-users.**

Transparency: Publication and notification of terms and conditions

- 6.111 In accordance with Regulation 18 of the *Universal Service Regulations*, ComReg has a role in ensuring that transparent and up to date information on applicable prices and tariffs is available to end-users and consumers. ComReg may specify information to be published such as the standard tariffs covering access, usage charges, discounts and special/targeted tariff schemes. ComReg has already directed on printed tariff information and tariff information on websites in ComReg document 03/86. Accordingly, 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.
- 6.112 In the initial consultation, ComReg reviewed whether additional transparency obligations other than the general requirement to publish (standard terms and conditions together with the applicable tariffs) needed to be imposed on eircom which was designated with SMP in the retail calls market. At present, eircom notifies ComReg and publishes any changes to retail tariffs, 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. Designated with SMP, *eircom* was obliged to supply such services at the published prices and in accordance with the published terms and conditions. This allowed ComReg to monitor compliance with principles of transparency, cost orientation and non discrimination.
- 6.113 While advance publication of changes to applicable tariffs, terms and conditions allows other operators and consumers time to respond to changes it has a potential disadvantage where competing operators simply follow the price changes of the

SMP operator. This may reduce the degree to which innovative or aggressive prices and service offerings are introduced. Advance notification to ComReg of changes in tariffs, terms and conditions gives ComReg the opportunity to raise concerns relating to principles such as transparency, cost-orientation, and non-discrimination before any changes become effective.

- 6.114 The consultation asked for comment on advance publication of changes to applicable tariffs, terms and conditions. It also sought views on advance notification to ComReg of changes in to applicable tariffs, terms and conditions. ComReg proposed that there should be some administrative clarification of the process by measuring time periods in working days rather than calendar days. ComReg also proposed to retain the current obligation that the SMP operator should publish changes at least in one of the following: national newspaper, in *Iris Oifigiuil*, and in its public offices. Public notice should be given in the manner as is currently, notably, in a national newspaper, in *Iris Oifigiuil* and on the *eircom* website.
- 6.115 ComReg has considered all points made by respondents on the potential advantages and disadvantages of advance publication. ComReg considers that, given the nascent state of competition in the domestic calls market, the current requirement to publish in advance changes to applicable tariffs, terms and conditions should be maintained. However, in recognition of the increasing level of competition in the international calls market, ComReg proposes that, although *eircom* continues to have SMP in the market, competition is developed sufficiently to justify the removal of the requirement to publish changes in respect of international calls in advance. Changes to the prices, terms and conditions of these call types will be published when they become effective, in accordance with general publication requirements.
- 6.116 In light of the agreement from all respondents with the proposal to require advance notification, ComReg intends to require *eircom* to to notify it in advance of changes in retail tariffs, terms and conditions applicable for both domestic and international calls. This is to allow ComReg to identify potential anti-competitive behaviour.
- 6.117 ComReg is not currently responsible for approving changes to tariffs, terms and conditions and does not consider that it should assume such responsibility. ComReg's interest in proposed price changes and changes to the published terms and conditions is to prevent any anti-competitive behaviour. ComReg would expect the SMP operator to ensure that planned changes to the published tariffs, terms and conditions are fully compliant with all regulatory obligations prior to notification. ComReg at any time following notification may require an immediate explanation from *eircom* as the designated operator of how the changes comply with relevant regulatory obligations.
- 6.118 The obligation of transparency is not confined to the publication of tariffs. Publication without implementation of what is published would be in accordance with the transparency requirement. *eircom* therefore designated as having SMP in the relevant calls market will continue to be required to ensure that retail call tariffs follow the basic principle of transparency. In that regard, it is proposed that *eircom* shall be required, in respect of retail calls, to supply such services only at those prices published in accordance with those obligations described above and in accordance with any other terms and conditions for the relevant services published in accordance with Regulation 18 of *the Universal Service Regulations*.

6.119 ComReg proposes to initiate the administrative changes described in the consultation.

Conclusion

6.120 **eircom is therefore designated as having SMP and will be obliged to notify ComReg at least 20 working days in advance of proposed changes to tariffs, terms and conditions of domestic and international calls.**

6.121 **eircom will be obliged to publish changes to tariffs, terms and conditions of domestic calls at least 15 working days in advance of their coming into effect.**

6.122 **eircom will be obliged, in respect of retail calls, supply such services only at the prices and in accordance with all the other terms and conditions for the relevant services published in accordance with any requirements imposed following the publication of this paper and any requirements specified from time to time in accordance with Regulation 18 of *the Universal Service Regulations*.**

6.123 **The SMP operator will publish changes in *Iris Oifigiuil*, a national newspaper, in its public offices and web site.**

Retail Bundling

6.124 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.

6.125 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.

6.126 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.

6.127 ComReg asked for comment in the consultation on whether an obligation should be placed on the SMP operator to prevent unreasonable bundling. 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 offer all the unbundled elements of the bundled product /service as separate products/services.

6.128 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, ComReg recognises that bundling can lead to economies of scale or scope for operators and this in turn can lead to savings for consumers.

- 6.129 ComReg noted in the consultation that bundling may involve bundles containing elements only within the SMP market or may include elements from the SMP market and from other markets. These elements may or may not be defined as electronic communications services.
- 6.130 ComReg considers that there are two key issues. First, a customer should be able to purchase a product or service included in a bundle without having to purchase the whole bundle. None of the respondents commented on this point, and it is ComReg's view that it is reasonable to require the SMP operator to offer the elements of a bundle as individual products or services.
- 6.131 The second issue is to do with access at the wholesale level to the elements of a bundle. ComReg notes the economic benefits associated with bundling, and that respondents agreed that bundling could benefit the market, the operator and the consumer. ComReg's approach to bundling is to ensure that it cannot be used to abuse market dominance. Therefore, any remedy must address the prevention of anti-competitive practice. It is ComReg's view that OAOs must be able to access wholesale equivalents of the elements of a bundle where eircom is dominant. ComReg proposes to consider in further detail the pricing issues where the bundled product is comprised of elements from SMP and non SMP markets. ComReg wishes to note that further issues relating to bundling will be considered in its review of margin squeeze, which is due to be published in the first half of 2005.
- 6.132 ComReg's legal basis for proposing this obligation is Regulation 14(2(d) of the Universal Service Regulations which states that "obligations imposed may include requirements that the undertaking concerned does not unreasonably bundle services".

Conclusion

- 6.133 **An obligation will be placed on the SMP operator to ensure that services are not unreasonably bundled. The forthcoming consultation on margin squeeze will further clarify this issue.**

Cost accounting systems

- 6.134 The Universal Service Regulations require that ComReg ensures that an undertaking that is subject to retail tariff regulation or other relevant retail control operates and maintains a cost accounting system that is based on generally accepted accounting practices, is suitable for ensuring compliance with Regulation 14 of the Universal Service Regulations and is capable of verification by ComReg.. ComReg must also keep available, with an adequate level of detail, information on the cost accounting systems applied used by such undertaking and ComReg is required to submit this information on request to the European Commission.
- 6.135 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, such as cost causality.
- 6.136 A cost accounting system is a set of rules to ensure the attribution and allocation of revenues, costs, assets, liabilities and capital employed to individual activities and

services More precisely, it is a means of establishing a recordkeeping mechanism, keeping tracks of costs. This results in a transparent illustration of the relationship between costs and prices, as the system should be able to analyse costs to a greater level of granularity in order to ensure that costs allocated to regulated services do not result in cross subsidies, excessive prices and, in general, that costs are efficiently incurred. ComReg considers that in order for it to be able to ensure compliance by eircom with its obligations of cost orientation, it is necessary for eircom to have in place a cost accounting system which includes separated accounts. ComReg is currently consulting further on cost accounting systems and the accounting separation methodologies which support these systems in more detail⁴⁷.

- 6.137 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 requirement for eircom to put in place a cost accounting system which provides for the separation of accounts is designed to ensure that eircom's cost accounting system is a suitable system having regard to ComReg's obligation to ensure that eircom's tariffs for leased lines in the minimum set are cost oriented and demonstrate the presence or absence of margin squeeze and provide information on margins in the retail business.
- 6.138 As noted above, ComReg is currently consulting further on cost accounting systems and the accounting separation methodologies which support these systems in more detail. In the interim ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as the consultations is completed.

Conclusion

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

⁴⁷ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18).

7 Regulatory Impact Assessment

Summary of consultation issue

- 7.1 The Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with S13 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 believes the market analysis process represents a comprehensive review of the market under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction quoted in 7.1 above.
- 7.3 The impact of the remedies proposed has been assessed and considered throughout the initial consultation and this market review. Moreover, ComReg has given structured consideration of alternatives to regulation and of different regulatory approaches.
- 7.4 ComReg has upheld the principles outlined in the Government White Paper of Better Regulation⁴⁸; these considerations are explained below. The impact and alternatives have been discussed throughout this consultation process and review of the market and the implications of regulatory compliance have been considered, particularly in light of any departure from the existing regulatory regime.
- 7.5 At the outset it is important to note that ComReg has endeavoured to select the appropriate level of intervention. A comprehensive consultation process has been undertaken. The remedies proposed take into account the dynamics between the retail and the wholesale market and have been adapted to ensure that there is no distortion at both levels of the market.

⁴⁸ Regulating Better: A Government White Paper setting out six principles of Better Regulation”. Appendix 1 – Regulatory Impact Analysis.

Respondents are asked to provide views on whether the remedies in Section 6 of the 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.

Views of respondents

- 7.6 Of the respondents who commented on this question, two proposed that the remedies put forward by ComReg were proportionate and justified, noting that the market was failing and all steps needed to be implemented.
- 7.7 Another respondent strongly supported the principle of carrying out a RIA, and requested clarification of the process. Specifically, the respondent asked when the RIA would be completed, how remedies would be made known, and whether operators would be included in the debate. The respondent's view was that a consideration of proportionality implied a cost benefit analysis of options. Finally, the respondent proposed that the timeframe for remedies should be made clear.
- 7.8 Another respondent believed that ComReg had not given adequate regard to the requirement to consider whether regulatory obligations would be better achieved by forbearance, and had not conducted a satisfactory RIA. The respondent's understanding was that in order to determine whether forbearance from regulation would better serve objectives, ComReg would need to first of all define the period for which any new regulation would have effect. ComReg would then have to compare the net benefit associated with the imposition of ex ante regulation with the net benefit of relying on market forces alone. In the respondent's opinion, the intent was that regulatory impact assessment should be carried out before any decision was made.
- 7.9 The final respondent also questioned the proportionality and justification for some of the remedies proposed. This applied especially to the application of measures at the retail level, and the respondent suggested that there should be no question of additional price cap controls over and above the existing cost orientation, price cap and transparency requirements.

ComReg's position

- 7.10 ComReg sets out the remedies that have been selected and analyses the impact that these obligations will have on the SMP operator and the market as a whole.

Remedies

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

7.12 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 calls markets.

Wholesale remedies

7.13 The finding that eircom has SMP in the market for fixed retail calls services means that ComReg is obliged under the Universal Service Regulations to impose an obligation enabling subscribers of the SMP operator to access CA/CS and CPS. The proposal to mandate this obligation is discussed in the Consultation on Retail Fixed Narrowband Access⁴⁹.

7.14 While the implementation of the Universal Service Regulations makes provisions for obligations in respect of transparency and non-discrimination at the retail level, with reference to specific end users, ComReg believes that further obligations are required in relation to the inter-operator transactions and processes required to provide CPS facilities.

7.15 Therefore ComReg proposes that while the mandated remedy for CA/CS and CPS within the Universal Service Regulations imposes the obligation on the SMP operator to provide both CA/CS and CPS products, there is additional justification for supporting obligations to be imposed under the Access Regulations.

7.16 ComReg believes that appropriate wholesale remedies to address market failure in the domestic and international calls markets are :

- An obligation of non-discrimination
- An obligation of transparency
- An obligation that the SMP operator should maintain a reference offer for the CPS product set and any new offerings
- An obligation to maintain and develop the existing level of accounting separation obligations pending the outcome of further consultation.

Retail remedies

7.17 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 within the lifetime of this review. For that reason, ComReg proposes to impose additional remedies in the retail calls market.

7.18 ComReg believes that the appropriate retail remedies for the retail fixed calls markets are as follows :

- Maintenance of the current price cap under the new regulatory framework, to be applied to the retail domestic calls market

⁴⁹ Market Analysis: Fixed Retail Narrowband Access (05/25)

- An obligation of cost-orientation, to be applied to the domestic and international calls markets
- An obligation of non-discrimination, to be applied to the domestic and international calls markets
- An obligation of transparency, such that the SMP operator will be obliged to notify ComReg 20 working days in advance of changes to terms and conditions in the domestic and international calls markets. The SMP operator will be obliged to publish 15 working days in advance changes to terms and conditions in the domestic calls market. The SMP operator will be obliged to publish changes to the terms and conditions in the international calls market when they come into effect.
- An obligation not to unreasonably bundle products and services
- An obligation that the SMP operator should be obliged to set prices in a way which does not inhibit market entry or competition.
- An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of further consultation.

7.19 ComReg proposes to impose all of these remedies as of the effective date of the decision.

7.20 ComReg is publishing in Appendixes A and B its proposed Draft Measures to implement the remedies detailed above. ComReg is consulting on the measures as detailed in Appendixes A and B and would welcome comments on the provisions prior to the final adoption.

7.21 ComReg believes the remedies set out in this market review support the objectives outlined in the Communications Regulation Act 2002 as to how ComReg should exercise its functions. The remedies address market failure in the markets for domestic and international calls, and in so doing, promote the best interests of Irish consumers through increased competitive activity.

ComReg's Regulatory approach

7.22 In considering these issues, the principles proposed in "Regulating Better: A Government White Paper setting out six principles of Better Regulation"⁵⁰, provide useful assistance. The criteria to be considered when undertaking a regulatory impact assessment include:

- Identification or quantification (where possible) of impacts;
- Structured consideration of alternatives to regulation and of different regulatory approaches;
- Built-in comprehensive, consultation processes; and
- Formal consideration of compliance issues.

⁵⁰ Regulating Better: A Government White Paper setting out six principles of Better Regulation". Appendix 1 – Regulatory Impact Analysis.

- 7.23 It is the view of ComReg that the impact of regulatory intervention cannot always be easily quantified. However, it is clear that the regime of obligations being imposed will not impose additional costs on the SMP regulator, as the current regime is being continued. Furthermore, it could be considered that the analysis and consultation process which formed the current price cap included a cost benefit analysis which set the appropriate level of regulation.
- 7.24 ComReg considered the alternative forms of regulation, in particular the option to forbear from intervention. Given the market power which is derived from the specific advantages accruing to eircom, ComReg is of the view that other forms of regulation, including forbearance would not address the potential competition problems sufficiently in the market within the timeframe of the review. As suggested by one respondent, market forces could not be relied upon to eliminate potential competition problems. Despite ComReg's past intervention at both a wholesale and retail level, this has not been sufficient to eliminate eircom's market power in the retail markets. Its persistently high market share continues to merit intervention at both the wholesale and the retail level. An alternative regulatory approach, particularly forbearance, would not address the issues that span these markets. ComReg notes further that where the existence of SMP is identified in a market ComReg is obliged to impose some obligation relating to that market, thus the option of forbearance is not feasible in the relevant market for domestic or international calls.
- 7.25 Having completed the market analysis ComReg is of the view that eircom's dominance in both retail calls markets continues to remain, despite historical intervention at both the wholesale and retail level. ComReg considered the option of intervention at the wholesale level only however, given the persistence of eircom's market power and its ability to leverage its market power both vertically and horizontally, ComReg is satisfied that intervention at both the wholesale and retail level is required. This aligns with the specifications of the *Universal Services Regulations*.
- 7.26 Indeed, the specific advantages that eircom derives from control of a ubiquitous network, justify mandated intervention and supplementary intervention at both the wholesale and retail level. As concluded in Section 6, it would not be feasible to replicate the access network; this gives rise to the possibility for eircom to leverage its single market dominance both vertically and horizontally. For this reason, ComReg is proposing a suite of remedies which would address the potential competition problems that could manifest across both the Retail Access markets and the Retail Calls markets (despite the fact that there are separate markets).
- 7.27 At a wholesale level the Universal Services Regulations mandate an obligation to ensure that subscribers have access to CA/CS and CPS from any operator at rates which are cost orientated for access and interconnection. These mandated remedies assist in addressing some of the infrastructural and network advantages enjoyed by the SMP operator. However, eircom's market power can only be addressed with additional remedies of transparency, non-discrimination and accounting separation.

