



Response to Consultation & Consultation on Draft Decision

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

(response to Consultation 04/94 and draft decision)

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All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg 05/25” as indicated above,  
and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)  
(current consultations), to arrive on or before 6.00 pm 26 April  
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## Contents

1	Executive Summary .....	3
2	Introduction .....	6
	OBJECTIVES UNDER THE COMMUNICATIONS REGULATION ACT, 2002 .....	6
	REGULATORY FRAMEWORK .....	6
	COMREG PROCEDURE .....	7
	LIAISON WITH COMPETITION AUTHORITY .....	8
	STRUCTURE OF THIS DOCUMENT .....	8
3	Relevant Market Definition .....	10
	SCOPE OF REVIEW .....	10
	IS THERE A SINGLE MARKET FOR FIXED ACCESS AND FIXED CALLS? .....	11
	ARE FIXED ACCESS AND MOBILE ACCESS IN THE SAME MARKET? .....	11
	ARE ALL FORMS OF FIXED NARROWBAND ACCESS IN THE SAME MARKET? .....	13
	ARE THERE SEPARATE RELEVANT MARKETS FOR RESIDENTIAL AND NON-RESIDENTIAL CUSTOMERS? .....	17
	THE RELEVANT GEOGRAPHIC MARKET .....	18
	SUMMARY OF PRELIMINARY CONCLUSIONS .....	19
4	Relevant Market Analysis .....	21
	INTRODUCTION .....	21
	<i>Background</i> .....	21
	ASSESSMENT OF SIGNIFICANT MARKET POWER .....	21
	<i>Market Structure</i> .....	21
	<i>Market share</i> .....	23
	<i>Barriers to entry and potential competition</i> .....	24
	<i>Barriers to Switching</i> .....	26
	<i>Countervailing Buyer Power</i> .....	26
	CONCLUSIONS OF MARKET ANALYSIS .....	27
5	Designation of Undertakings with Significant Market Power .....	29
6	Proposed Market Remedies .....	30
	INTRODUCTION .....	30
	COMPETITION PROBLEMS IN THE RETAIL ACCESS MARKETS .....	30
	PRINCIPLES IN SELECTING REMEDIES .....	31
	REMEDIES PROPOSED .....	33
	<u>WHOLESALE REMEDIES</u> .....	33
	<u>REGULATORY CONTROLS ON RETAIL MARKETS</u> .....	42
7	Regulatory Impact Assessment .....	53
8	Submitting Comments on the draft direction .....	59
	Appendix A – Draft Decision - Retail Fixed Lower Level Access Market .....	60
	Appendix B – Draft Decision -Retail Fixed Higher Level Access Market .....	69
	Appendix C – Responses to Consultation on Market Definition, Analysis and Remedies .....	78
	MARKET DEFINITION .....	78
	IS THERE A SINGLE MARKET FOR FIXED ACCESS AND FIXED CALLS? .....	78
	ARE FIXED ACCESS AND MOBILE ACCESS IN THE SAME MARKET? .....	79
	ARE ALL FORMS OF FIXED NARROWBAND ACCESS IN THE SAME MARKET? .....	82

ARE THERE SEPARATE RELEVANT MARKETS FOR RESIDENTIAL AND NON-RESIDENTIAL CUSTOMERS?	83
THE RELEVANT GEOGRAPHIC MARKET .....	85
SUMMARY OF PRELIMINARY CONCLUSIONS .....	86
MARKET ANALYSIS .....	88
CONCLUSIONS OF MARKET ANALYSIS .....	88
REMEDIES .....	91
COMPETITION PROBLEMS IN THE RETAIL ACCESS MARKETS .....	91
PRINCIPLES IN SELECTING REMEDIES .....	93
REMEDIES PROPOSED .....	95
WHOLESALE REMEDIES .....	95
RETAIL REMEDIES .....	106
Appendix D – Opinion of the Competition Authority .....	118
Appendix E – Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC.....	120

## 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*.<sup>1</sup>
- 1.2 On 1 September 2004, ComReg issued a national consultation on its market analysis for retail fixed narrowband access (ComReg Document 04/94). ComReg received detailed submissions from the five respondents listed below by the close of the consultation period. Additionally, there were eight respondents who provided comments on specific issues in the market whose views were also taken into consideration.
- 1.3 The five detailed responses to the consultation were provided by :
  - Chorus
  - Eircom
  - energis
  - Esat BT
  - Vodafone
- 1.4 ComReg thanks all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its conclusions regarding the market analysis process.

### Market definition

- 1.5 ComReg proposes to define two retail narrowband access markets:
  - Lower level retail narrowband access (which includes access via analogue exchange lines over copper and FWA and ISDN BRA, also including ‘hi-speed’), which is referred to as **Lower Level Access**
  - 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.

### Market analysis

- 1.7 In the analysis of the markets, ComReg assessed that eircom has a market share in excess of 99% in the lower level access market. eircom’s market share of the higher level access market is 77%<sup>2</sup>. ComReg considered other characteristics of the markets, including barriers to entry and relatively high customer switching costs and concluded that there is little likelihood of this market share diminishing significantly within the lifetime of this review.

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<sup>1</sup> Framework Regulations 26 and 27. S.I. No. 307 of 2003.

<sup>2</sup> As of the start of 2004

- 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.

### **Remedies**

- 1.9 ComReg 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.
- 1.10 A finding of SMP in the retail fixed access markets obliges ComReg to mandate the SMP operator to enable their subscribers to access the services of any other interconnected provider of telephone services. In addition, the *Access Regulations* and the *Universal Service Regulations* provide ComReg with a number of remedies it can apply given its preliminary finding of eircom's SMP in the retail fixed access markets.

### Wholesale remedies

- 1.11 The finding that eircom has SMP in the market for fixed retail access services means that ComReg is obliged under the Universal Service Regulations to impose an obligation enabling subscribers of the SMP operator to access Carrier Access/Carrier Selection (CA/CS) and Carrier Pre Selection (CPS). Details of the current implementation and requirements for ongoing product development of CA/CS and CPS are dealt with in the consultation on *Market Analysis: Retail Fixed Calls* (Document Number 05/26).
- 1.12 The market analysis and identification of competition problems carried out in the market review of the retail fixed access markets indicate a clear need for the continuation of Wholesale Line Rental (WLR) as a remedy in both the retail fixed lower level narrowband access market and the market for higher level narrowband access. ComReg therefore proposes that the SMP operator should be obliged to offer a WLR product under the obligations of the Access Regulations, and this product should be offered in line with industry agreed requirements supported where necessary by regulatory determination.
- 1.13 ComReg believes that, in addition to mandating CA/CS and CPS and WLR, appropriate wholesale remedies to address market failure in the higher and lower level retail access markets are :
- An obligation to permit access to relevant wholesale products
  - An obligation to grant open access to relevant information, interfaces, protocols and key technologies and to provide OSS or similar
  - An obligation not to withdraw access to facilities already granted, except where ComReg has approved this withdrawal
  - An obligation of transparency
  - An obligation of non-discrimination
  - The continued application of retail minus price control

- An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of consultation<sup>3</sup>.

### Retail remedies

- 1.14 ComReg believes that wholesale measures are necessary but not sufficient to address competition problems in the retail markets. WLR will not eliminate the SMP provider's ability to raise prices above the competitive level during this review period, and therefore further consumer protection is needed.
- 1.15 ComReg believes that the appropriate retail remedies for the retail fixed access markets are as follows :
- Maintenance of the current price cap under the New Regulatory Framework, to be applied to lower and higher level access markets.
  - Introduction of a sub cap on PSTN line rental at a rate of CPI-CPI for one year effective from the date of the Decision.
  - An obligation of cost-orientation
  - An obligation of non-discrimination
  - An obligation of transparency, such that the SMP operator will be obliged to notify ComReg 20 working days in advance of changes to prices, terms and conditions in the lower and higher level access markets. The SMP operator will be obliged to publish 15 working days in advance changes to prices, terms and conditions in the lower level access market.
  - An obligation not to unreasonably bundle products and services
  - An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of consultation.
- 1.16 ComReg proposes to impose all of these remedies as of the effective date of the decision.
- 1.17 ComReg is publishing in Appendixes A and B its proposed Draft Measures to implement the remedies detailed above. ComReg is consulting on the measures as detailed in Appendixes A and B and would welcome comments on the provisions prior to the final adoption.
- 1.18 ComReg believes the remedies set out in this market review support the objectives outlined in the Communications Regulation Act 2002 as to how ComReg should exercise its functions. The remedies address market failure in the markets for lower and higher level retail fixed narrowband access, and in so doing, promote the best interests of Irish consumers through additional competitive activity.

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

## 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 (ECNs), electronic communications services (ECSs) and associated facilities these objectives are:
- (i) to promote competition
  - (ii) to contribute to the development of the internal market, and
  - (iii) to promote the interests of users within the European Union.
- 2.2 ComReg believes that the interests of users can be promoted by protecting users, among other things, from excessive pricing for 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.

2.3

### Regulatory Framework

- 2.4 Four sets of Regulations,<sup>4</sup> which transpose into Irish law four European Community directives on electronic communications networks and services,<sup>5</sup> 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.
- 2.5 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*.<sup>6</sup> In addition, ComReg is

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<sup>4</sup> 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*").

<sup>5</sup> 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.

<sup>6</sup> Framework Regulation 26.

required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.<sup>7</sup> 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.<sup>8</sup> 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)<sup>9</sup>.

- 2.6 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.<sup>10</sup> 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**

- 2.7 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*.
- 2.8 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<sup>11</sup>.
- 2.9 On 1 September 2004, ComReg issued a national consultation on its market analysis for retail fixed narrowband access (ComReg Document 04/94). Interested parties were asked to submit comments by 5 November 2004 on a number of questions pertaining to the preliminary findings of the analysis. ComReg received detailed submissions from the five respondents listed below by the close of the consultation period. Additionally, there were eight

<sup>7</sup> Framework Regulation 27.

<sup>8</sup> Framework Regulation 27(4).

<sup>9</sup> Framework Regulation 27(3).

<sup>10</sup> Framework Regulations 26 and 27.

<sup>11</sup> All surveys are available from ComReg’s website; [www.comreg.ie](http://www.comreg.ie). Relevant surveys will be referenced throughout this document.



respondents who provided comments on specific issues in the market whose views were also taken into consideration.

2.10 The five detailed responses to the consultation were provided by :

- Chorus
- eircom
- energis
- EsatBT
- Vodafone

2.11 ComReg thanks all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its conclusions regarding the market analysis process. Comments relevant to each consultation question are addressed in the following sections. All responses received are available for inspection (with the exception of material supplied on a confidential basis) at ComReg's office.

2.12 As required by Regulation 20 of the Framework Regulations, any draft measure which ComReg proposes to adopt will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to adopting the measure

### **Liaison with Competition Authority**

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

### **Structure of this document**

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

- **Section 3** presents ComReg's conclusions on the definition of the markets 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 markets and presents ComReg's view on whether these markets are effectively competitive;
- **Section 5** presents ComReg's view on those undertakings with significant market power in the retail narrowband access market;

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<sup>12</sup> ComReg Document No. 03/06

- **Section 6** provides a discussion of the general principles associated with remedies. ComReg proposes remedies to be implemented under the new regulatory framework;
  - **Section 7** outlines the regulatory impact assessment conducted in relation to the proposed regulatory intervention regarding these markets;
  - **Section 8** provides details with regard to the submission of comments on the Draft Decisions in Appendixes A and B.
- 
- **Appendix A** consists of the proposed draft measure for lower level access
  - **Appendix B** consists of the proposed draft measure for higher level access
  - **Appendix C** contains a summary of views of respondents, and ComReg's discussion of points raised
  - **Appendix D** contains the response of the Competition Authority
  - **Appendix E** contains the Notification of Draft Measures.

### 3 Relevant Market Definition

#### Scope of Review

- 3.1 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".
- 3.2 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 transmission<sup>13</sup>.
- 3.3 This review is concerned with the ability of customers to access the public switched telephone network (PSTN) via analogue exchange lines over copper, ISDN and Fixed Wireless Access (FWA). 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 through dial-up narrowband internet<sup>14</sup>. A separate market review of Retail Fixed Calls was carried out and will be published concurrently with this consultation (Document Number 05/26).
- 3.4 The starting point for ComReg's analysis of the fixed retail access market is the European Commission recommendation, and this has been broadly accepted by all respondents. Specific comments on ComReg's approach to the analysis are dealt with further in the sections on market definition and analysis and in Appendix C.
- 3.5 ComReg notes that several respondents wished to extend the scope of the review to consider Functional Internet Access. Several respondents perceived a need to define and enforce a functional internet access (FIA). A range of possible definitions were proposed, but respondents shared the underlying principle that the enforcement of Universal Service Obligations required the definition of FIA. ComReg has considering requirements as provided for in the Universal Service Regulations, and has published its proposals<sup>15</sup>, however the definition of FIA does not fall within the scope of this review and thus will not be analysed in this document.
- 3.6 ComReg considered access to the public network via payphones and is of the view that payphones offer a bundled service for which people pay a single charge for access and calls. A number of other demand and supply-side factors preclude ComReg from including calls from payphones in either of the markets for access or calls.
- 3.7 ComReg notes broad agreement that calls from payphones are sufficiently distinct in terms of demand and supply characteristics to warrant definition in a

<sup>13</sup> Commission *SMP Guidelines* on Market Analysis and the assessment of SMP under the Community regulatory framework for ECNS, 2002/C 165/03 paragraph 65.

