



Consultation Paper

**Market Analysis – Retail Fixed Narrowband
Access Markets**

Document No:	04/94
Date:	01 September 2004

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

Ms. Ruth Kenny
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Freepost
Dublin 1
Ireland

Ph: +353-1-8049600 Fax: +353-1-804 9680

Email: ruth.kenny@comreg.ie

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

Contents

1	Executive Summary	3
2	Introduction	5
	OBJECTIVES UNDER THE COMMUNICATIONS REGULATION ACT, 2002	5
	REGULATORY FRAMEWORK	5
	COMREG PROCEDURE	6
	LIAISON WITH COMPETITION AUTHORITY	7
	CONSULTATION	7
	STRUCTURE OF THIS DOCUMENT	7
3	Relevant Market Definition	9
	MARKET DEFINITION PROCEDURES	9
	MARKET OVERVIEW	10
	<i>Background</i>	10
	<i>Current products</i>	11
	SCOPE OF REVIEW	14
	IS THERE A SINGLE MARKET FOR FIXED ACCESS AND FIXED CALLS?	15
	<i>Background</i>	15
	<i>Demand issues</i>	16
	<i>Supply issues</i>	17
	<i>Preliminary Conclusion</i>	17
	ARE FIXED ACCESS AND MOBILE ACCESS IN THE SAME MARKET?	18
	<i>Background</i>	18
	<i>Demand issues</i>	18
	<i>Supply issues</i>	20
	<i>Preliminary Conclusion</i>	21
	ARE ALL FORMS OF FIXED NARROWBAND ACCESS IN THE SAME MARKET?.....	21
	<i>Background</i>	21
	<i>Demand issues</i>	21
	<i>Supply issues</i>	24
	<i>Preliminary Conclusions</i>	25
	ARE THERE SEPARATE RELEVANT MARKETS FOR RESIDENTIAL AND NON-RESIDENTIAL CUSTOMERS?.....	26
	<i>Background</i>	26
	<i>Demand issues</i>	26
	<i>Supply issues</i>	27
	<i>Preliminary conclusions</i>	28
	THE RELEVANT GEOGRAPHIC MARKET	29
	SUMMARY OF PRELIMINARY CONCLUSIONS	29
4	Relevant Market Analysis	31
	INTRODUCTION	31
	<i>Background</i>	31
	MARKET STRUCTURE	31
	BARRIERS TO ENTRY AND POTENTIAL COMPETITION	34
	<i>Economies of scale and of scope</i>	34
	<i>Provision of combined calls and access packages</i>	36
	<i>Vertical integration</i>	37
	BARRIERS TO SWITCHING	37
	COUNTERVAILING BUYER POWER	38
	PRELIMINARY CONCLUSIONS	38

5	Designation of Undertakings with Significant Market Power.....	40
6	Proposed Market Remedies	41
	INTRODUCTION.....	41
	COMPETITION PROBLEMS	41
	PREVIOUS COMPETITION PROBLEMS.....	45
	AVAILABLE REMEDIES	46
	PRINCIPLES IN SELECTING REMEDIES	48
	REMEDIES PROPOSED	49
	<i>Wholesale remedies</i>	49
	<i>Retail remedies</i>	60
7	Regulatory Impact Assessment.....	73
8	Submitting Comments.....	75
	Appendix A – Consultation Questions	76
	Appendix B – Consumer packages bundling access and calls.....	79

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 In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive and, having identified competition problems, propose appropriate regulatory measures.
- 1.2 The *Framework Regulations* further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes places as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets (“*the Relevant Markets Recommendation*”) by the EU Commission². 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*”).
- 1.3 ComReg would welcome comments from all interested parties on the questions posed in this market review and will accept written comments on or before Wednesday 13 October 2004. Under Article 5 of the *Framework Regulations* and in order to promote further openness and transparency, ComReg will publish the names of all respondents and will make available for inspection responses to the consultation at its offices³.
- 1.4 This consultation is a review of retail markets identified by the European Commission as access to the public telephone network at a fixed location⁴.
- 1.5 ComReg proposes to define two retail narrowband access markets:
 - Lower level retail narrowband access (which includes access via analogue exchange lines over copper, cable and FWA and ISDN BRA, also including ‘hi-speed’), which is referred to as **Lower Level Access**
 - Higher level retail narrowband access (which includes access via ISDN FRA and PRA) which is referred to as **Higher Level Access**
- 1.6 ComReg considers that this differentiation is necessary because there is limited demand and supply side substitution between the markets, due primarily to different functional attributes and the absence of common pricing constraints. Further, ComReg considers that the conditions of supply in the markets are different.
- 1.7 In the analysis of the markets, ComReg assesses that eircom has a market share in excess of 99% in the lower level access market. eircom’s market share of the higher

¹ S.I. No. 307 of 2003.

² Framework Regulations 26 and 27.

³ This is subject to confidentiality. Respondents are asked to clearly identify material which is to be treated as confidential.

⁴ Markets 1 and 2 of the Relevant Markets Recommendation, 11 Feb 2003 C(2003)497.

level access market is 77%. ComReg considers other characteristics of the market, including barriers to entry and relatively high customer switching costs and concludes that there is little likelihood of this market share diminishing significantly within the lifetime of this review.

- 1.8 ComReg proposes to designate eircom as having SMP in the market for lower level access and in the market for higher level access.
- 1.9 According to the *Guidelines*⁵, the purpose of imposing ex ante obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power to restrict or distort competition in the relevant market, or to lever market power into an adjacent market.
- 1.10 The *Guidelines* make it clear that the designation of SMP, without imposing any regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 27 (4) of the *Framework Regulations*.
- 1.11 ComReg has identified potential competition problems in the retail fixed narrowband access markets, associated with single market dominance, and with vertical and horizontal leveraging. ComReg proposes that remedies are required to address these problems.
- 1.12 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 access markets.
- 1.13 ComReg proposes a range of obligations to be placed on the SMP operator.
- 1.14 This document is a consultation document. ComReg welcomes comments from all interested parties on the questions posed in this review. Written comments will be accepted up until 13 October 2004. As required by Regulation 20 of the *Framework Regulations*, the draft measure will then be made accessible to the European Commission and National Regulatory Authorities in other member states of the European Community prior to taking a final decision.

⁵ Commission Guidelines on Market Analysis and Significant Market Power.

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 Measures imposed as a result of this consultation will aim to achieve these objectives. ComReg believes that the interests of users can be promoted by protecting users, among other things, from excessive pricing for access to retail narrowband in Ireland. The focus on remedying current and potential competition problems will promote effective competition leading to operator efficiency thereby providing choice, price and quality to end users.

Regulatory Framework

- 2.3 Four sets of Regulations,⁶ which transpose into Irish law four European Community directives on electronic communications and services,⁷ 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.

⁶ 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*").

⁷ 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*.⁸ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.⁹ 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.¹⁰ 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)¹¹.
- 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.¹² In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Market Recommendation and the Commission's *Guidelines* on Market Analysis and Significant Market Power (“*The Guidelines*”).

ComReg procedure

- 2.6 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services (“ECNs and ECSs”), and from consumer surveys commissioned by ComReg, in order to carry out its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of the *Relevant Markets Recommendation* and the *Guidelines*.
- 2.7 The results of ComReg’s consumer surveys are referred to throughout this report. In particular, ComReg commissioned Amárach to carry out research on fixed and mobile users regarding their usage of fixed and mobile services. Amárach carry out a quarterly survey on Internet penetration, which is referred to in this document. TNS MRBI carried out a Residential Consumer survey referred to in this review.

⁸ Framework Regulation 26.

⁹ Framework Regulation 27.

¹⁰ Framework Regulation 27(4).

¹¹ Framework Regulation 27(3).

¹² Framework Regulations 26 and 27.

Liaison with Competition Authority

2.8 There is a requirement on ComReg under Regulation 27 of the *Framework Regulations* to carry out an analysis of a relevant market that has been defined. This analysis must be carried out in accordance, where appropriate, with an agreement with the National Competition Authorities (NCAs) under Section 34 of the Competition Act 2002. In December 2002, ComReg signed a co-operation agreement with the Competition Authority for a period of three years¹³. To facilitate market review decision-making, a Steering Group including a representative from the Competition Authority was established by ComReg. Through this forum, the Competition Authority has been informed and involved throughout the market review decision making process.

Consultation

- 2.9 All comments to this Public Consultation are welcome. However, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 2.10 The consultation period will run from 1 September 2004 to 13 October 2004 during which time ComReg welcomes written comments on any of the issues raised in this paper.
- 2.11 As required by Regulation 20 of the *Framework Regulations*, the relevant draft measure related to the markets discussed will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking the measure.

Structure of this document

- 2.12 The remainder of this consultation document is structured as follows:
- **Section 3** presents ComReg's preliminary conclusions on the definition of the markets for fixed retail narrowband access. This section consists of a review of the market definition procedure and its scope, as well as demand- and supply-side assessments at the wholesale and retail level;
 - **Section 4** presents ComReg's market analysis for the retail narrowband access market and presents ComReg's preliminary view on whether this market is effectively competitive;
 - **Section 5** presents ComReg's preliminary view on those undertakings with significant market power in the retail narrowband access market;
 - **Section 6** provides a discussion of competition problems. The general principles associated with remedies are outlined. A range of possible remedies is identified, and likely remedies proposed;

¹³ ComReg Document No. 03/06

- **Section 7** outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention regarding these markets;
- **Section 8** provides details with regard to the submission of comments on this consultation document.

3 Relevant Market Definition

Market Definition Procedures

- 3.1 The *Framework Regulations* require ComReg to define relevant markets appropriate to national circumstances, in accordance with the market definition procedure outlined in the *Framework Regulations*¹⁴. The obligations of the *Framework Regulations* apply both to the markets identified in the *Relevant Markets Recommendation* and to additional relevant markets that ComReg may consider to merit investigation above and beyond these¹⁵.
- 3.2 The market definition procedures are designed to identify in a systematic way the competitive constraints that providers of electronic communication networks and services encounter. They do so in a way which also facilitates subsequent market analysis procedures. According to the European Court of Justice,¹⁶ a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable with its products, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question. In essence, this leads to a definition of the market's boundaries.
- 3.3 Market definition cannot occur without taking into account the specific conditions at play in the market. The process involves considering constraints resulting from demand and supply issues (and indeed their interaction) to consider overall substitutability. If demand and supply issues suggest a lack of current or potential substitutability between different types of product, a market will be more tightly defined. If substitutability or its potential exists, a broader definition may be appropriate¹⁷. The competitive position and problems of each relevant market can then be considered.

¹⁴ Regulation 26 of the *Framework Regulations*, and Articles 15(1) and 15(2) of the framework Directive.

¹⁵ These additional markets will occasionally be referred to as "Article 7" markets. This term comes from the article from the Framework Directive that defines the notification procedures that ComReg must follow in such cases.

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

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

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

Market overview

Background

- 3.5 This document concerns the provision of narrowband access at a fixed location. ComReg is considering a connection to the public telephone network which is capable of allowing a user to make and/or receive domestic and international calls, fax communications, and data communications at rates sufficient to permit functional internet access. Access is provided at the network termination point to the local loop.
- 3.6 Historically twisted copper pairs were the prime means of providing access although radio solutions have been used in certain remote locations. More recently, to a limited extent, fibre in the local loop has been deployed, typically for large corporate users.
- 3.7 In Ireland, radio solutions (point-to-point and point-to-multipoint) also provide a means of providing customer access and have also been used in other countries during the roll-out of competing service offerings. In the past, ComReg has offered licences for the use of suitable spectrum. For various reasons, use of this technology remains low in Ireland.
- 3.8 Another potential means of delivering narrowband access services is via cable networks originally established for the delivery of multi-channel television. Whilst modern network systems are designed to support a range of applications (TV, broadband and voice), multi-channel television network services in Ireland generally were provided before such systems became available. Upgrading would require a complete replacement of networks and is therefore expensive. Currently only 0.3% of subscriber lines are delivered directly on networks originally designed for multi-channel television.
- 3.9 Market definition is about identifying the competitive supply and demand boundaries of a relevant market. In terms of competitive supply, eircom remains the only ubiquitous supplier of access to the public telephony network. Although there has been some infrastructure investment by other operators, the level of competition at the access level remains limited and there is very little infrastructure in the access network that is not provided by the incumbent.
- 3.10 The limitation of infrastructure competition can be addressed in a number of ways, including sale, rental or agency billing arrangements for the end user access connection. ComReg recently mandated a new obligation in this regard. This is the Wholesale Line Rental (WLR) offering which is a wholesale product that allows a service provider to offer a more complete retail offering including inter alia both calls and access. The WLR product is offered only in conjunction with the Carrier

Pre-Selection (CPS) “all calls” package It also allows the consumer who has chosen an alternative supplier for its calls to receive a single bill from that operator covering inter alia all calls and line rental, rather than receiving a separate bill from eircom for the line rental.

- 3.11 WLR enables Other Authorised Operators (OAOs) sufficient access to eircom’s network and related facilities to offer customers a line rental product, in combination with the CPS “all calls” package. However, an equivalent and competitive retail service offering from an OAO is only possible where the wholesale product is inclusive of all related line facilities and call management services e.g. call forwarding, call answering. These related services cannot be offered in isolation and are currently defined in the complete WLR product documentation and as set out in eircom’s Reference Interconnect Offer, Schedule 401.
- 3.12 An interim manual solution for WLR was launched in June 2003, a number of OAOs participated in product testing, however the manual solution proved too onerous to implement in the marketplace. In parallel, an automated solution was developed and this was launched on 1st April 2004. After extensive testing with selected customers, Single Billing through WLR, offering an all calls and access product, was launched in the retail market by two OAOs. There are currently over 15,000 WLR lines spanning both markets for lower level and higher level access i.e. less than 0.4% of all access channels.

Current products

- 3.13 Access has been, and generally still is, bought from the owner of the distribution network. This network may be provided over copper, fibre, wireless cable or combined elements.
- 3.14 In terms of overall structure, prior to liberalisation in 1998, the incumbent had monopoly rights and operated in a vertically integrated manner. Regulatory measures since then have in part aimed to break aspects of the vertical integration and defined interfaces that could be opened to facilitate service competition. The incumbent also has a significant horizontal coverage of the complete telecommunications market. It is the only operator active in access supply in many parts of the country.
- 3.15 It should be noted that more companies provide call services (see Review of Retail Fixed Calls Markets; Document number 04/95) than access services, although all companies offering fixed access also offer calls.
- 3.16 In Ireland, fixed access to the telephone network can be provided by:
- **Analogue exchange lines.** This provides a single channel, originally designed to provide voice traffic but capable also of supporting fax and data modems with speeds of up to 56 kbit/s. In Ireland, this is the predominant form of access and at the end of 2003, there were 1.6 million basic PSTN lines in service¹⁸. The number of PSTN lines has been stable for the last few years. Incidentally,

¹⁸ eircom offering memorandum. July 30 2003

residential penetration of PSTN is relatively high and stable, with access available to approximately 71%¹⁹ of households.

- **Digital ISDN exchange lines.** Three levels of service are available :
 - ISDN Basic Rate Access (BRA), which supports 2 channels for user voice and data²⁰.
 - ISDN Primary Rate Access (PRA), which supports 30 channels
 - ISDN Fractional Rate Access (FRA), which supports between 16 and 30 channels

3.17 At the end of March 2004, there were close to a total of 355,000 ISDN access channels in Ireland and of these nearly half are basic rate. ISDN growth has remained relatively constant over the last four years²¹.

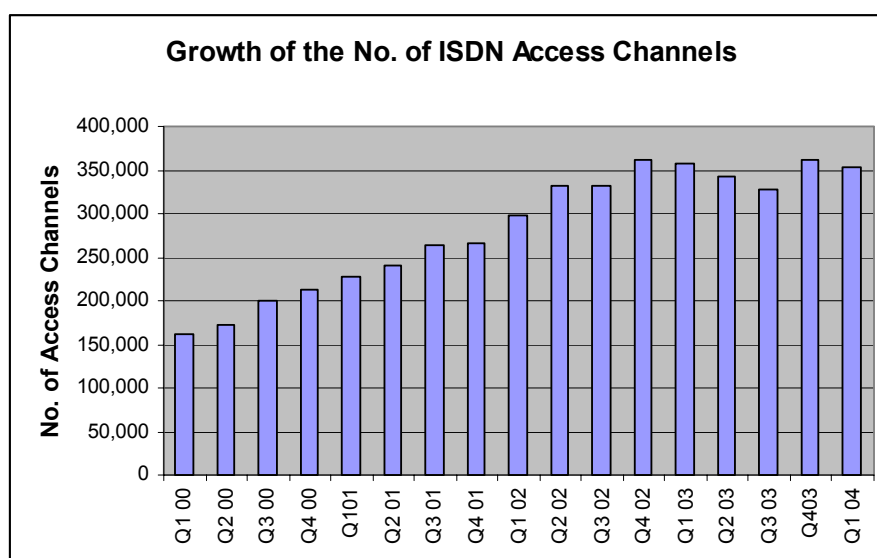


Figure 3.1 ISDN (BRA, FRA and PRA) Growth since Q1 2000

3.18 At the end of March 2004, eircom supplied nearly all ISDN BRA channels, over 77% of all ISDN FRA and ISDN PRA.²²

3.19 A user typically buys access to the telephone network in the form of an initial connection charge and a monthly rental fee. This applies to access via both PSTN and ISDN (BRA, FRA & PRA). A supplier may offer other service elements – for example, services such as call forwarding or call waiting, these are known as call management services. These additional call management services may be offered as

¹⁹ Number of residential PSTN lines/No. of households. Calculated on the basis of 1,382,000 households. CSO June 2003. .