- 7.28 eircom's ability to vertically leverage its market power into the retail market means that it is appropriate to impose a price control at the retail level. This takes the form of continuing the existing price control obligation for the domestic calls market. Intervention at both the wholesale and retail level aims to prevent the use of margin squeeze. Additional intervention is required to ensure that the competition problems associated with vertical and horizontal leverage do not manifest.
- 7.29 ComReg has considered and concluded that it remains appropriate to continue the current price cap. The current price cap was introduced in 2003, following an extensive review and a number of consultations. Through its market analysis, ComReg has found that eircom's market power continues and therefore maintaining the price cap is appropriate. ComReg continues to consider that this is the most appropriate method of ensuring consistent prices for consumers. Where market conditions change sufficiently, ComReg may revisit the appropriateness of the existing price cap.
- 7.30 ComReg has recognised different levels of competition in the market for domestic calls and the market for international calls, and has devised remedies accordingly. International calls are not included in the current price cap, and ComReg intends to continue to exclude international calls. Further, ComReg proposes to withdraw the obligation that the SMP operator should publish changes to terms and conditions in advance of their coming into effect. ComReg notes that this decrease in the level of regulation is proposed despite eircom continuing to hold significant market power in the international calls market.
- 7.31 At the retail level, the current price cap provides that excessive prices are not charged to end users for domestic calls and ComReg considers that this is appropriate to maintain. Given that the price cap is currently in place, this should not cause additional burden to the SMP operator. It is important to note that despite the intervention at both levels of the market, eircom's market power persists. For this reason, ComReg deems it to be necessary to oblige eircom to cost orient tariffs and set prices in a way which does not inhibit market entry or competition.
- 7.32 In addition to maintaining the price cap, ComReg proposes to maintain an obligation not to unreasonably bundle products. eircom's continuous infrastructural advantage and ability to bundle both access and calls means that intervention at both the wholesale and retail level and across markets, is necessary. ComReg emphasises that its aim is to prevent anti-competitive conduct, and notes that this must be balanced against the potential benefits to consumers of bundling.
- 7.33 The regulatory impact of not imposing these specific controls would enable eircom to leverage its market power by foreclosing the markets or pricing excessively. ComReg believes that these obligations continue to deliver the appropriate level of regulation. As this approach does not depart from the current level of regulation, it should not pose an additional burden on the SMP operator.
- 7.34 The Government White paper on better regulation proposes that an adequate consultation process be followed. In this instance, the conclusions of this market review have incorporated evidence and views submitted by respondents to the consultation. Furthermore, an extensive consultation process and analytical

framework was developed for implementing the price cap, and ComReg considers that it has carried out a cost benefit analysis for the use of this specific price control.

- 7.35 Respondents are further invited to submit their views on the draft measure pertaining to the obligations for these markets.
- 7.36 ComReg will be consulting on its procedures for accounting separation and cost accounting systems. ComReg is initiating further consultation on margin squeeze, and expects to address issues relating to bundling in this context.
- 7.37 ComReg has considered the various regulatory options and the burden of compliance associated with these measures. The suite of remedies proposed by ComReg is to a large extent, a continuation of the regime in place and hence should not place an additional burden on the SMP operator, nor should they cause any market distortion.
- 7.38 Given the structure of the market and eircom's dominance ComReg deems that the regime of obligations has been selected to address the potential competition problems in this market. ComReg has set out its considerations of the impact of this regulation, on the retail markets.

8 Submitting Comments on the Draft Direction

- 8.1 The draft text of the proposed decisions are presented in Appendixes A and B. All comments are welcome.
- 8.2 The consultation period will run from 22 March 2005 to 26 April 2005 during which ComReg welcomes written comments on the question below.

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

Q. 2. Do respondents believe that the draft text of the proposed decision set out in Appendix B is, from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed? Please elaborate on your response.

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

Appendix A – Draft Direction – Retail Fixed Domestic Calls Market

STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and imposing the obligations set out herein, ComReg has, amongst other things, assessed the proportionality of these obligations relative to the objectives of ComReg set out in section 12 of the Act of 2002,⁵¹ has taken the utmost account of the EU Commission’s Recommendation⁵² and the Guidelines⁵³ and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister.⁵⁴ This Decision is based on the market analysis and reasoning conducted by ComReg in relation to the market for the retail fixed calls related to the Consultation Paper entitled *Market Analysis: Retail Fixed Calls Markets* (‘Document No. 05/26’) dated 22 March forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations⁵⁵, Regulations 14 and 16 of the Universal Service Regulations⁵⁶ and having regard to sections 10 and 12 of the Act of 2002.

2 MARKET DEFINITION

- 2.1 This Decision relates to the market for retail domestic calls from a fixed location. The market in this Decision is defined as the market for retail domestic calls from a fixed location and differs from any defined in the EU Commission’s Recommendation.
- 2.2 The relevant geographic market for the market for retail domestic calls from a fixed location is defined as Ireland.

3 DESIGNATION OF UNDERTAKINGS WITH SMP

- 3.1 [e]ircom Limited (“Eircom”) is designated as having significant market power in the market for retail domestic calls from a fixed location in Ireland (the “Market”).

⁵¹The Communications Regulation Act 2002.

⁵²EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁵³Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

⁵⁴Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

⁵⁵S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁵⁶S.I. No. 308 of 2003 the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

4 SPECIFIC OBLIGATIONS

- 4.1 ComReg has found that the Market is not effectively competitive and, accordingly, shall impose obligations on Eircom in accordance with Articles 14 and 16 of the Universal Service Regulations.

5. CARRIER SELECTION AND PRE-SELECTION

- 5.1 Eircom shall enable its subscribers to access the services of interconnected provider of publicly available telephone services:-
- on a call by call basis by dialing 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 dialing a carrier selection code.
- 5.2 Eircom shall ensure that its pricing for access and interconnection related to the provision of the facilities referred to in section 5.1 is cost oriented and that direct charges to its subscribers, if any, do not act as a disincentive for the use of those facilities.
- 5.3 Without prejudice to the generality of sections 5.1 and 5.2, all of the obligations in relation to provision of those facilities referred to in Section 5.1, applicable to Eircom immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of those facilities referred to in Section 5.1 of the type, and in accordance with the processes, described in the Eircom Reference Interconnect Offer – Annex C -Service Schedule 120.⁵⁷
- 5.4 Eircom shall not discriminate with regard to the provision of access and interconnection related to the provision of the facilities referred to in section 5.1. Without prejudice to the generality of the foregoing, Eircom shall apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and shall provide services information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.
- 5.5 Eircom shall conclude service level agreements ('SLAs') in respect of the facilities referred to in section 5.1, if SLAs have not already been concluded.
- 5.6 Eircom shall publish a reference offer for those facilities referred to in section 5.1 and that reference offer shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:-

⁵⁷ As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

- 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.

5.7 All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision in respect of access and interconnection related to the provision of the facilities referred to in section 5.1, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with, inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
- D7/01- Eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

6. REGULATORY CONTROLS ON THE MARKET⁵⁸

- 6.1 Eircom shall ensure that its tariffs for calls in the Market follow the basic principles of cost orientation.
- 6.2 Eircom shall not inhibit market entry or restrict competition in the Market by setting predatory prices.
- 6.3 Eircom shall not show undue preference to specific end-users.⁵⁹
- 6.4 Eircom shall notify ComReg at least 20 working days in advance of proposed changes to the terms and conditions of supply of calls within the Market and in respect of the proposed terms and conditions of new services, discounts or special offers within the Market. Eircom shall publish, in at least one newspaper circulating in the State, in Iris Oifigiúil and its public offices, all changes to terms and conditions of supply of calls within the Market and proposed terms and conditions in respect of new services, discounts or special offers within the Market, at least 15 working days in advance of their coming into effect. For the avoidance of doubt, Eircom shall, in respect of services within the Market, supply such services only at the published price and in accordance with the terms and conditions published in accordance with this Decision and Regulation 18 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations 2003. For the purpose of this section 6.4, 'working day' means a day (other than a Saturday or Sunday) on which clearing banks are generally open for business in Ireland.
- 6.5 Eircom shall not unreasonably bundle services.
- 6.6 Without prejudice to the generality section 6.5, where Eircom offers a number of services in a bundle, it shall ensure that end-users are able to purchase an individual service included in such bundle without purchasing the entire bundle of services and that tariffs for such individual services reflect the principle that end users should not be required to pay for facilities which are not necessary for the service requested.
- 6.7 Eircom shall continue to comply with the obligations in relation to cost accounting applicable to it prior to the date of this Decision until such time as ComReg makes

⁵⁸ ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that the Market is not effectively competitive and has concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not achieve the objectives set out in section 12 of the Act of 2002.

⁵⁹ The term 'undue preference' means that any scheme which is introduced must not discriminate between similar users. Therefore, consumers which are of a comparable status should be charged the same prices. However, it is not discriminatory to apply different charges to consumers in different circumstances. In short, as long as there are objectively justifiable reasons for applying different tariff structures to different types of consumers, such a scheme will not be discriminatory. Objectively justifiable reasons could include lower tariffs for vulnerable consumers, such as the elderly and disabled, who have little or no income and who need a telephone connection to contact carers in the event of an emergency. Therefore, an allowance for vulnerable users, which is based on objective criteria and applied equally to all users in similar or comparable circumstances, fulfils the requirement of non-discrimination.

a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.

6.8 In order to fulfil its obligations of cost orientation and its obligations in relation to cost accounting, Eircom shall keep separated accounts. All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with, inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
- D7/01- Eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

Isolde Goggin
Chairperson
The Commission for Communications Regulation

Dated the [●] day of [●] 2005

Appendix B – Draft Direction – Retail Fixed International Calls Market

1 STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and imposing the obligations set out herein, ComReg has, amongst other things, assessed the proportionality of these obligations relative to the objectives of ComReg set out in section 12 of the Act of 2002,⁶⁰ has taken the utmost account of the EU Commission’s Recommendation⁶¹ and the Guidelines⁶² and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister.⁶³ This Decision is based on the market analysis and reasoning conducted by ComReg in relation to the market for the retail fixed calls related to the Consultation Paper entitled *Market Analysis: Retail Fixed Calls Markets* (‘Document No. 05/26’) dated 22 March forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations⁶⁴, Regulations 14 and 16 of the Universal Service Regulations⁶⁵ and having regard to sections 10 and 12 of the Act of 2002.

2 MARKET DEFINITION

- 2.1 This Decision relates to the market for retail international calls from a fixed location. The market in this Decision is defined as the market for retail international calls from a fixed location and differs from any defined in the EU Commission’s Recommendation.
- 2.2 The relevant geographic market for the market for retail international calls from a fixed location is defined as Ireland.

⁶⁰The Communications Regulation Act 2002.

⁶¹EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁶²Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

⁶³Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

⁶⁴S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁶⁵S.I. No. 308 of 2003 the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

3 DESIGNATION OF UNDERTAKINGS WITH SMP

- 3.1 [e]ircom Limited (“Eircom”) is designated as having significant market power in the market for retail international calls from a fixed location in Ireland (the “Market”).

4 SPECIFIC OBLIGATIONS

- 4.1 ComReg has found that the Market is not effectively competitive and, accordingly, shall impose obligations on Eircom in accordance with Articles 14 and 16 of the Universal Service Regulations.

5. CARRIER SELECTION AND PRE-SELECTION

- 5.1 Eircom shall enable its subscribers to access the services of interconnected provider of publicly available telephone services:-

- on a call by call basis by dialing 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 dialing a carrier selection code.

- 5.2 Eircom shall ensure that its pricing for access and interconnection related to the provision of the facilities referred to in section 5.1 is cost oriented and that direct charges to its subscribers, if any, do not act as a disincentive for the use of those facilities.

- 5.3 Without prejudice to the generality of sections 5.1 and 5.2, all of the obligations in relation to provision of those facilities referred to in Section 5.1, applicable to Eircom immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of those facilities referred to in Section 5.1 of the type, and in accordance with the processes, described in the Eircom Reference Interconnect Offer – Annex C -Service Schedule 120.⁶⁶

- 5.4 Eircom shall not discriminate with regard to the provision of access and interconnection related to the provision of the facilities referred to in section 5.1. Without prejudice to the generality of the foregoing, Eircom shall apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and shall provide services information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.

- 5.5 Eircom shall conclude service level agreements (‘SLAs’) in respect of the facilities referred to in section 5.1, if SLAs have not already been concluded.

⁶⁶ As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

- 5.6 Eircom shall publish a reference offer for those facilities referred to in section 5.1 and that reference offer shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:-
- 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.
- 5.7 All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision in respect of access and interconnection related to the provision of the facilities referred to in section 5.1, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-
- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
 - D8/99 – Costing Methodology for use in Accounting Separation.
 - D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
 - D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
 - D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
 - D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
 - D7/01- Eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
 - D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

6. REGULATORY CONTROLS ON THE MARKET⁶⁷

- 6.1 Eircom shall ensure that its tariffs for calls in the Market follow the basic principles of cost orientation.
- 6.2 Eircom shall not inhibit market entry or restrict competition in the Market by setting predatory prices.
- 6.3 Eircom shall not show undue preference to specific end-users.⁶⁸
- 6.4 Eircom shall notify ComReg at least 20 working days in advance of proposed changes to the terms and conditions of supply of calls within the Market. Eircom shall publish, in at least one newspaper circulating in the State, in Iris Oifigiúil and its public offices, all changes in to terms and conditions of supply when such changes come into effect. For the avoidance of doubt, Eircom shall, in respect of services within the Market, supply such services only at the published price and in accordance with the terms and conditions published in accordance with this Decision and Regulation 18 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations 2003. For the purpose of this section 6.4, 'working day' means a day (other than a Saturday or Sunday) on which clearing banks are generally open for business in Ireland.
- 6.5 Eircom shall not unreasonably bundle services.
- 6.6 Without prejudice to the generality section 6.5, where Eircom offers a number of services in a bundle, it shall ensure that end-users are able to purchase an individual service included in such bundle without purchasing the entire bundle of services and that tariffs for such individual services reflect the principle that end users should not be required to pay for facilities which are not necessary for the service requested.
- 6.7 Eircom shall continue to comply with the obligations in relation to cost accounting applicable to it prior to the date of this Decision until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.

⁶⁷ ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that the Market is not effectively competitive and has concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not achieve the objectives set out in section 12 of the Act of 2002.

⁶⁸ The term 'undue preference' means that any scheme which is introduced must not discriminate between similar users. Therefore, consumers which are of a comparable status should be charged the same prices. However, it is not discriminatory to apply different charges to consumers in different circumstances. In short, as long as there are objectively justifiable reasons for applying different tariff structures to different types of consumers, such a scheme will not be discriminatory. Objectively justifiable reasons could include lower tariffs for vulnerable consumers, such as the elderly and disabled, who have little or no income and who need a telephone connection to contact carers in the event of an emergency. Therefore, an allowance for vulnerable users, which is based on objective criteria and applied equally to all users in similar or comparable circumstances, fulfils the requirement of non-discrimination.