<sup>14</sup> For further information, see Universal Service Regulations, Regulation 3.

<sup>15</sup> ComReg Document Number 05/17

separate market. ComReg notes that this means that a separate market review will be carried out. Under the transitional provision of the *Framework Regulations* any obligations relating to payphones remain until such time as that review of payphones is complete.

- 3.8 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?
- 3.9 In assessing competition within the access market, ComReg has analysed the market by customer type, service type, and geographic scope.
- 3.10 ComReg concludes that there was broad support from all respondents for the scope of its review of the retail fixed narrowband access market.

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

- 3.11 ComReg proposed that, at present, the access market and the calls market in Ireland are complementary, and are not substitutes. The conditions of supply are different for access than for calls, and there is greater potential for an access provider to enter the calls market than for a calls provider to enter the access market. ComReg noted areas of change in the market, such as bundling calls and access, and proposed that it should monitor whether such service offerings change the competitive dynamics of supply.
- 3.12 ComReg notes broad agreement amongst respondent that the overall direction of change in the markets for fixed access and calls was towards increasing substitutability. The main area of difference among respondents was in their perceptions of how quickly this change would take place. ComReg observed support among respondents, that the need for change in the market was underpinned by previous and continuing regulatory efforts in WLR and CPS. For details on WLR and CPS, see paragraph 4.7- 4.11 of Section 4.
- 3.13 ComReg concludes that for the retail access market the appropriate timeframe may be less than three years, at this point ComReg holds that the suitable time horizon for this review is approximately two years. ComReg's time horizon for this review is less than the three years assumed by one respondent who suggested that the market would develop faster than expected by ComReg and other respondents. ComReg takes note of the need to monitor developments.
- 3.14 ComReg concludes that retail fixed calls and retail fixed access constitute separate relevant markets.

### **Are fixed access and mobile access in the same market?**

- 3.15 The European Commission has, in a number of decisions, found that there is a market for mobile communications services that cannot be seen as being substitutable to fixed communications services. The European Commission notes that the key difference between mobile and fixed services is the mobility inherent in all mobile services (i.e., mobile numbers are associated with individuals on the move, rather than a fixed location). Thus, even though

technological advances may mean that similar services could be offered over both fixed and mobile networks, fixed services do not offer this mobility.<sup>16</sup>

- 3.16 Although fixed and mobile access services provide many of the same basic functions, important differences between the two remain, with mobile service being distinguished by its mobility, while fixed service boasts superior transmission quality and bandwidth. Among consumers mobility is perceived to be an important functional characteristic which differentiates mobile from fixed access. In a recent consumer survey<sup>17</sup> over 75% of respondents either strongly agreed or agreed that being permanently contactable or being able to make a call whenever they wish is important. Technically speaking, mobile can be a substitute at least for voice services because users can place and receive calls just as they do with fixed service. The relevant question is whether an increase in mobile access prices would cause customers to switch to fixed services.
- 3.17 It is difficult to compare the cost of fixed access with the cost of mobile access, as mobile access is generally sold either as a bundle of access and calls, or as a pre-paid service which does not incur an 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 generally a separate connection fee.
- 3.18 ComReg notes that the mobile charges in Ireland is perceived, among consumers, to be higher than fixed access. A recent finding<sup>18</sup> noted that 42% of respondents ‘strongly agreed’ with the statement that if the price levels for fixed and mobile phones were similar, it would encourage respondents to give up the fixed phone at home.
- 3.19 ComReg’s most recent market research<sup>19</sup> indicates that when consumers were asked, what was the main reason for *not* having a fixed line telephone in their house, the most common response (approximately half of respondents) noted that ‘having a mobile subscription’ was the primary driver. This response was particularly predominant among respondents in the 25-34 age band. However this research also shows that currently 81% of consumers interviewed had a mobile access and 79% had fixed access which would indicate that from the demand side the two products are not seen as substitutes. ComReg holds that from the demand-side, pricing and functional characteristics are sufficiently different to define separate markets for fixed and mobile access. ComReg does recognise a trend towards mobile only households (from 12% in 2003 to 15% in 2004<sup>20</sup>), however ComReg takes the view that this trend is more indicative of younger age bands who are more likely to be in rental accommodation, and does not reflect the market as a whole.

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<sup>16</sup> See, for example, Commission Decision of 10 July 2002, Case No. COMP/M.2803 – TeliaSonera, Commission Decision of 20 September 2001, Case No. COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia, Commission Decision of 20 September 2001, Case No. COMP/M.1439 – Telia/Telenor and Commission Decision of 12 April 2000, Case No. COMP/M.1795 – Vodafone Airtouch/Mannesmann

<sup>17</sup> TNS mrbi 102498/Residential Telecommunications survey/January 2004.

<sup>18</sup> TNS mrbi 102498/Residential Telecommunications survey/January 2004

<sup>19</sup> Amarach Consulting November 2004.

<sup>20</sup> Source: IPSOS survey for the European Commission, 2004.

- 3.20 In the consideration of supply-side substitution, ComReg is aware that in several other countries, there are proposals for converged fixed and mobile products<sup>21</sup>. Considering supply-side substitution between the fixed and mobile markets, ComReg notes that the development of 3G mobile networks may impact on whether mobile networks can provide a range of converged voice and data services on a single platform. Furthermore, in the future, the emergence of 4G solutions and the technological convergence of WiFi, GSM, 3G and WiMax technologies may provide opportunity for a mobile voice and high band-width data offering that would provider users with a seamless solution as a complete substitute for fixed line services. ComReg notes from the SMP Guidelines<sup>22</sup> that supply-side substitution involves no significant additional costs, whereas potential entry occurs at significant costs. ComReg concludes that supply side substitution is unlikely to take place within the time frame of the review and should therefore be considered in the assessment of potential competition in Section 4.
- 3.21 Additionally, ComReg's view is that such a bundled product would represent a form of "added value" to the fixed access network, rather than a substitute for it, and so its introduction would not change the conclusions of this analysis. This view is supported by market developments in other jurisdictions<sup>23</sup>.
- 3.22 ComReg notes that all respondents agreed that the overall direction of change in the markets for fixed and mobile access is towards increasing substitutability between fixed and mobile access, and that substitution applies to technology, use and pricing. The main area of difference among respondents is in their perceptions of how quickly this change will come about. ComReg does not agree with one respondent who proposed that substitution has already taken place to a sufficient extent to justify the definition of a single market.

### **Conclusion**

- 3.23 ComReg holds that it is unlikely that within the timeframe of the review, sufficient demand or supply-side substitution will take place between the fixed and mobile access markets, thus it would be inappropriate to define a single market.

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

- 3.24 ComReg has identified two types of access products: analogue access lines and digital ISDN channels.
- 3.25 In analysing 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 existing firms to switch production readily to narrowband access services in response to a price increase.

#### ***Demand issues***

- 3.26 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.

<sup>21</sup> Yankee Group Report. Wireless/Mobile Europe, October 2004. Matt Hatton. Cost and convenience will determine the success of fixed mobile convergence.

<sup>22</sup> para 38

<sup>23</sup> BT BluePhone (UK)

*Functional Substitutability*

- 3.27 Telephony service delivered over Fixed Wireless Access is not considered to be functionally distinct, although the services may be packaged differently. In other words, narrowband access via FWA still offers access to analogue access lines and/or to digital ISDN. ComReg notes that the different forms of access are not uniformly available. PSTN access is ubiquitous, but FWA is currently available in limited locations.
- 3.28 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 internet<sup>24</sup>.
- 3.29 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.<sup>25</sup> 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.
- 3.30 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.
- 3.31 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.
- 3.32 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*

- 3.33 In considering the market boundaries for access products including ISDN, PSTN and the other access technologies in the context of a price increase by a

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<sup>24</sup> FWA can accommodate internet access, however the service can be limited by bandwidth capacity.

<sup>25</sup> 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.

hypothetical monopolist, we must first of all establish the current price differentials. Ideally ComReg would apply the hypothetical monopolist test by using prices evaluated at competitive levels. ComReg is aware that many prices in this review are subject to regulation. ComReg assumes that current regulated prices are a reasonable proxy for competitive price levels

- 3.34 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.)<sup>26</sup>, and a monthly subscription of €24.18 (VAT incl.)<sup>27</sup>. The same charge applies uniformly across Ireland, and applies to business and residential customers.
- 3.35 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.).
- 3.36 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.).
- 3.37 From the pricing information available to ComReg, it appears that pricing is generally consistent between access via analogue exchange line, FWA and ISDN BRA. ISDN 'hi-speed' has a lower connection fee than ISDN BRA<sup>28</sup>, 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.
- 3.38 A hypothetical monopolist who raised the price of access by a small but significant amount could find that users could switch to 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 lines.
- 3.39 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 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.
- 3.40 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.

<sup>26</sup> Where a PSTN line has previously been connected at the location this reduces to €24.99.

<sup>27</sup> All prices include VAT at 21%

<sup>28</sup> 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.



- 3.41 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*

- 3.42 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., 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.
- 3.43 ComReg has recently extended its assignment of FWA licences to offer local licences. 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.
- 3.44 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.
- 3.45 It should also be noted that the economies of providing higher rate access 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. ComReg notes that the economies of serving a series of industrial estates and a residential population will be sufficiently different to negate supply-side substitution between the two markets.
- 3.46 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.
- 3.47 ComReg does not accept one respondent's argument that a supplier could easily move into the supply of ISDN BRA from ISDN PRA and FRA. ComReg's analysis of functional substitutability, pricing and supply side dynamics leads it to conclude that on all of these measures, lower and higher level access are in separate markets.
- 3.48 ComReg agrees with one respondent that the penetration of alternative access such as FWA was currently low. However, this does not change the conclusion that, as a result of functional substitutability when their characteristics are considered, they are part of the same market as PSTN fixed line access. ComReg notes also that its assessment of the potential impact of technologies such as VoIP and FWA assumed a shorter timescale than that assumed by the respondent who proposed that there would be more dynamic growth, and greater potential impact on the market.
- 3.49 ComReg therefore proposes that fixed retail access to the public telephone network includes two relevant markets.

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

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

- 3.50 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 determining 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 pronounced in Ireland than might be elsewhere. Part of the reason for this may be the relatively high number of SMEs in the Irish economy, especially those at the smallest end of the SME range. As a result, there are a large number of businesses that require only a single line and may, furthermore, be light users.
- 3.51 ComReg's analysis of business and residential customers acquiring fixed access indicated that there is no differentiation in terms of pricing for connection or rental, and there is little differentiation in the conditions of supply. Additionally, ComReg notes that residential and non residential access is functionally homogeneous in terms of quality of service. The impact of any differentiation is modified by the way in which residential and business are defined by service providers. There is no consistent definition among operators, and users are often categorised by self-selection, arbitrary allocation, and often change. Unlike other member states, operators in Ireland do not categorise users based on specific criteria such as having a VAT or social security number. 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. ComReg suggests that its separation of the markets by product type (as discussed above in the analysis of whether all forms of fixed narrowband are in the same market) rather than user type is more appropriate in the context of the Irish market.
- 3.52 In its analysis of the retail access market<sup>29</sup> ComReg proposed that the Irish market for retail access was sufficiently distinctive to warrant a broader scope than that suggested by the European Commission. All but one respondent agreed that there was little differentiation between residential and non-residential fixed access, and that generally this applied both to demand and to supply characteristics.
- 3.53 The respondent who did not agree put forward an analysis which was based primarily on a distinction between the largest users and the rest of the market.
- 3.54 ComReg has considered whether competitive conditions vary by customer group, and so whether the market definition should be narrowed to reflect

<sup>29</sup> Market Analysis – Retail Fixed Narrowband Access Markets Consultation 04/95

particular customer types. If customer types can be defined objectively, and price discrimination is possible between customer types, then the market definition should be narrowed. This is not so for the retail access market.