²⁰ ISDN BRA is taken to include ISDN hi-speed. eircom hi-speed access is a 2B+D ISDN product with similar characteristics to ISDN BRA but tariffs differ due to different connections.

²¹ Irish Communications Market - Quarterly Key Data June 2004 ComReg Document Number (04/71).

²² Irish Communications Market - Quarterly Key Data June 2004 ComReg Document Number (04/71).

a 'free' element of the package or may attract a charge in some form. However, they cannot be offered in isolation (i.e. separate from access), and are therefore viewed as part of the access product.

- 3.20 The introduction of wholesale products such as Local Loop Unbundling (LLU) and WLR allows other companies to take over the control of the local loop facilities of the infrastructure owner who is compensated appropriately. In LLU the service provider uses its own switching equipment and extends the 'unbundled local loop' to its own switching facilities appropriately. In Ireland, while LLU could in theory be used to provide access to telephone services, this has to date not taken place here as the primary focus has been on the provision of the higher bandwidth element of the circuit used for broadband Internet access. However the emergence of new applications and services coupled with a changing business environment has led to a renewed interest in LLU both here and elsewhere. Indications are that these developments may also include the provision of voice services. ComReg will therefore keep developments on the front under review.
- 3.21 The introduction of WLR means that while ownership of assets may not change, access services can be offered to end users by a third party. In essence, the service provider pays the access charges to the infrastructure provider thereby allowing the customer to avoid the second bill. The original infrastructure provider carries the call from the local exchange to the agreed point of interconnection with the alternative service provider. However, the customer sees a single provider of access and all calls, and receives a single bill. This form of competition in access supply is only just beginning to take effect in Ireland.
- 3.22 Following the introduction of WLR, there is some evidence of an increasing trend to bundle calls with fixed access. This has always been the model in the mobile market, where a customer buys a package which includes access, whether this is explicit as in a contract subscription or implicit in pre-paid mobile call charges.
- 3.23 As well as variants in services offered there are a few other features of current offerings relevant to the market review. First it is necessary to consider the distribution of multi-channel television services. Companies providing such services have a relatively long history in Ireland. The market is currently dominated by two companies – ntl and Chorus who each use a combination of cable and radio based (Multipoint Microwave Distribution System - MMDS) distribution systems. Both are introducing digital TV services. There are also a number of smaller operators providing a range of TV services in their locality.
- 3.24 In most cases, voice services provided by cable operators are via alternative indirect access products rather than by direct access. This reliance on indirect access products is largely because most of the cable network is of a generation that cannot directly support voice telephony. There is a limited direct access offering but, collectively, the cable operators account for about 0.3% of the total number of access lines²³.
- 3.25 Fixed Wireless Access (FWA) also has an impact on the review. Currently eircom and EsatBT provide services in the 3.5 GHz and 26GHz band via FWA. Both voice

²³ Irish Communications Market - Quarterly Key Data June 2004 ComReg Document Number (04/71).

and Internet services can be delivered to end users over these platforms²⁴. At present the service tends to be limited to specific areas and, to some extent, the use of narrowband FWA can be seen as choice of supply by the supplier (since eircom and EsatBT are currently the only operators of narrowband FWA services), rather than a product demanded by the user. There are currently close to 2,000 users of narrowband FWA in Ireland representing approximately 0.1% of exchange lines²⁵.

Scope of Review

- 3.26 The European Commission recommends, in its Relevant Markets Recommendation, that NRAs should analyse the relevant retail markets for "access to the public telephone network at a fixed location for residential customers" and "access to the public telephone network at a fixed location for non-residential customers" for the purposes of using voice services.
- 3.27 These recommendations are based on the European Commission's characterisation of the retail market for public fixed telephone services²⁶. Key elements of this characterisation are :
- the retail market at a general level is described as the provision of a connection to and use of the public telephone network at fixed locations
 - access to the fixed network may be offered by different types of undertakings, using different technologies
 - access and calls may be supplied as a package by a single undertaking, or may be acquired separately from different undertakings. This is the basis for identifying separate retail markets for access and calls
 - the distinction between residential and business markets is proposed because the contractual terms of service often vary, and because the economics of serving the residential and business markets may be very different
- 3.28 The European Commission distinguishes between retail access to switched voice telephony services, wholesale access to networks; and business data communications. Fixed telephony retail services are seen to include traditional service, which is voice and narrowband data transmission²⁷.
- 3.29 This review is concerned with the ability of customers to access the telephone network. The focus is on access to traditional fixed telephony services. In line with European Union guidance, ComReg's interpretation is that this means access which allows a user to make voice calls, fax calls and functional internet access; normally

²⁴ FWA can accommodate internet access; however the service can be limited by bandwidth capacity.

²⁵ Irish Communications Market - Quarterly Key Data June 2004 ComReg Document Number (04/71)

²⁶ Section 4.2, Commission Recommendation on relevant Product and service Markets.

²⁷ Commission *Guidelines* on Market Analysis and the assessment of SMP under the Community regulatory framework for ECNS, 2002/C 165/03 article 65.

dial-up narrowband internet²⁸. A separate market review of Retail Fixed Calls (Document Number 04/95) has been carried out and is published concurrently with this consultation.

3.30 ComReg has considered access to the public network via payphones and is of the view that payphones present a form of access which is a bundled service for which people pay a single charge for access and calls. The assessment of payphones is however considered in ComReg's review of Retail Fixed Calls²⁹. ComReg will also consider whether a separate market for payphone access and payphone calls is appropriate. However, under the transitional provision of the *Framework Regulations* any obligations relating to payphones remain until such time, as that review of payphones is complete.

3.31 The scope of this market review therefore considers the following:

- Are fixed access and fixed calls in the same relevant market?
- Are fixed access and mobile access in the same relevant market?
- Are all forms of fixed narrowband access in the same market?
- Are there separate relevant markets for residential and non-residential customers?

3.32 In assessing competition within the access market, ComReg has analysed the market by customer type, service type, and geographic scope.

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

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

Background

3.33 The European Commission recommends that there are separate markets for fixed access and fixed calls³⁰. The reason for this is that the conditions of supply are different for access than for calls, and that there is greater potential for an access provider to enter the calls market, than for a calls provider to enter the access market.

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

²⁸ For further information, see Universal Service Directive, articles 2 and 4.

²⁹ ComReg Document No. (04/95)

³⁰ Commission Recommendation of 11 Feb 2003 C(2003)497.

Demand issues

- 3.35 Historically the telephone service was supplied as a package of access and calls, and while each element may be charged separately, the package was bought from a single undertaking. Until recently, access to the fixed network could be bought only from an infrastructure owner. Calls could be bought from the access supplier, and with the introduction of Carrier Access (CA), Carrier Selection (CS) and CPS, from an undertaking offering full or partial calls services over the access network. Figure 3.1 shows the recent development of the growth of Carrier Pre-Select lines.
- 3.36 ComReg's view is that current market conditions differ significantly between the market for access and the market for calls. An increasing number of customers purchase all or part of their outgoing calls from an undertaking other than the access provider. ComReg notes that this difference may simply reflect the fact that CA/CS and CPS on a calls basis have been available for some time and that until very recently there has not been a similar option for access.

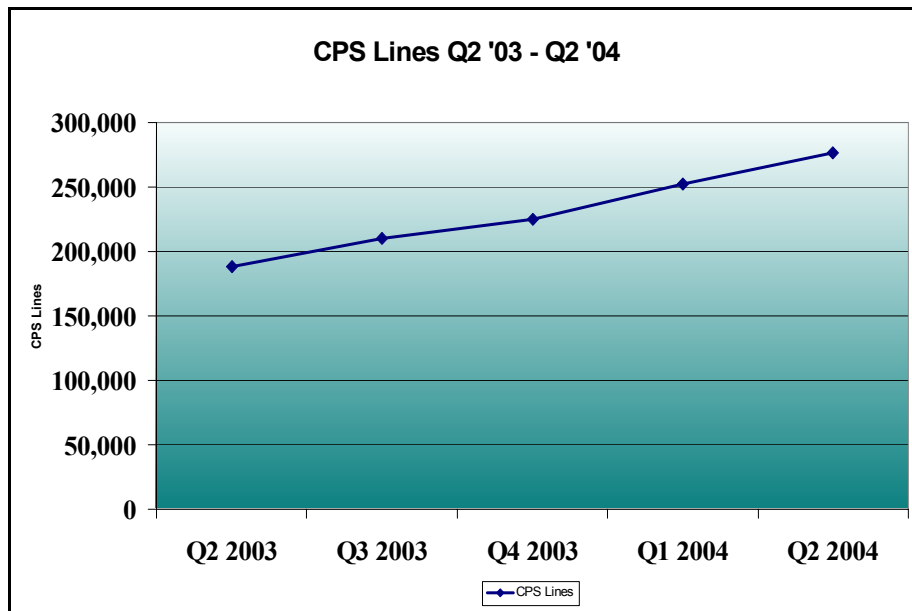


Figure: 3.2 CPS Lines Q2 2003 to Q2 2004

- 3.37 CA/CS and CPS enable a customer, who has a line with the access provider, to select an alternative carrier to carry their calls, either on a call by call basis³¹ or on a pre-defined category of calls. The customer may choose to buy all calls from the alternative operator, or to buy domestic calls only, and/or international calls on a pre-select or per call basis. These calls, which originate on the access provider's network, are then routed from the local exchange to the appropriate point of interconnection with the alternative service provider, as agreed between the service provider and access provider.

³¹ Call by call selection has been implemented in Ireland via Carrier Access and Carrier Selection codes. Carrier Access is implemented through a two stage call set up procedure whereas Carrier Selection is implemented as a one stage call set up. For the purposes of this document call-by-call selection is referred to as CA/CS.

- 3.38 CA/CS and CPS also make switching between calls providers a simpler process than switching access providers³², and means that access and calls are perceived differently. Number portability ameliorates the potential cost and inconvenience of a number change, but it does not does not eliminate all potential barriers to switching.
- 3.39 ComReg notes that the basic functionality of calls and access is different. The services are bought for two different purposes, and so cannot be substitutes.
- 3.40 ComReg notes the recent introduction (on 1 June 2004) of new packages for both residential and business users which effectively bundle access and calls³³. Other, smaller operators have since launched similar products. For a fixed monthly fee, the customer buys access subscription and a package of calls which can be customised to fit individual call patterns. As these have very recently been introduced, ComReg cannot assess the impact that they might have on the market, but notes that it does suggest that ComReg must monitor whether such service offerings change the competitive dynamics of supply. It will, therefore, be necessary to keep this matter under review.

Supply issues

- 3.41 While all access providers offer calls services, not all call providers offer access services. ComReg has considered the extent to which calls providers could enter the market for access during the lifetime of this review. If a hypothetical monopolist of access lines sought to impose a small but significant non-transitory increase in price, it would not be possible for a calls provider to switch production quickly (within a year) and provide access lines. Given the economies of scale and sunk costs involved in the construction of access networks, this would not be feasible absent of regulation. ComReg therefore considers that there is no realistic possibility of supply-side substitution.

Preliminary Conclusion

- 3.42 As such, a hypothetical monopolist access provider would be able to profit by raising prices above cost, as the barriers to entry in the access market are substantial.
- 3.43 ComReg takes the preliminary view that, at present, the access market and the calls market in Ireland are complementary, and are not substitutes. ComReg, therefore, proposes to define separate calls and access markets.

³² The WLR product offers similar ease of switching as does CPS.

³³ See Annex B for example of eircom's "talktime" and "talktime for Business", and Gaelic Telecom's access and calls offering. Gaelic Telecom offers an access product through Access Telecom.

Q. 2. Do you agree that retail calls and retail narrowband access are in separate markets? Please elaborate your response.

Are fixed access and mobile access in the same market?

Background

- 3.44 The European Commission has recommended that mobile access be considered as a separate market to fixed access³⁴. ComReg's preliminary analysis would suggest that this is the case in Ireland.
- 3.45 In considering whether mobile access is in the same relevant market as fixed access, we need to consider the extent to which a user would choose to access the telephone network using a mobile as opposed to a fixed connection, and the extent to which the user would see mobile access as a substitute for fixed access or indeed vice versa.
- 3.46 On the supply side, ComReg considers the extent to which an undertaking currently offering mobile access would enter the market for fixed access in response to a price increase or indeed vice versa.

Demand issues

Functional substitutability

- 3.47 The European Commission has, in a number of decisions, found that there is a market for mobile services which cannot be substituted by fixed services. The key characteristic is mobility, so that access is irrespective of location. Thus, although similar services can be offered by both, fixed services by definition do not offer full mobility.
- 3.48 However, it may be possible for users to substitute in only one direction, by replacing fixed access with mobile access. Technically, mobile can substitute for fixed because users can access the network to make and receive calls just as they would do with a fixed connection.
- 3.49 The areas of functionality where we see a marked difference between fixed and mobile are in quality of service and transmission bandwidth.
- 3.50 As an indication of the importance of quality to users, a ComReg survey³⁵ found that "quality of reception" was second only to price when a user decided whether to use fixed or mobile access. Over 70% of respondents indicated that quality of reception was either important or very important, and 43% strongly agreed that in terms of quality and scope of services, there is currently no alternative to fixed services.
- 3.51 The issue of transmission bandwidth is relevant particularly for data services. At present, a user who has fixed access also has dial-up Internet access. ComReg notes that the roll-out of 3G is likely to improve the quality and bandwidth of mobile

³⁴ Commission Recommendation of 11 Feb 2003 C (2003)497.

³⁵ TNS MRBI Residential telecom Survey Feb 2003

services, but currently and within the timeframe of this review, Internet access over mobile connections is likely to remain considerably slower than over fixed lines.

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

Pricing

- 3.53 The assessment of demand side substitution must consider the impact on the user of an increase in the price of fixed line access, and the extent to which a user would choose mobile access over fixed access if the price of fixed access were to increase.
- 3.54 It is difficult to compare the cost of fixed access with the cost of mobile access, as mobile access is generally either sold as a bundle of access and calls, or as a pre-paid service which does not incur an access charge. (It should also be noted that in excess of 70% of all mobiles are pre-paid). Mobile handsets are generally subsidised by the mobile operator and indeed there is not a direct retail charge for connection to the network. This differs to the pricing of fixed access, which has a separate connection fee.
- 3.55 Because of the different pricing structures for mobile calls and access between different providers it is difficult to separate demand for access and demand for calls. A price comparison at call level is made in the Review of the Retail Fixed Calls markets. It identifies that, with limited exceptions, prices for mobile originating calls are considerably higher than prices for fixed originating calls. Combined with high customer price sensitivity³⁶, these differences indicate to ComReg that it is unlikely in the timescale of this review that fixed line subscribers will surrender their ability to make fixed calls by surrendering their fixed access in sufficient numbers to constrain the price of fixed access.
- 3.56 We also note that a fixed connection is specific to a location, and may be shared by a number of users, while a mobile connection is generally associated with a single user. The cost of access from a fixed location may therefore be shared by a number of people.
- 3.57 When we look at historic data, the price of PSTN line rental has increased by 54% between February 2000 and March 2004³⁷. Following the removal of the line rental subcap in February 2003, the price of line rental increased by 23% in a 12 month period. During that period, the number of mobile subscribers has grown, while the number of residential PSTN line subscribers has remained static, at around 78% of households. This suggests that the price increase has not resulted in users substituting mobile access for fixed access, as the increase in mobile subscribers has not been accompanied by a decrease in fixed subscribers. This view is supported in a survey showing that in Ireland only 4% of households have chosen not to have a

³⁶The February 2003 Residential Telecommunications Consumer Survey, Quarterly Report, conducted by TNS MRBI indicates that 73% of mobile phone users consider price to be important or very important when deciding whether to make a fixed or mobile call.

³⁷ ComReg notes that in principle the hypothetical monopolist test is relevant for prices which are at the competitive level. This may not have been the case for these prices, over this period.

fixed line because they believe that the “mobile phone subscription sufficiently serves the needs of the household”³⁸.

Supply issues

- 3.58 Substitution on the supply side would involve a mobile operator responding to a price increase in fixed access by switching production and offering fixed access, or by supplying a product which is substitutable on the demand side. It is unlikely that a fixed access provider will establish an entirely new mobile network, not least because of the regulated access to spectrum and the cost and time involved. However a fixed access supplier could act as a service provider and offer mobile handsets to its fixed customers.
- 3.59 To have a true substitution effect this product would have to be sold as a substitute for, not complement to, fixed access and priced so that the customer could use either when calling from the ‘fixed’ location. Given engineering costs, it would not seem to be in the suppliers’ interest to do this and, therefore, full substitution does not appear to be a realistic prospect.
- 3.60 A mobile provider seeking to enter the fixed access market would need to provide a product which matched the quality of a fixed line, and was price competitive. This would require either the construction of a new greenfield access network or the development of a mobile (or other wireless) product which more closely resembled the fixed access product in terms of price and quality³⁹. The cost of such developments, the economies of scale and scope involved in the fixed network, render supply side substitution impossible during the timeframe of this review.
- 3.61 ComReg is aware that in several other countries there are proposed alliances between fixed and mobile operators with a view to offering a converged fixed and mobile product. 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 “value added” to the fixed access network rather than a substitute for it.

³⁸ *Inra EU 2002*

³⁹ In ComReg’s view, 3G offers the possibility of higher quality of service on mobile, as high speed data can be delivered through a mobile handset. Three licences were granted to 3G operators (Vodafone, O2 and 3) in 2002. All three networks have launched commercially but 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.

Preliminary Conclusion

3.62 ComReg concludes that fixed and mobile access services 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 the direction of change is towards greater substitutability, and this applies in terms of technology, use and pricing. ComReg intends to monitor this area closely.

Q. 3. Do you agree that fixed narrowband access and mobile access services do not currently belong in the same relevant market? Please elaborate your response.