6.8 In order to fulfil its obligations of cost orientation and its obligations in relation to cost accounting, Eircom shall keep separated accounts. All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
- D7/01- Eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

Isolde Goggin
Chairperson
The Commission for Communications Regulation

Dated the [●] day of [●] 2005

Appendix C – Responses to Consultation on Market Definition, Analysis and Remedies

Market definition

C.1 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 fixed to mobile calls in the same relevant product market as fixed domestic calls?
- 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 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 freephone calls in the same relevant product 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?
- are local and national fixed calls in the same relevant market?
- are fixed international calls in the same relevant market as fixed domestic calls?
- are there separate relevant markets for residential and non-residential customers?
- what are the relevant geographic markets?

Q. 3. Do you agree with the scope of ComReg’s review of the retail fixed calls market? Please elaborate your response.

Q. 4. Are there other elements which should be considered?

Views of respondents

C.2 Four respondents agreed that the correct markets had been reviewed, and no other elements were proposed. One of these respondents indicated that some of the distinctions drawn in defining relevant markets depended on the period of the review, and that failure to establish the time period under consideration had consequences for the validity of the overall analysis.

C.3 One respondent did not agree with ComReg’s approach, and suggested that it represented the rollover and extension of the existing regulatory model. The respondent believed that this was unsustainable from a prospective viewpoint, leading to a high cost and inefficient regulatory regime.

ComReg's position

- C.4 ComReg agrees that the timescale used in the market review will affect the conclusions of the market analysis – clearly, in a fast developing market, different conclusions would be reached depending on the time horizon. The indicative time period used for the market reviews is approximately two years, and this is consistent with the approaches of other NRAs and with the European Commission. ComReg emphasises that this time horizon is for the benefit of carrying out an assessment of likely market developments, and is not a commitment to a rigid timetable for further market reviews.
- C.5 ComReg notes criticism of its overall approach. It is ComReg's view that it has carried out the market review following the guidelines established by the European Commission and in line with the requirements of the new regulatory framework.

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

- C.6 ComReg took the view that, at present, the access market and the calls market in Ireland are complementary, and are not substitutes. ComReg therefore proposed to define separate access and calls markets.

Q. 5. Do you agree that access should be considered to be in a separate market to the market for calls? Please detail your response.

Views of respondents

- C.7 Four respondents agreed that access and calls should be considered as separate markets.
- C.8 One respondent proposed that change in the market was already significant enough to indicate that they are in the same market. The respondent believed that ComReg had taken an unduly conservative view of the likely development of CPS which will result from the introduction of WLR. Further, it was this respondent's view that bundled calls and access were likely to represent a large proportion of the market within the next three years, and that this would suggest calls and access should be in the same market.

ComReg's position

- C.9 ComReg notes broad agreement with respondents on likely directions of change in the market, and suggests that the differentiating factor is of timing and speed of change. ComReg notes that the shared view of the need for change in the market underpins its previous and continuing regulatory efforts in WLR and CPS.
- C.10 ComReg's time horizon for this review is less than the three years assumed by the respondent who proposed a more radical dynamic, but ComReg takes note of the need to monitor developments.

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

- C.11 ComReg proposed 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.
- C.12 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.
- C.13 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.

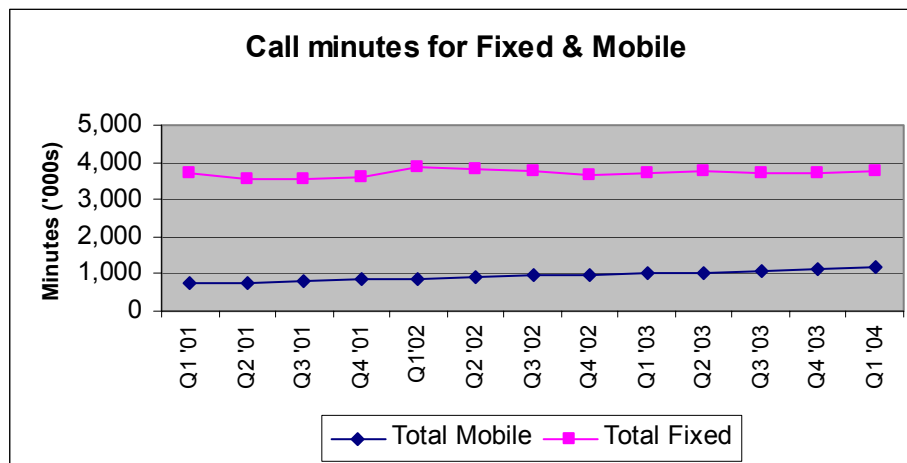


Figure C 1: Call Minutes from Fixed and Mobile Connections

- C.14 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.

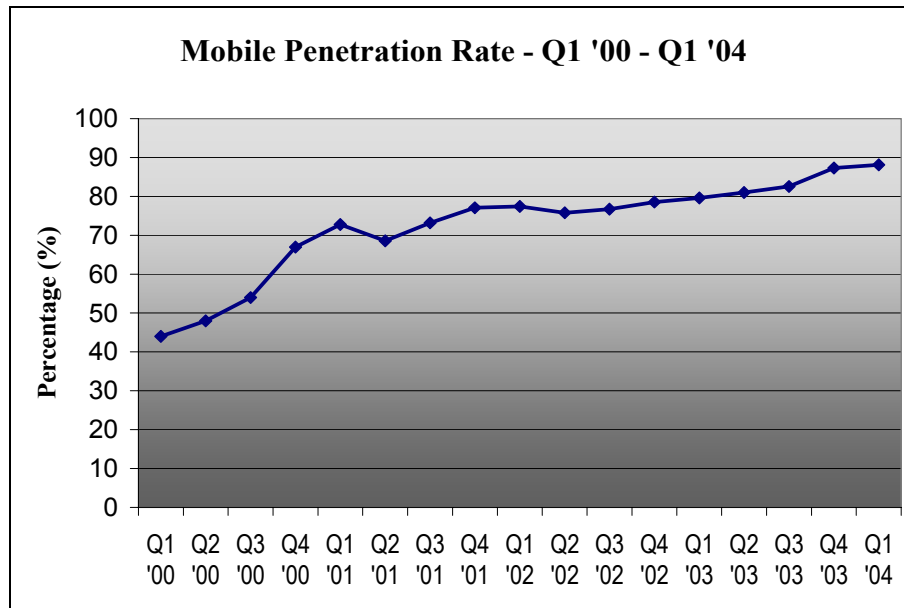


Figure C.2 Mobile Penetration Rate

C.15 The Residential Telecommunications Survey⁶⁹ 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, 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.

C.16 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

C.17 The tables below show that there are significant differences between tariffs⁷⁰ 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 C.1: Fixed to fixed Tariffs⁷¹⁷²

⁶⁹ TNS MRBI Residential telecommunications Survey, February 2003.

⁷⁰ Tariffs are standard daytime rates per minute. All tariffs are inclusive of VAT at 21%.

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 C.2: Mobile to fixed Tariffs⁷³

- C.18 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.
- C.19 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 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.
- C.20 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.
- C.21 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.

⁷¹ Source: operator websites. The prices quoted are standard daytime prices and are subject to a minimum fee.

⁷² Rates are per minute and inclusive of VAT.

⁷³ Source: operator websites. Rates are per minute and inclusive of VAT.

C.22 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 substitutability⁷⁴.

C.23 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.

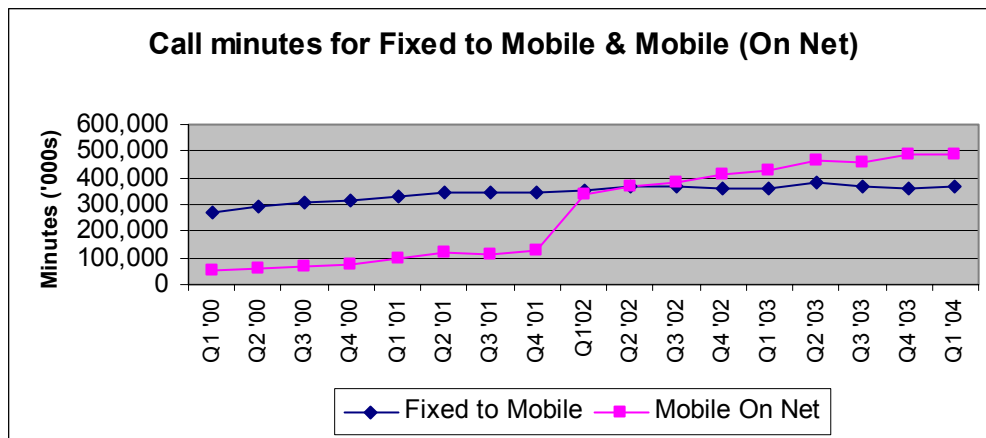
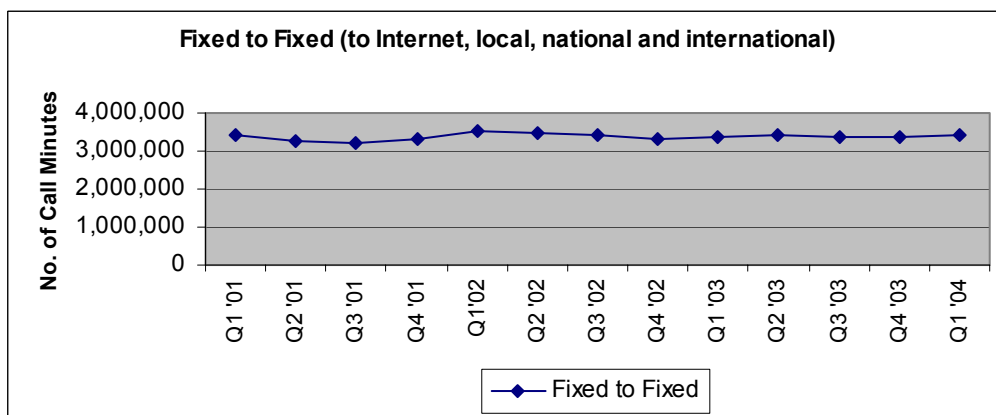
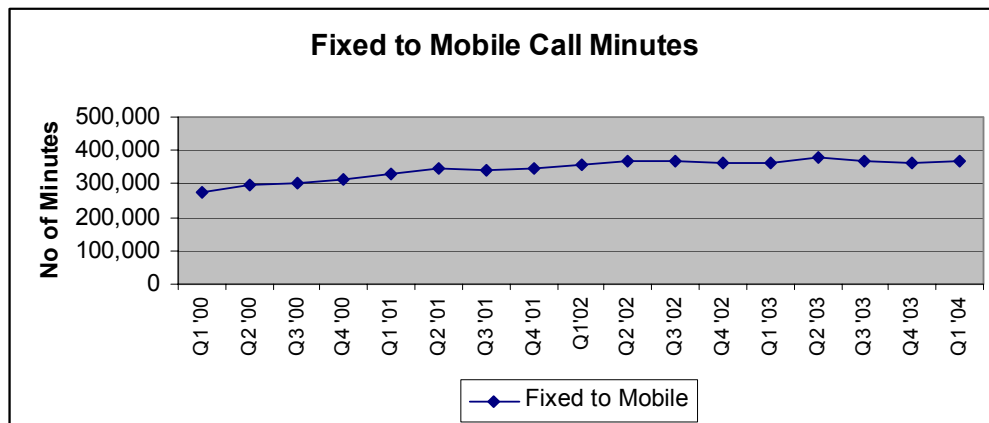


Figure C.3 Fixed to Mobile Calls & Mobile (On Net) Calls

C.24 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.



⁷⁴ Note that over 70% of mobile customers in Ireland are prepaid, not contract, so the “free” minutes may be less significant.

Figure C.4: Fixed to Fixed Calls**Figure C.5: Fixed to Mobile Calls**

- C.25 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.
- C.26 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.
- C.27 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.
- C.28 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.⁷⁵ However, developments such as 3G could potentially change this.
- C.29 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.
- C.30 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

⁷⁵ 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.

hypothetical monopolist fixed call service provider within the two year timeframe of this review.

Preliminary conclusion

C.31 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%.

C.32 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. 6. Do you agree that fixed and mobile call services are complements and should be considered to be in separate markets? Please detail your response.

Views of respondents

C.33 Four respondents agreed that fixed and mobile calls should be considered in separate markets. However, one of these respondents, while agreeing with the conclusion, disagreed with ComReg’s reasoning. It was this respondent’s view that the markets were separate due primarily to functional differences and not to distinctions in price, service quality or scope. The respondent believed there was an increasing one way substitution from fixed to mobile.

C.34 One respondent strongly disagreed with ComReg’s analysis and conclusions. The respondent proposed that fixed and mobile calls had been substitutes for some time, and that the trend was increasing. The respondent outlined detailed criticisms of ComReg’s methodology, and suggested that ComReg should undertake robust econometric modelling to better judge substitutability. In the respondent’s view, Internet access minutes should not be included in the total of fixed call minutes; ComReg should be consistent in the use of revenue and call minutes in analysis; and that ComReg is guilty of the Cellophane Fallacy. It asserts that “While prices for fixed line calls are at competitive levels the oligopolistic structure of the mobile market and lack of regulation of prices therein means that prices in the mobile market are not at competitive levels (i.e. cellophane fallacy). Thus it is possible that were

mobile per minute prices at competitive levels then if a hypothetical monopolist in the fixed line market were to raise prices by 5-10% that the price rise could not be held profitably.”

ComReg's position

- C.35 ComReg notes that all respondents agreed that the overall direction of change in the markets for fixed and mobile calls is towards increasing substitutability, and that substitution applies to technology, demand and pricing. The main area of difference among respondents was in their perceptions of how quickly this change would come about.
- C.36 ComReg does not agree with the respondent who proposed that substitution had already taken place. ComReg's view is that in terms of functional substitutability, a user who uses a fixed line to access calls and narrowband data would not currently see mobile as a substitute for fixed. ComReg recognises that the roll-out and take-up of 3G may impact on this conclusion, but does not believe that the change will be sufficiently significant within the timescale of this review.
- C.37 On the question of pricing, ComReg is aware that, for some users, making calls to certain numbers (notably on-net mobile phones), mobile calls can compete favourably with fixed calls. However, again, ComReg does not agree that this process will advance sufficiently within the lifetime of this review to challenge the conclusion that fixed and mobile calls should be in separate markets.
- C.38 ComReg notes that one respondent's analysis asserted that growth in fixed call volumes should have occurred and that, because it did not, substitution by mobile calls must have occurred. ComReg maintains that correlations between the growth in the number of mobile phones and a lack of growth in fixed call volumes does not demonstrate that mobile calls and fixed calls are in the same market for the purposes of competition analysis. This does not seem to be the proper way to conduct this analysis. Rather ComReg has, as set out in the consultation paper, conducted a hypothetical SSNIP test and concluded that, when both are available, fixed calls are functionally distinct from mobile calls, having better quality and higher bandwidth, and that the price differential is sufficient to ensure that a SSNIP would be profitable; while there is no evidence that such an increase would lead to mobile operators entering the fixed call market.
- C.39 ComReg is grateful to this respondent for drawing its attention to the statement in the consultation document that the growth of fixed calls had been steady in recent times. This should have read that the volume of fixed calls had been steady in this period.
- C.40 ComReg notes that one respondent proposed that Internet access calls should be excluded from total fixed calls. It is ComReg's view that this not only requires a dramatic departure from past practice, but also prejudices the outcome of other aspects of the definition of the market for calls at a fixed location which are considered later in this section.
- C.41 ComReg's choice of data for its analytical reviews is necessarily limited by availability and it does not consider that the use of revenues where available and minutes where revenue data was less robust materially affects the outcome of such reviews.