- 3.55 ComReg's main issue is with the definition of customer types which could facilitate the definition of separate markets. While the notion of large corporate user can be readily applied in a marketing context, in ComReg's view it is not an objective definition, and cannot be defined adequately enough for the purposes of a market review exercise. Further, as noted earlier, delineation is fluid.
- 3.56 ComReg has considered whether it is possible to define such a group on the basis of a measure such as turnover, number of employees or total telecoms spend. ComReg's conclusion is that the use of any criterion, or combination of criteria, would need to be evaluated on a case-by-case basis. It is ComReg's view that, while there may indeed be distinctive characteristics shared by the largest users of access services, there is no objective and robust way of defining the boundaries of such a group.
- 3.57 ComReg notes further that other NRAs have considered ways in which a narrower definition of the largest users of access services could be constructed. They have reached a consensus that it is not feasible within the standard market definition principles shared by NRAs and the European Commission.<sup>30</sup>
- 3.58 In conclusion, ComReg recognises that it is conceivable to define two separate markets in accordance with the *Relevant Markets Recommendation*. In the event that operators *started* to a sufficient extent to offer differentiated residential and non residential services (as is the case in other member states), it may be appropriate for ComReg to take this approach. At present there is nothing to indicate that this is likely to happen within the timeframe of the review, however ComReg will monitor the market for such developments. ComReg further notes that that regardless of whether the access market was sub divided into a residential and non-residential market or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power. ComReg therefore proposes to undertake its analysis as a single market.
- 3.59 ComReg suggests that its separation of the markets for higher and lower level access more usefully captures the different needs of larger and smaller users of access, primarily by defining them in terms of the services they use rather than in terms of other features that they may have in common. It should be noted that consumers in the higher level access market are all likely to be non-residential users, while the lower level access market could be a part residential and part smaller non-residential users. Thus ComReg holds that it is more appropriate to define the market in terms of product type rather than user type. ComReg concludes that, in Ireland, residential and non-residential access are not in separate markets.

### **The relevant geographic market**

- 3.60 ComReg proposed that the relevant geographic market for the markets considered in this review is the state of Ireland.
- 3.61 ComReg believes that the conditions of supply of access services are homogeneous across Ireland. In particular, while the access services provided

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<sup>30</sup> Ofcom's Review of Fixed Narrowband Retail Markets, 17.03.03

by some entities other than eircom are not available across the whole of Ireland, they all compete with eircom's access services where they are available. eircom's access services are provided on the same terms and conditions, including price, across Ireland. As a result, the conditions of supply are, effectively, homogeneous.

- 3.62 ComReg has considered the view proposed by one respondent that competitive conditions were sufficiently different in some urban areas to warrant their definition as separate geographical markets. ComReg's view remains that eircom offers its services for fixed access on a national basis, under the same terms and conditions. Where other services are or might be offered by other operators on a less than national basis, such services will compete with eircom's national services. For this reason, the relevant geographical market is the state of Ireland. Should circumstances change, whether through commercial or regulatory imperatives, then this conclusion would be reviewed.
- 3.63 ComReg concludes that the relevant geographical market is Ireland.

### **Summary of preliminary conclusions**

- 3.64 ComReg concludes that, at present, the access markets and the calls market in Ireland are complementary, and are not substitutes. They are therefore defined as separate markets.
- 3.65 ComReg concludes that fixed and mobile access do not currently belong in the same relevant market. The evidence in the Irish market suggests that, at present, fixed and mobile access are complementary products. ComReg intends to monitor developments in this area closely.
- 3.66 ComReg concludes that fixed analogue exchange lines, narrowband FWA and ISDN BRA currently belong in the same relevant market, for lower level narrowband access. They are products which offer the same functionality, for the same end use, and operate under similar price constraints.
- 3.67 ComReg also concludes that there is a separate market for higher level access to include access via ISDN FRA and PRA. Functional substitutability is limited. Pricing for connection shows price progression from multiple PSTN lines, but the monthly rental is significantly different.
- 3.68 ComReg's analysis of the supply of fixed access to business and residential customers indicated that there is no differentiation in terms of pricing, and that there is little differentiation in the conditions of supply. The impact of any differentiation is modified by the fluid way in which residential and business are defined, end-user self-selection and arbitrary allocation by operators.
- 3.69 ComReg notes broad agreement with its proposed market definition, and recognises that where there are differences of opinion, these are generally with the result of differing perspectives on the rate of change, rather than fundamental differences regarding the nature or direction of change.
- 3.70 ComReg is aware of the potential for rapid development in the ECS market, and recognises that alternative interpretations of the rate of change result where respondents anticipate faster change in the market than that assumed by ComReg. ComReg intends to monitor developments closely, and identifies the converging calls and access markets, and the increasing substitution in the fixed and mobile access markets as requiring particular attention.

3.71 ComReg will maintain the definition of two markets at the retail level for access to the public telephone network from a fixed location:

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

## 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 undertaking<sup>31</sup>.
- 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*<sup>32</sup>.

### Assessment of Significant Market Power

#### Market Structure

- 4.4 eircom is the largest provider in the access market, and is the only operator offering ubiquitous access via analogue exchange line over copper throughout the country. Other owners of access networks offering access are the two cable operators<sup>33</sup>, ntl and Chorus and EsatBT, which offers access via FWA. Some OAOs offer direct connection and calls to particular types of customer, mainly large SMEs and corporates.
- 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). update

<sup>31</sup> Framework Regulations, Regulation 25(3).

<sup>32</sup> Framework Regulation 25(2).

<sup>33</sup> Neither cable operators currently offer direct access to narrowband or voice services extensively, other than ntl offering direct access to ISDN PRA.

- 4.6 ISDN FRA is supplied by eircom and EsatBT. ISDN PRA is supplied by a number of operators including eircom, EsatBT, Chorus, energis, and MCI.
- 4.7 A recent development in Ireland is the introduction of the use of wholesale inputs to offer access services. Local Loop Unbundling (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. Following a period of consultation, which reviewed the CPS product as one of the key tools for fixed line competition, ComReg mandated the introduction of Single Billing for CPS customers through the development of the WLR product. This product, which is only available in conjunction with All Calls CPS, is only just beginning to take effect in Ireland. The availability of these two wholesale products facilitates the provision of both access and calls from one operator with the added benefit of single billing.
- 4.8 ComReg recognises the benefits that will arise from the delivery of a Single Billing WLR product to the marketplace and has been engaged with eircom and OAOs in a process to launch a Single Billing WLR product since 2002. As part of this process, ComReg has issued a number of decisions and directions defining the specific detail of the product description to ensure a fit for purpose volume product including<sup>34</sup>. ISDN (BRA, FRA & PRA) forms part of the WLR product
- 4.9 An interim manual solution for WLR was launched in June 2003. A number of Other Authorised Operators (OAOs) participated in product testing, however the manual solution proved too onerous to implement in the marketplace. In parallel, an automated solution was developed and this was launched on 1 April 2004, in line with ComReg's timetable for development of the product. The subsequent launch of retail services incorporating this product by several OAOs has demonstrated potential for a positive impact on the fixed line telephony market. There are currently four OAOs processing orders for WLR, currently supporting at least five retail Single Billing products in the market. ComReg is continuing to work with industry on the development and enhancement of the WLR product, which, in conjunction with the CPS All Calls option allows the combination of an access and calls package with a single bill.
- 4.10 ComReg notes that the price which OAOs can charge for PSTN line rental is currently set at retail -10%. While wholesale line rental will allow OAOs to offer a bundled calls-and-access product, which may in turn provide overall reductions for consumers, its impact on access costs is considered not to be material in terms of the time under review as it does not allow the exercise of any pricing constraint on eircom in relation to access.
- 4.11 The likelihood is that a calls provider wishing to provide a bundled calls and access product would do so by migrating its CPS customers to an all CPS calls and WLR product. However, ComReg believes OAOs offering WLR will not impact on eircom's share of the retail narrowband access markets to an extent

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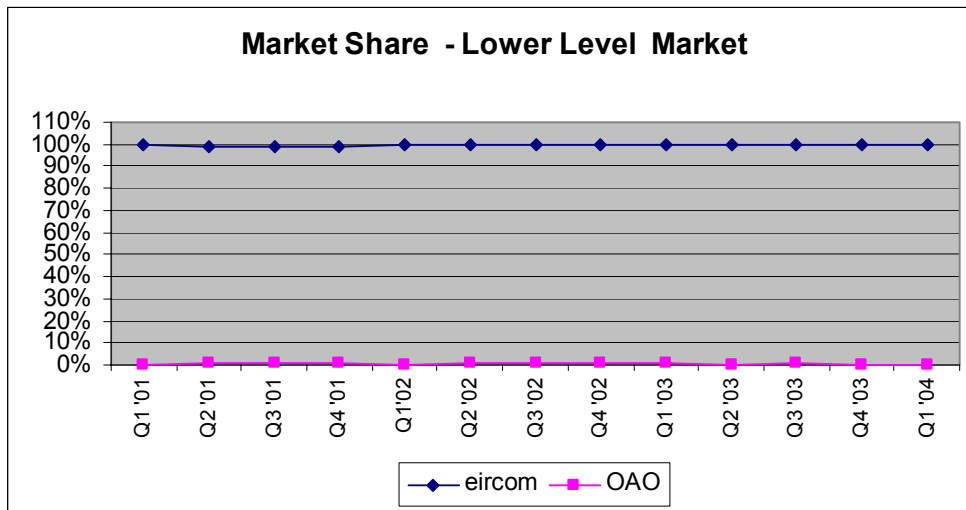
<sup>34</sup> CPS in Ireland 2002 - D13/02, Implementation of CPS Single Billing Products: Wholesale Line Rental (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS) -D2/03, Implementation of CPS Single Billing Products - Wholesale Line Rental and Agency Rebilling Updating of Timetable and Formalisation of Product Descriptions, D9/03, SB-WLR - Requirements for 31st March 2004 Launch Date, D4/04

that would fundamentally change the market dynamics during the lifetime of this review.

- 4.12 As of January 2004, there were almost 79,000 WLR lines spanning both of the defined markets for fixed retail access to the PSTN and lower and higher level ISDN, representing approximately 1.3% of total telecom access paths<sup>35</sup>.
- 4.13 ComReg recognises that development of new or upgraded infrastructure, such as increasing the use of fibre or wireless in the access network, together with 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, on the basis of its current analysis, does not believe that change will be rapid enough to have significant effect within the timeframe of this review. ComReg is of the view that narrowband and broadband services are in separate markets – this is reviewed in greater detail in the Market Analysis: Wholesale Broadband Access (ComReg Document 04/83).
- 4.14 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. This is considered under potential competition below.

Market share

- 4.15 eircom’s market share of the market for **Lower Level Narrowband Access** was just over 99% on a channel basis at the end of December 2004. It should also be noted that eircom’s market share has remained consistently at this level for several years.

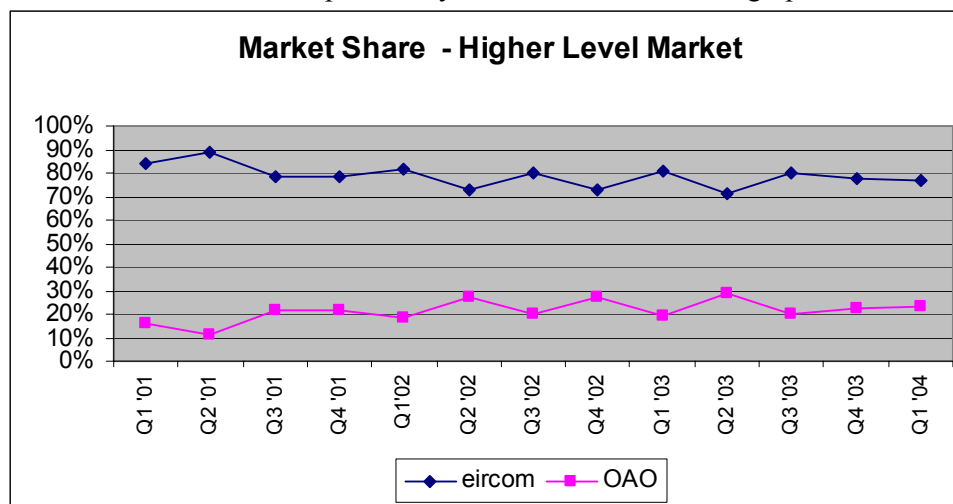


**Figure 4.1: Lower Level Access Market**

<sup>35</sup> Quarterly report, December 2004



- 4.16 In relation to **Higher Level Narrowband Access** eircom's market share on a channel basis was 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**

- 4.17 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.
- 4.18 The number of subscribers obtaining retail narrowband services over alternative platforms to copper is minimal. Given trends in the market, ComReg takes the view that eircom will continue to provide a significant majority of higher level ISDN connections during the timeframe of this review.