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

Background

3.63 ComReg has identified two types of access products: analogue access lines and digital ISDN channels.

3.64 Telephony service delivered over a network designed for the distribution of multi-channel television or FWA is not considered to be functionally distinct, although the services may be packaged differently. In other words, cable telephony and narrowband access via FWA still offer access to analogue access lines and/or to digital ISDN.

3.65 ComReg notes that the different forms of access are not uniformly available. PSTN access is ubiquitous, but cable telephony services are currently only available in areas limited by the suitability of the network. FWA is currently available in limited locations.

3.66 In analysing at demand side substitution, ComReg considers the end use of access products, their functional substitutability, and pricing. The assessment of supply side substitutability examines the potential for market entry in response to a price increase.

Demand issues

3.67 The core issue in assessing demand side substitution amongst different forms of fixed access is the extent to which consumers would be prepared to switch from one form of fixed line access to another in response to a price increase.

Functional Substitutability

3.68 All technologically-enabled fixed access lines, however offered, are functionally substitutable. All offer fixed access to networks capable of supporting telephony services. All offer similar quality of service for the purposes of making a voice call.

All offer the possibility of access to other narrowband services such as dial-up internet⁴⁰.

- 3.69 The preference for using ISDN for access to voice is made primarily because the subscriber needs more than one channel. This may be because the user needs more than one voice channel, or the user needs a mix of voice and data channels or simply wants one higher speed channel (which can be achieved by bonding two access channels together). Functionally, the product can be seen as a multiple of PSTN lines, with ISDN terminating equipment allowing transparent data transmission without a traditional modem. Like other forms of fixed access, data access via ISDN is a switched circuit service operating over a dial-up connection.⁴¹ ISDN access supports some ‘supplementary services’ not supported by PSTN access, but these are of minor importance, except where a customer has a PBX or other equipment that can exploit them (see next paragraph). In terms of overall functionality, ISDN may be seen as substitutable for other forms of access to the telephone network.
- 3.70 For ISDN PRA and ISDN FRA, while these services share overall functionality with analogue access and basic rate ISDN, the larger number of channels means that additional network equipment - a PBX - is required to switch calls on the customer’s side of the network termination point. Supplementary services can be used with a PBX to allow certain additional facilities often associated with virtual private networking.
- 3.71 It is possible to connect multiple PSTN lines to a PBX, and share a single directory number. However, many PBXs are configured to use only ISDN lines, and these are often provided in conjunction with direct dialling, which allows direct dial to an individual PBX extension.
- 3.72 It is not clear, therefore, that there is similar functional substitutability between the higher level ISDN products on one hand, and basic rate ISDN and other PSTN access on the other.

Pricing

- 3.73 Solutions offered over traditional local loops may be included in price packages that are structured differently to solutions using cable TV networks (which could be bundled with TV and broadband products) or FWA (which could be linked to broadband products).
- 3.74 In considering the split between ISDN, PSTN and the other access technologies in the context of a price increase on customer choice of access, we must first of all establish the current price differentials.
- 3.75 To access the telephone network via an analogue exchange line supplied by eircom, a customer needs to pay a one-off connection fee of €129.99 (VAT incl)⁴², and a

⁴⁰ FWA can accommodate internet access, however the service can be limited by bandwidth capacity.

⁴¹ Higher speed data services are available e.g. up to 2Mbps for ISDN PRA. However, functionally, service is still switched dial-up, and uncontended, and so is distinct from packet switched services such as xDSL.

⁴² Where a PSTN line has previously been connected at the location this reduces to €24.99.

monthly subscription of €24.18 (VAT incl.)⁴³. The same charge applies uniformly across Ireland, and applies to business and residential customers.

- 3.76 One of the cable operators, Chorus, offers business subscribers direct connection, and its charges are based on the customer taking two lines. The connection charge is €202 for 2 lines, with a monthly subscription of €25.40. At present Chorus is offering approx a 50% discount on both installation and subscription, so that a business user could buy two lines for less than the price of a single eircom PSTN line.
- 3.77 When we look at the price of ISDN, eircom ISDN BRA has an initial connection fee of €244.99 (VAT incl.), and a monthly subscription of €37.50 (VAT incl.). As this offers the customer 2 channels, there is a saving on the equivalent cost of buying two separate exchange lines. The saving is both for connection and for monthly line rental. eircom has another ISDN product marketed as hi-speed, which offers two lines and two numbers. It has a connection fee of €119.99 (VAT incl.) and monthly rental of €37.50(VAT incl.).
- 3.78 eircom's ISDN FRA and PRA both have a connection charge of €3,991.79 (VAT incl.), and a monthly charge dependent on the number of channels. For example, 16 channel FRA costs €192.06 (VAT incl.) per month, and 30 channel PRA costs €319.58(VAT incl.).
- 3.79 From the pricing information available to ComReg, it appears that pricing is generally consistent between access via analogue exchange line, cable connection, FWA and ISDN BRA. ISDN 'hi-speed' has a lower connection fee than ISDN BRA⁴⁴, and a lower connection fee than a single PSTN line. However, the monthly rental for hi-speed and BRA are the same, and both offer two lines at a lower cost than two single PSTN lines.
- 3.80 Ideally ComReg would apply the HMT test by using prices evaluated at competitive levels. ComReg is aware that many prices in this review are subject to regulation. ComReg assumes that current regulated prices are a reasonable proxy for competitive price levels.
- 3.81 A hypothetical monopolist who raised the price of access by a small but significant amount could find that users could switch to cable or FWA connection, or could switch to ISDN BRA or hi-speed. There is clear price progression between the services. Similarly, a hypothetical monopolist supplying ISDN BRA which sought to increase the price by a small but significant amount would find that users could substitute by, for example, buying two access lines⁴⁵.
- 3.82 In terms of the connection charge, the price of ISDN FRA and PRA broadly reflect their characteristic as a multiple of PSTN lines. However, the monthly charge per channel for PRA ISDN variants is around €10.65 (VAT incl.), compared with a

⁴³ All prices include VAT at 21%

⁴⁴ ISDN hi-speed has a lower connection fee than ISDN BRA, as the customer already has a PSTN connection. The PSTN line is surrendered in order to acquire the ISDN hi-speed.

⁴⁵ Ideally ComReg would apply the HMT test by using prices evaluated at competitive levels. ComReg is aware that many prices in this review are subject to regulation. ComReg assumes that current regulated prices are a reasonable proxy for competitive price levels.

single PSTN line rental price of €24.18 (VAT Incl.). This suggests that a customer would not be prepared to substitute higher level ISDN with individual PSTN lines, as the monthly rental cost would effectively more than double.

- 3.83 A hypothetical monopolist supplier of higher level ISDN services could profitably raise prices by 5-10%, since the current rental differential makes it unlikely that users will switch to multiple PSTN lines.
- 3.84 Therefore, ComReg would argue that in terms of demand substitution, a rise in the price of analogue fixed line access could lead to customers deciding to use alternatives for PSTN access, either from other operators or via ISDN BRA. The pricing differences between higher level ISDN access and other PSTN access services suggest that the price of PSTN lines does not constrain the price of higher level ISDN access services.

Supply issues

- 3.85 The cost of entering the retail access market through owned infrastructure is a significant inhibitor to market entry. For operators offering forms of access on existing networks, e.g., cable and FWA, the key issue is the extent to which they would be induced to expand their offering following a price increase in fixed line access.
- 3.86 Given the small proportion of the cable network which is currently able to support the provision of access to voice telephony, ComReg notes that the investment costs required to upgrade the network to offer telephone services is unlikely to materially impact during the timeframe of this review.
- 3.87 ComReg has extended assigning national licences to offer local licences for FWA. It is expected that services will start to become available as networks roll out by year end 2004. In any case, these are broadband licences and it is expected that these operators will concentrate on the supply of high-speed data services rather than narrowband access. This indicates that significant market expansion within the timeframe of this review is likely to be limited.
- 3.88 An operator currently offering higher rate ISDN but not basic PSTN access would have to acquire older generation equipment at the exchange. There is, therefore, a cost disincentive for an ISDN supplier beginning to offer PSTN access; such disincentives would be especially strong if the supplier concentrated on higher rate services.
- 3.89 It should also be noted that the economies of providing higher rate extend beyond technical facilities. Higher rate ISDN customers will be larger and more concentrated and a whole range of related costs will be significantly different from offering the more 'mass appeal' products of ISDN BRA and PSTN.
- 3.90 In other words, the economics of supply are such that the supply of BRA is more similar to PSTN access than it is to the supply of the larger ISDN FRA and PRA products. Support for this point is that several OAOs offer the larger PRA product, but not the BRA product. This leads ComReg to believe that higher rate ISDN access is a separate market on the supply side.

3.91 ComReg is aware that other technologies which provide similar services for a similar price could come to be included in these markets. A notable example is Voice over IP (VoIP), which is likely to become increasingly important, particularly in the business telephony market. Increasing use of VoIP may mean that access products that enable VoIP are more likely to become substitutes for narrowband retail access in the future. However, ComReg does not believe that the use of VoIP will grow sufficiently for it to constrain the pricing of other forms of access within the lifetime of this review.

Preliminary Conclusions

3.92 In considering access to the PSTN, ComReg concludes that fixed exchange lines, cable connection for telephony, narrowband FWA and ISDN BRA currently belong in the same relevant market. They are products which offer the same function, for the same end use, and operate under similar price constraints. A hypothetical monopolist seeking to impose a price increase in one would be subject to substitution by another. ComReg will, from this point forward, refer to this market as **lower level access**. It should be noted that this term does not relate to the bandwidth capacity provided by the relevant product, but rather differentiates these products on the basis of the number of access channels.

3.93 ISDN FRA and PRA are, at a basic level, multiples of exchange lines. However, in reality the types of PBX equipment which are normally used with higher level ISDN means that the functional substitutability is limited. Pricing for connection shows price progression from multiple PSTN lines, but the monthly rental is significantly different. A user seeking to replace higher level ISDN with multiple exchange lines (whether PSTN or ISDN BRA) would have to pay approximately double the rental fee. This suggests to ComReg that a hypothetical monopolist increasing the price of higher level ISDN connection by 5-10% would not be subject to potential substitution. ComReg will, from this point forward, refer to this market (including ISDN FRA and PRA) as **higher level access**. It should be noted that this term does not relate to the bandwidth capacity provided by the relevant product, but rather differentiates these products on the basis of the number of access channels.

3.94 ComReg proposes that fixed retail access to the public telephone network includes two relevant markets.

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

Q. 4. Do you agree that there are distinct markets for retail fixed *lower level* narrowband access and for retail fixed *higher level* narrowband access? Please detail your response.

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

Background

- 3.95 ComReg's preliminary view is that residential and business fixed access are in a single market in Ireland. While we can see the beginnings of differentiation between business and residential in terms of the competitive dynamics at the margins, it is not yet sufficient – and is not likely to become sufficient within the next two years – to identify residential and business access as separate markets.
- 3.96 The European Commission's Explanatory Memorandum to *the Relevant Markets Recommendation* proposes a distinction between the residential and business markets based on possible variation in contract terms, and the potential for the economics of supply to vary between the two markets. In proposing that there is not, at present, a distinction between the business and residential markets in Ireland, ComReg has considered the differences between the residential and business markets for fixed access in terms of demand and the conditions and economics for business and residential supply. It appears that the different supply conditions are less apparent in Ireland than is the case elsewhere. Part of the reason for this may be the high number of SMEs within the Irish economy, especially those at the smallest end of the SME range, and so there are a large number of businesses that require only a single line and may, furthermore, be relatively light users.

Demand issues

Customer classification

- 3.97 There is generally not a clear and consistent method among operators in Ireland of defining a business or a residential customer. During the course of this review, ComReg conducted a number of interviews with access service providers in an effort to determine criteria that are used to differentiate residential and non-residential customers. The results of these interviews indicate that the operators either operate systems that rely exclusively on 'self-nomination' or adopt apparently arbitrary and flexible criteria for differentiating between residential and non-residential customers. The latter criteria are often determined and applied on a case-by-case basis. A number of operators use relatively simplistic revenue-based criteria for identifying customer groups. However, in addition to variation in the thresholds adopted, there are 'rules of thumb' that are varied on a case-by-case basis.
- 3.98 ComReg notes that during the data collection process of this review, attempts were made to define customers as residential and non-residential. However, it became clear that operators might designate the same customer differently because of the variation between designation criteria. Care should therefore be taken in reviewing data.
- 3.99 In terms of classification, therefore, all operators do classify customers as business or residential. Given the fluid manner in which the categories are used, this should be

seen primarily as a marketing tool, as in most cases, there is a strong element of customer choice in the category to which they are assigned.

Pricing

- 3.100 In Ireland, there is no difference in the price paid for a business exchange line, and the price paid for a residential exchange line, and this applies to the connection charge and to the subscription charge. Similarly, there is no difference in the price a residential user would pay for ISDN access and the price a business user would pay.
- 3.101 From the demand side perspective then, there is high substitution as users can and do switch from being “residential” to “business” and vice versa. Given the lack of product difference, this is often to do with call packages rather than access, and is discussed further in the review of retail calls.

Supply issues

Conditions of supply

- 3.102 There is some differentiation between business and residential customers in the terms and conditions of supply. Business customers can benefit from service and quality guarantees provided under service level agreements. This may include, for example, a shorter time to get a connection, or faster fault repair. However, ComReg notes that the *Universal Service Directive* and consumer protection legislation ensure that all customers benefit from clear contractual commitment from operators, and that this has reduced the impact of service level agreements for business customers in relation to narrowband network access.
- 3.103 Business and residential customers may have different billing arrangements. Generally, business customers receive bills more frequently. However, this may be available on request to residential customers.
- 3.104 There is generally a different emphasis in marketing and sales to the business and residential sectors, and all operators distinguish business from residential in their marketing. However, the different marketing strategies relate to the different types of product which are suitable for different types of customer.
- 3.105 We can see therefore that there is a level of differentiation in the way in which services are marketed to the business and residential sectors, but this differentiation is not reflected in the substance of the product. The lack of a consistent determination as to who has access to what means that, in practice, the business/residential differentiation is extremely fluid.

Economics of supply

- 3.106 The European Commission has suggested that there may be variation in the economics of supplying the business and the residential markets.
- 3.107 For potential market entrants, differences in the cost of supply would be relevant when considering competition at the level of infrastructure (i.e. where a new network had to be built, and concentration of users is relevant). However, as noted,

infrastructure competition is limited in Ireland and most market entry has relied on service competition. In this context, the ubiquity of the eircom network and wholesale pricing structures (notably geographic averaging) means that costs associated with supply are not substantially different for business and residential customers. There are no local charge areas that are exclusively 'business' or exclusively 'residential'. While there are areas (e.g. the financial districts of Dublin) where there is a concentration of businesses, provision of access for residential customers in the same area could (depending on the location of the exchange) be achievable at a broadly comparable cost. In other words, a network – even one optimised to handle a business customer base – could still handle some residential customers on an opportunistic basis at a similar cost. What might make a difference is the number of lines per customer (see below). ComReg, therefore, sees no difference between business and residential customers in this regard.

- 3.108 The difference in the competitive conditions of supply of lower level access and the supply of higher level access was discussed earlier. However, this occurs as a result of economies of scale inherent in serving customers requiring multiple exchange lines rather than the fact that the customer is a business user. That said, ComReg notes that there is nevertheless a business/residential dimension to this in that ISDN subscribers, particularly subscribers to the expanded FRA and PRA products, are much more likely to be business customers⁴⁶.
- 3.109 ComReg's conclusion is that the economics of supplying the business and residential markets are the result of the demand and supply characteristics of basic and enhanced (multi-line) products, rather than the customer "category".
- 3.110 The assessment of supply-side substitution must consider whether an operator currently supplying residential customers would be likely to commence supply to business customers – or *vice versa* - in response to a price increase. Given the lack of distinct business and residential markets in Ireland, and an interconnect regime that does not distinguish between classes of caller, a supplier of one would have little difficulty in switching supply to the other.

Preliminary conclusions

- 3.111 ComReg's analysis of business and residential customers acquiring fixed access indicates that there is no differentiation in terms of pricing, and there is little differentiation in the conditions of supply. The impact of any differentiation is modified by the way in which residential and business are defined. There is not a consistent definition, and the boundaries are fluid and subject to self-selection, arbitrary allocation, and change. The economics of supplying business and residential customers suggest that it is relatively simple for a supplier to supply both, in response to a hypothetical price increase for one type of customer.
- 3.112 ComReg therefore considers that the high level of supply side substitution, and the fact that customers can choose their classification of customer category, would

⁴⁶ For Basic Rate Access (including ISDN hi-speed), around 20% of users are classified as residential.

indicate that at present, there are not separate markets for business and residential users in Ireland.

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

The relevant geographic market

- 3.113 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas⁴⁷.
- 3.114 According to the EU *Guidelines*, in the electronic communications sector, 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 instruments⁴⁸.
- 3.115 On the basis of this definition, ComReg takes the view that the relevant geographic market for the markets considered in this review is the state of Ireland.
- 3.116 ComReg believes that the conditions of supply of access are homogeneous across Ireland. In particular, while the direct access networks operated by entities other than eircom do not cover the whole of Ireland, they all compete with eircom's narrowband access services. eircom's narrowband access services are provided on the same terms and conditions, including price, across Ireland. As a result, the conditions of supply are effectively homogeneous.

Q. 6. Do you agree that the relevant geographic market for the retail narrowband access markets is Ireland? Please expand in your response.