C.42 ComReg notes that the cellophane fallacy relates to a situation where market dominance was such that inferior products were preferred because of extreme price differentials. The respondent contends that mobile phone calls cost so much that consumers will use an inferior product, i.e. fixed phone calls, but it is not necessarily the case that the use of fixed networks for making calls from a fixed location is inferior. Indeed fixed calls have certain clear advantages - quality and bandwidth as noted above - so the accusation that ComReg has fallen victim to this error does not hold good.

C.43 ComReg has indeed noted that customers use their mobile phones in their homes, but consider that their reasons for so doing provide evidence of the complementarity of fixed calls and mobile calls rather than indicating that they form part of the same market in the terms of this analysis.

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

C.44 ComReg proposed that fixed to mobile calls fall within the same relevant market as fixed to fixed calls.

C.45 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.

Q. 7. 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.

Views of respondents

C.46 All respondents agreed that fixed to mobile calls and fixed to fixed calls formed part of the same relevant market.

ComReg's position

C.47 ComReg notes agreement on the definition of fixed to mobile and fixed to fixed calls within the same market.

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

C.48 ComReg suggested that, 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. 8. Do you agree that operator assisted calls should be considered to be an ancillary service to direct-dialled calls? Please detail your response.

Views of respondents

- C.49 Two respondents agreed that operator assisted calls should be considered as an ancillary service to direct dial calls, but one was unclear about how ComReg proposed to treat such calls within the market review process if they are not included in the calls markets under review.
- C.50 One respondent proposed that OA calls were a separate sub-market, as they were not demand-side substitutes. Also, the conditions for supply were such that a provider of direct dial calls could not switch to provide OA calls due to the prohibitive investment in infrastructure which would be required.
- C.51 One respondent stated that if OA calls were a product feature and not a separate market, then they could not be subject to regulation under this market review. This respondent disagreed strongly with the inclusion of DQ calls in the market for fixed retail calls noting that DQ calls were available to mobile as well as fixed calls.

ComReg's position

- C.52 Having considered the views of respondents ComReg agrees with the majority in confirming its own preliminary conclusion that OA calls are best treated as services associated with the calls which make up the fixed calls market rather than as a part of that market or as a separate market. ComReg considers that as the assistance of an operator is sometimes required by a customer in making a call and that in so far as an SMP operator is required to provide their subscribers with the ability to access interconnected operators with Carrier Access / Carrier Select / Carrier PreSelect as set out in Article 19 of the Universal Service Directive then this should be implemented in accordance with Article 12 of the Access Directive which provides for access to associated facilities. As associated facilities of the calls in this market they will attract the same obligations and remedies that may be found to be appropriate to the calls to which they are ancillary. ComReg therefore rejects the assertion that OA calls should not be subject to regulation.
- C.53 This section specifically addresses Operator Assistance calls and does not cover Directory Enquiry (DQ) calls which have not been identified by ComReg or most respondents as potentially appropriate for exclusion from the fixed calls market as a whole. While one respondent has expressed its strong disagreement with the inclusion

of DQ calls in the fixed calls market it has not evinced an argument sufficiently convincing of its point for ComReg to vary its initial conclusion – that DQ calls fall within the fixed calls market as a whole and do not form a separate market.

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

C.54 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.

C.55 ComReg suggested that the varying levels of functionality and pricing would indicate that on the demand-side, calls from payphones are not in the same market as other landline calls. ComReg does not believe it likely that such a supplier of calls from payphones would have any material advantage in entering the fixed retail calls 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.

Q. 9. 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.

Views of respondents

C.56 Three respondents agreed that calls from payphones should not be considered in the same relevant market as other landline calls, but one of these respondents suggested that calls made from terminals that require pre-payment but were in private locations should be included in the same relevant market.

C.57 One respondent viewed calls from payphones to differ only on the basis of geographic location and payment method, and believed that this did not justify designation as a separate market.

ComReg's position

C.58 ComReg notes broad agreement that calls from payphones are sufficiently distinct in terms of demand and supply characteristics to warrant definition in a separate market. Payment for calls and access are bundled for payphone services, which would indicate that calls from payphones do not fit into either a market for access or calls alone. ComReg notes that this means that a separate market review will be carried out, and that this review will consider issues raised by the respondent who believes calls from payphones should be in the same market as other fixed calls.

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

- C.59 ComReg proposed 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, and vice versa.
- C.60 ComReg noted that calls to the Internet can be provided in a number of alternative ways, with varying contractual relations between the customer, the originating network and 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.
- C.61 ComReg's analysis of the demand-side indicated that 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. Further, a significant proportion of Internet traffic is excluded from CPS, and so 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.
- C.62 On the supply-side, ComReg considered that within the timeframe of this review supply-side substitution will increase between calls to Internet and voice calls, and so they are not in a separate market. ComReg notes that currently all supplier of calls to the Internet also provide telephony calls and vice versa, there are no independent ISPs in Ireland.

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.

Views of respondents

- C.63 Four respondents agreed with the proposal that calls to Internet and fixed domestic calls formed part of the same relevant market. One of these respondents noted that there was currently a greater ability to substitute from voice calls into Internet calls than vice versa, and so voice calls were relatively unconstrained by Internet call prices. However, the respondent agreed with ComReg's view that the development of WLR meant that supply-side substitutability should increase during the term of this review.
- C.64 One respondent strongly disagreed. The respondent suggested that narrowband Internet calls and DSL calls were demand-side substitutes, and cited as evidence the decline in dial-up minutes and corresponding increase in DSL connections. The respondent argued that there was evidence of distinct differences between purchasing calls to the Internet and purchasing other call types, and suggested some confusion between Internet service provision and call provision. The respondent believed that

ComReg was incorrect in stating that calls to Internet using 1891 and 1892 can only be used using a network operator's own infrastructure. Overall, it was the respondent's view that voice calls and Internet calls could not be substitutes.

C.65 Four respondents agreed with the proposal that calls to Internet and fixed domestic calls formed part of the same relevant market. However one respondents noted that supply-side substitution was easier from voice calls to Internet calls rather than vice versa. It was their view that voice calls were relatively unconstrained by Internet call prices. However, the respondent agreed with ComReg's view that the development of WLR meant that supply-side substitutability should increase during the term of this review.

ComReg's position

C.66 ComReg notes that all but one respondent agreed that calls to Internet and voice calls should be defined in the same relevant market.

C.67 Responding specifically to points made by the respondent who did not agree, ComReg notes the following :

C.68 ComReg accepts the respondent's clarification on calls to Internet using 1891 and 1892, such that the incumbent can offer Internet access to any 1891 or 1892 service, but that calls to Internet are currently excluded from CPS all calls. This means that, in the absence of an indirect access mechanism for these calls, OAOs must construct their own direct access mechanism, that is to say build their own originating infrastructure, if they are to offer calls to these numbers to their customers.

C.69 The respondent presented data indicating that its dial-up Internet minutes had diminished over the same period as its DSL connections had grown. It regarded this correlation as a demonstration of the substitutability of these two services for accessing the Internet, and that ComReg's assertion that dial-up access is distinct from DSL access was not definitive. In contrast, ComReg does not consider that a chronological correlation of rapid growth in one product with a decline in another is necessarily an indication that the two products are in the same market from a competition perspective. ComReg maintains that 'always on' is a most significant functional difference between DSL access and dial-up; a further key difference is the difference in the speed (bit rate) of the connection. These functional differences and the underlying differences in delivery technology are reflected in pricing differences between broadband and dial-up access. Price and performance differences taken together are more than sufficient to sustain the judgement that dial-up access and DSL access are distinct and exist in different markets.

C.70 On the confusion of Internet service provision and calls provision, ComReg notes that this consultation is concerned with the supply of telephone calls and the question is whether dial-up Internet access calls form part of the same market as other calls from a fixed location. All operators are obliged to provide Internet access calls to all their directly connected customers and supply these services as part of an overall cluster of calls, calls to 'pay as you go' numbers (eg 1892) unambiguously form part of these overall packages as they are charged for in their totality on the basis of individual calls made.

C.71 The question must be whether the introduction of a payment to the Internet Service Provider and the inclusion of bundled minutes in exchange for this payment provides a sufficient distinction. As ComReg has noted, dial-up Internet Services are offered to the public as a continuum ranging from full ‘pay as you go’, with no monthly fee through a range of increasing monthly payments which come with increasing levels of bundled minutes. Per call payments are still required outside of these bundles, entirely bundled offerings are available in other countries but such an offering is not available in Ireland. Irrespective of the level of the monthly payment the Internet access calls are supplied by the customer’s telephone operator whenever they are directly connected, while indirect operators are unable to provide this service and their customers must use the incumbent’s services.

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

C.72 ComReg proposed 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.

C.73 Calls to other non-geographic numbers include 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.

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.

Views of respondents

C.74 All respondents agreed that calls to other non-geographic numbers and voice calls should be defined in the same relevant market.

ComReg’s position

C.75 ComReg notes agreement with its proposal that calls to other non-geographic numbers are in the same market as fixed voice calls.

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

C.76 ComReg proposed that, given the nascent level of development of the service, it is not appropriate to regulate this service at the retail level at this time. However ComReg believes that in order to promote the development of competition, it may be

appropriate to propose regulatory obligations at the wholesale level. ComReg notes that the Consultation on the Market Analysis of the Interconnect Market⁷⁶ proposes that Fixed SMS is currently sufficiently covered through the Wholesale Line Rental provision for Non-discrimination.

C.77 ComReg recognises the concern expressed by one respondent regarding the potential to leverage dominance from the fixed access and calls markets into the fixed SMS markets. However, this market is at a very early stage of development and ComReg does not consider it appropriate to regulate at this time.

C.78 ComReg maintains that fixed SMS calls should not be defined in the same relevant market as voice calls at this time, and that there should be no retail regulation of the markets for fixed SMS calls at this time.

Q. 12. Do you agree with ComReg's analysis of fixed SMS calls? Please detail your response.

Views of respondents

C.79 Four respondents agreed with ComReg's proposal that fixed SMS calls should not be regulated at the retail level at this time.

C.80 One respondent expressed concern that fixed SMS would remain unregulated. It was this respondent's view that eircom dominated the access and calls markets and could leverage dominance into SMS.

ComReg's position

C.81 ComReg maintains that fixed SMS calls should not be defined in the same relevant market as voice calls at this time. ComReg recognises the concern expressed regarding the potential to leverage dominance from the fixed access and calls markets into the fixed SMS markets. ComReg notes that the Consultation on the Interconnection Market⁷⁷ proposes that Fixed SMS is currently sufficiently covered through the Wholesale Line Rental provision for Non-discrimination.

C.82 This market is at a very early stage of development and ComReg does not consider it appropriate to regulate at the retail level at this time.

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

C.83 ComReg proposed that calls over VoIP should not form part of the fixed calls markets at this time. ComReg noted that the market is at an early stage of development and take-up is negligible. However, ComReg noted some instances where VoIP calls could be considered to substitute for other fixed calls, and proposed that developments would be monitored during the timeframe of the review.

⁷⁶ Market Analysis: Interconnection Markets (ComReg Document No. 04/106)

⁷⁷ Market Analysis: Interconnection Markets (Document No. 106)

Q. 13. Please give your views as to whether calls over VoIP should form part of the market for all fixed calls. Please detail your response.

Views of respondents

C.84 All respondents agreed with ComReg's proposal that calls over VoIP should not form part of the fixed calls market. Two of these respondents suggested that VoIP could impact in the market sooner than ComReg suggested, and that the area should be kept under close review.

C.85 One respondent looked for clarification on the definition of a voice call, and asked if ComReg intended to exclude voice services which originate on devices which do not look like traditional telephony devices. In other words, calls over the Internet which are not started or ended on 'phone type' equipment and do not have an associated 'telephone number' would not be a voice call.

ComReg's position

C.86 ComReg concludes that calls over VoIP should not form part of the fixed calls markets at this time. ComReg noted that the market is at an early stage of development and take-up is negligible. However, ComReg noted some instances where VoIP calls could be considered to substitute for other fixed calls, and proposed that developments would be monitored during the timeframe of the review.

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

C.87 ComReg proposed that local and national calls should be defined in the same market. 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.

C.88 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.

C.89 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.

Q. 14. Do you agree that local and national calls should be considered to be in the same relevant market? Please detail your response.

Views of respondents

C.90 All respondents agreed that local and national calls should be defined in the same relevant market. One respondent, while agreeing in general, noted that competitive conditions differ.

ComReg's position

C.91 ComReg maintains that local and national calls should be considered to be in the same market.

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

C.92 ComReg proposed that international calls and domestic calls should be defined as separate markets. 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 short time, and it appears that the conditions of competition are therefore different.

C.93 ComReg considered whether the international market should be further divided. It concluded that, 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 without significant cost. There are no perceived barriers to entry to switching services from one route to another. It was therefore proposed that the international market should not be subdivided further.

Q. 15. 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.

Views of respondents

C.94 All respondents agreed that international calls should be defined in a separate market from domestic calls.

C.95 One respondent detailed its reasoning as including the level of competition prior to the introduction of CPS; the number of competing operators and service provision which is independent of access constraints.

C.96 Another respondent proposed further dividing the market between business and residential, so that there would be four relevant markets. The respondent submitted that competition varied between these four markets, and that business and residential customers had different requirements for international calls.

ComReg's position

C.97 ComReg notes that all respondents agree that international calls are in a separate market from domestic calls.

C.98 One respondent has proposed that the market should be narrower, and that separate markets should be defined for residential and business customers. ComReg refers forward to its discussion of the issues around the separation of business and residential markets, and notes that the respondent's analysis is actually about a segment of the market described as large corporate users. While there may be large corporate users who share certain characteristics in demand and supply of international calls, and where these characteristics are distinct from the rest of the international calls market, ComReg does not believe that this segment can be defined according to the market definition principles to be followed in this market review.

Are there separate relevant markets for residential and business customers?

- C.99 ComReg's proposed that residential and business fixed calls in Ireland are in a single market. While the beginnings of differentiation resulting from some differences in the level of competition within this market can be seen, it is not, in ComReg's opinion, yet sufficient – and will not become sufficient within the timeframe of the review – to identify residential and business calls as separate markets.
- C.100 ComReg's analysis indicated 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.
- C.101 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.
- C.102 While the European Commission suggested that the economics of supply may differ between the residential and non-residential markets, ComReg suggests that once issues surrounding the cost of access (either through direct provision or the access of wholesale products) have been addressed, a current supplier of calls can supply either business or residential customers.
- C.103 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. 16. Do you agree that business and residential calls should be considered to be in the same relevant market? Please detail your response.

Views of respondents

- C.104 Four respondents agreed that business and residential calls should be in the same market, and one respondent confirmed ComReg's proposal that the decision to supply calls to residential and non-residential customers was primarily a commercial distinction of marketing focus for operators. This respondent did not see any barriers on the supply-side which would prevent suppliers switching between the supply of residential and non-residential calls
- C.105 One respondent strongly disagreed, and put forward a detailed analysis of differences in terms of demand and price elasticities, respective cost bases, switching costs, and utility derived from fixed calls. The respondent's view was that ComReg has not presented any substantive evidence to explain why the EC Recommendation does not apply to the Irish market.