#### Barriers to entry and potential competition

- 4.19 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.
- 4.20 ComReg analysed actual and potential barriers to entry in the fixed access markets in terms of economies of scale and scope; provision of combined calls and access packages; and vertical integration of the incumbent.
- 4.21 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 may act as a barrier to entry.
- 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 It is unlikely that retail narrowband lower or higher level access services provided by OAOs over LLU will offer sufficient potential competition to act as a competitive constraint on eircom over the timeframe of the review. ComReg 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 quality<sup>36</sup>. 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.
- 4.26 Respondents who commented on this issue generally agreed that the incumbent benefited from economies of scale and of scope, and from vertical integration. Although the incumbent's ability to provide combined calls and access packages would be an important advantage in the absence of regulation, respondents considered that this was less significant since the introduction of CPS/WLR, as OAOs can provide bundled calls and access packages of their own by combining WLR with CPS All Calls.
- 4.27 ComReg agrees that the introduction of CPS/WLR will reduce the extent to which the provision of combined calls and access packages constitute a barrier to entry. ComReg notes that this introduction was mandated by regulatory intervention, and maintains its view that, while early signs of market development are encouraging, it is still too soon to consider the development of this market without regulatory input. Absent regulation, these barriers to entry are very unlikely to be overcome by a competitor of eircom.
- 4.28 It was proposed by one respondent that economies of scale and scope may be achieved by operators other than the incumbent, where these operators are part of international organisations. However, ComReg notes that the relevant geographic market for the provision of retail leased lines is Ireland. From the information available to ComReg, it is difficult to see what, if any benefit a subsidiary operator can enjoy from being part of a wider organisation group. The respondent did not provide any detail regarding the potential competitive advantage.
- 4.29 It is ComReg's view that eircom enjoys network economies of scale and of scope in the market for high level access. It is economically infeasible that any

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<sup>36</sup>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.

operator would be able to replicate eircoms network, thus presenting significant barriers to entry. However in terms of services, these economies are less significant in the market for higher level access than they are in the lower level access market. This is because higher level access is not a mass market product, and so economies relating to network density and ubiquity are less important.

- 4.30 ComReg concludes that economies of scale and of scope, and the vertical integration of the incumbent, continue to constitute barriers to entry in the fixed retail access markets. ComReg is of the view that it is unlikely that any operator is in a position to replicate eircom's network. The ability for the incumbent to offer combined calls and access packages becomes less significant as CPS/WLR develops, but its development continues to be dependent on regulatory intervention.

#### Barriers to Switching

- 4.31 Low barriers to switching would indicate that, even when market share suggested otherwise, market power is reduced.
- 4.32 ComReg analysed actual and potential barriers to switching such as customer awareness, number portability and high connection fee. ComReg holds that a lack of customer awareness presents the most significant barrier to switching.
- 4.33 One respondent commented on customer awareness, suggesting that it did not constitute a barrier to switching, and could be overcome by more widespread marketing by operators. ComReg notes that its most recent market research indicated that 50% of residential consumers<sup>37</sup> and 40% of non residential consumers<sup>38</sup> were still unaware of the availability of single billing, and while this may be addressed by operator marketing, ComReg maintains that persistent low customer awareness continues to constitute a barrier to switching.
- 4.34 ComReg concludes that barriers to switching are evident in the lower and higher level access markets, but are less pronounced in the higher level market. The existence of these barriers indicates that they do not mitigate market dominance.

#### Countervailing Buyer Power

- 4.35 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.
- 4.36 ComReg notes that two respondents identified this as a major issue in the higher level access market, specifically in relation to the largest customers. These respondents provided anecdotal evidence of the existence of countervailing buyer power. In their view, countervailing buyer power would act to constrain eircom's pricing, so reducing market power. ComReg notes that both respondents agreed that countervailing buyer power was not an issue in relation to residential users, and was not likely to be an issue for small or even medium sized business users. It is therefore, potentially relevant only in relation a very small number of very large customers, in both the private and the public sectors. ComReg recognised in the consultation that it was possible that the largest users

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<sup>37</sup> Amarach Consulting, November 2004

<sup>38</sup> TNSmrb: SME survey December 2004

could influence the incumbent's behaviour, but noted that ComReg has been provided with no evidence that this happens to a significant enough extent to change the its conclusions.

- 4.37 ComReg concludes that there is no indication of the material existence of countervailing buyer power in the market for lower level access. While purchasers of higher level access products may be more able to exert buyer power, ComReg has seen no quantifiable evidence to indicate that this happens in a manner which could significantly constrain eircom's pricing behaviour.

### **Conclusions of market analysis**

- 4.38 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, and FWA platforms) was just over 99% on a channel basis at the start of 2004. This represents control of a ubiquitous network of exchange lines which could not easily be replicated.
- 4.39 The analysis of the relevant market for retail fixed lower level narrowband access shows evidence of a market failure, in that market forces are unable to constrain eircom's pricing of access. 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.
- 4.40 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.
- 4.41 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.
- 4.42 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 because the economics of supplying higher level ISDN differ from the supply of basic PSTN access.
- 4.43 The most significant difference is that higher level ISDN 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 all total access acquirers. 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.
- 4.44 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 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.
- 4.45 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. ComReg does not believe that any current service provider could impose a sufficient competitive constraint on eircom, and does not believe that this situation will change significantly during the lifetime of this review.

- 4.46 The analysis of the market for higher level access indicates that eircom should be designated as having SMP in the lower and higher level access market as defined.
- 4.47 ComReg recognises the impact of change in the markets defined, and notes comment from respondents on the likely direction and rate of change. Specific note was made of the impact which WLR would have on the access markets. At the time the market review was prepared, WLR had very recently been introduced into the market. ComReg welcomes the positive introduction of WLR in Ireland, but notes that WLR lines still represent less than 5% of all PSTN lines, and just over 1% of all telecoms access paths. ComReg does not believe that WLR will significantly challenge eircom's dominance in the retail access markets within the lifetime of this review.
- 4.48 ComReg concludes that both the lower and higher level markets for retail fixed narrowband access are not effectively competitive, and that eircom has SMP in both markets. ComReg notes that all respondents agreed with the overall conclusion of the market analysis, that there is market failure in the markets for lower and higher level access, and that market forces are not able to constrain the pricing and behaviour of the SMP operator. Where there were differences of opinion, this was generally to do with some respondents proposing that eircom's dominance would reduce at a faster rate than that proposed by ComReg and some other respondents. Respondents agreed that eircom had, and will continue to have, SMP in both markets.

## 5 Designation of Undertakings with Significant Market Power

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

## 6 Proposed Market Remedies

### Introduction

- 6.1 ComReg is obliged, under Regulation 9(1) of the Access Regulations, where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the *Framework Regulations*, to impose on such an operator some of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.
- 6.2 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the *Framework Regulations* as having significant power on a given retail market.
- 6.3 Regulation 14 of the *Universal Service Regulations*<sup>39</sup>, allows ComReg, where it concludes that obligations imposed under the Access Regulations and/or Regulation 16 of the Universal Service Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, to impose such obligations as it considers appropriate to achieve those objectives.
- 6.4 This section of the consultation discussed actual and potential competition problems in the defined markets, and proposed remedies to address these problems.

### Competition Problems in the retail access markets

- 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 In line with the *SMP Guidelines*, ComReg has conducted its market analysis on a forward-looking basis, similar to that carried out in a merger analysis, rather than ex post, as would be carried out under Article 82 of the EC Treaty or Section 5 of the Competition Act 2002. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation.
- 6.7 ComReg considers that the justification for considering *ex ante* remedies must therefore be broader than if solely based on demonstrable acts of past behaviour. ComReg instead has to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. ComReg suggests that this is a key difference in approach between ex ante and

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<sup>39</sup> Which transposes Article 17 of the Universal Service Directive into national law

ex post analysis, and ComReg notes that its approach has been developed in line with other NRAs.

- 6.8 ComReg does not agree with the assertion made by one respondent that the competition problems identified were purely theoretical. ComReg has used the evidence gathered through market analysis, its own experience in regular meetings with both eircom and OAOs, as well as regulatory interventions over recent years to identify these competition problems. ComReg also participated, in collaboration with other NRAs, in a ‘stock taking’ exercise to feed these into the ERG Common Position on Remedies<sup>40</sup>.
- 6.9 ComReg notes that respondents from the OAO community have stated that the competition problems identified by ComReg were entirely reflective of the issues in this area and have provided evidence to support the existence of these problems. ComReg has provided analysis of the proportionality and justification of remedies when setting out the detailed remedies and in the accompanying Regulatory Impact Assessment.
- 6.10 ComReg notes growth in the market for WLR since this market review was prepared, and agrees with respondents that the rate of growth has increased in the last few months. However, ComReg also notes that this has not been accompanied by a decrease in OAO requests for ComReg to intervene. In other words, there is a continuing requirement for ComReg to support the development of this market, and this serves to further confirm ComReg’s interpretation of previous development.
- 6.11 ComReg believes that its interpretation and analysis of competition problems reflects its experience, and that of OAOs, in developing the WLR product.

### **Principles in selecting remedies**

- 6.12 ComReg notes its obligations under the Framework Regulations, the Access Regulations and the Universal Service Regulations.
- 6.13 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 as having significant power in that market. ComReg does not believe that, within the period of this review, there will be sufficiently significant developments which will prevent eircom from acting independently from its competitors. Accordingly, ComReg proposes to impose appropriate obligations on the SMP operator that ComReg believes will encourage efficient investment and innovation, protect consumers and further promote competition in the retail access markets.
- 6.14 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.
- 6.15 In choosing remedies, ComReg has also taken account of their potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg has conducted, *inter alia*, a Regulatory Impact Assessment (see

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



Section 7) in accordance with the Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with section 13 of the Communications Regulation Act, 2002) published in February 2003.

- 6.16 Finally, the remedies chosen will be incentive compatible. This means that the remedies will be selected and designed in a manner that ensures compliance with regulation outweighs the benefits of evasion.
- 6.17 ComReg notes general agreement with the principles which were laid out in the consultation as a basis for selecting remedies. Three respondents raised issues to do with the implementation of a Regulatory Impact Assessment. This is dealt with in Section 7.
- 6.18 ComReg agrees with respondents that the duration of the review period will affect the view taken of likely changes in the market, and notes that one respondent rightly pointed out that a 3 year horizon might produce different conclusions to an 18 month horizon. ComReg has based its market assessment on a time horizon of around 2 years<sup>41</sup>. ComReg wishes to emphasise that this timescale is to aid market assessment and in no way commits ComReg to a rigid review timetable. This is particularly important given the qualification throughout this response noting areas which require close monitoring.
- 6.19 ComReg notes that two respondents raised questions to do with the approach to the market analysis, and the consequent basis for justifying remedies. Specifically, these respondents suggested that remedies could only be justified where there was a catalogue of past examples of actual abuse of dominance. However, the nature of an ex ante analysis is that actual and potential instances of market failure must be considered, and ComReg notes that several OAOs concurred with ComReg's presentation both of actual and of potential examples. ComReg is therefore of the view that market failure is clearly demonstrated in both the lower and higher level access markets. It should be noted that both markets are currently regulated, and therefore instances of the exercise of market power should be limited.
- 6.20 ComReg is obliged, where a designation of SMP has been proposed, to impose at least one obligation<sup>42</sup>. Therefore some form of ex ante regulation is required. 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*'. ComReg notes that eircom clearly has SMP in these markets. All respondents have agreed that eircom's market share is 99% of the lower level market and 77% of the higher level market. It is ComReg's view that, based on its analysis of competitive conditions in the markets, no current service provider is able to impose a sufficient competitive constraint on eircom. ComReg cannot see this situation as changing significantly within the lifetime of this review.
- 6.21 ComReg concludes that the appropriate principles to use in selecting remedies have been identified.

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<sup>41</sup> SMP Guidelines para 20

<sup>42</sup> SMP Guidelines paras. 21 and 114.

## Remedies Proposed

6.22 SMP may give rise to a range of problems associated with single market dominance, and vertical and horizontal leveraging. Intervention will be necessary in both the wholesale and the retail markets to mitigate potential competition problems.

### Wholesale remedies

6.23 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.

6.24 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 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.

6.25 ComReg therefore notes that it is obliged to impose obligations for the purpose of ensuring the SMP operator's subscribers can access CA/CS and CPS<sup>43</sup>.

6.26 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. 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.

6.27 Given the finding of SMP in the retail fixed access market, ComReg is obliged to impose obligations to ensure that subscribers of the SMP operator have access to CA/CS and CPS. Details of the current implementation and requirements for ongoing product development of CA/CS and CPS are dealt with in the Response to the Consultation on Retail Calls (doc ref 05/26).