Summary of preliminary conclusions

- 3.117 ComReg takes the preliminary view that, at present, the access markets and the calls market in Ireland are complementary, and are not substitutes. ComReg, therefore, proposes to define separate calls and access markets.
- 3.118 ComReg concludes that fixed exchange lines, cable connection for telephony, narrowband FWA and ISDN BRA currently belong in the same relevant market, for

⁴⁷ See the Commission Notice on Market Definition, *SMP Guidelines*, [ComReg's Market Data Information Notice] and *United Brands v. Commission*, [1978] ECR 207, for additional guidance.

⁴⁸ For example, the Universal Service Obligation on geographical averaging

lower level narrowband access. They are products which offer the same function, for the same end use, and operate under similar price constraints. A hypothetical monopolist seeking to impose a price increase would be unable to do so profitably.

- 3.119 ComReg also concludes at this stage that there is a separate market for higher level access to include access via ISDN FRA and PRA. Higher level access at a basic level are multiples of exchange lines. However, in reality the types of PBX equipment which are normally used with higher level ISDN means that the functional substitutability is limited. Pricing for connection shows price progression from multiple PSTN lines, but the monthly rental is significantly different. A user seeking to replace higher level access with multiple exchange lines (whether PSTN or ISDN BRA) would have to pay approximately double the rental fee. This suggests to ComReg that a hypothetical monopolist increasing the price of higher level access connection by 5-10% would not be subject to potential substitution.
- 3.120 ComReg concludes that fixed and mobile access do not currently belong in the same relevant market. The evidence in the Irish market suggests that at present fixed and mobile are complementary products. However, ComReg notes that a small minority of users have chosen not to take up a fixed line but to use mobile exclusively. ComReg believes that this trend is likely to increase and intends to monitor such developments closely.
- 3.121 ComReg's analysis of the supply of fixed access to business and residential customers indicates that there is no differentiation in terms of pricing, and that there is little differentiation in the conditions of supply. The impact of any differentiation is modified by the fluid way in which residential and business are defined.
- 3.122 ComReg considers that the provision of a WLR product, where that product is offered to the end user in combination with the CPS "all calls" calling option, is inclusive of all related line facilities and call management services, as defined in the WLR product description, details of all WLR product offerings can be found in eircom's Reference Interconnect Offer⁴⁹.
- 3.123 ComReg therefore proposes to define two markets at the retail level for access to the public telephone network from a fixed location:
- Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA
 - Higher Level Access – including services over ISDN FRA and PRA

Q. 7. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.

⁴⁹ eircom Reference Interconnect Offer, Service Schedule 401

4 Relevant Market Analysis

Introduction

Background

4.1 Having identified two relevant markets in retail fixed narrowband access to the public telephone network, 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 adjacent market, thereby strengthening the market power of the undertaking⁵⁰.

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*⁵¹.

Market Structure

4.4 In Section 3, ComReg proposed a relevant market defined as retail lower level narrowband access which included services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA. Until very recently, retail access could only be acquired from the owner of the access network. This network may be provided over copper, fibre, radio or combined elements. There is very little competition in infrastructure supply in Ireland. eircom is by far the largest provider in the access market, and is the only operator offering ubiquitous access throughout the country. Other owners of access networks offering access are the two cable operators, ntl and Chorus, and EsatBT, which offers access via FWA.

4.5 eircom is the main supplier of ISDN BRA in the Irish market. At the end of March 2004, eircom supplied approximately 87,000 ISDN BRA lines which provided an equivalent 174,000 access channels (each ISDN BRA line provides two access lines).

⁵⁰ Framework Regulations, Regulation 25(3).

⁵¹ Framework Regulation 25(2).

- 4.6 A market for retail higher level narrowband access, has been provisionally defined, and consists of ISDN FRA and ISDN PRA. The nature of the higher level access products is such that they are used solely by businesses. ISDN FRA is supplied by eircom and EsatBT. ISDN PRA is supplied by a number of operators including eircom, EsatBT, Chorus, energis, and MCI. As far as ComReg is aware, ISDN access is supplied solely on owned infrastructure.
- 4.7 A recent development in Ireland is the introduction of the use of wholesale inputs to offer access services. LLU and Wholesale Line Rental (WLR) means that while ownership of assets may not change, access services can be offered to end users by a third party. ISDN (BRA, FRA & PRA) form part of the WLR product. This form of service based competition in access supply is only just beginning to take effect in Ireland.
- 4.8 Two OAOs, Smart Telecom and Access Telecom, have begun to acquire subscribers for a WLR product which will involve an access and calls package with a single bill. As an indication of the potential impact on prices, Access offers a reduction of 10-20% on eircom's PSTN line rental charge. ComReg notes that the price which OAOs can charge for PSTN line rental is constrained by the retail minus mechanism, so that if eircom's retail price increases and the OAO wanted to maintain its margin, it would have to follow.
- 4.9 The likelihood is that a calls provider wishing to enter the access market would do so by migrating its CPS customers to an all CPS calls and WLR product⁵². However, ComReg believes OAOs offering WLR will not impact eircom's share in the retail narrowband access markets to an extent that would fundamentally change the market structure during the lifetime of this review. ComReg notes that the current level of WLR penetration is less than 0.4% of all access lines, and that even if all OAOs migrated all their CPS customers to WLR with all-calls CPS, eircom would retain approximately 70-80% of customers (see Retail Calls market for details).
- 4.10 ComReg recognises that development of new or upgraded infrastructure, such as greater use of fibre or wireless in the access network, and increased use of services such as VoIP and broadband could have an impact on the access market. ComReg will monitor developments in the market, but based on current analysis, does not believe that change will be rapid enough to have effect, within the timeframe of this review.
- 4.11 eircom's current market share of the market for **Lower Level Narrowband Access** is just over 99% on a channel basis at the end of March 2004.

⁵² The impact of CPS on the market for retail calls is addressed in detail in the Market Review of Retail Calls, also published today.

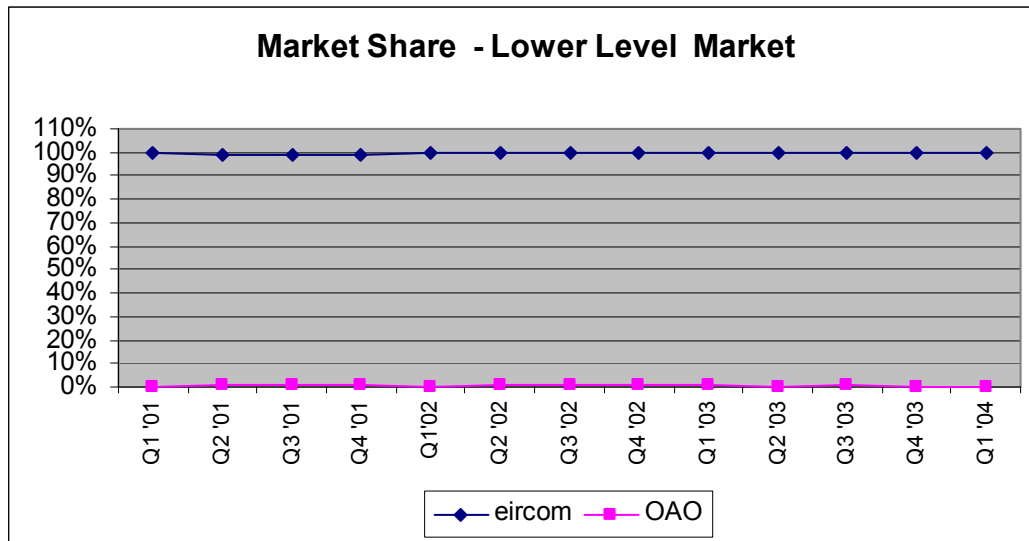


Figure 4.1: Lower Level Access Market

- 4.12 The number of subscribers obtaining retail narrowband services over alternative platforms to copper is minimal. At the end of the first quarter in 2004, approximately 0.3% of services were provided via cable and 0.1% provided over FWA networks.
- 4.13 In the second proposed market, defined as the **Higher Level Narrowband Access** eircom's market share is just over 77%. eircom's market share in this market has not fallen below 70% in the past four years as evidenced in the graph below.

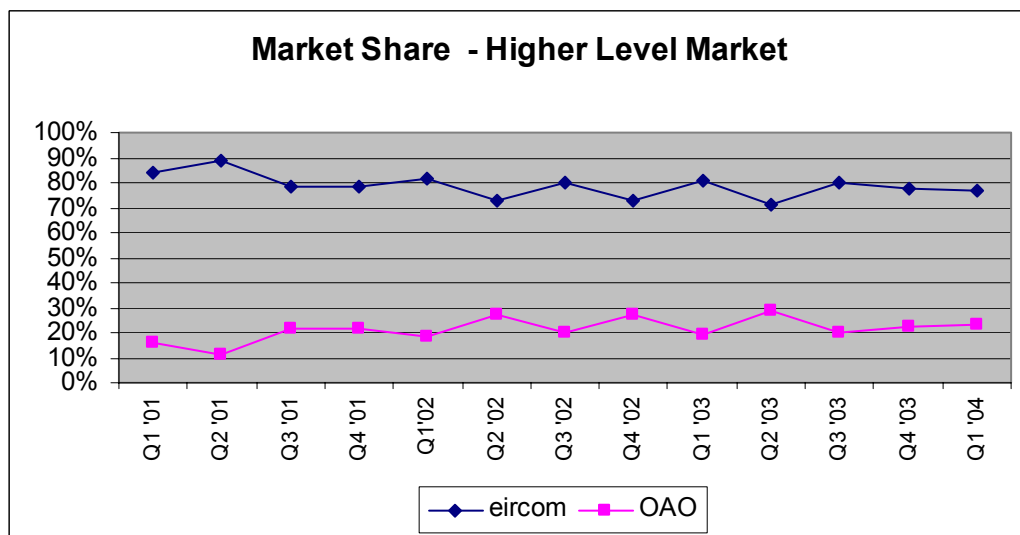


Figure 4.2: Market Share for Higher Level ISDN

- 4.14 In the higher level access market the overall supply of ISDN FRA has remained relatively static in the last year, while the supply of ISDN PRA has grown within the last year, as shown in Figure 4.3 below.

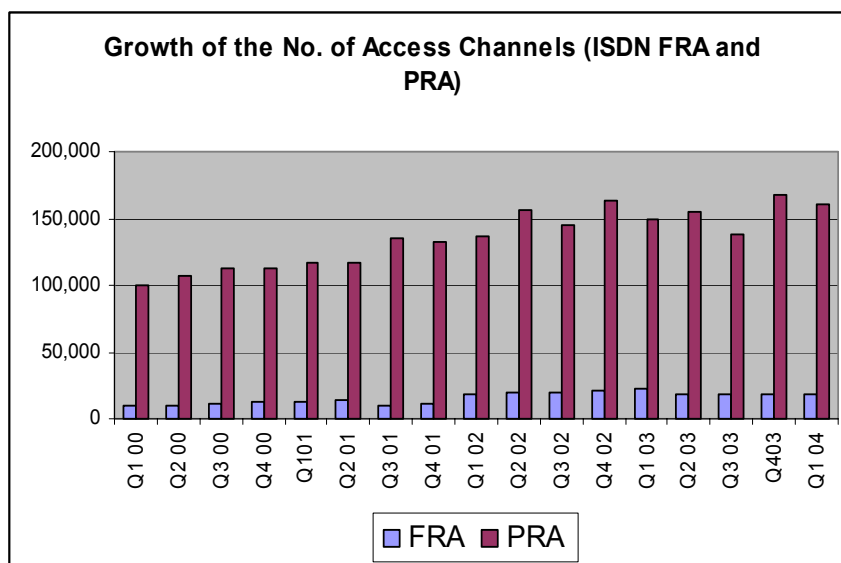


Figure 4.3 Growth of Higher Level Access Channels

4.15 Given trends in the market, ComReg takes the view that eircom is likely to continue to provide a significant majority of higher level ISDN connections during the timeframe of this review.

Barriers to entry and potential competition

4.16 The threat of market entry is one of the main potential competitive constraints on incumbent firms, and threat of market entry may prevent a dominant incumbent from raising prices above competitive levels. The threat of entry will be reduced by the existence of barriers to entry.

Economies of scale and of scope

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

4.18 In the fixed access markets, the density and ubiquity of eircom's access network means that eircom will typically incur cost advantage on a per line basis over competing network operators, and will usually be able to provide an end-to-end service at a lower cost than other operators. For an operator seeking to use owned facilities to offer access services, the effect of economies of scale is that such an operator is likely to have costs which are higher than those of the incumbent, but would have to price below the incumbent in order to gain market share. This makes it even more difficult to recover sunk costs invested in the network infrastructure.

4.19 The impact of economies of scale is not as pronounced in the higher level access market as they are in the fixed lower level access market. This is largely because ISDN FRA and PRA are products targeted at a particular type of business customer

- it is not a consumer product. The supply of higher level access products is therefore well suited to niche marketing strategies.
- 4.20 Economies of scale are likely to be achieved not only in the supply of access, but in the supply of associated support services. This means that the incumbent benefits in having reduced costs in network support.
- 4.21 Competing operators to eircom currently can avail of Unbundled Local Loop products, specifically the Unbundled Local Metallic Path (ULMP) product. This would potentially allow competing operators access to end customers for the purpose of providing narrowband access services. Although ComReg acknowledges the theoretical potential of the ULMP services to enable competition in the retail markets for access and calls (and notes that in some other jurisdictions this has actually occurred to some extent) ComReg does not believe that ULMP presents a significant competitive threat to eircom in the provision of narrowband access services.
- 4.22 ComReg notes that although ULMP can be used to provide voice services, currently the product is used predominantly for the provision of broadband access. Where ULMP lines have been purchased by OAOs, (and only a few hundred have been since the introduction of LLU in 2001) they are used to provide high capacity data services and all the information available to ComReg indicates that this pattern of use is unlikely to change in the foreseeable future.
- 4.23 Secondly, there are very considerable barriers to entry into the voice market associated with ULMP. In order to offer a competing national voice service equivalent to eircom's, an OAO would have to un-bundle in excess of 1,000 exchanges each of which involves considerable time and costs, and to provide physical connectivity to each of those exchanges.
- 4.24 Given the economies of scale available to eircom and the existence of large sunk costs entry into the narrowband access market via ULMP it is unlikely that services provided by OAOs over LLU is will offer sufficient potential competition over the timeframe of the review to act as a competitive constraint on eircom. ComReg will however monitor the impact of ULMP on the relevant markets, and revisit its analysis if necessary.
- 4.25 ComReg also considers potential competition posed by mobile operators. A mobile provider seeking to enter the fixed access market would need to provide a product which matched the quality of a fixed line, and was price competitive. This would require either the construction of a new greenfield access network or the development of a mobile (or other wireless) product which more closely resembled the fixed access product in terms of price and quality⁵³. The cost of such

⁵³In ComReg's view, 3G offers the possibility of higher quality of service on mobile, as high speed data can be delivered through a mobile handset. Three licences were granted to 3G operators (Vodafone, O2 and 3) in 2002. All three networks have launched commercially but 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.

developments, the economies of scale and scope involved in the fixed network, render supply side substitution impossible during the timeframe of this review.

- 4.26 eircom also has a cost advantage in economies of scope arising due to the existence of common costs in the supply of different services. Economies of scope come into play when the greater the range of services sharing costs; so an operator which is present across the range of telecommunications services is better able to recover common costs from any one service.
- 4.27 ComReg takes the view that eircom is likely to continue to provide a significant majority of narrowband network connections, including PSTN, basic and higher level ISDN, during the timeframe of this review. ComReg does not consider it feasible that a new entrant would build a new access network replicating all or part of eircom's network, or that sufficient investment will be made in existing infrastructure not currently used as local access networks (e.g., uni-directional cable networks) to upgrade it to the extent that it provides alternative access networks.

Provision of combined calls and access packages

- 4.28 ComReg considers that eircom has had advantages in the way in which it can offer access and calls, and that this may constitute a barrier to entry for alternative operators. At present, an access provider is able to offer calls services, so that a customer can choose to purchase a single service from a single supplier, and will receive one bill. Until very recently, a customer who had chosen CA/CS or CPS for calls received a calls bill from the CPS Operator, and an access bill from the access provider.
- 4.29 As an indication of the importance of this for customers, when asked in a recent survey if they would change supplier if they could have a single bill for calls and access, 51% of respondents said yes, compared with 38% who would not⁵⁴.
- 4.30 One of the ways in which ComReg has addressed this issue is by introducing the WLR product, through which a calls provider will be able to offer a single bill to the customer for all calls and the access package. ComReg considers that WLR offers not only the possibility of single billing, but also offers the provider the opportunity to devise varied and flexible tariff structures and access/calls bundles. WLR is not a stand alone product but was designed as a supporting access remedy to enhance the effectiveness of CPS.
- 4.31 The ability to offer a bundled services of access and calls is not confined to one operator, in the current higher level access market because in principle an operator offering ISDN access can also offer a calls service to their subscribers. This means that they can already offer a single bill, and can structure tariffs in a flexible way.
- 4.32 The WLR product is applicable to all types of ISDN BRA, FRA and PRA. This could enable operators, who do not own all of the necessary infrastructure, to purchase the wholesale elements that are necessary to enter the market with an ISDN product. However, it will not erode eircom's position as owner of the access infrastructure

⁵⁴ TNS MRBI, Residential Telecommunications Survey Jan 2004.

Vertical integration

- 4.33 A vertically integrated provider of electronic communications services may be dominant at the wholesale level as well as the retail level. For the purposes of this review, potential dominance in the market for wholesale inputs means that market power may be leveraged into the retail market, and so adversely affect competition.
- 4.34 This means that competition problems related to vertical leverage identified at the retail level may need to be addressed partially by wholesale remedies, because a vertically integrated provider may be able to use wholesale dominance to control the price of inputs needed to compete in the retail market. In the market for lower level retail fixed narrowband access, and in the market for higher level retail fixed narrowband access, a barrier to entry could be constituted if a market entrant could not obtain suitable wholesale inputs at cost oriented prices.