ComReg's position

- C.106 In its analysis of the retail calls market, ComReg proposed that the Irish market for retail calls was sufficiently distinctive to warrant different definition than that suggested by the European Commission. All but one respondent agreed that there is little differentiation between residential and non-residential fixed calls, and that generally this applies both to demand and to supply characteristics.
- C.107 The respondent who did not agree put forward an analysis which is based primarily on a distinction between the largest users and the rest of the market.
- C.108 ComReg has considered whether competitive conditions can vary by customer group, and so whether the market definition should be narrowed to reflect particular customer types. ComReg has discussed its approach to market definition, such that the relevant market is defined by determining the boundaries established by constraint on the price setting behaviour of firms.
- C.109 In its assessment of whether there is a single market for residential and non-residential users, ComReg has considered whether there is a price progression between different tariff packages, such that, if a hypothetical monopolist of services e.g. residential calls raised its price, consumers have the ability to switch to a different package (non-residential calls) and the price increase would not be profitable. As mentioned above there is no industry consensus on what is the appropriate categorisation of residential and non-residential users (which would in itself indicate that there is no obvious demarcation), therefore there is an inherent difficulty in comparing prices universally between the different sectors..
- C.110 ComReg's main issue is with the definition of customer types. While the notion of large corporate user can be readily applied in a marketing context, in ComReg's view

it is not an objective definition, and cannot be defined adequately enough for the purposes of a market review exercise.

- C.111 ComReg has considered whether it is possible to define such a group on the basis of a measure such as turnover, or number of employees, or total telecoms spend. ComReg's consideration is that the use of any criterion, or combination of criteria, would need to be evaluated on a case-by-case basis. It is ComReg's view that, while there may indeed be distinctive characteristics shared by the largest users of calls services, there is no obvious way of defining the boundaries of such a group.
- C.112 ComReg notes further that other NRAs have considered ways in which a narrower definition of the largest users of calls services could be constructed. There is a consensus that it is not feasible within the standard market definition principles shared by NRAs and the European Commission.
- C.113 In conclusion, ComReg notes that historically and currently operators tend not to offer different services for residential and non-residential users. Given this, if there were a price increase of a non-residential call it is very likely that a non-residential user would switch to a residential package and vice versa. Having said this, ComReg recognises that it is conceivable to define two separate markets in accordance with the *Relevant Markets Recommendation*, in the event that operators *started* to a sufficient extent to offer differentiated residential and non residential services (as is the case in other member states). At present there is nothing to indicate that this is likely to happen within the timeframe of the review, however ComReg will monitor the market for such developments. ComReg further notes that that regardless of whether the calls market was sub divided into a residential and non-residential market or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power. ComReg therefore proposes to undertake its analysis under a single market.
- C.114 ComReg concludes that, in Ireland, residential and non-residential calls are defined in the same relevant market.

The relevant geographic market

- C.115 ComReg proposed that the relevant geographic market for the markets considered in this review is the state of Ireland.
- C.116 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. 17. Do you agree that the relevant geographic market for the retail fixed calls markets is Ireland? Please detail your response.

Views of respondents

- C.117 Four respondents agreed that the relevant geographic market for retail fixed calls was Ireland.
- C.118 One respondent did not agree, and proposed that the main urban areas differed from the rest of the country in terms of competitive conditions. The respondent put forward its view that the conclusion should not be based on eircom's national pricing, as eircom may have regulatory as well as commercial reasons for this. The respondent also noted that if competition continues to increase in urban areas, it may result in the end of geographical averaging.

ComReg's position

- C.119 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of 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 in the neighbouring areas.
- C.120 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.
- C.121 ComReg has considered the view that competitive conditions are sufficiently different in some urban areas to warrant their definition as separate geographical markets. ComReg view remains that eircom offers its services for fixed calls on a national basis, under the same terms and conditions. Where other services are or might be offered by other operators on a less than national basis, such services will compete with eircom's national services. For this reason, the relevant geographical market is the state of Ireland.

Summary of preliminary conclusions

- C.122 ComReg's conclusions on the market definition were summarised as follows :
- ComReg proposes that the market for fixed access and the market for fixed calls are separate.
 - 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 indicates that business and residential calls are in the same market 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 conclusion is that calls to/from payphones are in a separate relevant market. A separate market review will be completed.
- Due primarily to the potential for supply-side substitution, local and national calls should be defined in the same market.
- ComReg's view is that fixed to mobile calls are in the same relevant market as other domestic calls, because services are generally sold as a cluster, and because of supply-side substitution.
- ComReg's view is that calls to non-geographic numbers, including calls to Internet, premium rate numbers and freephone numbers, should be defined in the same market as other domestic calls. This is because services are sold as a cluster of services and there is substitution on the supply-side.
- ComReg proposes that domestic and international calls do not belong in the same market, principally because the competitive conditions of supply are different. .
- ComReg believes that it is not appropriate to regulate fixed SMS services at the retail level, given the nascent development of the market.
- ComReg's view is that VoIP should not be considered as part of the retail calls market at this time.
- ComReg proposes that the geographic market is Ireland

C.123 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. 18. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.

Views of respondents

C.124 Four respondents agreed with ComReg's preliminary conclusions with the following exceptions :

C.125 One respondent proposed that calls from payphones should be in the same market

C.126 One respondent proposed that OA calls are not an ancillary service, and formed a separate sub-market

C.127 One respondent proposed that :

- Fixed originating and mobile originating calls were already substitutes and should be in the same market

- Speech and data calls were not substitutable and therefore voice and Internet calls cannot be part of the same market
- Residential and non-residential markets were separate in demand and supply characteristics and in their cost bases, and had different competitive conditions

C.128 This led the respondent to propose that there should be four relevant markets :

- Business domestic
- Residential domestic
- Business international
- Residential international

ComReg's position

C.129 ComReg notes broad agreement from all but one respondent on the market definition exercise. ComReg has responded to individual points raised in relation to the OA market and to calls from payphones, and does not believe that there is sufficient reason to change its position on market definition.

C.130 ComReg notes wider ranging disagreement from one respondent. Some aspects of this respondent's objections were to do with its perception of the rate of change in the market. ComReg has explained in the review that it is assuming a two year time frame for the purposes of market analysis. ComReg has reviewed its assumptions in light of this respondent's comments, and notes agreement with the direction of change, particularly in the mobile market. However, ComReg does not agree with the respondent's view of timescales in which changes have already, or will, take place, and does not believe that change during the lifetime of this review will be significant enough to challenge ComReg's conclusions.

C.131 ComReg has discussed one respondent's proposal to separate the domestic and international markets by customer type, namely by residential and non-residential user. ComReg understands the respondent's characterisation of large users of calls services, whether corporate or government, but cannot see how this characterisation can be translated into a meaningful distinction when defining relevant markets for the purposes of this market review.

Conclusion

C.132 ComReg will define two markets in retail calls from a fixed location :

- Retail domestic calls from a fixed location
- Retail international calls from a fixed location

Market Analysis

Market structure

C.133 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. 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 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.

C.134 The larger CPS operators are EsatBT, MCI, SMART and Energis. 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 process⁷⁸ to ComReg and are required to comply with the conditions of a general authorisation⁷⁹. While resellers do not have a direct interconnect relationship with eircom, they manage their customer's calls service through their host operator.

C.135 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

Domestic calls

C.136 At the time of preparing the market analysis, eircom's market share of the domestic calls market was 87% based on revenue. All other operators had market shares of under 10%.⁸⁰

C.137 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. 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 during 2004, growth in CPS has been 8-10% per quarter⁸¹. This suggests that over the last year, eircom's market share by revenue

⁷⁸ 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.

⁷⁹ Regulation 8(3) of the Authorisations Regulations: European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 – S.I. No. 306 of 2003.

⁸⁰ Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

⁸¹ Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

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

- C.138 Eircom's share of the international calls market is 68% based on revenue. All other operators have market shares of under 15%, based on revenue⁸².
- C.139 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.
- C.140 In the same period, the two largest OAOs (EsatBT and MCI) showed a small increase in the international calls market.
- C.141 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

- C.142 When considering both the domestic calls market and the international calls market, ComReg examined 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.
- C.143 ComReg analysed actual and potential barriers to entry in the fixed calls markets in terms of economies of scale and scope; provision of combined calls and access packages; and vertical integration of the SMP operator.

Barriers to switching

- C.144 Low barriers to switching would indicate that, even when market share suggests otherwise, market power is reduced. ComReg analysed barriers to switching in terms of customer awareness, number portability and concludes that eircom's dominance of the calls markets is not mitigated by low barriers to switching.

Countervailing buyer power

- C.145 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. However, countervailing buyer power can only exist where large customers have the ability (within a reasonable timeframe) to resort to credible alternatives (e.g.

⁸² Irish Communications Market - Quarterly Key Data June 2004 (Document number 04/71).

not to purchase or to switch supplier) in response to a price increase or threatened price increase.

- C.146 ComReg has seen no evidence that supports the existence of countervailing bargaining power in the markets for domestic or international calls.

Conclusions of the market analysis

Domestic calls

- C.147 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
- C.148 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.

International calls

- C.149 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.
- C.150 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. 19. Do you agree with the above preliminary conclusions regarding market analysis of the domestic calls market? Please provide a reasoned response.

Q. 20. Do you agree with the above preliminary conclusions regarding market analysis of the international calls market? Please provide a reasoned response.

Views of respondents

- C.151 Three respondents agreed with ComReg's analysis of the domestic and international fixed calls markets. These respondents agreed with ComReg's characterisation of the market, with its interpretation of trends, and with its conclusion of market failure in both markets.

- C.152 In the analysis of the domestic calls market, one respondent believed that ComReg had exaggerated the significance of sunk costs. The respondent suggested that the rapid growth in single billing, where the wholesale inputs are subject to cost-orientation requirements, led to the conclusion that sunk costs were not significant. This respondent also suggested that lack of customer knowledge cannot act as a barrier to switching for long, and while this may be in evidence in early stages of market development, mass marketing would soon remove it as a barrier.
- C.153 In the analysis of the international calls market, one respondent believed that there were significant flaws. The respondent noted that this was a far more competitive market than other call types. It suggested that revenue was not appropriate as a measure, because customers would pay a premium for quality. It saw quality as a differentiator, in addition to price. Finally, this respondent believed that there was considerable countervailing buyer power, particularly in the international business market.
- C.154 Another respondent had a series of detailed comments on ComReg's approach, as well as substantive comments on the analysis. This respondent expressed dissatisfaction with the quantity and quality of market data available, and in particular with the use of Quarterly Market Review data, which was perceived as flawed. The respondent suggested that both call revenue and call volume were required when analysing market shares. The respondent proposed that ComReg should undertake further more robust analysis of market share trends.
- C.155 The respondent disagreed with ComReg's analysis of economies of scale and scope. It proposed that the evidence of economies of scale was inconclusive, that USO negated any advantages resulting from economies of scope, and that some operators in the Irish market were able to benefit from economies of scale and scope because they were part of international organisations.
- C.156 Finally, the respondent agreed with the respondent noted above on the existence of countervailing buyer power, particularly in the large corporate and government markets. The respondent suggested that ComReg should undertake an appropriate level of analysis on this point, and proposed that failure to do so would represent a grave limitation in the ComReg approach and would not conform to the Guidelines.
- C.157 The conclusions reached by this respondent were that eircom should be designated as having SMP in the domestic market for fixed calls (for both business and residential). The respondent believed that the market for international business calls was now effectively competitive. The respondent suggested that only the domestic residential calls market was not prospectively competitive within the lifetime of this review.

ComReg's position

- C.158 ComReg notes that respondents have commented on its approach to the market analysis, on the analysis itself, and on the conclusions.
- C.159 One respondent has provided detailed comment on the data used by ComReg in its analysis.

- C.160 ComReg notes that this market review has drawn on a wide range of data and information to reach its conclusions. ComReg has utilised data supplied by industry, and has also referred to comparative data from other jurisdictions. ComReg has also used its own experience in the market to form conclusions.
- C.161 Two respondents have proposed that ComReg should use volume as a measure of market share, either as well as, or instead of, revenue. ComReg notes the point that users may be prepared to pay a premium for quality, and that this may inflate the revenue data. ComReg notes also that the calls markets include calls services which are structured and priced in different ways, and that this will impact on assessments of the size and structure of the market. However, ComReg notes that in the market share data presented by the respondent who challenged ComReg's conclusion, the SMP operator remains dominant in the markets which ComReg has defined. Only in the "corporate international" market (which ComReg does not define as a market, and which the respondent did not delineate) does the SMP operator's market share fall below 40% in the lifetime of this review.
- C.162 ComReg does not agree that the effect of economies of scale and of scope have been exaggerated. ComReg noted in the consultation that the effects of economies of scale and of scope are 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 the calls market as a result of the introduction of wholesale regulatory measures enabling them to obtain the relevant wholesale inputs at cost-oriented charges. The economies of scope and of scale have therefore been mitigated by regulatory intervention.
- C.163 On the question of countervailing buyer power, ComReg notes that two respondents identified this as a major issue in the calls market, specifically amongst the largest customers. These respondents provided anecdotal evidence of the existence of countervailing buyer power. In their view, countervailing buyer power would act to constrain eircom's pricing, so reducing market power. ComReg notes that both respondents agreed that countervailing buyer power was not an issue amongst residential users, and was not likely to be an issue for small or even medium sized business users. The issue therefore potentially applied to a very small number of very large customers, and in both the private and the public sectors. ComReg recognised in the consultation that it was possible that the largest users could influence the SMP operator's behaviour, but noted that ComReg has not been provided with any evidence that this happens to a significant enough extent to change the conclusions arising from its analysis.

Market Remedies

Competition Problems in the retail calls markets

- C.164 ComReg set out the type of competition problems that it considered may arise due to the presence of a vertically integrated operator having SMP in the retail fixed calls markets.
- C.165 ComReg indicated that actual and potential competition problems arising due to SMP in the retail calls markets fall into three broad categories :

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

C.166 ComReg noted 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.

Q. 21. Do you agree with the competition problems identified by ComReg, as outlined above? Please provide evidence in support of your response.

Views of respondents

- C.167 Three respondents agreed with ComReg's analysis of competition problems. One of these suggested that it had little doubt that CPS could not have survived without constant intervention by ComReg in the first four years of operation. This respondent believed that the survival of a robust CPS market was still in question. A second respondent expressed familiarity with many of the types of difficulty identified by ComReg. This respondent cited delays in the introduction of WLR, perceived excessive charges proposed by eircom, and an on-going concern about margin squeeze on broadband products as examples of directly experienced competition problems.
- C.168 One respondent suggested that ComReg had identified a theoretical set of market failures, but not actual or impending failures. This respondent believed that proposed remedies must be justified by actual instances of market failure.
- C.169 One respondent strongly rejected ComReg's approach and analysis. This respondent characterised the list of competition problems set out in the consultation paper as a textbook list of possible problems, presented without any evidence that the respondent had or intended to engage in these practices. This respondent alleged that ComReg had not complied with the obligations arising from Article 7 of the Framework Directive or Section 4 of the *SMP Guidelines*. In addition this respondent stated that it did not provide any insight into the proportionality and justification of the remedies subsequently proposed in Section 6.
- C.170 The respondent characterised ComReg's analysis as biased, unbalanced and misleading, and disagreed with a number of paragraphs. The respondent provided an alternative interpretation of several of ComReg's documents used as reference in this section of the consultation. It was the respondent's view that ComReg's approach was heavy-handed and interventionist, undermining the economic incentives of the market.

ComReg's position

- C.171 In line with the *SMP Guidelines*, ComReg has conducted its market analysis on a forward-looking basis, similar to that carried out in a merger analysis, rather than ex post, as would be carried out under Article 82 of the EC Treaty or Section 5 of the Competition Act 2002. While evidence of past market behaviour can contribute to this

analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation.