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<sup>43</sup> Carrier Access (CA), Carrier Select (CS) and Carrier Pre Select (CPS)

## Conclusion

- 6.28 **ComReg will impose obligations on the SMP operator to ensure that its subscribers have access to CA/CS and CPS.**

### Wholesale Line Rental

- 6.29 ComReg proposed that eircom should be obliged to provide a Wholesale Line Rental (WLR) product in line with requirements as determined by ComReg. These requirements are derived from obligations under the Access Regulations. ComReg noted that the provision of the product until now has required a high level of regulatory intervention to ensure the implementation of the specification. ComReg notes that since the launch of the automated version of WLR in April 2004, almost 79,000 lines have been transferred. This figure includes CPS customers who have migrated to WLR. While this indicates strong early adoption of the product, ComReg notes that WLR customers still constitute a very small part of the overall market, in that they account for just over 1.3% of total fixed access paths. To date, much of the take up of WLR is accounted for by operators switching their existing customers to WLR and that it remains to be seen what the growth rate of WLR is when the process is completed.
- 6.30 ComReg believes that the market analysis and identification of competition problems carried out in the 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.
- 6.31 ComReg considers that there is a continuing need for regulatory involvement in the direction of product development and implementation, such that ComReg will continue to be actively involved in negotiating the content and development of the WLR product. ComReg considers that there is a continuing need for regulatory involvement in the direction of product development and implementation, such that ComReg will continue to be actively involved in negotiating the content and development of the WLR product. This view is supported by ongoing requests from OAOs for ComReg to intervene.
- 6.32 ComReg believes that there are two issues for consideration. First is the proposal that eircom should offer a WLR product under the obligations of the Access Regulation. All respondents broadly agreed with this, and noted that it was consistent with EC Recommendations and with the Ministerial Direction.
- 6.33 The second issue concerns ComReg's role in the development of the WLR product. ComReg has described the process of developing the WLR product, and notes that OAOs have confirmed its experience. It is ComReg's view that there is a continuing need for regulatory involvement in product development and implementation, in the context of inter-operator processes and end-user experience. OAOs continue to support the need for ComReg to protect the integrity and facilitate the implementation of the suite of WLR product documentation, including, but not limited to, the WLR product description, the inter-operator SLA<sup>44</sup> and the WLR Code of Practice.
- 6.34 ComReg notes that, in the time since this market review was launched, there have been further requests from OAOs to review SLAs due to concern over several elements of the SLA. This is further confirmation that it is not sufficient

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<sup>44</sup> Service Level Agreement

to ensure the existence of the wholesale inputs necessary to offer the product, but that there is a continuing concern with how these inputs are provided in terms of quality, timeliness and scope.

- 6.35 One respondent objected to the proposal that ComReg should determine the requirements of the WLR product; ComReg does not support this objection. In common with other determinations, these are not ComReg's requirements. Rather, they are based on Access obligations, and are as agreed with industry.

### Conclusion

- 6.36 **It is ComReg's view that eircom should be obliged to offer a WLR product under the obligations of the Access Regulations, and that this product should be offered in line with requirements as determined by ComReg.**

- 6.37 ComReg notes that the wholesale measures defined above mandate the provision of CA/CS and CPS and WLR under the terms of Regulation 16(1) of the Universal Service Regulations. ComReg considers that, as well as mandating the need to offer these products, it is necessary to address their implementation and development. ComReg justifies this with reference to the experience of the development of these products so far.

- 6.38 The implementation and development of CA/CS and CPS is discussed in the Review of Retail Calls (doc ref 05/26). In order that the access elements of the CPS/WLR product can continue to be offered in line with industry agreed requirements, ComReg proposes to impose the following obligations under the Access Regulations.

- Obligation of access
- Obligation of non-discrimination
- Obligation of transparency
- Obligations of price control and cost accounting

- 6.39 The following sections detail these obligations.

### Access to and use of specific network facilities

- 6.40 ComReg proposed 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.
- 6.41 To support this proposal, ComReg noted 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.
- 6.42 ComReg notes that all but one respondent supported the proposal that an access obligation be imposed mandating WLR. The respondent who disagreed disputed ComReg's version of the development of the product up till now.
- 6.43 ComReg welcomes the increase in WLR orders, particularly in the last few months. However, as noted earlier, there has been a continuing requirement for regulatory intervention. ComReg's experience continues to be that the

implementation of this product requires ongoing intervention, and this view is supported by OAOs.

### **Conclusion**

- 6.44 An access obligation should be imposed on the SMP operator mandating Wholesale Line Rental.**

#### Access to wholesale products

- 6.45 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.
- 6.46 ComReg notes agreement amongst respondents that the SMP operator should be obliged to permit access to the wholesale products relevant for the offer of WLR. ComReg agrees that the obligation refers to those elements which are necessary for the provision of a viable offering.

### **Conclusion**

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

#### Open Access

- 6.48 ComReg considered that, insofar as it is required to avail of access, the SMP operator should also grant open access to relevant information, technical interfaces, protocols, or other key technologies, and should be required to provide such OSS or similar software necessary to ensure fair competition in the provision of services.
- 6.49 ComReg noted that when products are mandated 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.
- 6.50 ComReg notes broad support for the proposal that the SMP operator should be required to grant open access to relevant support elements for the provision of WLR.
- 6.51 ComReg does not agree with one respondent that this requirement constitutes an operational detail, and as such should not be part of this consultation. ComReg views it as fundamental that OAOs are able to access the supporting elements necessary to provide a WLR product. ComReg agrees that a basic level of open access has been made available, but notes that this level is not considered adequate by OAOs and is indeed the subject of many referrals to ComReg.

### **Conclusion**

- 6.52 The SMP operator should be required to grant open access to relevant information, interfaces, protocols and key technologies, and should be required to provide OSS or similar software to ensure fair competition in WLR.**

## Withdrawal of Access

- 6.53 ComReg proposed 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.
- 6.54 ComReg noted that 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 proposed 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.
- 6.55 ComReg considers that it is necessary to balance the need to provide OAOs with certainty regarding products against the practicalities of ensuring this certainty.
- 6.56 ComReg has considered whether relying on ex post disputes on the withdrawal of facilities would be an adequate safeguard for OAOs, and believes that it would not. ComReg believes that there is validity in the point raised by one respondent that it may not be practical to initiate a public consultation automatically should access to a facility be withdrawn.
- 6.57 ComReg therefore considers that the SMP operator should be required not to withdraw access to facilities already granted, except with ComReg approval. ComReg's response would be based on appropriate consultation, which may, but not necessarily, include public consultation.

**Conclusion**

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

## Approach to SLAs

- 6.59 ComReg proposed 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.
- 6.60 While ComReg agrees with respondents that a key purpose of the SLA is on a means of ensuring that there is no discrimination between the SMP operator's retail arm and the OAOs, it is ComReg's view that the SLA also dictates the quality of wholesale inputs available to the OAOs, and that this shapes the service which can be offered. In ComReg's view, the SLA is key to making the product fit for use.
- 6.61 Respondents raised the issue of the inclusion and enforcement of penalties within the SLA. ComReg notes that there are penalties in place for other SLAs. It was not ComReg's intention to suggest that it would impose penalties – clearly, this is a contractual matter between the SMP operator and the OAO. However, generally, ComReg supports the use of penalties as a means of making sure that the SLA is effective.

## Conclusion

- 6.62 **ComReg considers that the SLA is central to ensuring that the product is fit for purpose, and its establishment should be supported with a transparency obligation.**

### Non-Discrimination

- 6.63 ComReg proposed that an obligation of non discrimination was necessary to provide the same ability to OAOs to purchase wholesale access to retail lines as would apply to eircom's direct provision of access.
- 6.64 ComReg proposed 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.
- 6.65 The imposition of a non-discrimination obligation would mean that the SMP operator 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 it 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 the SMP operator's retail arm and associates. The SMP operator's downstream arms should not have privileged access to wholesale inputs, not available to other operators.
- 6.66 In assessing what would be viewed as an equivalent product, ComReg's concern is that OAOs should be able to offer a fit-for-purpose product, and this requires access to the same wholesale products and services as is available to the SMP operator's retail arm.
- 6.67 ComReg agrees with most respondents that an obligation of non-discrimination is an essential remedy to target the kinds of actual and potential competition problems which have been identified in the retail access markets. ComReg believes that the potential for the SMP operator to discriminate, justifies the imposition of non-discrimination as an obligation.

## Conclusion

- 6.68 **ComReg will impose an obligation of non-discrimination on the SMP operator.**

### Transparency

- 6.69 ComReg proposed that an obligation of transparency should be placed on the SMP operator. This obligation ensures that OAOs have sufficient information and clear processes to which they would not otherwise have access. This assists their entry into the market and hence promotes competition. Transparency also provides a method of ensuring compliance with a non-discrimination obligation, as the information needed to measure this would not otherwise be available.
- 6.70 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.

- 6.71 Currently eircom publish – as part of the Reference Interconnection Offer – Service Schedules for the WLR<sup>45</sup>. 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 expects that any new offerings developed pursuant to Regulations 11 and 13 of the *Access Regulations* should also be detailed in a reference offer.
- 6.72 ComReg notes broad agreement with the principle of transparency, which is essential to promote competition and to ensure that there is no discrimination. ComReg notes also that there was broad agreement that reference offers should be maintained for the WLR product and any new developments of it.
- 6.73 ComReg does not agree with the respondent who believed that any requirement for transparency is satisfied by current practice. ComReg has been generally supported by all other respondents in its assessment of competition problems in this market, and in its identification of actual and potential difficulties. ComReg can therefore not accept the proposal that there have been no problems in this market, and that therefore there will be no problems in the future.

## Conclusion

- 6.74 An obligation of transparency should be imposed on the SMP operator. 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.*

- 6.75 ComReg proposed to continue with the application of the retail minus price control for WLR for the period of this review.
- 6.76 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. Given that WLR is a relatively new product, and taking into account the experience with CPS and the time taken for it to have a significant impact on the market, ComReg proposed 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.
- 6.77 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. ComReg notes general agreement amongst respondents that the application of the retail minus price control should continue for the lifetime of this review, but that in the longer term, a move towards cost-orientation on the basis of FL-LRIC could be considered. ComReg's decision

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<sup>45</sup> See in particular Service Schedule 401



regarding whether to base WLR price on cost will be strongly influenced by the impact of Local Loop Unbundling on retail access.

- 6.78 ComReg supports the respondents whom agreed that the application of the retail minus price control should continue for the lifetime of this review, but that in the longer term, a move towards cost-orientation on the basis of FL-LRIC could be considered. The appropriateness of moving towards FL-LRIC will be considered in context of market development as part of ComReg's next market review of the relevant market.
- 6.79 ComReg notes comments from respondents on the level of the margins set under the present formula. WLR is a new service. Its growth rate so far suggests that a good price point has been achieved, and it is ComReg's view that the market would be best served by a period of certainty and predictability as regards prices. The current level of retail minus compares favourably with that of other European markets.
- 6.80 In considering one respondent's proposal to align the period for which retail minus would apply with the period proposed for control of the unbundled metallic path, ComReg recognises that there is a relationship between the costs of the local loop and the costs of WLR.
- 6.81 ComReg proposed to continue with the application of the retail minus price control for WLR for the period of this review subject to the consideration outlined regarding LLU.

### **Conclusion**

- 6.82 **ComReg intends to continue with the application of the retail minus price control for WLR.**

### *Cost Accounting Systems*

- 6.83 ComReg proposed to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim ComReg proposed that it maintains the existing level of cost accounting system obligation on eircom until such time as any further consultations are completed.
- 6.84 ComReg outlined its view that the obligation of cost accounting systems supports the obligations of price control and accounting separation. 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.
- 6.85 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.
- 6.86 ComReg set out in the market review its reasoning of the need for obligations relating to cost accounting. ComReg notes that all but one respondent agreed with ComReg's principles.
- 6.87 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. It was therefore proposed that a consultation would consider cost accounting systems and the accounting separation methodologies which support these systems. Current systems and

obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents supported the need for further consultation.

## **Conclusion**

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

### Accounting Separation

- 6.89 ComReg proposed to consult further on accounting separation but in the interim, ComReg is proposing to maintain the existing level of accounting separation on the SMP operator until such time as any further consultations are completed.
- 6.90 ComReg outlined how an obligation of accounting separation supports the obligations of non-discrimination and cost-orientation.
- 6.91 At present, ComReg requires 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.
- 6.92 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.
- 6.93 In circumstances where retail minus is imposed as a form of price control and for the accounting separation remedy to be effective, further information on the associated retail costs will be necessary to enable the calculation of the retail minus price control. ComReg proposes to discuss this issue further in the proposed consultation on accounting separation.
- 6.94 ComReg proposed to implement accounting separation on a by service and/or product basis, in order to ensure that products and services are being provided on a non-discriminatory basis, and to discourage possible cross-subsidisation of pricing at a service level.
- 6.95 ComReg set out in the market review its reasoning of the need for obligations relating to accounting separation. ComReg notes that three respondents agreed with ComReg's principles, and two do not.
- 6.96 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. It was therefore proposed that a consultation would consider cost accounting systems and the accounting separation methodologies which support these systems. Current systems and obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents supported the need for further consultation.