Barriers to Switching

- 4.35 Low barriers to switching would indicate that, even when market share suggested otherwise, market power is reduced.
- 4.36 The current situation for fixed PSTN access in Ireland is that, for most customers, up until recently there has been no alternative to the incumbent. Other operators tended to operate in niche markets, whether geographical or by customer type, and in any case, the installed base held by other operators is extremely low. It remains to be seen what impact the introduction of wholesale line rental will have on consumers switching behaviour.
- 4.37 ComReg considers that the barriers to switching arising from customer awareness in the higher level narrowband access markets are lower than in the lower level access market. Higher level ISDN is typically sold into better resourced and informed companies. This is primarily because higher level ISDN is offered as a business product to a targeted user group. This means that customer awareness of the possibility of switching higher level ISDN supplier is high and does not therefore constitute a significant barrier to entry.
- 4.38 ComReg notes also that the facility to retain a telephone number when switching access provider is important in reducing potential barriers to switching. Number portability (NP) is essential to maximise the benefits of a competitive telecommunications market.
- 4.39 ComReg has found that in the absence of regulatory intervention, there were considerable barriers to switching. The CPS product alone suffers from particular disadvantages in relation to dual billing, winback opportunities etc. ComReg has put in place a mandated WLR product, for use in conjunction with the CPS “all calls” facility in order to address these issues.
- 4.40 However, ComReg notes that the high level of connection fee for higher level ISDN could be seen to constitute a barrier to switching. The pricing of higher level ISDN is structured so that the initial connection fee is high, and monthly per channel rental

low when compared with PSTN. While ComReg understands that this may well reflect cost for an operator, it may be a significant disincentive for a user to switch.

Countervailing Buyer Power

- 4.41 If an operator engages in practices that are potentially exploitative, customers might be able to exert countervailing buyer power against such practices. Where buyers are large and powerful, they can effectively respond to any attempt to increase prices by sellers.
- 4.42 However, countervailing buyer power can only exist where large customers have the ability (within a reasonable timeframe) to resort to credible alternatives (e.g., not to purchase or to switch supplier) in response to a price increase or threatened price increase.
- 4.43 ComReg has seen no evidence that supports the existence of countervailing buyer power in the market for lower level access. As noted above, ComReg recognises that purchasers of products with the higher level access are more informed and could possibly exert some buyer power in this market. However, ComReg has seen no evidence to suggest that consumers buying power has a sufficiently significant impact to constrain eircom's pricing behaviour.

Preliminary conclusions

- 4.44 ComReg notes that eircom's current market share of the market for **Lower Level Narrowband Access** (which includes voice and narrowband data services (ISDN BRA) on PSTN, cable and FWA platforms) is just over 99% on a channel basis at the end of March 2004. This represents control of a ubiquitous network of exchange lines which could not easily be replicated. Economies of scale are evident not only in the sunk costs required to construct an access network, but are achieved also in exchange line support services. This means that eircom achieves economies of scale both in the physical network and in the management of the network, and that these economies act as a barrier to entry.
- 4.45 The analysis of the market for fixed lower level narrowband access to the public telephone network indicates that eircom should be designated as having SMP in the fixed narrowband access market as defined. ComReg does not believe that any service provider currently imposes a competitive constraint on eircom, and does not anticipate that this situation will change significantly within the lifetime of this review.
- 4.46 The identification of the relevant market as the market for retail fixed lower level narrowband access and its subsequent market analysis shows evidence of a market failure, in that market forces are unable to constrain the pricing of access.
- 4.47 In the second proposed market, defined as the **Higher Level Narrowband Access market**, eircom's market share is just over 77% measured in access channels.
- 4.48 However, ComReg believes that the economies of scale achieved in the higher level access market are reduced in comparison with the lower level narrowband access market. This is because the economics of supplying higher level ISDN differ from the supply of basic PSTN access.

- 4.49 The most significant difference is that higher level ISDN is not a consumer product in the sense that it is not supplied to a mass market. Rather, it is supplied to a particular customer on a case by case basis, and will only ever be demanded by and supplied to a relatively small subset of the total access market. This means that economies relating to the density of the network, which are crucial in the lower level access market, are not so significant in the higher level access market.
- 4.50 However, ComReg notes that with a market share of 77% and a ubiquitous network, eircom is still able to achieve considerable economies of scale and of scope in this market. In particular, the higher level access market is a business market in which eircom could achieve economies through recovering costs from the supply of a range of services to business customers.
- 4.51 The market analysis shows evidence of a market failure, in that market forces are unable to constrain eircom in the pricing of ISDN FRA and PRA.
- 4.52 The analysis of the market for higher level access indicates that eircom should be designated as having SMP in the fixed narrowband access market as defined. ComReg does not think it is likely that any current service provider could impose a sufficient competitive constraint on eircom, and does not see this situation as changing significantly within the lifetime of this review.

Q. 8. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response.

5 Designation of Undertakings with Significant Market Power

- 5.1 This market review has defined two markets in Ireland which are concerned with retail narrowband access to the public telephone network. For each market, ComReg has analysed the market characteristics, and has concluded that eircom has SMP in both markets.
- 5.2 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the *Framework Regulations*:
- eircom Ltd should be designated as having SMP in the fixed retail market for **Lower Level Narrowband Access** to the public telephone network.
- eircom Ltd should be designated as having SMP in the fixed retail market for **Higher Level Narrowband Access** to the public telephone network.
- 5.3 A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6 Proposed Market Remedies

Introduction

- 6.1 This market review has defined two markets in Ireland which are concerned with retail narrowband access to the public telephone network. For each market, ComReg has analysed the market characteristics, and has concluded that eircom has SMP in both markets.
- 6.2 ComReg is obliged, under Regulation 9(1) of the Access Regulations, where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the *Framework Regulations*, to impose on such operator such of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.
- 6.3 Regulation 14 of the *Universal Service Regulations*, which transposes Article 17 of the *Universal Service Directive* into national law, requires ComReg, when it determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive, and ComReg concludes that obligations imposed under the Access Regulations or Regulation 16 of the *Universal Service Regulations* would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, to impose such obligations as it considers appropriate to achieve those objectives, on undertakings designated by ComReg under Regulation 27(4) of the *Framework Regulations* as having significant power on a given retail market.
- 6.4 The purpose of this section is therefore to discuss actual and potential competition problems in the defined markets, and to propose remedies to address these problems.

Competition Problems

- 6.5 ComReg believes that competition problems arising due to eircom's dominance in the retail narrowband access markets fall into three broad categories :
- Single market dominance
 - Vertical leveraging
 - Horizontal leveraging
- 6.6 Competition problems are discussed in terms of each of these categories.

Single market dominance

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

- Entry deterrence, where economies of scale and/or of scope act as a barrier to entry.
 - Exploitative behaviour, where for example market power enables an SMP undertaking to sustain profits which are higher than would be expected in a competitive market.
 - Productive inefficiencies, where there is a lack of investment, and/or excessive costs, or where quality is compromised.
- 6.8 Entry deterrence ComReg notes that eircom's share of over 99% in the lower level access market and 77% in the market for higher level access market represents control of a ubiquitous network of exchange lines which could not easily be replicated. Economies of scale are evident not only in the sunk costs required to construct an access network, but are achieved also in exchange line support services. This means that an SMP operator can achieve economies of scale both in the physical network and in the management of the network, and that these economies may act as a barrier to entry.
- 6.9 Exploitative Behaviour – The Telecommunications (Miscellaneous Provisions) Act, 1996 enables ComReg to protect consumers against excessive pricing by capping the prices of a basket of telecommunications services. At present the price cap covers PSTN access, ISDN access, fixed and mobile calls, local calls, national calls, operator assisted calls and payphones. The price cap is set at CPI-0%.
- 6.10 Productive inefficiencies – Regulations set out in Regulation 15 and Schedule 3 of the Universal Service Regulations and Regulations 13 (Access), 11 (Non Discrimination), 10 (Transparency), 12 (Accounting Separation) and 14 (Price Control and Cost Accounting) of the Access Regulations allow ComReg to intervene on these issues.

Vertical leveraging

- 6.11 Vertical leveraging arises where an operator has dominance at a wholesale level and can potentially transfer this power into the retail markets. Vertical leverage:
- “may arise when a firm controls an input that is essential for a potentially competitive downstream industry. The upstream bottleneck owner can then alter downstream competition by denying access or limiting access to its input”⁵⁵.
- 6.12 Because an SMP operator has control of the wholesale inputs necessary for an entrant to offer an access service, it is in a position to control the use of these inputs and so affect the competitive conditions in the downstream retail markets. This is particularly important because of the economies of scale identified in the access market, as market entry is most likely to be via the purchase of wholesale inputs in order to offer service over eircom's network.
- 6.13 ComReg considers there is evidence and potential for vertical leveraging in the Irish retail narrowband access market. This may happen in the following ways :

⁵⁵ Patrick Rey and Jean Tirole (2003, p.8) "A Primer on Foreclosure", forthcoming Handbook of Industrial Organization, volume III, editors Mark Armstrong and Bob Porter.

- denial of access;
- leveraging by non-price means;
- leveraging by means of pricing.

Denial of access

- 6.14 If an operator has SMP in the wholesale markets, it may attempt to leverage its market power by denying access to or refusing to deal with undertakings operating downstream and competing with the SMP operator's retail divisions. An SMP operator may also attempt to leverage its market power by being unprepared to supply a good or a service on reasonable terms.
- 6.15 ComReg notes also that access refers not just to the physical network but also to associated facilities, services and information.

Leveraging by non-price means

- 6.16 ComReg's analysis of the market for fixed narrowband access indicates potential for leveraging in a range of non-price means. These include:

Discriminatory use or withholding of information – where the SMP operator provides its retail arm with information it does not provide to other downstream undertakings, or where it refuses to supply information which is necessary to take up the wholesale product and/or to sell the retail service.

*Delaying tactics*⁵⁶ - is where an SMP undertaking supplies an upstream input to downstream competitors at a later date compared to the retail affiliate of the SMP undertaking. Such behaviour could give an SMP undertaking a first-mover advantage in the potentially competitive downstream retail market.

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

Quality discrimination – the effect is to raise rivals' costs and/or restrict its rivals' sales.

Strategic design of product characteristics – where an SMP undertaking may, for example, apply standards that are easier for its own retail affiliate to meet than for its downstream competitors.

Undue use of information about competitors – may occur where an SMP undertaking in the wholesale market uses information about rivals' wholesale demands to influence its marketing strategies in its own retail affiliate. Examples of this could

⁵⁶ Also known as a 'provisioning squeeze'.

include use of customer and competitor information to implement aggressive win back campaigns.

Leveraging by pricing means

- 6.17 A vertically integrated SMP undertaking could pursue the following strategies:
- Price Discrimination* – a vertically integrated operator dominant in an upstream wholesale market may engage in pricing that gives rise to a ‘margin squeeze’⁵⁷. This is achieved by charging a higher price to downstream competitors than implicitly charged to its own retail affiliate, i.e. discrimination between internal and external provision.
- Cross-subsidisation* – is the case involving two prices for two products. For example, a dominant operator could set a price above cost in an upstream SMP market, and set a price in another non-SMP market (typically downstream) below cost. If the reduced price is predatory, in that it is intended to foreclose the related potentially competitive market, this can result in a leverage of market power.
- 6.18 ComReg noted earlier that the nature of the current higher level ISDN market is such that there is no reliance on wholesale products, and so less danger of vertical leveraging. However, ComReg expects that the market for ISDN will develop through the introduction of the WLR ISDN product. In this case, an OAO wishing to introduce an ISDN WLR product would need to be able to acquire wholesale inputs at appropriate cost.

Horizontal leveraging

- 6.19 Horizontal leveraging involves the dominant undertaking using its position in one market to leverage into related markets. ComReg considers that a dominant operator may be able to use its dominance in the retail narrowband access markets to exert undue influence on other markets. In the case of higher level ISDN supply, ComReg considers that a dominant operator could be able to use its dominance to leverage into related markets, particularly for business voice and data.
- 6.20 ComReg and OAOs have previously expressed concern over the potential impact of the dominant provider bundling access and calls. ComReg’s view was that a bundled product should not be launched by the incumbent until the incumbent provided wholesale equivalents of relevant retail products to OAOs. The potential for an SMP operator to leverage from its access base into the calls market is discussed further in the Market Review of Retail Fixed Calls.
- 6.21 ComReg also notes the potential for a dominant operator to use its dominance in retail narrowband access to leverage into expanding markets such as DSL. This potential arises because an SMP operator has a very large and very stable installed base in fixed access, and can use its presence in the access market to improve its

⁵⁷ A margin squeeze is sometimes referred to as a price squeeze. It occurs when a dominant provider supplies an upstream (e.g. wholesale) product A which is used in combination with a downstream (e.g. retail) component B to produce a final service or product; where undertakings competing against A+B would provide their own alternative to B; and the implicit charge by the dominant provider to itself for B (i.e. the difference between the prices at which it supplies A+B and A only) is so low that an equally efficient competitor cannot profitably compete against A+B.

position in related markets. This could be done, for example, by using knowledge about customers to target campaigns for new products and services in other markets.

Previous competition problems

- 6.22 ComReg has broadly outlined the actual and potential types of competition problems which can arise in fixed retail narrowband access markets where there is an SMP operator. There has been past experience of such problems in the introduction of both the CPS and WLR products, many of which have been dealt with via the industry committees that ComReg chairs. Some examples as cited below for illustration. ComReg notes that eircom's historical dominance has necessitated price control.
- 6.23 ComReg has had to resort to intervention at various stages of the development of the WLR product⁵⁸. Initially, to assist in the speedy implementation of the WLR product, ComReg (then ODTR) gathered the industry requirements and presented these to eircom as a list of essential features to be included in the product description. eircom responded with product descriptions, but they were incomplete and omitted many of the essential features and much of the detail required for a fully conforming product description. Substantial amendments and multiple revisions were required before industry agreement could be reached on the product description and associated processes.
- 6.24 A specific example of problems associated with vertical leveraging arises where eircom's retail arm has access to customer information which was not available to OAOs offering an equivalent service. The introduction of the Line Status/Enquiry Process in WLR was an effort to provide OAOs with information on the customer account. ComReg notes that regulatory intervention was required to introduce this to WLR, to prevent discrimination by the incumbent and allow OAOs access to relevant customer information in order to provide a complete service to their customers. Similarly, when placing an order for CPS, OAOs have no visibility of the lines a customer has on an account and the associated call management services on these lines and ComReg notes that OAOs have requested the introduction of a parallel facility for CPS and that specific regulatory intervention may be required to address this issue.
- 6.25 Although the introduction of Line Status/Enquiry Process for WLR was a step in the right direction, this process does not offer OAOs an equivalent service to the incumbent. The incumbent has real time access to their customer database; an incumbent CCR (Customer Care Representative) can answer a query immediately. This is as opposed to the OAO CCR who has to place a Line Status/Enquiry Process, wait for up to 24 hours for response from the incumbent and build up the OAO database. This introduces a delay into the WLR process, resulting in a decreased level of service by the OAO to the customer. Another example of an issue adversely affecting the ability of the OAO to compete is the inability of OAOs to reset certain call management services on a customer's line in real time. An example is the resetting of a voice mail service, where a WLR end customer has a problem with their voice mail service that requires the voice mail service to be reset. An OAO

⁵⁸ see www.ComReg.ie for details.

must place a request with eircom wholesale to reset the voicemail, the response from eircom wholesale could take up to 24 hours. As opposed to the incumbent whose CCR can reset the voicemail immediately, again a delay is built into the WLR process, resulting in a diminished level of service to the customer.

- 6.26 OAOs have identified situations where there are significant delays in reapplying CPS to a customer's line after some specific change implemented e.g. where a CPS customer orders a line upgrade from PSTN to ISDN, a change of address or name on the account. In addition OAOs have also identified other incidents where CPS has been removed from a customer's line without customer authorisation.

Q. 9. Do you agree with the competition problems identified by ComReg, as outlined above? Please provide evidence in support of your response.

Available Remedies

- 6.27 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.
- 6.28 Regulatory controls on retail markets should only be imposed if ComReg concludes that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would fail to achieve the objectives set out in section 12 of the Communications Regulation Act, 2002.
- 6.29 This means that where ComReg has determined, as result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market is not effectively competitive, it must first assess the extent to which the competition problems it has identified in that given retail market would be addressed by imposing obligations under the *Access Regulations*, or under Regulation 16 of the *Universal Service Regulations*, on any undertaking it has identified under Regulation 27(4) of the *Framework Regulations*, as having significant power on that retail market . Regulation 16 of the USO refers to mandating CA/CS and CPS, details of which are discussed in the following paragraph. The type of obligations that may be imposed under the *Access Regulations* include potential obligations on an operator regarding:

Access to and use of specific network facilities

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

Transparency

- 6.31 ComReg can oblige an SMP operator to publish information such as accounting information, technical specifications, network characteristics, terms and conditions of supply and use and prices in relation to interconnection and/or access, and can specify the precise information to be made available. ComReg can oblige the SMP

operator to publish a sufficiently unbundled reference offer and can direct changes to that offer.

Non-discrimination

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

Accounting separation

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

Price control and accounting

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

6.35 Regulation 16 of the *Universal Service Regulations* requires ComReg, where it determines as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a relevant market consisting of the provision of connection to and use of the public telephone network at a fixed location is not effectively competitive, to impose obligations on an undertaking designated under Regulation 27(4) of the *Framework Regulations* as having significant market power in such a relevant market for the purpose of enabling subscribers of such undertaking to access the services of any interconnected provider of publicly available services:

- on a call by call basis by dialling a carrier selection code, and
- by means of pre-selection, with a facility to over-ride any pre-selected code on a call-by-call basis by dialling a carrier selection code.