- C.172 ComReg considers that the justification for considering *ex ante* remedies must therefore be broader than if solely based on demonstrable acts of past behaviour. ComReg will instead have to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. ComReg suggests that this is a key difference in approach between *ex ante* and *ex post* analysis, and ComReg notes that its approach has been developed in line with other NRAs.
- C.173 ComReg does not agree with the assertion that the competition problems identified are purely theoretical. ComReg has used the evidence gathered through market analysis and also its own experience in regular meetings with both eircom and OAOs, as well as its regulatory interventions over recent years to identify these competition problems. ComReg also participated, in collaboration with other NRAs, in a ‘stock taking’ exercise to feed these into the ERG Common Position on Remedies⁸³.
- C.174 ComReg notes that respondents from the OAO community have stated that the competition problems identified by ComReg are entirely reflective of the issues in this area and have provided evidence to support the existence of these problems. ComReg has provided analysis of the proportionality and justification of remedies when setting out the detailed remedies and in the accompanying Regulatory Impact Assessment.

Principles in selecting remedies

- C.175 ComReg noted its obligations under the 2002 Act, the *Framework Regulations*, the *Access Regulations* and the *Universal Service Regulations*.

Q. 22. 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?

Views of respondents

- C.176 All respondents who commented on this question agreed with the principles outlined by ComReg. However, two respondents questioned the extent to which the principles were followed by ComReg.
- C.177 One respondent suggested that the approach proposed in their own submission would have been a better guiding principle when selecting remedies.
- C.178 The second respondent had specific concerns in three areas. First, the respondent suggested that there was no clear timescale for the review. This means that there was no context for considering the market analysis, and that different conclusions could be drawn depending on whether, for example, the timeframe was 18 months or 3 years.

⁸³ ERG Common Positioning on the approach to Appropriate remedies in the new regulatory framework (ERG (03) 30rev1) – page 88
http://erg.eu.int/documents/index_en.htm#ergdocuments

This applied particularly to the introduction and development of technologies and services such as FWA, Wi-Fi and VoIP. Second, the respondent did not believe that ComReg adequately substantiated market failure, and so was not justified in extending regulation at the retail level. Third, the respondent was critical of the approach to Regulatory Impact Assessment, and suggested that there should have been a comparison of the net benefit accruing from the imposition of ex ante regulation with that of relying on market forces alone.

ComReg's position

- C.179 ComReg notes general agreement with the principles which were laid out in the consultation as a basis for selecting remedies.
- C.180 Two respondents raised issues to do with the implementation of a Regulatory Impact Assessment. This is dealt with in Section 7.
- C.181 ComReg agrees that the duration of the review period will affect the view taken of likely changes in the market, and notes that one respondent rightly pointed out that a 3 year horizon would produce different conclusions to an 18 month horizon. ComReg has based its market assessment on a time horizon of around 2 years. ComReg wishes to emphasise that this timescale is to aid market assessment and in no way commits ComReg to a rigid review timetable. This is particularly important given the qualification throughout this response noting areas which require close monitoring.
- C.182 ComReg does not agree that it has failed to substantiate market failure. The nature of an ex ante analysis is that actual and potential instances of abuse of dominance must be considered, and ComReg notes that several OAOs concurred with ComReg's presentation both of actual and of potential examples.
- C.183 ComReg does not agree with the criticism of its overall approach. ComReg is obliged, where a designation of SMP has been proposed, to impose at least one obligation⁸⁴. Therefore some form of ex ante regulation is required. ComReg notes that dominance in these markets is not marginal. eircom's market share is 87% of domestic calls, and 68% of international calls. It is ComReg's view that, based on its analysis of competitive conditions in the markets, it is highly unlikely that any current service provider could impose a sufficient competitive constraint on eircom. ComReg cannot see this situation as changing significantly within the lifetime of this review.

Proposed Market Remedies

- 8.4 ComReg in exercising its functions in relation to the provision of electronic communications networks / services has the twin objectives of promoting competition whilst protecting the interest of consumers. Indeed a number of elements of the relevant statutory frameworks are directed to encouraging and fostering competition in the industry, having particular regard to the principles of transparency and non discrimination.
- 8.5 As outlined earlier, competition will not evolve automatically and requires regulatory intervention to achieve the above regulatory objectives. ComReg's proposed package of regulatory measures (including direct wholesale measures such

⁸⁴ SMP Guidelines paras. 21 and 114.

as CPS, WLR and single billing provisioning) aims to give a stable and cohesive framework for consistent incentive. ComReg believes that this proposed approach will not hinder market forces from evolving over time.

- 8.6 Having identified SMP in the retail calls market at least one regulatory measure must be imposed on eircom. ComReg notes that all regulatory interventions have to be appropriate and justified and should be kept to a minimum. However, removal of regulatory measures too fast where competition in this market is not self sustaining would have a detrimental impact on the development of the market. Until then regulatory intervention is necessary and appropriate to address the market imbalances resulting from the monopoly period and to steer the market towards competition, i.e., to create an environment where market forces can evolve and self sustaining competition is promoted.
- 8.7 This can be achieved by imposing regulatory measures on the dominant operator such as:
- A wholesale obligation to grant access to essential facilities on non discriminatory terms in order to *create a level playing field* i.e., CPS.
 - Price control
 - Prevent the establishment of new economic or strategic barriers to entry
 - Prevent price squeeze with regulation on the access/ wholesale level as well as the retail level (price cap)
 - Prevent foreclosure and leverage (to stop short anti competitive practices)
- 8.8 As discussed below, all these regulatory instruments are modelled to achieve the aim of creating a competitive market and are necessary, given the finding of SMP in this relevant market.
- C.184 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 into the calls market would be most likely to rely on wholesale inputs, 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.
- C.185 ComReg noted that under Regulation 16(1) of the Universal Service Regulations it is obliged to impose obligations on an undertaking designated as having significant power in the relevant market for provision of connection to and use of the public telephone network at a fixed location. These obligations are to ensure that the SMP undertaking's subscribers can access CA/CS and CPS.
- C.186 ComReg noted 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. ComReg believes that, in addition to the imposition of the obligation of CA/CS and CPS on eircom, it is necessary to ensure continuity in relation to the provision of CA/CS and CPS by eircom. ComReg, therefore, proposed 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),⁸⁵ which deals with the following key product areas:

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

C.187 ComReg also recognised that further interventions may be required in the future to continue to develop the CPS product and ComReg expects to consult with industry fully on the specific details of such developments. It is ComReg's view that 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.

C.188 ComReg explained in the consultation that it considers failure by it to impose 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. This in turn would mean that ComReg would be failing to give effect to, and defeating the purpose and intention of, Regulation 16 of the *Universal Service Regulations*.

C.189 ComReg believes that further obligations are required in relation to the inter-operator transactions and processes required to provide CPS facilities.

C.190 Therefore ComReg proposed that while the mandated remedy for CA/CS and CPS within the *Universal Service Regulations* 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, there is additional justification for supporting obligations with respect to transparency and non-discrimination.

Non- discrimination

C.191 In the consultation, ComReg set out in detail the reasoning behind its proposal to impose a non-discrimination obligation on the SMP operator.

⁸⁵ Some of the key documents are listed here: -CPS 16 – CPS IT Specification, CPS 18 – CPS Process Manual, CPS24 - Excluded Calls List, CPS Service Level Agreement, eircom Reference Interconnect Offer- Service Schedule 120.

Q. 23. Do you agree that obligations of non-discrimination should be imposed on eircom? Please detail your response.

Views of respondents

- C.192 Three respondents supported the proposal to impose a non-discrimination obligation, with one noting that non-discrimination was the fundamental obligation that gives OAOs and consumers an entitlement to equality. The respondent suggested that it would be inconsistent with ComReg's obligations under the Communications Regulation Act 2002 not to impose an obligation of non-discrimination.
- C.193 One of the respondents who supported the proposed obligation requested that ComReg provide transparent guidelines as to what would be viewed as "equivalent", and also as to how this would be monitored and enforced. The respondent referred to approaches carried out by other NRAs.
- C.194 One respondent believed that a SLA should contain the minimum level of detail necessary to demonstrate that there was no discrimination. The respondent noted that, as the consultation indicated that the current SLA regime alleviates concerns of OAOs about competition problems, there could be no justification for proposing the addition of penalties to the SLA.
- C.195 On the question of quality of service, the respondent referred to ComReg's review of eircom's RIO, which noted the same level of quality for calls for OAO customers and calls for eircom customers. The review concluded that there was no requirement on eircom to produce comparative quality data at this time.
- C.196 Concerning the potential misuse of information, one respondent believed that this should be handled without the need for ex ante regulation, for example via a Non-Disclosure Agreement. The respondent's view was that ComReg had not demonstrated that such an abuse had occurred or was likely to occur.
- C.197 One respondent stated that, as in its view there was no evidence of past discrimination, this obligation should not be imposed. Any possible future discriminatory behaviour would be dealt with via competition law.
- C.198 This respondent noted also that it believes that the SLA already in place meets the demands of the OAO community. The respondent argued that ComReg does not have the power to impose the levels of penalties but that the levels of penalties should be negotiated by industry. The levels of penalties must be proportionate with the commercial disruption to operators caused by the failure to meet the specific metric. Finally, the metrics addressed in an SLA must only be those which are service impacting and not simply the application of metrics to every possible process point.

ComReg's position

- C.199 ComReg agrees with most respondents that an obligation of non-discrimination is an essential remedy to target the kinds of actual and potential competition problems which have been identified in the retail calls markets. ComReg believes that there is evidence of past discrimination in these markets, and that, coupled with the potential for the SMP operator to discriminate, justifies the imposition of non-discrimination as

an obligation. ComReg notes that its interpretation of developments in the calls markets is supported by OAOs.

- C.200 While ComReg agrees that the SLA is a means of ensuring that there is no discrimination between the SMP operator's retail arm and the OAOs, it is ComReg's view that the SLA also dictates the quality of wholesale inputs, and that this shapes the service which can be offered. In ComReg's view, the SLA is key to making the product fit for use. ComReg therefore takes a broader view of the purpose of the SLA.
- C.201 In assessing what would be viewed as an equivalent product, ComReg's concern is that OAOs should be able to offer a fit-for-purpose product, and this requires access to the same wholesale products and services as is available to the SMP operator's retail arm.
- C.202 ComReg does not agree with the respondent who stated that current processes ensured the evolution of the CPS product. OAOs which responded to this consultation did not believe that current processes were adequate. Further, ComReg notes the continuing requests for intervention by OAOs in relation to process modification and development and Code of Practice compliance.
- C.203 ComReg agrees that it is not its responsibility to impose penalties – this is a contractual matter between the SMP operator and the OAO. However, ComReg confirms its support for penalties as a means of ensuring that SLAs are achieved and implemented.

Transparency

- C.204 An obligation of transparency 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.
- C.205 In the consultation, ComReg considered that 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. 24. Do you agree that an obligation of transparency should be imposed on eircom? Please detail your response.

Views of respondents

- C.206 Three respondents agreed that an obligation of transparency should be imposed on the SMP operator. One of these respondents believed that there may be some cases where the reference offer is not sufficiently transparent, and requested that ComReg investigate any issue where an OAO expresses confusion about the nature of the wholesale products it was purchasing.

- C.207 One respondent indicated a disagreement on principle with the obligation of transparency. However, the respondent noted that the extent of the reference offer was undetermined, and that if ComReg wished to apply a specific requirement, this should be proportionate to the market failure identified.
- C.208 One respondent believed that the existing level of publication satisfied the obligation for transparency. Further, in the respondent's view, there had been no evidence presented that there was currently a lack of transparency and so it was unnecessary to impose this remedy. The respondent believed that processes are in place which would ensure the evolution of the CPS product.

ComReg's position

- C.209 ComReg believes that a transparency obligation is necessary to support the non-discrimination obligation, and believes that the case for the necessity of such an obligation is made in the market analysis.
- C.210 ComReg believes that there is evidence of a lack of transparency in these markets, and that, coupled with the potential for the SMP operator to be less transparent than is necessary, justifies the imposition of transparency as an obligation.
- C.211 ComReg does not agree with the respondent who stated that current processes ensured the evolution of the CPS product. OAOs who responded to this consultation did not believe that current processes are adequate. Further, ComReg notes the continuing requests for intervention by OAOs.
- C.212 Should any OAO have an issue with the Reference Offer, current practice is that this can be referred to ComReg. ComReg sees no reason to change this procedure.

Reference offers

- C.213 Regulation 10 (2) of the Access Regulations 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.
- C.214 ComReg proposed in the consultation that the obligation to publish a reference offer for CPS should be maintained, and that any new offerings should also be detailed in a reference offer. ComReg did not propose that any further detail should be added, but asked for comment.

Q. 25. 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?

Views of respondents

- C.215 One respondent stated that processes were in place to ensure the evolution of CPS and that there was no need for further regulation.

C.216 Three respondents agreed that reference offers should be maintained for the CPS product set, and for any new offerings. One respondent pointed out that the CPS offering has been relatively stable to date. Another respondent proposed that very robust, European best practice SLAs should be adopted, or else any product that has been developed would fail. This respondent felt that punitive penalties should apply to ensure the enforcement of non-discrimination.

ComReg's position

C.217 ComReg reiterates its view of the need for further regulatory support of the evolution of the CPS product.

Additional information requirements

C.218 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.

C.219 The current SLA regime requires eircom to monitor performance metrics in relation to the following activities:-

- order acceptance and completion;
- hub availability;
- statistical reporting.

Q. 26. 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.

Views of respondents

C.220 Two respondents commented on this question. One respondent did not think there was any requirement for further information. The other respondent proposed that, in addition to the obligation to continue to publish current offerings, eircom should be obliged to give advance notice of any wholesale price changes or special offers. Notice should be provided at least 28 working days before implementation. Eircom should maintain an email list of parties requesting this information.

ComReg's position

C.221 ComReg has considered the proposal that advance notice should be provided of any wholesale price changes. ComReg appreciates the benefit of such publication but note that its implementation will depend on the circumstances pertaining to any particular charging regime. Where charges are set under a retail-minus arrangement

advance publication is both necessary and practical. Where charges are set on a cost oriented basis it may be that the calculation of such charges cannot be satisfactorily concluded in advance of the period to which they relate (in particular where costs are derived from those actually incurred in a period) and that prior publication is impossible. In these instances eircom will be required to follow existing practice, that is to say the publication of interim prices with subsequent publication of final prices once available.

- C.222 ComReg does not, at this stage, propose to require eircom to make public any additional information other than as described in previous sections of this report, however the practicality of these proposals will be kept under active review so as to identify any weaknesses or gaps that may become apparent.
- C.223 ComReg does not agree that it is eircom's responsibility to inform other operators individually of price changes.

Accounting Separation

- C.224 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.
- C.225 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.
- C.226 The obligation of accounting separation would 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.
- C.227 ComReg proposed 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. 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.
- C.228 In the consultation, ComReg explained that, if it were to withdraw the accounting separation obligation, it would not have any means of monitoring non-discrimination or of having any information on margins in the retail business.

- C.229 ComReg proposed 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. 27. Do you believe eircom should have an obligation of accounting separation? Please detail your response.

Views of respondents

- C.230 Three respondents agreed that eircom should have an obligation of accounting separation, and supported ComReg's proposal to consult further.
- C.231 One respondent refuted ComReg's view that the current accounting separation requirement did not constitute an onerous burden. Specifically, this respondent expressed concern that ComReg would consider implementing accounting separation on a service by service and/or product basis. The respondent found this proposal impractical, and likely to result in an even more burdensome obligation. The respondent did not believe that ComReg had demonstrated that there was a proven requirement for accounting separation in order for competition to develop.
- C.232 One respondent questioned the relevance of accounting separation as a remedy in the retail fixed calls market. The respondent noted that ComReg had not specified technical improvements, and would not expect any changes to the existing obligation without further consultation.