## **Conclusion**

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

### **Regulatory Controls on Retail Markets**

- 6.98 ComReg recognises the importance of wholesale telephone line rental (together with other elements of the regulatory package such as CPS and single billing) to the advancement of competition. In order to remove barriers to market entry or support entry in to new sectors by existing players, eircom, as previously outlined, should continue to be obliged to offer a WLR product under the obligations of the Access Regulations, and that this product should be offered at least in line with requirements as already determined by ComReg.
- 6.99 In conjunction with the CPS provision, it is envisaged that in the longer term the WLR product will stimulate competition in retail markets. In particular, it will facilitate consumer demand in respect of single billing thereby removing a barrier to competition. However, the impact of WLR (CPS and single billing) is difficult to predict with any great certainty. Overall, progress is good and in line with expectation. Only six months after its launch, Single Billing has shown great potential to make a very positive impact on competition. However, it is not yet possible to come to overall conclusions on its impact on line rental and this will require more time to evaluate fully.
- 6.100 While WLR will contribute to improving retail competition, its effect within the lifetime of this review is expected to be limited, particularly given previous experience with CPS. The impact of the introduction of the WLR product on competition and line rental is insufficient to meet fully the objectives of the office at this time. 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. In order to prevent eircom from exploiting its advantages and blocking entry to new operators by using its market power, ComReg needs to intervene where appropriate at the wholesale and retail levels.
- 6.101 ComReg has considered price controls in retail markets that will be the most effective and proportionate way to develop competition further and to protect consumers. In light of the consultation responses, ComReg sets out here its final proposed position with respect to appropriate retail remedies.

### **Price control**

- 6.102 Price controls have provided consumers with protection in markets in which eircom has had monopoly power and continues to have market power. ComReg has imposed price controls on eircom via a price cap mechanism limiting its freedom to increase prices for a group of services notably access (connection and rentals) and calls (domestic, operator assisted, payphone and fixed to mobile calls). An overall price cap of CPI-0% has been in place since February 2003. Additional protection is offered to relatively low users through the Vulnerable

User Scheme<sup>46</sup> which was introduced in order to limit the increases in the size of the vulnerable users' telephone bills. ComReg expects that eircom will continue to offer this product.

- 6.103 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 overall price cap. Removing the specific constraint on access pricing (sub cap on access) 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, prices are now at or above cost.
- 6.104 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.
- 6.105 In considering price controls as a remedy for problems identified in the fixed access market, ComReg identified options in two key areas. These are:
- Price cap measure
  - Cost orientation

#### *Price Cap: Lower Level and Higher Level Narrowband Retail Access services*

- 6.106 In consultation, ComReg invited comment as to whether the state of competition in the market and its likely development warrants the maintenance of a price cap, its extension, or its removal. Respondents were also asked to comment on issues ranging from the specific need for some form of upper limit price control on access services to the form of price control that should be applied. Each of these issues will be dealt with in this section. In each case a summary of the respondent's views is presented together with ComReg's proposed final position. ComReg has considered carefully the representations it has received from all interested parties in response to the consultation and in detail at Appendix C.
- 6.107 The last consultation of this market<sup>47</sup> proposed to maintain the current price cap until markets are next reviewed for SMP designation and remedies. At that time, a full review of the price cap would be carried out. In addition, ComReg proposed that because of eircom's likely continued strong position in access and persistent high market share, some form of upper limit price control could be applied specifically to both lower and higher level access prices. This could, as at present, take the form of a general cost-orientation obligation, in addition to

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<sup>46</sup> It is a condition of the Telecommunications Tariff Regulation Order 2003 (the 'Order') that a vulnerable user scheme be put in place by eircom in order for the price cap formula of CPI - 0% to apply to the basket of services to which the Order applies. If such a scheme is not in place, the price cap formula in the Order will be adjusted so that, in respect of the lower quartile bill, the price cap will be CPI + 0%.

<sup>47</sup> Market Analysis – Retail Fixed Narrowband Access Markets Consultation 04/95

the current price cap. Alternatively, it could take the form of a sub-cap or individual cap on retail access. The specific cap could include PSTN line rental only, within the range of CPI-0% and CPI-CPI, or it could include a wider range of access services. For example, the specific cap could include ISDN BRA lower level access or ISDN FRA and PRA higher level access.

- 6.108 ComReg notes a level of dissatisfaction with the current price cap, and notes also the range of views presented by industry as to how this should be addressed. For two of the respondents, the favoured route would be to maintain a remedy at the wholesale level, and to reduce regulation at the retail level. However, the other three respondents favour an increase in regulation at the retail level via the introduction of a price cap on access. As with the discussion of lower level price controls, respondents views on remedies for the higher level market were diverse, with one respondent favouring reliance on wholesale measures, and another suggesting that a separate sub cap should be introduced on higher level access. It is clear from the views of respondents and the consideration outlined in the paper that there is a need to introduce some form of upper limit on access.
- 6.109 As outlined above, ComReg has given due consideration to whether it may be more appropriate to deal with the persistent market failure through direct wholesale measures in the absence of retail price controls. ComReg notes that while competition is developing in the higher level access market, it is not clear that competition is fully protecting all consumers at this time. The price cap imposed by ComReg in 2003 recognised a number of important dynamics in the voice telephony markets. Firstly, there was by now a well established wholesale regime in place at cost orientated prices which allowed competing operators to offer service through Carrier Select/Carrier Pre Select. Secondly, there was a recognition, in Ireland as in other European countries, that the cross subsidisation implicit in historical rates would have to cease and access charges, (notably, the line rental) would have to rise in order to recover efficient costs, in line with EU legislation. Thirdly, it was important to preserve the relativities of wholesale and retail rates. For all these reasons, it was felt that a cap of CPI-0%, with the removal of a sub cap on access, would achieve a number of desired objectives; it would prevent consumer prices overall from rising above the rate of inflation, while allowing some necessary rebalancing of rental and call charges and also allowing further competition to develop on calls, which in itself would act as a check on prices.
- 6.110 However, ComReg has recently determined the cost of the local copper loop as being €14.65 per month. Given that the retail line rental is €19.98 per month,<sup>48</sup> ComReg believes that, even allowing for the additional costs over and above the cost of the local copper loop required to provide access to voice services (such as the line card, fault repair, and retail costs), eircom is now fully rebalanced. ComReg therefore expects that it will no longer be acceptable for eircom to increase access prices in order to rebalance tariffs.
- 6.111 In any case, ComReg would not expect an increase in line rental as the current charge (EUR 19.98 excl. VAT) is the highest in Europe by some distance as illustrated below. The margins between retail line rental and LLU are also among the highest in Europe. This raises concerns about the cost justification of line rental and also its affordability for consumers. ComReg envisages that the

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<sup>48</sup> Prices are exclusive of VAT

package of direct wholesale solutions such as WLR and CPS will level the playing field and promote competition in fixed retail markets. However, the current retail minus mechanism for WLR would not appear to impose downward pressure on retail prices, in particular access. *eircom* as the dominant operator in fixed access has the clear ability to significantly increase line rental.

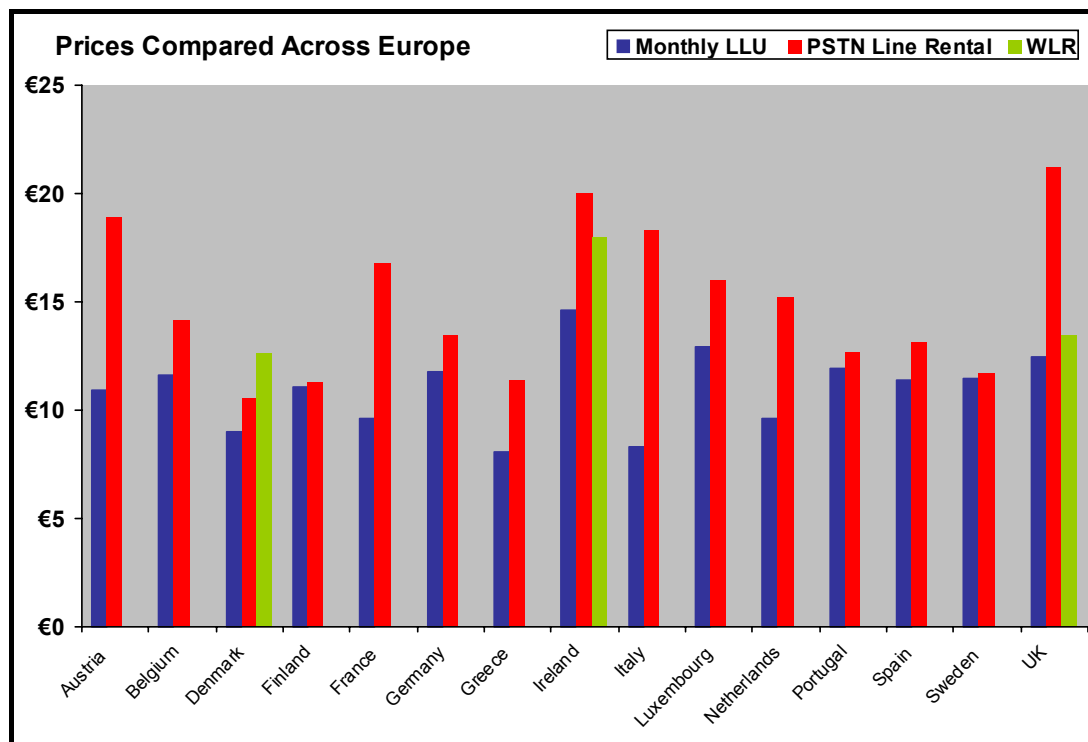


Figure 6.1: LLU Prices Compared Across Europe (Retail and Wholesale Pricing)<sup>49</sup>

- 6.112 ComReg believes there is considerable risk that retail access prices could depart from those provided under more competitive conditions. ComReg maintains that there is a continuing requirement for regulation at the retail level in the markets for fixed access, and that this regulation should include price control. The current price cap on *eircom* should be maintained until the full effect of wholesale measures is felt and can ensure lower prices overall through greater choice of product and provider for the consumer. Any withdrawal of the price cap mechanism only makes sense as a response to competition in fixed retail markets. In turn, this can only happen if terms of access are reasonable.
- 6.113 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 cap.<sup>50</sup> ComReg intends therefore to continue to require *eircom* to comply with its obligations under the current Price Cap Order. In addition, to ensure *eircom* does not raise line rentals in the absence of more significant call price reductions, in particular, domestic calls, it may be

<sup>49</sup> Source: ComReg Feb 2005. VAT excluded.

<sup>50</sup> ComReg Document No 03/14

appropriate to apply a sub cap to particular services in the basket to restrict flexibility in pricing, notably PSTN line rental. The aim of such a price cap would be to further protect consumers from large and sudden increases in line rental going forward.

- 6.114 In addition, to continuing with the current Price Cap Order, ComReg intends, to impose a sub cap on PSTN line rental of CPI-CPI for a period of one year, effective from the date of the Decision. ComReg proposes that the sub cap on line rental in any subsequent year would to be CPI+0% as this is the most likely to meet the demands of consumer protection and facilitating competition. This will ensure that the alignment of costs and price in respect of retail line rental is maintained. Additionally, the sub cap aims to protect vulnerable users who are more likely to avail of PSTN rather than ISDN BRA or hi-speed services.
- 6.115 ComReg does not intend to impose the sub cap on other line rental products within the market for lower level access, as historically ISDN BRA line rental has not been subject to the same price increase as PSTN line rental and tariffs may not yet be rebalanced. ComReg notes that eircom decreased its line rental for ISDN BRA access in 2002 which is indicative of a greater competitive constraint imposed by OAOs. While eircom's dominance is persistent in higher level access, ComReg also recognises that competitive conditions in the higher level market are improving. ComReg does not propose to introduce a sub cap on higher level access but will continue to closely monitor developments in this regard.
- 6.116 Introducing a sub cap on PSTN access only, ComReg is seeking to find the best balance between the interest of consumers and the long term sustainability of the industry. ComReg concludes that maintaining the price cap at this time and, in addition, introducing a sub cap of CPI-CPI on PSTN access for a period of one year will best achieve this balance. It is still important that a retail price control on eircom be maintained where it holds a dominant position in the provision of both access and domestic calls. In the interests of consumer protection, a tougher price cap will be considered if competitive pressures on price have not increased via LLU or WLR as previously discussed. A price cap review will be carried out as soon as is practicable.