6.36 Where ComReg concludes that obligations imposed under the *Access Regulations* or Regulation 16 of the *Universal Service Regulations* would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, ComReg is required by Regulation 14(1) of the *Universal Service Regulations* to impose such obligations as it considers appropriate to achieve those objectives on an undertaking identified by it under Regulation 27(4) of the *Framework Regulations* as having significant market power on that relevant retail market.

6.37 Should such measures be insufficient to address competition problems at the retail level, ComReg may apply remedies identified in the *Universal Service Directive*. Particular competition problems specific to retail markets identified in the *Universal Service Directive* include:

- Excessive pricing
 - Predatory pricing
 - Show undue preference to specific end-users
 - Unreasonably bundled services.
- 6.38 Where ComReg has identified problems of this nature in a given retail market, and where it concludes that obligations imposed under the *Access Regulations* and Regulation 16 of the *Universal Service Regulations*, would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, ComReg may consider the following:
- Appropriate retail price cap measures
 - Measures to control individual tariffs
 - Measures to orient tariffs towards costs or prices on comparable markets
- 6.39 Further, an undertaking that is subject to retail tariff regulation or other relevant retail control, in accordance with Regulation 14 of the *Universal Service Regulations*, is required to operate and maintain a cost accounting system that is, inter alia, suitable for ensuring compliance by the undertaking with the obligations imposed on it in accordance with Regulation 14 of the *Universal Service Regulations*.

Principles in selecting remedies

- 6.40 ComReg is obliged under Regulation 9(6) of the *Access Regulations* to ensure that any obligations imposed on an operator, in accordance with Regulation 9 of the *Access Regulations*, be based on the nature of the problem identified, be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act, 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the *Framework Regulations*.
- 6.41 Furthermore, in accordance with Regulation 14(2) of the *Universal Service Regulations*, ComReg is obliged to ensure that any obligations imposed on an operator pursuant to Regulation 14(1) of the *Universal Service Regulations* be based on the nature of the problem identified pursuant to the market analysis carried out in accordance with Regulation 27 of the *Framework Regulations* and be proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act, 2002.
- 6.42 Given the identified actual and potential competition problems arising from SMP in the retail access market, ComReg is obliged to impose obligations on undertakings identified by it under Regulation 27(4) of the *Framework Regulations* as having significant power on that market. As set out previously, ComReg believes it is unlikely that within the period of this review there is any possibility of the development of effective competition in these markets. Accordingly, ComReg proposes to impose appropriate obligations on the SMP operator that ComReg believes will encourage efficient investment and innovation and further promote competition in the retail access markets it is proposing be defined in section 3 of this consultation paper.

- 6.43 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.
- 6.44 In choosing remedies, ComReg will also take account of potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg will conduct, inter alia, a Regulatory Impact Assessment in accordance with the Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with section 13 of the Communications Regulation Act, 2002) published in February 2003.
- 6.45 Finally, the remedies chosen will be incentive compatible. This means that the remedies will be selected and designed in a manner that ensures compliance with regulation outweighs the benefits of evasion.

Q. 10. Do you agree with the principles which ComReg believes should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies?

Remedies Proposed

- 6.46 ComReg has already set out the competition problems in the fixed narrowband access markets. SMP may give rise to a range of problems associated with single market dominance, and vertical and horizontal leveraging.
- 6.47 ComReg believes that the obligations it is proposing to impose are based on the nature of the problems it has identified in the relevant markets it is proposing to define and that in light of its objectives set out in section 12 of the Communications Regulation Act, 2002, the imposition of the proposed obligations would be proportionate and justified.

Wholesale remedies

Mandated remedies

- 6.48 In terms of fixed access to the telephone network, a significant competition problem is that associated with barriers to entry arising from sunk costs. 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. In order to bring the benefits of competition to end users, and to avoid the market failures associated with foreclosure of the retail market, it is essential that competing operators can have access to eircom's local access infrastructure. This indicates that remedies should be designed in the first instance to provide OAOs with sufficient access to wholesale inputs, so that access services may be offered using eircom's network.

- 6.49 ComReg notes that Regulation 16(1) of the *Universal Service Regulations* requires ComReg, where it determines as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a relevant market consisting of the provision of connection to and use of the public telephone network at a fixed location is not effectively competitive, to impose obligations on an undertaking designated under Regulation 27(4) of the *Framework Regulations* as having significant market power in such relevant market for the purpose of enabling subscribers of such undertaking to access the services of any interconnected provider of publicly available telephone services:
- on a call-by-call basis by dialling a carrier selection code, and
 - by means of pre-selection, with a facility to over-ride any pre-selected choice on a call-by-call basis by dialling a carrier selection code.
- 6.50 ComReg therefore notes, it is obliged to impose obligations for the purpose of ensuring such undertaking's subscribers can access CA/CS and CPS. ComReg further notes that this obligation, which was previously imposed on eircom by the European Communities (Interconnection in Telecommunications) Regulations 1998 to 2000, and continues to apply to eircom, notwithstanding the revocation of the Interconnection Regulations, by virtue of Regulation 13 of the *Universal Service Regulations*, would, if eircom is found to have significant market power in the markets ComReg is proposing to define, continue as an existing remedy addressing competition problems identified in the retail markets for fixed access and fixed calls.
- 6.51 As discussed, CA/CS and CPS are wholesale remedies to address specific competition problems within the retail markets. The requirement for CA/CS and CPS is a mandated obligation within the *Universal Service Regulations* for indirect access products in the fixed access market. The role of CA/CS and CPS in the market for retail calls is discussed in the Market Review of the retail fixed calls market, also published today. This paper details the specific competition problems which have been experienced in the retail fixed narrowband access market and the specific interventions which have been required in the implementation of CA/CS and CPS remedies in terms of access. The CPS product has been defined as per the current suite of industry agreed documentation in order to give effect to Regulation 16 (1) of the *Universal Service Regulations*.

Wholesale Line Rental

- 6.52 In terms of fixed access to the telephone network, a significant impediment to the emergence of sustainable competition is the considerable sunk costs associated with entry. ComReg's analysis has concluded that entry on a sufficient scale to duplicate much of the existing eircom network is highly unlikely during the lifetime of this review. To facilitate the emergence of sustainable competition and to encourage OAOs up the ladder of investment, ComReg is of the view that remedies should be designed to enable access to eircom's wholesale inputs. In designing such access remedies, ComReg will ensure that they are proportionate and take due account of investment incentives in accordance with Access Regulation 13(4).
- 6.53 As discussed previously in the analysis of potential competition and barriers to entry in Section 4, competing operators can already avail of Unbundled Local Loop

products, specifically the Unbundled Local Metallic Path (ULMP) product. This would potentially allow competing operators access to end customers for the purpose of providing narrowband access services. Currently, ULMP is mainly used to provide high capacity data services. Although some operators have signalled their intention to provide voice services over ULMP, as discussed in Paragraph 4.24, ComReg considers that, given the economies of scale available to eircom and the existence of large sunk costs entry into the narrowband access market via ULMP it is unlikely that services provided by OAOs over LLU is will offer sufficient potential competition over the timeframe of the review to act as a competitive constraint on eircom.

- 6.54 The market analysis noted that competition in fixed access was minimal, that eircom has a stable market share of over 99% in lower level narrowband access market and 77% market share in the market for higher level narrowband access. Additionally due to sunk costs, it is not feasible to replicate the network. Lack of competition in access raises concerns also over eircom's ability to leverage its dominance in this market into the calls market.
- 6.55 ComReg believes that the market analysis and identification of competition problems carried out in this market review indicate a clear need for the continuation of WLR as a remedy in both the retail fixed lower level narrowband access market and the market for higher level narrowband access.
- 6.56 The aim of WLR is to promote competition by addressing eircom's dominance in the access market, and to enhance the effectiveness of the CPS remedy in the calls market. With a WLR product, the service provider effectively leases eircom's line, and takes on a complete retail relationship with the customer for all calling services.
- 6.57 In considering wholesale intervention in the retail access markets, ComReg has identified two options:

Option 1: Oblige eircom to offer a "fit for purpose" WLR product.

- 6.58 This option would mean that eircom would be obliged to offer a WLR product. The offer would be based on the WLR product and processes which have been developed to date. There would be no further intervention by ComReg in the development of WLR.
- 6.59 ComReg views this as an interim step towards no ex ante involvement beyond imposing the obligation to provide access, in that this option would continue to require the existence of a WLR product without specifying its functionality or terms of offer. ComReg suggests that it is too soon in the development of this product in the market to recommend this option.

Option 2: Oblige eircom to provide a WLR product in line with requirements determined by ComReg.

- 6.60 This means that ComReg would continue to be involved in the direction of product development and implementation.

- 6.61 This option would involve a continuation of current practice, where ComReg is actively involved in negotiating the content and development of the WLR product.
- 6.62 Under this option, ComReg would propose to direct eircom, under the obligations of the Access Regulations, to provide a WLR product in conjunction with a CPS ‘all calls’ option. Access Regulations obligations potentially covering access, transparency, non-discrimination and price control and cost accounting would be applied to address the relation between eircom and the OAOs offering WLR.

Preferred option

- 6.63 ComReg notes that the provision of the product until now has required a high level of regulatory intervention to ensure the implementation of the specification. Further, the product has very recently been introduced to the market, and the extent and nature of its impact cannot yet be fully clear. Based on these factors ComReg proposes that eircom should be obliged to provide a WLR product in line with requirements as determined by ComReg. These requirements are derived from obligations under the Access Regulations. Available remedies and the proposed approach to WLR are set out in detail below.

Q. 11. Do you agree that eircom should be obliged to offer a WLR product in line with requirements as determined by ComReg, under the obligations of the Access Regulations? Please detail your response.

Access to and use of specific network facilities

- 6.64 The assessment of competition problems indicates that it is highly unlikely that eircom would offer sufficient wholesale products through commercial negotiations with OAOs. To support this, ComReg points to the many interventions which it has had to make in respect of the introduction of wholesale access products (not just Wholesale Line Rental but other wholesale access products outside the scope of this review such as Partial Private Circuits and Wholesale Leased Lines, Bitstream and Local Loop Unbundling) over the last number of years.
- 6.65 ComReg therefore proposes, pursuant to Regulation 13 (2) (a) of the Access Regulations to require eircom to provide a WLR offering. An access remedy is the only remedy which allows OAOs to make reasonable requests for products according to their specifications.

Q. 12. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Wholesale Line Rental? Please detail your response.

- 6.66 In order to take up WLR OAOs need to acquire the relevant wholesale products as currently set out in SS 401 of eircom's Reference Interconnect Offer. ComReg considers these products an essential requirement for the provision of WLR and proposes, pursuant to Regulation 13 of the Access Regulations, that eircom be required to provide such access.

Q. 13. Do you agree that the SMP operator should be obliged to permit access to the relevant wholesale products?

- 6.67 When products are mandated ComReg believes that there may be an incentive for an SMP operator to limit access or make access more difficult. Many of the detailed negotiations at the WLR Steering Group have, in addition to issues on the availability of the product, concerned the form of that provision. It is necessary for OAOs to have open access to relevant information, technical interfaces, protocols, and OSS such as is necessary for them to take up the mandated product and allow them to compete with eircom at the retail level in winning customers. Therefore, pursuant to Regulation 13 (2) (e) ComReg also considers it appropriate that, insofar as it is required to avail of access, eircom should also grant open access to relevant information, technical interfaces, protocols, or other key technologies and similarly, pursuant to Regulation 13 (2) (h) eircom is required to provide such OSS or similar software necessary to ensure fair competition in the provision of services.

Q. 14. Do you agree that the SMP operator should be required to grant open access to relevant information, technical interfaces, protocols, or other key technologies and should also be required to provide such OSS or similar software necessary to ensure fair competition in the provision of WLR services? Please detail your response.

- 6.68 Additionally, pursuant to Regulation 13 (2) (b) of the *Access Regulations* ComReg also believes that eircom should have the obligation to negotiate in good faith with undertakings requesting access. This is necessary to ensure that OAOs can approach eircom and ensure that their requests for new or amended products are treated promptly and appropriately. In respect of WLR, many of the issues on which ComReg intervened related to delays experienced between the parties. Indeed the fact that ComReg had to set up and chair a WLR Steering Group to agree arrangements arose from the failure of commercial negotiations.
- 6.69 ComReg also proposes, pursuant to Regulation 13 (2) (c) of the *Access Regulations*, to impose the obligation on eircom not to withdraw access to facilities already granted. This is necessary to ensure that OAOs have the certainty to provide retail services to the marketplace and so compete with eircom.

- 6.70 There are circumstances where it may be desirable to withdraw access to facilities, for example when a facility is no longer needed and it is an undue burden on eircom to maintain it. ComReg therefore proposes to qualify the obligation on eircom not to withdraw access to facilities already granted, save without prior ComReg approval which would only be granted following public consultation.

Q. 15. Do you agree that the SMP operator should be required not to withdraw access to facilities already granted, save without prior ComReg approval which would only be granted following public consultation? Please detail your response.

- 6.71 Pursuant to Regulation 13 (3) of the *Access Regulations* ComReg may also attach conditions covering fairness, reasonableness and timeliness to the obligations set out above. In this context, ComReg believes that Service Level Agreements (SLAs) are required in respect of those products mandated following an access obligation, and at all process points. This is necessary to allow OAOs the ability to compete in the retail market by giving them appropriate certainty as to supply and repair of the wholesale input. Where SLAs apply, ComReg is of the view that penalties should apply where appropriate to provide for incentive compatibility and additionally a remedy of transparency may be appropriate as a supporting remedy.

Q. 16. Do you agree with the approach to Service Level Agreements for access obligations set out above? Are there any other conditions which should be attached to the proposed obligations? Please detail any response.

Non-Discrimination

- 6.72 eircom's access lines are used by OAOs to provide a service to the customer which is equivalent to access provided directly by eircom. Many competition problems relate to discriminatory provision or use of information. Evidence of this is the weight attached to the development of the WLR SLA by OAOs. ComReg believes that an obligation of non discrimination provides the same ability to OAOs to purchase wholesale access to retail lines as would apply to eircom's direct provision of access.
- 6.73 ComReg believes that non discrimination, as a remedy, can directly target competition problems, particularly non-price parameters such as withholding of information, delaying tactics, undue requirements, low or discriminatory quality, strategic design of product, and discriminatory use of information.
- 6.74 The proposed imposition of a non-discrimination obligation pursuant to Regulation 11 of the *Access Regulations* would mean that eircom must apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent

services, and must provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners. Information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least as good as those provided to *eircom*'s retail arm and associates.

- 6.75 In particular, it is important that information gained by eircom as a result of their provision of services to another operator is not used by eircom's downstream arms in any manner. eircom's downstream arms should not have privileged access to eircom wholesale.

Q. 17. Do you agree that obligations of non-discrimination should be imposed on the SMP operator? Please detail your response, making references to ComReg's interpretation of such an obligation set out above.

Transparency

- 6.76 Following the imposition of access and non-discrimination obligations, ComReg believes that it is proportionate and justified to impose an obligation of transparency. This ensures that OAOs have sufficient information and clear processes to which they would not otherwise have access. This assists their entry into the market and hence promotes competition. Transparency also provides a method of ensuring compliance with a non-discrimination obligation, as the information needed to measure this would not otherwise be available. Therefore ComReg considers an obligation of transparency directly targets the nature of the problem and should be imposed on eircom.
- 6.77 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.
- 6.78 Currently eircom publish – as part of the Reference Interconnection Offer – Service Schedules for the WLR⁵⁹. ComReg believes that this obligation should be maintained. Regulation 10 (3) of the *Access Regulations* allows ComReg to specify the precise information to be made available, the level of detail required and the manner of publication. ComReg is not currently of the view that any further detail is required to be added to the reference offer for WLR but would appreciate feedback from interested parties. Regulation 10(3) of the *Access Regulations* allows ComReg to specify the precise information to be made available, the level of detail required and the manner of publication. ComReg is interested to hear views as to whether extra information should be included in the reference offer.

⁵⁹ See in particular Service Schedule 401

- 6.79 ComReg expects that any new offerings developed pursuant to Regulations 11 and 13 of the *Access Regulations* should also be detailed in a reference offer.

Q. 18. Do you agree that an obligation of transparency should be imposed on the SMP operator? Please detail your response.

Q. 19. Do you believe that reference offers should be maintained for the WLR product set and any new offerings developed in accordance with Regulations 11 or 13 of the Access Regulations?

Price Control & Cost Accounting

Price control

- 6.80 A vertically integrated operator with market power in the wholesale markets, absent regulation of wholesale products, could be able to exert its market power by charging an excessive price for wholesale inputs and could be able to foreclose the retail market by means of a margin squeeze.
- 6.81 ComReg believes that eircom's market power is unlikely to be eliminated over the time frame of this review. The expected continuation of eircom's market power arises because of the considerable entry barriers associated with high sunk costs in wholesale markets.
- 6.82 eircom is currently required to offer access to a WLR product, and to meet reasonable requests for these products. OAOs in Ireland are able to purchase eircom's WLR product to offer retail access to customers. ComReg proposes to continue this obligation as discussed above.
- 6.83 Access to eircom's WLR product has been mandated using price terms governed by a retail-minus formula (currently -10%). The WLR product was launched on a retail minus basis as a pragmatic means of introducing WLR to the market while accepting uncertainty concerning underlying costs. ComReg believes that eircom should continue to offer the WLR product (including call management services, CPS excluded calls, and other associated facilities) on the terms set out in eircom's Reference Interconnect Offer. Given that WLR is a relatively new product with, as yet, a limited take-up, and taking into account the experience with CPS and the time taken for it to have a significant impact on the market, ComReg believes that it may be appropriate to maintain the current pricing arrangement for a period of time, in the interests of certainty and predictability for OAOs entering or developing this market. ComReg therefore proposes that the current arrangements remain in place, at least during the lifetime of this review.
- 6.84 ComReg considers that further development of the WLR product could move eventually towards cost-orientation on the basis of FL-LRIC. It is ComReg's view that cost-orientation of wholesale products acts as an anchor to prevent excessive

prices at the retail level. However, WLR is, at the access network level, a service based form of competition requiring no investment in network infrastructure from the OAO taking the service. ComReg is not convinced that cost oriented prices on the basis of FL-LRIC would provide the correct economic incentives for efficient investment. Therefore ComReg believes that a retail minus regime is likely to be the preferable price control for the period of this review.