ComReg's position

- C.233 ComReg set out in the market review its reasoning of the need for obligations relating to accounting separation. ComReg notes that three respondents agreed with ComReg's principles, and that two did not. However, ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts, it is not possible to fulfil the obligations of cost orientation and cost accounting.
- C.234 ComReg therefore believes that the principle of the need for accounting separation is clearly established and justified.
- C.235 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. A consultation is currently being undertaken which considers cost accounting systems and the accounting separation methodologies which support these systems. Current systems and obligations will be maintained pending the outcome of the consultations. ComReg notes that all respondents support the need for further consultation.

Regulatory Controls on Retail Markets

Background

- C.236 Without prejudging the outcome of other market reviews, ComReg noted 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 within the lifetime of this review. For that reason, ComReg proposed to consider additional remedies in the retail calls market.

- C.237 Whereas eircom and OAOs face each other in a vertical relationship in the wholesale market, they are in a horizontal relationship as competitors in the retail market. Thus on the retail level too, a form of price control is necessary to prevent eircom from a price squeeze policy that would hinder market entry of new operators or potentially undermine existing competition. In order to prevent eircom from exploiting its advantages and blocking entry to new operators by using its market power, ComReg needs to intervene where appropriate at the wholesale and retail levels.
- C.238 There is a risk that eircom having SMP in the relevant market may act in various ways to inhibit entry or distort competition, for example, by charging excessive prices, setting predatory prices, compulsory bundling of retail services or showing undue preference to certain customers. Without prejudging the outcome of other market reviews, although direct wholesale intervention by ComReg (through the continuation of all requirements relating to the provisioning of CA/CS and CPS outlined above) is a necessary condition for the promotion of competition in retail calls, it is unlikely to be sufficient of itself at this time to achieve the objective of ensuring effective competition and protecting consumers. Further detail is provided below taking on board the view of respondents.
- C.239 The impact of direct measures at the wholesale level such as CPS (WLR and single billing) is difficult to predict with any great certainty. Given this uncertainty, ComReg believes that consumers would not be protected adequately if all price controls were removed at this time. As a consequence, retail controls are necessary in the calls market to support direct wholesale measures. Discussed below, ComReg believes that all of the proposed regulatory actions relating to retail controls are necessary to minimise eircom's incentive for exercising its market power in the retail calls market or leveraging power into related markets (such as access) due to the fact that it is a vertically integrated operator.
- C.240 ComReg has consulted on its overall approach to retail price control in this market, including, the price cap. In light of the responses consultation, ComReg sets out here its final position with respect to appropriate retail remedies.

Price Control

- C.241 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.
- C.242 An overall price cap of CPI-0% has been in place since February 2003. ComReg notes that the price cap does not apply to all retail call services – for example international calls are not included. Additional protection is offered to relatively low users through the Vulnerable User Scheme, which was introduced in order to limit the increases in the size of the vulnerable users' telephone bills.
- C.243 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. These remedies will not necessarily prevent eircom from

charging excessive prices for individual call services, but do constrain the overall increase in customer bills for the services subject to the price cap.

C.244 ComReg noted that, in addition to the price controls on which it consulted, there is a Vulnerable Users Scheme which limits the increase in the size of vulnerable users' telephone bills, where they had relatively low usage levels.

C.245 In considering price controls as a remedy for problems identified in the fixed calls market, ComReg identified options in three key areas.

C.246 These are:

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

C.247 Each is discussed in turn below.

Price cap : domestic calls

C.248 ComReg proposed that the current price cap should be maintained until markets are next reviewed for SMP designation and remedies. At that time the appropriateness of the price cap as a remedy would be reassessed. In addition, ComReg proposed that because of eircom's likely continued strong position in this market and persistent high market share, some form of upper limit price control could continue to be applied specifically to retail call prices.

Q. 28. 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.

Views of respondents

C.249 Four respondents believed some form of price cap was necessary, but that the current arrangement was not satisfactory. The overall view was that the price cap which is in place now was "too blunt an instrument" to achieve its objective.

C.250 Two respondents suggested that the retail price cap on domestic calls ought to be removed. In these respondents' views, there was no justification for continuing any regulation in the retail market because the market was effectively competitive. One of the respondents maintained that competitive conditions in the calls market were such

that eircom was reducing prices faster than required by the price cap. This respondent proposed that a retail price cap constituted a high regulatory overload, both for the regulator and the operator, with low benefits for the user. A price cap at the wholesale level was seen as adequate and appropriate.

- C.251 One respondent noted that ComReg's proposal to maintain the price cap and assess its appropriateness as a remedy as part of the next Market Review in its view extended the lifetime of the current price cap. A second respondent suggested that postponing the assessment of the price cap as a remedy meant that ComReg has failed to justify its application, and has failed to demonstrate proportionality.
- C.252 Several respondents raised issues to do with the elements which are included in the price cap.
- C.253 One respondent stated that eircom has rebalanced charges away from calls towards access. This was seen as regressive, raising the cost of a fixed line for everyone. Further, because calls prices were pushed down to balance increased access prices, it had an undesirable impact on new market entrants in the calls market.
- C.254 Four respondents questioned the inclusion of fixed to mobile calls within the price cap. It was argued that the inclusion of the retail price of fixed to mobile, rather than the fixed retention element alone, allowed eircom to take advantage of falling mobile termination rates. This had nothing to do with eircom's costs or with the element of retail prices which was under eircom's control, and effectively allowed eircom to use price reductions in mobile termination rates to subsidise other elements of the price cap.

ComReg's position

- C.255 ComReg notes that all but one respondent believe that some form of price cap on retail domestic calls continues to be necessary at this time. As discussed in earlier sections of this document, ComReg does not believe that the domestic calls market is effectively competitive. ComReg has argued that wholesale remedies are not sufficient in themselves at this stage, and therefore proposes to maintain a price cap on domestic calls.
- C.256 ComReg notes that all respondents view the current price cap as unsatisfactory. For two of the respondents, the favoured route would be to maintain a remedy at the wholesale level, and to reduce regulation at the retail level. However, the other three respondents favoured an increase in regulation at the retail level via the introduction of a subcap on access. Several respondents commented on the increase in access prices over the last year, suggesting that a sharp increase in access prices must be compensated by a decrease in calls prices in order to remain within the price cap limits. This has serious implications for the viability of other operators in the domestic calls market.
- C.257 ComReg notes that the prime purpose of having a single overall price cap was to maintain the level of customers' bills while allowing eircom to better align access prices with costs. ComReg noted in the consultation that, in its view, access prices are now closely aligned with costs. ComReg would therefore expect that it will no longer be necessary for eircom to increase access prices in order to rebalance tariffs.
- C.258 One respondent expressed concern that this market review was being used as a means of extending the current price cap. ComReg notes that under the new regulatory

framework, it was obliged to review competition in the markets for retail fixed calls as soon as possible after adoption of the directive, and that the shape and direction of any regulation of the fixed access markets would be determined by the outcome of that analysis.

- C.259 ComReg notes specific points raised on the content of the price cap, to do with the balance between calls and access, and with the inclusion of the retail price of fixed to mobile calls. The question of access is dealt with in the Response to Consultation on the *Retail Fixed Narrowband Access Markets (doc 05/25)*. On the issue of the price of fixed to mobile, ComReg understands concern over the inclusion of the whole retail price. This was done to maintain consistency with the inclusion of other calls, where the whole retail price is included, and not just that portion of the price allocated to the SMP operator.
- C.260 ComReg maintains that there is a continuing requirement for regulation at the retail level in the markets for fixed calls, and that this regulation should include price control. ComReg has demonstrated market failure in the supply of retail domestic fixed calls, and has stated that its analysis of market shows that there will be no significant challenge to eircom's dominance within the lifetime of this review.
- C.261 ComReg therefore intends, in accordance with Regulation 14 of the *Universal Service Regulations* to continue to require eircom to comply with the current price cap previously imposed by the Price Cap Order. A price cap review will be carried out as soon as is practicable

Price cap : international calls

- C.262 ComReg noted in the consultation that the international calls market was more competitive than the domestic calls market but that eircom's market share remained above 60%. 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.
- C.263 ComReg proposed that there was no requirement to re-introduce a price cap on international calls, but that the 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.

Q. 29. Do you agree that the SMP operator should not be subject to a price cap on international call prices?

Views of respondents

- C.264 All respondents agreed that there was no need to reintroduce a price cap on international calls. However, one respondent noted that eircom's market share remained high, and suggested that the situation should be monitored.

C.265 One respondent, while generally supporting ComReg's proposal, suggested that the market for international calls should be further split into a residential/SME market and a corporate market. In the view of this respondent, the corporate market for international calls was already competitive, and eircom did not have SMP, so that all controls on this market should be removed.

ComReg's position

C.266 Support from respondents confirms ComReg's view that there is no current requirement to reintroduce a price cap on international calls.

C.267 ComReg notes the argument that some segments of the international market may be more competitive than others. However, it is not clear that such segments can be defined and measured in a way which would be consistent with market definition principles for the purposes of this market review.

Cost orientation

C.268 In addition to the price cap obligation there is currently 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.

C.269 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.

Q. 30. In addition to a price cap (see Q. 26), do you believe that it would be necessary for the SMP operator to 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.

Views of respondents

C.270 Two respondents suggested that a cost-orientation obligation was an essential element of protection against leverage or abuse of market power.

C.271 One respondent indicated that, where the wholesale price is cost-oriented, and in the absence of obvious anti-competitive behaviour, there was no need for ex ante regulation of retail prices.

C.272 One respondent suggested that there was confusion between cost orientation and cost justification. eircom's position to date has been that as long as the price is above

average total costs (i.e. not selling below cost), eircom should be able to choose an appropriate positive margin. Cost orientation would require that costs and prices move in the same general direction, and this was seen as a different obligation.

ComReg's position

- C.273 ComReg considers that the key issue is the extent to which price control in addition to the price cap is required in the retail calls market.
- C.274 It is ComReg's view that there is a continuing need for price control at this stage, and part of the reason for proposing a cost-orientation obligation is to apply a level of price control across all services, not just those covered by the price cap. ComReg is particularly concerned about international calls, where it has agreed that, despite eircom's high market share, international calls should not be included in the price cap. ComReg therefore considers that cost-orientation should be applied to both markets.

Margin squeeze

- C.275 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. 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.
- C.276 ComReg proposed to place an obligation on the SMP operator such that retail prices would 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 would make a judgement of longer-term impacts on competition in the market, in line with ComReg's objectives to promote competition.
- C.277 In the consultation, ComReg asked for comment firstly on the principle of obliging the SMP operator not to set prices in an anti-competitive manner, and secondly on the possible ways of approaching margin squeeze testing. ComReg proposed to issue guidelines on margin squeeze testing, and to consult further on the content of those guidelines.

Q. 31. 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. 32. What are your views on the most appropriate approach to margin squeeze tests in this market?

Views of respondents

- C.278 On the principle of setting prices, one respondent stated that where remedies were applied at a wholesale level, there was no requirement for ex ante regulation at a retail level.
- C.279 All other respondents agreed that there should be an obligation on price setting. It was noted that tests should be constructed properly, and not applied in a way which may encourage inefficient market entry. One respondent proposed that margin squeeze testing should be applied to all price changes, wholesale and retail, before changes were approved by ComReg.
- C.280 In considering approaches to margin squeeze testing, several respondents commented in some detail, and referred to previous submissions to ComReg and to the research and practice of other NRAs.

ComReg's position

- C.281 ComReg notes that all but one respondent agreed with the principle that retail prices should not be set in a way which could unfairly inhibit market entry or restrict competition, and that the issue for the respondent who does not agree was to do with a perceived adequacy of wholesale remedies rather than concern over price setting per se.
- C.282 ComReg welcomes the overall support for the principle of margin squeeze testing, and thanks respondents for their input in considering possible approaches. ComReg is preparing a consultation on margin squeeze testing and will issue this in the first half of 2005.
- C.283 ComReg notes that price changes are currently notified to ComReg, not approved by ComReg, and that this situation is not expected to change.

Obligation not to show undue influence

- C.284 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.
- C.285 The obligation not to show undue preference to specific end-users prevents an operator with SMP from charging differing prices in markets, depending on the competitive conditions of the market and price sensitivity to products in the markets.
- C.286 ComReg noted that an obligation not to show undue preference to specific end- 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 proposed that the prohibition on undue preference to specific end-users would 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.

C.287 ComReg proposed that the emergent state of competition in the calls market indicates that ex post regulation alone will not be sufficient, and that there will be a requirement for an obligation not to show undue preference to specific end-users for the lifetime of this review. It was noted also that measures which are taken at the wholesale level may not prevent undue discrimination at the retail level, as the obligation not to discriminate at the wholesale level applies to the wholesale relationship.

Q. 33. Do you agree that an obligation not to show undue preference to specific end-users should be placed on the SMP operator?

Views of respondents

- C.288 All respondents agreed in principle that there should be an obligation not to show undue preference to specific end-users, with one respondent noting that this should apply only if it were proven that the market was not effectively competitive.
- C.289 One respondent welcomed ComReg's clarification on the application of an obligation not to show undue preference to specific end-users, such that the aim was to ensure that any differences in treatment did not adversely affect competition.

ComReg's position

C.290 ComReg welcomes support for the proposal that, given the emergent state of competition in the market for domestic and international calls, the SMP operator should be subject to an obligation not to show undue preference to specific end-users.

Transparency: Publication and notification of terms and conditions

- C.291 At present, eircom notifies ComReg and publishes 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.
- C.292 ComReg noted that there are two key issues to consider. First, advance publication of changes to terms and conditions allows other operators and consumers time to respond to changes, but has the potential disadvantage that other operators may simply follow the price changes of the SMP operator, and this might reduce the degree to which they introduce innovative or aggressive price changes. Second, advance notification to ComReg of changes in terms and conditions gives ComReg the opportunity to raise concerns relating to principles such as transparency, cost-orientation, and non-discrimination before any changes become effective.
- C.293 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.
- C.294 The consultation asked for comment firstly on advance publication of changes to terms and conditions, and secondly on advance notification to ComReg of changes in terms and conditions. ComReg proposed also that there should be some administrative clarification of the process, by measuring time periods in working days rather than calendar days. ComReg proposed that the SMP operator should publish changes in at least one national newspaper, in *Iris Oifigiuil*, and in its public offices.

- C.295 ComReg would also expect the SMP operator to ensure that planned changes to terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.

Q. 34. Do you agree with ComReg's proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers.

Views of respondents

- C.296 Two respondents believed that there should be no requirement for the advance publication of changes to terms and conditions. In one case, this was seen to apply only where there was no SMP, and in the other, there was a view that advance publication of changes hinders competition. One respondent suggested that current consumer law requirements were adequate, and proposed that there should be no obligation to publish prices where customers are account managed.
- C.297 Three respondents indicated that there should be a continuation of the requirement for the SMP operator to publish changes in terms and conditions in advance. Two of these respondents suggested that ComReg should be responsible for formally approving changes to terms and conditions before they became effective.
- C.298 All respondents accepted advance notification to ComReg of proposed changes, where this was justified as a means of identifying potential anti-competitive behaviour.
- C.299 Where respondents commented on administrative clarification, there was agreement that time periods should be measured in working days rather than calendar days. One respondent proposed that the location of publication should be extended to include an email list to be maintained by the SMP operator.

ComReg's position

- C.300 ComReg has considered points made on the advantages and disadvantages of advance publication of changes to terms and conditions. ComReg considers that, given the nascent state of competition in the domestic calls market, the requirement should remain to publish in advance changes to terms and conditions.
- C.301 In recognition of the increasing level of competition in the international calls market, ComReg proposes that, although eircom continues to have SMP in the market, competition is developed sufficiently for the removal of the requirement to publish changes in advance.
- C.302 ComReg notes agreement amongst respondents with the proposal to require advance notification to ComReg of changes in terms and conditions. ComReg intends to require advance notification to ComReg of changes in terms and conditions, for both domestic and international calls. This is to allow ComReg to identify potential anti-competitive behaviour.