### Conclusion

- 6.117 **In light of the foregoing, ComReg is seeking to maintain the current price cap as a retail remedy under this particular market review.**
- 6.118 **eircom shall continue to comply the Price Cap Order.**
- 6.119 **In accordance with Regulation 14(2) of the *Universal Service Regulations* eircom will comply with the requirement of sub cap on PSTN line rental at a rate of CPI-CPI for one year effective from the date of the Decision. eircom will comply with the requirement of sub cap on PSTN line rental at a rate of CPI-0% in any subsequent year, if appropriate.**
- 6.120 **eircom shall continue to comply with the Price Cap Order in respect of the effective upper limit on price for lower level ISDN BRA access and higher level access. A specific sub cap on lower level ISDN BRA access and higher level access will not be imposed but will remain subject the constraint of the current overall cap CPI-0%.**

*Cost Orientation for Retail Prices*

- 6.121 ComReg noted that 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.
- 6.122 Respondents' views were mixed, with one respondent proposing that wholesale measures should be sufficient, and three others stating strongly that a cost orientation obligation was necessary alongside price cap control.
- 6.123 While ComReg recognises that 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, it believes that there is a continuing need for cost orientation as a principle across the access markets. ComReg therefore intends to impose a cost orientation obligation on the SMP operator.

**Conclusion**

- 6.124 **The SMP operator will be obliged to ensure that its tariffs follow the basic principles of cost orientation.**

## Obligation not to show undue preference

- 6.125 ComReg proposed 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 proposed to place an obligation not to show undue preference on the SMP operator.
- 6.126 An obligation not to show undue preference 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 associated with supplying different sets of customers.
- 6.127 ComReg notes that all respondents agreed that there should be an obligation not to show undue preference at the retail level.

**Conclusion**

- 6.128 **The SMP operator should be subject to an obligation not to show undue preference.**

## Transparency: Publication and notification of terms and conditions

- 6.129 At present, eircom notifies ComReg and publishes any changes to terms and conditions 21 days before they come into effect. Current practice is that eircom has usually and voluntarily provided an additional 7 days' notification to ComReg before publication. Designated with SMP, eircom was also obliged to



supply such services only at the published prices and in accordance with published terms and conditions.

- 6.130 ComReg noted that there are two key issues to consider. First, advance publication of changes to terms and conditions allows other operators and consumers time to respond to changes, but have the potential disadvantage that other operators may simply follow the price changes of the SMP operator, and this might reduce the degree to which they introduce innovative or aggressive price changes. Second, advance notification to ComReg of changes in terms and conditions gives ComReg the opportunity to raise concerns relating to principles such as transparency, cost-orientation, and non-discrimination before any changes become effective.
- 6.131 Currently, ComReg does not formally approve changes to prices, terms and conditions offered by eircom, but intervenes where ComReg believes that eircom is in breach of its obligations.
- 6.132 The consultation asked for comment firstly on advance publication of changes to terms and conditions, and secondly on advance notification to ComReg of changes in terms and conditions. ComReg proposed also that there should be some administrative clarification of the process, by measuring time periods in working days rather than calendar days. ComReg also proposed to retain the current obligation that the SMP operator should publish changes at least in one of the following: national newspaper, in *Iris Oifigiuil*, and in its public offices. Public notice should be given in the manner as is currently, notably, in a national newspaper, in *Iris Oifigiuil* and on the eircom website.
- 6.133 ComReg would also expect the SMP operator to ensure that planned changes to prices, discount levels, terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.
- 6.134 ComReg notes that all respondents agreed that ComReg should be notified in advance of proposed changes to terms and condition in fixed access.
- 6.135 ComReg understands the concern of the respondent who did not agree with advance publication of changes, and recognises the possible disadvantages in terms of competition. However, given the very low level of competition in the lower level access markets, and the relatively recent introduction of services such as WLR, ComReg believes that it is too soon to relax the obligation to publish proposed changes to terms and conditions in advance.
- 6.136 ComReg does, however, recognise that there is increasing competition in the higher level access market. While eircom's market position remains at a level which warrants some regulatory intervention at the retail level, ComReg has decided to remove the requirement to publish changes to terms and conditions in the higher level market in advance. ComReg has carefully considered the advantages and disadvantage of advance publication of retail terms and conditions, and believes that, in the higher level market, competition is best served by relaxing this obligation.
- 6.137 ComReg notes the proposal that it should formally approve changes prior to their coming into effect. ComReg is not currently responsible for approving changes. ComReg's prime concern in being notified in advance is that it facilitates the identification of potential anti-competitive behaviour. In

ComReg's view, it would be unnecessarily intrusive to extend its role. However, ComReg would expect the SMP operator to ensure that planned changes to terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.

- 6.138 The obligation of transparency is not confined to the publication of tariffs. Publication without implementation of what is published would be in accordance with the transparency requirement. *eircom* therefore designated as having SMP in the relevant access market will continue to be required to ensure that retail call tariffs follow the basic principle of transparency. In that regard, it is proposed that *eircom* shall be required, in respect of lower level and higher level access markets, to supply such services only at those prices published in accordance with those obligations described above and in accordance with any other terms and conditions for the relevant services published in accordance with Regulation 18 of *the Universal Service Regulations*.
- 6.139 ComReg notes agreement with its proposed administrative changes.

### Conclusion

- 6.140 **The SMP operator should be obliged to notify ComReg at least 20 working days in advance of proposed changes to prices, terms and conditions in the lower and higher level access markets.**
- 6.141 **The SMP operator should be obliged to publish changes to prices and terms and conditions in the lower level access market at least 15 working days in advance of their coming into effect.**
- 6.142 **The SMP operator should be obliged to publish changes to prices, terms and conditions in the higher level access market when they come into effect.**
- 6.143 **The obligation that the SMP operator should publish changes in *Iris Oifigiuil*, a national newspaper, its public offices and web site should be retained.**

### *Retail Bundling*

- 6.144 ComReg proposed to impose an obligation that the SMP operator shall not unreasonably bundle services. This would apply 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).
- 6.145 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. The main purpose of a bundling obligation is to prevent foreclosure of markets through leveraging of market power which could have a detrimental effect both on operators and consumers. Bundling by its nature can also lead to a lack of transparency as two or more products are sold as a single package. However, ComReg recognises that bundling can lead to economies of scale or scope for operators and this in turn can lead to savings for consumers.

- 6.146 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.
- 6.147 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.
- 6.148 ComReg asked for comment in this review of the retail access markets on whether an obligation should be placed on the SMP operator to prevent unreasonable bundling. ComReg would consider it unreasonable to bundle products or services in such a way that customers can only purchase any product/service included in the bundle by purchasing the bundled product. In practice this means that ComReg would expect the SMP operator to be offering all the unbundled elements of the bundled product /service as separate products/services where eircom is dominant. ComReg proposes to consider in further detail the pricing issues where the bundled product is comprised of elements from SMP and non SMP markets.
- 6.149 ComReg considers that there are two key issues. First, a customer should be able to purchase a product or service included in a bundle without having to purchase the whole bundle. None of the respondents commented on this point, and it is ComReg’s view that it is reasonable to require the SMP operator to offer the elements of a bundle as individual products or services.
- 6.150 The second issue is to do with access at the wholesale level to the elements of a bundle. ComReg notes the economic benefits associated with bundling, and that respondents agreed that bundling can benefit the market, the operator and the consumer. ComReg’s approach to bundling is to ensure that it cannot be used to abuse SMP. Therefore, any remedy must address the prevention of anti-competitive practice. This will ensure that OAOs are able to assemble the element of a bundle in such a way that it can operate on fair terms with eircom.
- 6.151 ComReg recognises the potential advantages of bundling as well as the potential disadvantages, and emphasises that its primary concern is to prevent bundling being used as an anti-competitive practice. ComReg wishes to note that further issues relating to bundling will be considered in its review of margin squeeze, which is due to be published in the first half of 2005.
- 6.152 ComReg notes that one respondent is concerned with the legal status of “reasonable”. ComReg’s legal basis for proposing this obligation is Article 17 of the USD which states that “obligations imposed may include requirements that the identified undertakings do not...unreasonably bundle services”.

### **Conclusion**

- 6.153 **An obligation should be placed on the SMP operator to ensure that services are not unreasonably bundled.**

### *Cost accounting and accounting separation*

- 6.154 The *Universal Service Regulations* states that ComReg must ensure that, where an undertaking is subject to retail tariff regulation or other retail controls, the necessary and appropriate cost systems are implemented. ComReg may specify

the format and accounting methodology to be used, and must cause a statement of compliance to be published annually. Overall compliance with the cost accounting system should be verified by ComReg or another suitably qualified independent body.

- 6.155 In order to demonstrate cost orientation of a service or product, it is necessary for the dominant provider to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality.
- 6.156 A cost accounting system is a set of rules to ensure the attribution and allocation of revenues, costs, assets, liabilities and capital employed to individual activities and services. More precisely, it is a means of establishing a recordkeeping mechanism, keeping tracks of costs. This results in a transparent illustration of the relationship between costs and prices, as the system should be able to analyse costs to a greater level of granularity in order to ensure that costs allocated to regulated services do not result in cross subsidies, excessive prices and, in general, that costs are efficiently incurred. ComReg considers that in order for it to be able to ensure compliance by eircom with its obligations of cost orientation, it is necessary for eircom to have in place a cost accounting system which includes separated accounts. ComReg is currently consulting further on this issue in more detail in a consultation on Accounting Separation and Cost Accounting<sup>51</sup>.
- 6.157 In deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the support of competition promotion, in order to ensure efficient and sustainable competition and must contribute towards maximising consumer benefits. In this regard, the requirement for eircom to put in place a cost accounting system which provides for the separation of accounts is designed to ensure that eircom's cost accounting system is a suitable system having regard to ComReg's obligation to ensure that eircom's tariffs for leased lines in the minimum set are cost oriented and demonstrate the presence or absence of margin squeeze and provide information on margins in the retail business.
- 6.158 As noted above, ComReg proposes to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as any further consultations are completed.
- 6.159 ComReg set out in the market review its reasoning of the need for obligations relating to cost accounting systems and accounting separation. ComReg notes that three respondents agreed with ComReg's principles, and that two did not. However, ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts, and without cost accounting systems which can suitably relate costs to products and services, it is not possible to fulfil the obligations of cost orientation and non-discrimination. ComReg notes that all respondents supported the need for further consultation.

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<sup>51</sup> Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

**Conclusion**

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

## 7 Regulatory Impact Assessment

### *Summary of consultation issue*

7.1 The Ministerial Direction issued by the Minister for Communications Marine & Natural Resources in accordance with S13 of the Communications Regulation Act, 2002 published in February 2003, directs:

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

7.2 ComReg believes the market analysis process represents a comprehensive review of the market under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction quoted in 7.1 above.

7.3 The impact of the remedies proposed has been assessed and considered throughout the initial consultation and this market review. Moreover, ComReg has given structured consideration of alternatives to regulation and of different regulatory approaches.

7.4 ComReg has upheld the principles outlined in the Government White Paper of Better Regulation<sup>52</sup>; these considerations are explained below. The impact and alternatives have been discussed throughout this consultation process and review of the market and the implications of regulatory compliance have been considered, particularly in light of any departure from the existing regulatory regime.

7.5 At the outset it is important to note that ComReg has endeavoured to select the appropriate level of intervention. A comprehensive consultation process has been undertaken. The remedies proposed take into account the dynamics between the retail and the wholesale market and have been adapted to ensure that there is no distortion at both levels of the market.

### *Consultation Question*

**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**

### *Views of respondents*

<sup>52</sup> Regulating Better: A Government White Paper setting out six principles of Better Regulation”. Appendix 1 – Regulatory Impact Analysis.

- 7.6 Of the respondents who commented on this question, two proposed that the remedies put forward by ComReg were proportionate and justified, noting that the market was failing and all steps needed to be implemented. One of these respondents believed that further consultation was needed on the price cap and on bundling, and proposed that a timeframe for remedies should be made clear.
- 7.7 Another respondent strongly supported the principle of carrying out a RIA, and requested clarification of the process. Specifically, the respondent asked when the RIA would be completed, how remedies would be made known, and whether operators would be included in the debate. The respondent's view was that a consideration of proportionality implied a cost benefit analysis of options. Finally, the respondent proposed that the timeframe for remedies should be made clear.
- 7.8 Another respondent believed that ComReg had not given adequate regard to the requirement to consider whether regulatory obligations would be better achieved by forbearance, and had not conducted a satisfactory RIA. The respondent's understanding was that in order to determine whether forbearance from regulation would better serve objectives, ComReg would need to first of all define the period for which any new regulation would have effect. ComReg would then have to compare the net benefit associated with the imposition of ex ante regulation with the net benefit of relying on market forces alone. In the respondent's opinion, the intent was that regulatory impact assessment should be carried out before any decision was made.
- 7.9 This respondent also questioned the proportionality and justification for some of the remedies proposed. This applied especially to the application of measures at the retail level. The respondent noted ComReg's view that that eircom's retail price for access in the lower level market had reached a level that reflected costs. The respondent could see no indication that eircom was likely to increase either higher or lower level access prices, as it would be constrained by competition in the higher level market, and constrained by increasing mobile substitution in the lower level market.