Q. 20. ComReg proposes to continue with the application of the retail minus price control for WLR for the period of this review. Do you agree with this position? Please provide reasons for your answer.

Q. 21. ComReg proposes that prices set on the basis of FL-LRIC would not be appropriate in the period of this review. Do you agree with this position?

Cost Accounting Systems

- 6.85 A cost accounting system will be necessary where an obligation has been imposed on a dominant operator in relation to cost oriented pricing, price controls, recovery of costs and/or retail tariff controls. With regard to this particular market, the obligation of cost orientation has been proposed as an appropriate obligation to be imposed on eircom and therefore ComReg proposes to impose a further obligation with regard to cost accounting systems.
- 6.86 In this regard, the obligation of cost accounting systems supports the obligations of cost-orientation and accounting separation. This information can provide greater assurance to ComReg in monitoring of the obligation of non discrimination and address the competition problems identified earlier. Thus cost accounting is appropriate for the purposes of promoting efficiency, promoting sustainable competition, and conferring the greatest possible benefits on the end users of public electronic communications services.
- 6.87 In order to demonstrate cost orientation of a service or product, it is necessary for eircom to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. A key part of this process is the stage which identifies those parts of the underlying activities or elements that directly support or are consumed by those services or products. These elements are referred to as network components. As these components are frequently used to provide more than one product or service, it is also necessary to determine how much of each component is used for each service or product that should be cost-oriented. The service/product costing methodology applies the utilisation of these components to the appropriate service product.
- 6.88 ComReg is of the view that eircom could maintain some or all of its prices at an excessively high level, or impose a margin squeeze so as to have adverse consequences for end users. If ComReg were to relax this obligation, it would not have any means of ensuring the cost orientation of prices in the market and prevent such potential market failure.

- 6.89 As operators may operate in both SMP and non SMP designated markets, the division of services and products, and the corresponding costs, capital employed and revenues, between the different markets should be reflected in costing systems and coherence and integrity of information should be assured. Where such particular costs form part of the cost of an SMP service ComReg needs to have visibility as to the basis of and amount of allocation across all services. Therefore an obligation of Cost Accounting Systems can provide greater assurances in monitoring non-discrimination and address the competition problems identified.
- 6.90 ComReg does not consider that this obligation will constitute an unreasonable burden on eircom, as given the size of the organisation, it already has management accounting systems in place to support internal business decision making.
- 6.91 ComReg proposes to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim ComReg is proposing that it maintains the existing level of cost accounting system obligation on eircom until such time as any further consultations are completed.

Q. 22. Do you agree that obligations in respect of cost accounting systems should be imposed on eircom? Please detail your response.

Accounting Separation

- 6.92 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 through allowing ComReg to perform its duties to ensure prices are not set at an excessive level, to monitor margin squeezes and provide greater certainty about the cost base.
- 6.93 Separated accounts will help disclose possible market failures and provide evidence in relevant markets of the presence or absence of discrimination and margin squeeze. It will make visible the wholesale prices and internal transfer prices of a dominant operators products and services.
- 6.94 An obligation of non-discrimination can require, inter alia, the imposition of financial reporting regimes in order to monitor eircom's compliance with such an obligation. With regard to eircom's designation as SMP in the wholesale narrowband retail access markets and the identification of the obligation of non-discrimination as a means to remedy the competition problems discussed earlier, ComReg believes it appropriate to impose an obligation of accounting separation upon eircom in this market.
- 6.95 ComReg is proposing that eircom should have an obligation not to unduly discriminate because where eircom is a vertically integrated undertaking, it has an incentive to provide wholesale services on terms and conditions that discriminate in favour of its own retail activities in such a way that may have a material effect on competition. The obligation of accounting separation will support ComReg in its

monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services.

- 6.96 ComReg intends to implement accounting separation on a by service and/or product basis. ComReg believes it is not sufficient to implement such an obligation at a market level as it is important to discourage possible cross-subsidisation of pricing at a service level. Operators dominant in relevant markets may provide services in a number of markets and may divide the activities required to supply these services among a number of business units. The division of activities relevant to ComReg for regulatory purposes is the division of services, and the activities which underlie them, between relevant markets. These relevant markets may be a regulated market with an operator having SMP or a non SMP designated market. Therefore ComReg needs to be able to ascertain to what extent services in non SMP markets may impact on services supplied in SMP markets. In order to determine the information required for regulatory purposes, it is necessary to explore the nature of the costs incurred by activities undertaken in the course of supplying a service (or combination of services). If ComReg were to impose accounting separation at the market level, it would not be able to identify whether products and services are being provided on a non-discriminatory basis.
- 6.97 As discussed earlier, in deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion, must encourage access to the network in order to ensure efficient and sustainable competition, and must contribute towards maximising consumer benefits. In this regard, the accounting separation obligation is designed to help provide evidence from eircom which may demonstrate the presence or absence of discrimination. In this regard, ComReg believes the imposition of accounting separation upon eircom to be justifiable and based upon the nature of the problem identified.
- 6.98 If ComReg were to withdraw this obligation, it would not have any means of monitoring non-discrimination or of having any information on margins in the retail business.
- 6.99 ComReg proposes to consult further on accounting separation but in the interim, ComReg is still proposing that it maintains the existing level of accounting separation on eircom until such time as any further consultations are completed.

<p>Q. 23. Do you believe eircom should have an obligation of accounting separation? Please detail your response.</p>

Retail remedies

- 6.100 Without prejudging the outcome of other market reviews, ComReg notes that although wholesale intervention (for example through the continuing requirement to provide WLR) is a necessary condition for promoting competition in retail fixed access and calls, it does not protect consumers against potential exploitative abuse of dominance, such as excessive pricing. While WLR will contribute to improving competition, its effect within the lifetime of this review is expected to be limited, particularly given previous experience with CPS. ComReg believes that WLR is unlikely to eliminate the SMP provider's ability to raise prices above the competitive level during this review period, and that therefore further consumer protection is needed.
- 6.101 ComReg notes also that the retail minus mechanism does not constrain where eircom sets the level of retail and wholesale prices, only the differential between them. This means that any control at the wholesale level may need to be supplemented by retail price control measures in order to have the desired impact on the market and to achieve the correct balance between promoting competition and protecting the consumer.
- 6.102 For these reasons, ComReg proposes to consider additional remedies in the retail fixed narrowband access markets.
- 6.103 The imposition of obligations at a retail level is required where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive and it concludes that obligations imposed under the *Access Regulations* or Regulation 16 of the *Universal Service Regulations* would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002 .
- 6.104 In most areas, competition problems are common to the lower level narrowband access market and to the higher level ISDN market. In these cases, common remedies apply. The sections below which are common to both markets cover non-discrimination, transparency, retail bundling and cost accounting. Some price issues are specific to each market, and are discussed separately.

Price control

- 6.105 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 such as line rental, and could also help to ensure that an SMP operator does not attempt to restrict market entry or eliminate competition by charging unreasonably low prices that may harm competition.
- 6.106 Until February 2003, PSTN and ISDN line rental and PSTN and ISDN connections were subject to individual sub-caps of CPI+2% within the overall price cap of CPI-

8%.⁶⁰ The review of the price cap resulted in a revised price cap applied from February 2003. This review removed all sub-caps, including those sub-caps on line rentals and connections, placing them within an overall price cap of CPI-0%.

- 6.107 The removal of the sub-caps was seen as necessary to meet ComReg's legal obligation to allow eircom to rebalance. Removing specific constraints on access pricing allowed eircom the flexibility to better orient prices towards costs, within the overall constraint of the price cap. The result of removing the sub-cap was a series of price increases for PSTN line rental which amounted to around 23% since the new price cap came into force. In ComReg's view, these increases have succeeded in aligning prices more closely with cost.
- 6.108 In June 2003 the cap of CPI on the lower quartile bill was removed on the understanding that eircom's proposed Vulnerable User Scheme would be introduced. A cap of CPI was placed on the median Vulnerable User Scheme bill, which includes PSTN access and some call types⁶¹. The Vulnerable User Scheme was introduced in order to limit the increases in the size of the vulnerable users' telephone bills, where they had relatively low usage levels.
- 6.109 It should be noted that the price cap acts as a limited constraint on price increases as it allows eircom the scope to increase line rental further within the constraints of the cap. However, eircom is also subject to the obligation of cost-orientation which provides a further constraint. ComReg notes that the current price cap does not apply to all retail narrowband access services and since it allows eircom a degree of flexibility, it will not necessarily prevent eircom from charging excessive prices for access even where it does apply. It does however constrain the overall increase in customer bills for the services subject to the price cap⁶².
- 6.110 In considering price controls as a remedy for problems identified in the fixed access market, ComReg has identified options in three key areas. These are:
- Price cap (considered separately for lower level narrowband access market and higher level ISDN markets)
 - Cost orientation
 - Vulnerable User Scheme (for the market for PSTN and ISDN BRA)
- 6.111 Each is discussed in turn below.

Price Cap: Lower Level Narrowband Access market

- 6.112 The current price cap applies to a weighted average of eircom's revenues from PSTN connection and rental, all forms of ISDN connection and rental, local calls,

⁶⁰ PSTN and BRA, FRA, PRA and Hi Speed ISDN services were included in two separate sub-caps, one for connection and one for rental, which applied to weighted averages of the revenues from these services.

⁶¹ See ComReg 03/48 for further discussion of issues relating to the Vulnerable User Scheme.

⁶² ComReg 03/14 provides a fuller discussion of the current price cap. It applies to a weighted average of eircom's revenues from PSTN connection and rental, all forms of ISDN connection and rental, local calls, national calls, fixed to mobile calls, operator assisted calls and payphone calls.

national calls, fixed to mobile calls, operator assisted calls and payphone calls. ComReg's 'Review of the Price Cap on Certain Telecommunications Services - Decision Notice D3/03⁶³' provides a fuller discussion of the current price cap. In considering the imposition of a price cap, ComReg has identified three options:

Option 1: Exclusion of retail access prices from the price cap

- 6.113 This would mean that ComReg believed that measures at the wholesale level and other retail controls would be sufficient to act as a constraint on eircom's pricing behaviour.
- 6.114 ComReg's review of the retail access markets indicates a continuing requirement for a wholesale solution such as WLR as a means of promoting competition in the retail market. However, while ComReg believes that WLR will increase the level of service based competition in the market, it does not believe that WLR will eliminate eircom's ability to raise prices in the retail fixed access market above the competitive level within the lifetime of this review.
- 6.115 ComReg therefore concludes the current and medium term conditions in the access market indicate that it is too soon to consider this as an option.

Option 2: maintain line rental and connection within the price cap basket

- 6.116 This would mean continuing the current price cap, such that access prices are subject to overall price cap control but not to a specific price cap control. Access prices would remain within the price cap basket which is currently set at CPI-0%.
- 6.117 The current price cap allows eircom to adjust individual elements within the price cap, and so offers flexibility to eircom to balance prices and costs.

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

- 6.118 This could involve, for example, the introduction of a new cap, whether by introducing a new sub-cap on access, or by having a separate cap on access. The current price cap does not on its own prevent eircom from making further line rental increases, whereas the introduction of a new cap could provide greater control over changes to access, including line rental, prices. ComReg believes that if it were to pursue this option, an appropriate level of sub cap specific to PSTN line rental, would be within the range of CPI-0% and CPI-CPI. This position derives from ComReg's view that current retail PSTN line rental prices broadly reflect costs. A sub-cap could also be expanded to include other services in this market including PSTN connection, ISDN BRA connection and rental and prices for call management services. Sub-caps in previous price caps included PSTN and all forms (including FRA and PRA) of ISDN rental and connection charges and would be a further option in this case
- 6.119 ComReg proposes to maintain the current price cap until markets are next reviewed for SMP designation and remedies. At that time the appropriateness of the price cap as a remedy will be reassessed. In addition, ComReg proposes that because of eircom's likely continued strong position in this market and persistent high market share, some form of upper limit price control should continue to be applied specifically to retail fixed lower level access prices. This could, as at present, take

⁶³ (ComReg Document Number 03/14)

the form of a general cost-orientation obligation, discussed below (option 2 above). Alternatively, it could take the form of a sub-cap or separate cap, on retail access. This sub-cap could include PSTN line rental only and would be within the range of CPI-0% and CPI-CPI, or it could include a wider range of access services (option 3 above).

Q. 24. Do you agree that the current price cap should be maintained and that some form of additional price control should be applied specifically to lower level narrowband access prices? Do you believe that this should be an obligation of cost-orientation as at present, or should a price cap specific to access be introduced? Should this be a sub-cap on PSTN line rental only, or should it include other services? If so, which ones? Do you agree that, should a sub-cap be introduced, it should be within the range of CPI-0% and CPI-CPI? ComReg would also welcome respondents views on the other options considered in this section.

Price Cap: Higher Level Narrowband Access Market

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

Option 1: Exclusion of retail access prices from the price cap

- 6.121 This would mean that ComReg believed that measures at the wholesale level and other retail controls would be sufficient to act as a constraint on eircom's pricing behaviour. This option would involve removing higher level ISDN prices from the price cap.
- 6.122 In considering this option, ComReg notes that there are now several operators offering ISDN services, and that the largest after eircom has achieved a growing market share over the last two years. ComReg notes that the competition problems in the higher level access market are primarily to do with single market presence, and secondly horizontal leveraging, and questions whether these problems may better be remedied by obligations other than price controls.
- 6.123 ComReg's review of the retail access markets indicates a continuing requirement for a wholesale solution such as WLR as a means of promoting competition in the retail market. However, while ComReg believes that WLR will contribute to increasing the level of competition in the market, it does not believe that WLR will eliminate eircom's ability to raise prices in the retail fixed access market above the competitive level within the lifetime of this review. ComReg notes that the retail minus mechanism does not constrain where eircom sets the level of retail and wholesale prices, only the differential between them.
- 6.124 ComReg therefore concludes the current and medium term conditions in the access market indicate that it is too soon to consider this as an option.

Option 2 : maintain line rental and connection within the price cap basket

- 6.125 This would mean continuing the current price cap, such that higher level ISDN prices are subject to overall price control but not to specific price cap control.
- 6.126 ComReg's review of the higher level access markets indicates that eircom's market share has been largely stable over the last two years, and is still around 77%. Thus, while this part of the access market is more competitive than the lower level access line market, and while there is market presence from other operators, this may still not be enough to eliminate eircom's ability to raise prices above the competitive level within the lifetime of this review.

Option 3: introduce a more specific cap for ISDN FRA and PRA retail prices

- 6.127 This option would involve, for example, the introduction of a new cap, whether by introducing a new sub-cap on ISDN FRA and PRA access, or by having separate caps on ISDN FRA and PRA access or by introducing it into a cap that also included elements from the Lower Level Narrowband Access Market as discussed above.
- 6.128 ComReg can see some merit in being able to differentiate the ways in which price controls are applied in the lower level access and higher level access markets, primarily as a consequence of the reasoning behind ComReg's proposed definition of these as separate markets.
- 6.129 ComReg proposes to maintain the current price cap until markets are next reviewed for SMP designation and remedies. At that time the appropriateness of the price cap as a remedy will be reassessed. In addition, ComReg proposes that because of eircom's likely continued strong position in this market and persistently high market share, some form of upper limit price control should continue to be applied specifically to ISDN FRA and PRA prices. This could, as at present, take the form of a general cost-orientation obligation, discussed below, in addition to the current price cap (option 2 above). Alternatively, it could take the form of a sub-cap or separate cap, on ISDN FRA and PRA access, which might also include elements from the Lower Level Narrowband Access Market (option 3 above).

Q. 25. Do you agree that the current price cap should be maintained and that some form of additional price control should be applied specifically to ISDN FRA and PRA access prices? Do you believe that this should be an obligation of cost-orientation as at present, or should a price cap specific to access be introduced? Should this be a sub-cap on ISDN FRA and PRA access prices only, or should it include other services? Which ones? ComReg would also welcome respondents views on the other options considered in this section.

Cost Orientation for Retail Prices

- 6.130 In addition to the price cap obligation there is currently also a general obligation of cost-orientation for retail voice telephony services, including access. This provides a constraint that can prevent the SMP operator from charging excessive prices for specific services such as line rental, 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.
- 6.131 As noted above, a retail cost-orientation obligation could continue to be applied as a means of preventing excessive prices for individual services even where they are included within the price cap. The obligation would have a wider effect than a cap or sub-cap on access services in that it would also apply to services outside of the price cap and it could be used to prevent the restriction of market entry by charging unreasonably low prices that may harm competition. In these markets however, the retail minus approach to regulating wholesale line rental prices should be sufficient to minimise concerns in relation to charging unreasonably low prices that may harm competition.

Q. 26. Do you believe that the SMP operator should ensure that its tariffs follow the basic principles of cost orientation? Please link your response to this question with your response to Questions 24 and 25.