- C.303 ComReg is not currently responsible for approving changes to terms and conditions, and does not consider that it should assume that responsibility. ComReg’s interest in proposed price changes is to ensure that there is no anti-competitive behaviour.
- C.304 ComReg proposes to initiate the administrative changes described in the consultation.
- C.305 ComReg concludes that the SMP operator should be obliged to notify ComReg at least 20 working days in advance of proposed changes to terms and conditions of domestic and international calls. The SMP operator should be obliged to publish changes to terms and conditions of domestic calls at least 15 working days in advance of their coming into effect. The SMP operator should be obliged to publish changes to terms and conditions in the international calls market when they come into effect. The obligation that the SMP operator should publish changes in at least one national newspaper, in *Iris Oifigiuil*, and in its public offices should be retained.

Retail Bundling

- C.306 ComReg asked for comment in the consultation on whether an obligation should be placed on the SMP operator to prevent unreasonable bundling. 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.
- C.307 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, ComReg recognises that bundling can lead to economies of scale or scope for operators and this in turn can lead to savings for consumers.
- C.308 ComReg noted in the consultation that bundling may involve bundles containing elements only within the SMP market or may include elements from the SMP market and from other markets. These elements may or may not be defined as electronic communications services.

Q. 35. Do you agree that the SMP operator should be obliged to ensure that services are not unreasonably bundled?

Views of respondents

- C.309 Two respondents saw no justification for the regulation of bundling, and one suggested it could only be considered where wholesale remedies were proven to be inadequate. It was noted that, provided elements in the bundle were available at a wholesale level, it was relatively straightforward to identify anti-competitive practice. Both of these respondents cited the economic benefits of bundling as a means of passing on cost savings to customers.
- C.310 One respondent questioned the definition of “unreasonable”, suggesting that it was highly subjective and could not be legally enforced.

- C.311 Three respondents were concerned that other operators should be able to replicate bundles if they wished, and noted that this depended on access to wholesale products which were suitably priced and provided. Access needed to be available prior to retail launch. These respondents expressed concern over the bundling of SMP and non-SMP services.
- C.312 One respondent was not clear on what ComReg proposed to do to prevent abuse of retail bundling, and suggested a need for more detailed proposals.

ComReg's position

- C.313 ComReg considers that there are two key issues. First, a customer should be able to purchase a product or service included in a bundle without having to purchase the whole bundle. None of the respondents commented on this point, and it is ComReg's view that it is reasonable to require the SMP operator to offer the elements of a bundle as individual products or services.
- C.314 The second issue is to do with access at the wholesale level to the elements of a bundle. ComReg notes the economic benefits associated with bundling, and that respondents agree that bundling can benefit the market, the operator and the consumer. ComReg's approach to bundling is to ensure that it cannot be used to abuse market dominance. Therefore, any remedy must address the prevention of anti-competitive practice. It is ComReg's view that OAOs must be able to access wholesale equivalents of the elements of a bundle where eircom is dominant. ComReg proposes to consider in further detail the pricing issues where the bundled product is comprised of elements from SMP and non SMP markets. ComReg wishes to note that further issues relating to bundling will be considered in its review of margin squeeze, which is due to be published in the first half of 2005.
- C.315 ComReg's legal basis for proposing this obligation is Regulation 14(2)(d) of the Universal Service Regulations which states that " obligations imposed may include requirements that undertaking concerned does not.unreasonably bundle services".

Cost accounting systems

- C.316 The Universal Service Regulations require that ComReg ensures that eircom formulate and put in practice a suitable cost accounting system in order to ensure that tariffs for leased lines in the minimum set follow the basic principles of cost orientation. ComReg must also keep available, with an adequate level of detail, information on the cost accounting systems applied by eircom. ComReg is required to submit this information on request to the European Commission.
- C.317 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, such as cost causality.
- C.318 A cost accounting system is a set of rules to ensure the attribution and allocation of revenues, costs, assets, liabilities and capital employed to individual activities and services More precisely, it is a means of establishing a recordkeeping mechanism, keeping tracks of costs. This results in a transparent illustration of the relationship between costs and prices, as the system should be able to analyse costs to a greater level of granularity in order to ensure that costs allocated to regulated services do not result in cross subsidies, excessive prices and, in general, that costs are efficiently

incurred. ComReg considers that in order for it to be able to ensure compliance by eircom with its obligations of cost orientation, it is necessary for eircom to have in place a cost accounting system which includes separated accounts. ComReg proposed to consult further on this issue in more detail in a forthcoming consultation on Accounting Separation and Cost Accounting.

- C.319 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 requirement for eircom to put in place a cost accounting system which provides for the separation of accounts is designed to ensure that eircom's cost accounting system is a suitable system having regard to ComReg's obligation to ensure that eircom's tariffs for leased lines in the minimum set are cost oriented and demonstrate the presence or absence of margin squeeze and provide information on margins in the retail business.
- C.320 As noted above, ComReg proposed to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as any further consultations are completed.

Q. 36. Do you agree that an obligation should be placed on eircom to maintain the existing level of cost accounting systems and accounting separation obligations?

Views of respondents

- C.321 Four respondents supported ComReg's proposal to consult on cost accounting systems and accounting separation methodologies.
- C.322 One respondent refuted ComReg's view that the current accounting separation requirement did not constitute an onerous burden. Specifically, this respondent expressed concern that ComReg would consider implementing accounting separation on a service by service and/or product basis. The respondent found this proposal impractical, and likely to result in an even more burdensome obligation. The respondent did not believe that ComReg had demonstrated that there was a proven requirement for accounting separation in order for competition to develop.

ComReg's position

- C.323 ComReg set out in the market review its reasoning of the need for obligations relating to cost accounting systems and accounting separation. ComReg notes that three respondents agreed with ComReg's principles, and that two did not. However, ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts, and without cost accounting systems which can suitably relate costs to products and services, it is not possible to fulfil the obligations of cost orientation and non-discrimination.

- C.324 ComReg therefore believes that the principle of the need for cost accounting and accounting separation is clearly established and justified.
- C.325 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. It was therefore proposed that a consultation would consider cost accounting systems and the accounting separation methodologies which support these systems. Current systems and obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents supported the need for further consultation.
- C.326 ComReg is currently consulting further on cost accounting systems and the accounting separation methodologies which support these systems in more detail⁸⁶.

⁸⁶ [Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. \(ComReg 05/18\)](#)

Appendix D – Opinion of the Competition Authority



The Competition Authority

An tÚdarás Iomaíochta

Isolde Goggin
 Chairperson
 Commission for Communications Regulation
 Abbey Court, Irish Life Centre
 Lower Abbey Street
 Dublin 1

4th February 2005

Re: ComReg Market Review – retail fixed calls markets

Dear Isolde,

I have been asked, in my capacity as a Member of The Competition Authority (“the Authority”), to provide the Authority’s view with respect to the outcome of the Commission for Communications Regulation’s (“ComReg”) review and analysis of “*retail fixed calls markets*” in Ireland.

The Process

ComReg is obliged under the EU Communications Regulatory Framework to conduct market definition and market analysis activities to determine the relevant markets for the purposes of the new regulatory framework and in accordance with competition law. Under Regulation 27(1) ComReg is required to liaise with the Authority in its process of market definition and analysis of any markets that are outside or differ from those recommended by the Commission under the *Relevant Market Recommendation*. In December 2002, a cooperation agreement was signed between the Authority and ComReg in accordance with Section 34 of the Competition Act 2002 to facilitate *inter alia* cooperation in this type of exercise.

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

The Market Recommendations

In its *Relevant Market Recommendation*, the European Commission recommended that National Regulatory Authorities (NRAs) should review *retail fixed calls markets* in relation to publicly available telephone services provided at fixed locations for:

- Local and/or national telephone services for residential customers;
- International telephone services for residential customers;
- Local and/or national telephone services for non-residential customers; and
- International telephone services for non-residential customers.

ComReg reviewed the proposed markets as recommended by the Commission but concluded that while a domestic-international split is appropriate in the Irish circumstance, the market facts do not support a delineation of the markets into residential and non-residential customers. Thus, ComReg concludes that there are two discrete *retail fixed calls markets* in Ireland-

- (a) *Fixed domestic calls market* consisting of local and national calls and calls to mobiles and to the Internet; and

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(b) *Fixed international calls market* consisting of all calls to destinations located outside of Ireland.

The Authority takes the view that the exercise undertaken by ComReg to define the proposed markets applied principles based on best practice for defining relevant markets in competition analysis. The Authority believes it is reasonable to accept ComReg's findings that the proposed retail fixed calls markets exist in Ireland, at least for the period under review.

The Authority also takes the view, at this time, that ComReg's finding that the Irish *retail fixed calls markets* are not delineated into residential and non-residential customers is supported by the market facts. The Authority notes that although customers could be differentiated by high and low volume users, ComReg's analysis showed that the Irish situation does not depict economic or business rationale to support a further delineation of the *retail fixed calls markets* into residential and non-residential customers. Nonetheless, ComReg should monitor market developments in this regard.

Competitive Analysis

ComReg's assessment of the *retail fixed calls markets* showed that eircom accounts for over 87% of the *fixed domestic calls market* measured in terms of revenue, and none of the alternative operators has up to 10% of the market. eircom accounts for over 68% of the *fixed international calls market* measured in terms of revenue and none of the alternative operators has up to 15% of the market.

ComReg examined the competitive environment in each of these markets and found evidence of high barriers to entry to both markets, which in the absence of currently imposed regulatory measures mandating access on a non-discriminatory basis, would result in an absence of constraint currently imposed by potential competition in the market. ComReg concluded that customers have no countervailing bargaining power in the domestic calls market. In the international calls market while there is some evidence of countervailing buyer power by a small number of customers, this is not sufficient to constrain eircom's pricing decisions. ComReg expects this situation to continue at least for the period under review.

ComReg concluded that the proposed markets are characterised by a lack of effective competition at least for the period under review and as such eircom should be designated as having SMP on both the *retail fixed domestic calls market* and the *retail fixed international calls market* and appropriate *ex ante* regulatory measures are justified. These measures will apply in both the market for wholesale access to retail markets and the retail markets themselves. The Authority would recommend in this regard that ComReg takes an holistic approach in analysing the potential impact of its regulatory remedies by determining the effects such remedies will have in both wholesale access and retail calls markets. For example, ComReg should examine the effect that regulating wholesale access charges could have on eircom's ability and incentives to compete on price at the retail level.

With regard to a finding that *eircom* holds an SMP position in each of the above markets, the Authority is of the view that the analysis carried out by ComReg supports this view, at least for the period under review. All the same, the Authority welcomes ComReg's undertaking to monitor competitive dynamics and review any such developments.

We would note that the Authority's comments are made in the context of the specific provisions of the SMP guidelines relating to the relationship between markets defined for the purposes of *ex ante* regulation vis-à-vis competition law enforcement. The Authority reserves the right to re-examine any or all of the issues underlying these

recommendations in the light of facts and evidence that may arise in specific future cases,
before it.

Sincerely,

A handwritten signature in cursive script that reads "Paul".

Dr. Paul K. Gorecki
Member, Competition Authority

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

Under the obligation in Article 16 of the Directive 2002/21/EC, ComReg, has conducted an analysis of the markets for fixed retail domestic calls and fixed retail international calls.

Under Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg document 04/95. This consultation ran from 01 September 2004 and ended 05 November 2004. The responses to this consultation have been taken into consideration and ComReg has now reached decisions in market definition, designation of SMP and regulatory obligations, which are contained in ComReg document 05/26.

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

Section 1 - Market Definition

Please state where applicable:

1.1	The affected relevant product/service market (s).	ComReg proposes to define two retail calls markets : <ul style="list-style-type: none"> • 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) 	Pages 10 - 25
Is this market mentioned in the Recommendation on relevant markets?		Yes	
1.2	The affected relevant geographic market (s)	<ul style="list-style-type: none"> • Ireland 	Page 23 and 95
1.3	A brief summary of the opinion of the national competition authority where provided;	The Authority supports the approach and findings of this market definition exercise.	Page 128 - 131

1.4	A brief overview of the results of the public consultation to date on the proposed market definition (for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it)	<p>Five detailed responses to the consultation were provided by :</p> <ul style="list-style-type: none"> ▪ alto ▪ eircom ▪ energis ▪ Esat BT ▪ vodafone <p>There was general agreement among respondents on the analysis and conclusions reached. However there was some disagreement relating to the market definition, no robust alternative market definition was put forward. Overall, the proposed conclusions remained unchanged after the consultation.</p>	Pages 10-25 and 75-96
1.5	Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified the proposed market definition by reference to Section 2 of the Commission's Guidelines on the definition of the relevant market and the assessment of significant market power ⁸⁷ , and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and Section 3.2 of the accompanying Explanatory Memorandum ⁸⁸ .	ComReg has concluded that there are not separate markets for residential and non-residential users in Ireland, this is different to the EU recommendation.	Pages 20-23 and 93-95

⁸⁷ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services, OJ C 165, 11.7.2002, p. 6.

⁸⁸ Commission Recommendation of 11.2.2003 on Relevant Product and Service Markets with the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for ECNs and ECSs, C (2003) 497

Section 2 - Designation of undertakings with significant market power

Please state where applicable:

2.1	The name(s) of the undertaking(s) designated as having individually or jointly significant market power. Where applicable, the name(s) of the undertaking(s) which is (are) considered to no longer have significant market power	eircom Ltd should be designated as having SMP in the market for retail domestic calls from a fixed location. eircom Ltd should be designated as having SMP in the market for retail international calls from a fixed location.	Page 34
2.2	The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power	<ul style="list-style-type: none"> • Market Share • Potential Competition and Barriers to Entry • Absence of Countervailing Bargaining Power 	Pages 25-34 and 98 – 103
2.3	The name of the main undertakings (competitors) present/active in the relevant market.	EsatBT, Chorus, energis, and MCI, ntl	Page 25 and 98
2.4	The market shares of the undertakings mentioned above and the basis of their calculation (e.g., turnover, number of subscribers)	<ul style="list-style-type: none"> • Domestic market Total OAO market share = 13% based on revenue. No OAO had a market share in excess of 10%. • International market – total OAO market share = 32% based on revenue. All other operators had individually market shares of under 15%. 	Pages 26 and 99

Please provide a brief summary of:

2.5	The opinion of the national competition authority, where provided	The Authority supports the approach and findings of this market definition exercise.	Page 134-137
2.6	The results of the public consultation to date on the proposed designation(s) as undertaking(s) having significant market power	Five detailed responses to the consultation were provided by : <ul style="list-style-type: none"> ▪ alto ▪ eircom 	Pages 25-34 and 98-103

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

Please state where applicable:

3.1	The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC (Access Directive))	<p>Under the Access Regulations which transpose Articles 9 to 13 of Directive 2002/19/EC (Access Directive):</p> <ul style="list-style-type: none"> • Transparency – Regulation 10 • Non-discrimination – Regulation 11 • Accounting Separation – Regulation 12 • Access to, and use of, specific network facilities – Regulation 13 • Price Control and Cost Accounting – Regulation 14 <p>Articles 14 and 16 of the Universal Service Regulations.</p>	Pages 35-57 and 103 – 128
3.2	The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Alternatively, indicate the paragraphs,	Such information can be found in sections 6 & 7 and Appendix C of this document.	Pages 35-57 and 103 – 128

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

Section 4 - Compliance with international obligations

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

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