Vulnerable Users Scheme

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

Non-Discrimination

- 6.133 There is a risk that an undertaking with SMP may use market power to discriminate in a way that harms competition. 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, for example, by targeting specific customers with discounts where there is a risk that they may move to a competitor, thereby damaging competition.
- 6.134 A non-discrimination obligation would prevent the SMP operator from applying dissimilar conditions to equivalent transactions or applying similar conditions to transactions that are not equivalent. This does not mean that the SMP operator cannot offer different terms and conditions to different sets of customers, rather that any differences must be justified in an objective way. At the retail level, the main justification is likely to be based on cost differences.

- 6.135 At present, eircom publishes in its Telecommunications Scheme a list of tariffs, terms and conditions which apply to all retail customers in order to fulfil an obligation of transparency which supports the obligation of non-discrimination. This obligation was imposed on eircom by Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations 1999 (the “VT Regulations”), and by virtue of Regulation 13 of the Universal Service Regulations, eircom is required to continue to comply with this obligation notwithstanding the revocation of the VT Regulations on 25 July 2003. Under Regulation 21(3) of the VT Regulation eircom was and, by virtue of Regulation 13 of the Universal Service Regulations, continues to be, obliged to ensure that tariffs for access to and use of its fixed public telephone network are independent of the type of application which the user implements, except insofar as such user requires different services or facilities. The obligation of non-discrimination prevents operators from exploiting their market power by charging high prices for services which are uncompetitive and low prices for services which are competitive. ComReg considers that it is a necessary requirement to ensure that eircom adheres to the obligation of non-discrimination.
- 6.136 ComReg’s consideration in this area is whether ex ante regulation should be removed, or whether it is desirable for ex ante regulation to remain.

Option 1: remove the obligation not to discriminate.

- 6.137 This would mean that any discrimination would be treated under Competition Law as a potential abuse of a dominant position in a market.
- 6.138 ComReg considered the need for ex ante regulation; and believes that the emergent state of competition in the access market indicates that ex post regulation alone will not be sufficient. Further, measures which are taken at the wholesale level may not prevent undue discrimination at the retail level, as the obligation not to discriminate at the wholesale level generally applies to the wholesale relationship.

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

- 6.139 Under this option, the SMP undertaking would be prohibited from discriminating in its treatment of customers.
- 6.140 ComReg notes that an obligation of non-discrimination does not mean that the SMP operator must offer identical terms and conditions to every customer, but rather that any differences must be justified in an objective way. ComReg proposes that the prohibition on discrimination will apply to any differences that may have the effect of harming competition. This principle would be applied on a forward looking basis.

Preferred option

- 6.141 ComReg’s conclusion is that, given the very low level of competition in the markets for fixed narrowband access, it is too soon to consider the removal of regulation, and that there is a continuing need for a prohibition on discrimination. ComReg therefore proposes to place an obligation of non-discrimination on the SMP operator.

Q. 27. Do you agree that a non-discrimination obligation should be placed on the SMP operator?

Transparency: Publication and notification of terms and conditions

- 6.142 Regulation 18 of the *Universal Service Regulations* specifies, for all operators, information which must be made available to customers. It states that ComReg has a role to ensure that transparent and up to date information on applicable prices and tariffs is available to end-users. Under Regulation 18(2) ComReg may specify information to be published on standard tariffs covering access, usage charges, discounts and special/targeted tariff schemes.
- 6.143 In fulfilling our role to ensure transparency ComReg considered it appropriate that service providers should operate under a basic set of principles for presentation of tariff information. ComReg is currently undertaking a consultation on these issues - ComReg document 04/57 sets out a draft direction which contains three broad principles that tariff information should be accurate, comprehensive and accessible to end-users of publicly available telephone services. In relation to each principle, specific guidance is given as an aid, where required, towards implementation. The guidance is also an indication of how ComReg will assess the degree of compliance by service providers. ComReg has already directed on printed tariff information and tariff information on websites in ComReg document 03/86. This states that a service provider shall provide tariff information in response to a reasonable consumer request and provide a direct link from the homepage of their website into the tariff information section of their website.
- 6.144 In this consultation on the retail access market, ComReg is reviewing whether additional transparency obligations need to be imposed on SMP operators. At present, an undertaking with SMP is required to notify ComReg and publish any changes to terms and conditions 21 days before they come into effect. Current practice is that eircom has usually and voluntarily provided an additional 7 days' notification to ComReg before publication.
- 6.145 ComReg believes that these current requirements make it possible for at least some potential anti-competitive behaviour to be identified and addressed before changes to prices or terms and conditions are made. In particular, advance notification gives ComReg the opportunity to raise concerns relating to principles such as transparency, cost-orientation, and non-discrimination before any changes become effective. Advance publication of changes also gives consumers and OAOs the opportunity to raise any concerns with ComReg before price changes take effect.
- 6.146 Currently, ComReg does not formally approve changes to terms and conditions offered by eircom, but will intervene where ComReg believes that eircom may be in breach of its obligations. This intervention may take place before or after any changes have been applied and so allows for the possibility that some problems are not captured during the advance notification/publication period, but do become apparent later. Some pricing problems, such as margin squeeze for example, can depend on the degree of customer uptake of a pricing scheme and the characteristics of the customers who take it up and so may not become apparent for some time.

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

Option 1: No additional obligations

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

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

Option 2: Formalise and maintain current practice

6.150 In this case, the obligation would be to publish changes to terms and conditions (including tariff changes) at least 15 working days⁶⁴ before they became effective. In addition, eircom would notify ComReg of proposed changes at least 5 working days before publication, and so at least 20 working days before changes come into effect.

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

Option 3: Remove the advance publication period

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

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

Other issues

6.154 In order to avoid difficulties at times when public holidays are frequent, ComReg proposes that any requirement to notify and publish changes to terms and conditions should be expressed in terms of working days, rather than calendar days as at present⁶⁵.

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

Preferred option

⁶⁴ Working days are taken to exclude Saturdays, Sundays and public holidays.

⁶⁵ The 15 and 20 working day periods mentioned in Options 2 and 3 are broadly equivalent to the current practice of 21 and 28 calendar days.

- 6.156 ComReg's current view is to prefer Option 2, which broadly maintains current practice subject to the changes outlined above. ComReg believes that this is likely to provide the best balance between the advantages and disadvantages discussed. The obligation would apply to any product that includes any element of fixed narrowband retail access either in whole or in part. ComReg proposes to continue in its current practice of not formally approving changes to terms and conditions offered by eircom, but will intervene where ComReg believes that eircom may be in breach of its obligations. This intervention may take place before or after any changes have been applied.
- 6.157 ComReg would also expect eircom to ensure that planned changes to terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.

Q. 28. Do you agree with ComReg's proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers.

Retail Bundling

- 6.158 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.
- 6.159 ComReg proposes that to remedy this, a bundling obligation should be considered. The main purpose of a bundling obligation is to prevent foreclosure of markets through leveraging of market power which could have a detrimental effect both on operators and consumers. Bundling by its nature can also lead to a lack of transparency as two or more products are sold as a single package. However bundling can lead to economies of scale or scope for operators and this in turn can lead to savings for consumers.
- 6.160 The requirements for publication and notification set out above, and the general requirements for transparency imposed on all operators under Regulation 18 of the Universal Service Regulations, will apply to bundled products and will limit the extent to which bundling can reduce transparency.
- 6.161 Regulation 9(1) of the Universal Service Regulations, which applies to undertakings designated to provide certain 'universal services' which provide facilities and services additional to those 'universal services' (eircom is currently the universal services provider), states, inter alia, that a "designated undertaking shall...., establish terms and conditions for the provision of such additional facilities and services in such a way that the subscriber is not obliged to pay for facilities or services which are not necessary or not required for the service requested by him or her." In addition, eircom was obliged by Regulation 21(4) of the VT Regulations, and continues, by virtue of Regulation 13 of the Universal Service Regulations, to be obliged to ensure that tariffs for facilities additional to the provision of connection to

its fixed public telephone network and fixed public telephone services are sufficiently unbundled so that users are not required to pay for facilities that are not necessary for the service requested.

- 6.162 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.
- 6.163 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.
- 6.164 All respondents agreed that bundled products can benefit the market, the consumer and the operator. The majority of those respondents whose comments related primarily to the fixed communications market believe that specific regulation of bundled products is required.
- 6.165 Generally, respondents believe that where there is SMP, ex ante regulation should be adopted. One respondent argued that competition law, cost orientation obligations and the obligation that services must be sufficiently unbundled are sufficient to prevent anti-competitive bundling.
- 6.166 Some respondents felt there was a need to determine whether competitors can replicate a dominant operator’s offering and still have a viable business case. The view is that where there is SMP at the wholesale level the SMP operator should not be allowed to discriminate against other operators and that the wholesale equivalent of the retail product should be made available. Another respondent felt that where bundling by a dominant operator is allowed, at the absolute minimum other operators should be able to fully replicate the bundle using upstream services.
- 6.167 There were mixed views on the treatment of bundling competitive with non competitive products. One suggestion was the prohibition of bundling of regulated with unregulated products. Another response suggested that bundled products should require ComReg approval for all products where the bundle contains any part of an SMP designated product.
- 6.168 Having considered these issues, ComReg proposes to impose an obligation that the SMP operator shall not unreasonably bundle services. ComReg would consider it unreasonable for an operator 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. ComReg would expect also that wholesale equivalents would be provided for those wholesale products where eircom has SMP. Non-discrimination at the wholesale level has been discussed. Obligations relating to the problem of excessive prices and to prevent distortion to competition caused by unreasonably low prices would also apply to bundled products as they do to unbundled products.
- 6.169 ComReg proposes to apply the principles above to all cases of bundling whether they involve bundles only within this market or bundles that include elements from

this market and other elements, whether or not they are defined as electronic communications services.

Q. 29. Do you agree that the SMP operator should be obliged to ensure that services are not unreasonably bundled?

Cost accounting

6.170 Regulation 14(5) of the *Universal Service Regulations* provides that “[A]n undertaking that is subject to retail tariff regulation or other relevant retail control shall operate and maintain a cost accounting system that is:

- based on generally accepted accounting practices;
- is (sic) suitable for ensuring compliance with this Regulation [Regulation 14 of the *Universal Service Regulations*], and
- is (sic) capable of verification by the Regulator [ComReg].

6.171 Regulation 14(6) of the *Universal Service Regulations* allows ComReg to specify the format and accounting methodology to be used by an undertaking to whom Regulation 14(5) of the *Universal Service Regulations* applies and such undertakings are required by Regulation 14(8) of the *Universal Service Regulations* to publish with its annual accounts a statement concerning compliance by it with a cost accounting system referred to in Regulation 14(5) of the *Universal Service Regulations*. Compliance with the cost accounting system referred to in Regulation 14(5) of the *Universal Service Regulations* must be verified by a qualified independent body.

6.172 ComReg considers that in order to demonstrate cost-orientation of a service or product, it is necessary for the dominant provider to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles.

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

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

believes the imposition of accounting separation upon eircom to be justifiable and based on the nature of the problem identified.

- 6.175 If ComReg were to withdraw this obligation, it would not be able to monitor such margin squeeze problems or determine if costs are set at an excessive level, or have any information on margins in the retail business.
- 6.176 ComReg proposes to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim, ComReg is proposing that it maintain the existing level of cost accounting systems and accounting separation obligations on eircom until such time as any further consultations are complete.

Q. 30. Do you agree that an obligation should be placed on the SMP operator to maintain the existing level of cost accounting systems and accounting separation obligations?

7 Regulatory Impact Assessment

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

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

- 7.2 ComReg is obliged, under Regulation 9(1) of the *Access Regulations*, where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the *Framework Regulations*, to impose on such operator such of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.
- 7.3 ComReg is obliged under Regulation 9(6) of the *Access Regulations* to ensure that any obligations imposed on an operator, in accordance with Regulation 9 of the *Access Regulations*, ‘be based on the nature of problem identified, be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act, 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the *Framework Regulations*.
- 7.4 Regulation 14(1) of the *Universal Service Regulations* requires ComReg, when it determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive, and ComReg concludes that obligations imposed under the *Access Regulations* or Regulation 16 of the *Universal Service Regulations* would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, to impose such obligations as it considers appropriate to achieve those objectives, on undertakings designated by ComReg under Regulation 27(4) of the *Framework Regulations* as having significant power on a given retail market. In accordance with Regulation 14(2) of the *Universal Service Regulations*, ComReg is obliged to ensure that any obligations imposed on an operator pursuant to Regulation 14(1) of the *Universal Service Regulations* be ‘based on the nature of the problem identified pursuant to the market analysis carried out in accordance with Regulation 27 of the *Framework Regulations* and be proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act, 2002.
- 7.5 ComReg will conduct a Regulatory Impact Assessment which will form part of the decision making process and would comment on the proportionality of the remedies

listed in section 6 of this consultation paper and the justification of the remedies listed.

Q. 31. Respondents are asked to provide views on whether the remedies in section 6 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality

8 Submitting Comments

- 8.1 All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 8.2 The consultation period will run from 1 September 2004 to 13 October 2004 during which ComReg welcomes written comments on any of the issues raised in this paper.
- 8.3 ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.
- 8.4 Having analysed and considered the comments received, ComReg will review the implementation of remedies in the retail fixed narrowband access markets and publish a report on the consultation which will inter alia summarise the responses to the consultation.
- 8.5 In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its Offices.

Appendix A – Consultation Questions

- Q. 1. Do you agree with the scope of ComReg’s review of the retail fixed narrowband access markets? Please elaborate your response. 15
- Q. 2. Do you agree that retail calls and retail narrowband access are in separate markets? Please elaborate your response..... 18
- Q. 3. Do you agree that fixed narrowband access and mobile access services do not currently belong in the same relevant market? Please elaborate your response. 21
- Q. 4. Do you agree that there are distinct markets for retail fixed *lower level* narrowband access and for retail fixed *higher level* narrowband access? Please detail your response. 25
- Q. 6. Do you agree that the relevant geographic market for the retail narrowband access markets is Ireland? Please expand in your response. 29
- Q. 7. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response..... 30
- Q. 8. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response. 39
- Q. 9. Do you agree with the competition problems identified by ComReg, as outlined above? Please provide evidence in support of your response..... 46
- Q. 10. 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? 49
- Q. 11. Do you agree that eircom should be obliged to offer a WLR product in line with requirements as determined by ComReg, under the obligations of the Access Regulations? Please detail your response. 52
- Q. 12. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Wholesale Line Rental? Please detail your response..... 52
- Q. 13. Do you agree that the SMP operator should be obliged to permit access to the relevant wholesale products? 53
- Q. 14. Do you agree that the SMP operator should be required to grant open access to relevant information, technical interfaces, protocols, or other key technologies and should also be required to provide such OSS or similar software necessary to ensure fair competition in the provision of WLR services? Please detail your response. 53

- Q. 15. Do you agree that the SMP operator should be required not to withdraw access to facilities already granted, save without prior ComReg approval which would only be granted following public consultation? Please detail your response. 54
- Q. 16. Do you agree with the approach to Service Level Agreements for access obligations set out above? Are there any other conditions which should be attached to the proposed obligations? Please detail any response..... 54
- Q. 17. Do you agree that obligations of non-discrimination should be imposed on the SMP operator? Please detail your response, making references to ComReg's interpretation of such an obligation set out above. 55
- Q. 18. Do you agree that an obligation of transparency should be imposed on the SMP operator? Please detail your response. 56
- Q. 19. Do you believe that reference offers should be maintained for the WLR product set and any new offerings developed in accordance with Regulations 11 or 13 of the Access Regulations? 56
- Q. 20. ComReg proposes to continue with the application of the retail minus price control for WLR for the period of this review. Do you agree with this position? Please provide reasons for your answer. 57
- Q. 21. ComReg proposes that prices set on the basis of FL-LRIC would not be appropriate in the period of this review. Do you agree with this position? 57
- Q. 22. Do you agree that obligations in respect of cost accounting systems should be imposed on eircom? Please detail your response..... 58
- Q. 23. Do you believe eircom should have an obligation of accounting separation? Please detail your response..... 59
- Q. 24. Do you agree that the current price cap should be maintained and that some form of additional price control should be applied specifically to lower level narrowband access prices? Do you believe that this should be an obligation of cost-orientation as at present, or should a price cap specific to access be introduced? Should this be a sub-cap on PSTN line rental only, or should it include other services? If so, which ones? Do you agree that, should a sub-cap be introduced, it should be within the range of CPI-0% and CPI-CPI? ComReg would also welcome respondents views on the other options considered in this section. 63
- Q. 25. Do you agree that the current price cap should be maintained and that some form of additional price control should be applied specifically to ISDN FRA and PRA access prices? Do you believe that this should be an obligation of cost-orientation as at present, or should a price cap specific to access be introduced? Should this be a sub-cap on ISDN FRA and PRA access prices only, or should it include other services? Which ones? ComReg would also welcome respondents views on the other options considered in this section. 64

- Q. 26. Do you believe that the SMP operator should ensure that its tariffs follow the basic principles of cost orientation? Please link your response to this question with your response to Questions 24 and 25. 65
- Q. 27. Do you agree that a non-discrimination obligation should be place on the SMP operator? 67
- Q. 28. Do you agree with ComReg’s proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers..... 69
- Q. 29. Do you agree that the SMP operator should be obliged to ensure that services are not unreasonably bundled?..... 71
- Q. 30. Do you agree that an obligation should be placed on the SMP operator to maintain the existing level of cost accounting systems and accounting separation obligations?..... 72
- Q. 31. Respondents are asked to provide views on whether the remedies in section 6 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality..... 74

Appendix B – Consumer packages bundling access and calls

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

eircom Residential Packages

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

eircom Talktime Core Package (prices are inc VAT)

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

Business Packages

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

eircom Talktime for Business Core Package (prices are ex VAT)

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

Gaelic Telecom Residential Packages

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

Mobile “add-ons” are also available for an additional fee.

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

EsatBT Packages

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