### ***ComReg's position***

#### **Remedies**

- 7.10 To recap, ComReg is proposing to impose the following remedies on the SMP operator in the markets for lower level and higher level narrowband access.
- 7.11 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 to impose remedies required to address these problems; past experience has shown that despite regulation at the wholesale and retail level, eircom maintains high market shares. Its infrastructural advantages and the lack of countervailing bargaining power at both the wholesale and retail level, justify intervention at both levels of the markets.
- 7.12 The *Access Regulations* and the *Universal Service Regulations* provide ComReg with a number of remedies it can apply given its preliminary finding of eircom's SMP in the retail fixed access markets.

Wholesale remedies

- 7.13 Under the *Universal Services Regulations* ComReg is obliged to impose an obligation to provide access for CA/CS and CPS, where there is a finding of SMP.
- 7.14 Furthermore, the conclusions of the market analysis of both the lower level and higher level narrowband access markets, where eircom has been found to have SMP, coupled with the persistence of the competition problems indicate a requirement for the continuation of Wholesale Line Rental (WLR) by the SMP operator.
- 7.15 ComReg believes that, in addition to mandating CA/CS and CPS and WLR, appropriate wholesale remedies to address market failure in the higher and lower level retail access markets are :
- An obligation to permit access to relevant wholesale products
  - An obligation to grant open access to relevant information, interfaces, protocols and key technologies and to provide OSS or similar
  - An obligation not to withdraw access to facilities already granted, except where ComReg has approved this withdrawal
  - An obligation of transparency
  - An obligation of non-discrimination
  - The continued application of retail minus price control
  - An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of further consultation.

Retail remedies

- 7.16 ComReg believes that wholesale measures are necessary but not sufficient to address competition problems in the retail markets and proposes to impose the following retail remedies for consumer protection:
- Maintenance of the current price cap under the new regulatory framework, to be applied to higher and lower level access markets.
  - Introduction of a subcap on PSTN line rental in the lower level access market, until such time as the price cap is reviewed, at a rate of CPI-CPI
  - An obligation of cost-orientation
  - An obligation of non-discrimination
  - An obligation of transparency, such that the SMP operator will be obliged to notify ComReg 20 working days in advance of changes to terms and conditions in the lower and higher level access markets. The SMP operator will be obliged to publish 15 working days in advance changes to terms and conditions in the lower level access market.
  - An obligation not to unreasonably bundle products and services
  - An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of further consultation.



**ComReg's Regulatory approach**

- 7.17 In considering these issues, the principles proposed in “Regulating Better: A Government White Paper setting out six principles of Better Regulation”<sup>53</sup>, provide useful assistance. The criteria to be considered when undertaking a regulatory impact assessment include:
- Identification or quantification (where possible) of impacts;
  - Structured consideration of alternatives to regulation and of different regulatory approaches;
- 7.18 Built-in comprehensive, consultation processes; and
- Formal consideration of compliance issues.
- 7.19 ComReg has carried out an extensive review of the market and concludes that the costs and benefits of regulatory intervention have been considered. As part of the review ComReg has assessed the impact of regulation and deems that it should be no greater than the current regulatory burden. An additional change to the level of regulation for the lower level access markets is proposed, by means of a sub-cap on PSTN line rental. 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 previously 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 with cost. Hence a sub-cap on access to line rental should not impose an additional regulatory cost or burden.
- 7.20 The sub cap on line rental will not be imposed on the other relevant products and services contained in the lower level access market, as ComReg is of the view that tariffs have been rebalanced only in relation to the PSTN ComReg further notes that eircom decreased its line rental for ISDN BRA access in 2002, which is indicative of a greater competitive constraint imposed by OAOs. Additionally, the sub cap aims to protect users under the Vulnerable User Scheme, who are more likely to avail of PSTN rather than ISDN BRA or hi – speed services. Thus the most proportionate approach is to impose the sub cap on line rental only in relation to the PSTN.
- 7.21 Furthermore, the analysis and consultation process which formed the current price cap included a cost benefit analysis which set the appropriate level of regulation.
- 7.22 Having considered the market structure and the dynamics of competition through the market analysis, ComReg believes that the market structure lends itself to vertical and horizontal leverage of market power. ComReg has considered the alternative forms of intervention to address the potential competition problems. ComReg has concluded that intervention is required at both the wholesale and retail level to prevent the leveraging of such market power. Indeed, markets forces alone would not be sufficient to eliminate the potential competition problems and hence forbearance is not a regulatory solution, as suggested by one respondent. Despite ComReg's past intervention at both a wholesale and retail level, this has not been sufficient to eliminate eircom's market power in the retail markets. eircom's persistently high market

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<sup>53</sup> Regulating Better: A Government White Paper setting out six principles of Better Regulation”. Appendix 1 – Regulatory Impact Analysis.

shares continue to merit intervention at both the wholesale and the retail level. An alternative regulatory approach, particularly forbearance, would not address the issues that span these markets.

- 7.23 ComReg proposes that intervention at the wholesale level is required and this aligns with the requirements of the *Universal Services Regulations*. The Regulations mandate ComReg to impose obligations at the wholesale level where SMP has been found. The obligation to provide access to CA/CS along with CPS is deemed to be necessary to enable subscribers to access the services of any interconnected provider of publicly available telephone services. eircom maintains persistent infrastructural advantages; its ubiquitous network represents a barrier to entry which is insurmountable for other operators and which necessitate and justify intervention at the wholesale level.
- 7.24 ComReg believes that it is necessary to ensure the continuation of the wholesale line rental product, as derived from the *Access Regulations*. Experience has shown that the obligations to provide CA/CS and CPS has not been enough to counteract eircom's dominance and control of the network. Without the availability of the WLR product other operators would not be able to overcome eircom's advantage in offering both access and calls to end-users. The sharp uptake of the WLR product since its introduction demonstrates the derived demand for such a product at the retail level. This obligation of access is necessarily supported by the accompanying obligations of transparency; non-discrimination; price control and cost accounting.
- 7.25 At the retail level, ComReg sees that despite regulation at the wholesale level, eircom's dominance persists. eircom remains in a position to exploit its market power and hence regulation at the retail level is necessary. The competition problems associated with vertical leverage necessitates an obligation which would prevent eircom's ability to raise prices above the competitive level and hence to protect consumer interests. For this reason, ComReg deems that it is appropriate to maintain the price cap on lower level and higher level narrowband access.
- 7.26 ComReg has considered and concluded that it is appropriate to continue the current price cap, which was concluded through an extensive review and a number of consultations which took place during in 2002 and 2003. ComReg continues to consider that this is the most appropriate method of ensuring consistent prices for consumers, while it has given the scope to enable the rebalancing of access prices with costs. Given that there have been several increases to PSTN line rental over the period of review; ComReg believes that tariff rebalancing is no longer necessary and that a sub-cap on PSTN line rental can be considered appropriate. ComReg does not intend to impose the sub cap on the line rental of other products contained in the lower level access market, as historically ISDN BRA line rental has not been subject to the same price increase as PSTN line rental and tariffs may not yet be rebalanced. In the event that market conditions change sufficiently within the timeframe of this review, ComReg may revisit the appropriateness of the proposed price cap.
- 7.27 The price cap as it stands would not be sufficient retail regulation and ComReg is of the view that an obligation of cost orientation is required to prevent excessive pricing. The vulnerable users scheme should also be maintained for this reason.

- 7.28 Furthermore, an obligation that eircom should not unreasonably bundle services is appropriate to maintain, which gives customers the flexibility of choice, yet recognises the advantages to both end users and operators of offering a bundled product.
- 7.29 The Government White paper on better regulation proposes that an adequate consultation process be followed. In this instance, the conclusions of this market review have incorporated evidence and views submitted by respondents to the consultation. Furthermore, an extensive consultation process and analytical framework was developed for implementing the price cap, and ComReg considers that it has carried out a cost benefit analysis for the use of this specific price control.
- 7.30 Respondents are further invited to submit their views on the draft measure pertaining to the obligations for these markets. Furthermore, ComReg will be consulting on its procedures for accounting separation and cost accounting systems.
- 7.31 ComReg has considered the various regulatory options and the burden of compliance associated with these measures. The suite of remedies proposed by ComReg is to a large extent, a continuation of the regime in place and hence should not place an additional burden on the SMP operator, nor should they cause any market distortion.
- 7.32 ComReg is of the view that the remedies outlined above are not overly burdensome, in light of the market structure and the potential competition problems. The obligations proposed maintain the regime currently in place with the addition of a sub-cap on PSTN line rental. The introduction of the latter obligation should not impose any additional burden to eircom as it is clear that eircom has been able to rebalance tariffs. There should be no additional burden on the SMP operator given that these obligations are currently in force, moreover, despite regulation at both a wholesale and a retail level, eircom continues to hold high market share in these markets.

## **8 Submitting Comments on the draft direction**

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

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

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

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

## Appendix A – Draft Decision - Retail Fixed Lower Level Access Market

- 1.1 In making this Decision and imposing the obligations set out herein, ComReg has, amongst other things, assessed the proportionality of these obligations relative to the objectives of ComReg set out in section 12 of the Act of 2002,<sup>54</sup> has taken the utmost account of the EU Commission’s Recommendation<sup>55</sup> and the Guidelines<sup>56</sup> and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister.<sup>57</sup> This Decision is based on the market analysis and reasoning conducted by ComReg in relation to the market for the retail fixed calls related to the Consultation Paper entitled *Market Analysis: Retail Narrowband Access Markets* (‘Document No. 05/25’) dated 22 March forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations<sup>58</sup>, Regulations 14 and 16 of the Universal Service Regulations<sup>59</sup>, Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations<sup>60</sup> and having regard to sections 10 and 12 of the Act of 2002.

## 2 MARKET DEFINITION

- 2.1 This Decision relates to the market for retail domestic access from a fixed location. The market in this Decision is defined as the market for lower level retail access from a fixed location<sup>61</sup> and differs from any defined in the EU Commission’s Recommendation.
- 2.2 The relevant geographic market for the market for lower level retail domestic access from a fixed location<sup>62</sup> is defined as Ireland.

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<sup>54</sup>The Communications Regulation Act 2002.

<sup>55</sup>EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>56</sup>Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

<sup>57</sup>Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

<sup>58</sup>S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>59</sup> S.I. No. 308 of 2003 the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>60</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>61</sup>Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA

<sup>62</sup>Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA

### 3 DESIGNATION OF UNDERTAKINGS WITH SMP

- 3.1 [e]ircom Limited (“Eircom”) is designated as having significant market power in the market for lower level retail domestic access from a fixed location<sup>63</sup> in Ireland (the “Market”).

### 4 SPECIFIC OBLIGATIONS

- 4.1 ComReg has found that the Market is not effectively competitive and, accordingly, shall impose obligations on Eircom in accordance with Regulations 10, 11, 12, 13 and 14 of the Access Regulations and Articles 14 and 16 of the Universal Service Regulations.

### 5. CARRIER SELECTION AND PRE-SELECTION

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

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

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

- 5.3 Without prejudice to the generality of sections 5.1 and 5.2, all of the obligations in relation to provision of those facilities referred to in Section 5.1, applicable to Eircom immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of those facilities referred to in Section 5.1 of the type, and in accordance with the processes, described in the Eircom Reference Interconnect Offer – Annex C -Service Schedule 120.<sup>64</sup>

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

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<sup>63</sup>Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA

<sup>64</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

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

## 6. WHOLESALE LINE RENTAL

6.1 Eircom shall have an obligation to meet reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities, by undertakings requesting access or use of such access products, features or additional associated facilities, which enable such other undertakings to provide retail equivalents to the retail products offered by eircom in the Market. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of wholesale line rental products of the type, and in accordance with the processes, described in:-

- Eircom Reference Interconnect Offer – Annex C -Service Schedule 401<sup>65</sup>;
- Single Billing through Wholesale Line Rental Code of Practice Version 1.2;<sup>66</sup>
- Single Billing through Wholesale Line Rental Service Level Agreement 31/03/04;<sup>67</sup>
- Single Billing through Wholesale Line Rental Product Description Version M;<sup>68</sup>
- Single Billing through Wholesale Line Rental Interoperator Process Manual Version 3.1.<sup>69</sup>

6.2 Without prejudice to the generality of sections 6.1, all of the obligations in relation to provision of those facilities referred to in Section 6.1, applicable to Eircom immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations. Without limiting the generality of the foregoing, Eircom shall continue to comply with, inter alia, the various requirements described in the following Decision Notices previously issued by ComReg:-

- D13/02 - CPS in Ireland 2002;
- D2/03 - Implementation of CPS Single Billing Products: Wholesale Line Rental (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS);
- D9/03 - Implementation of CPS Single Billing Products – Wholesale Line Rental and Agency Rebilling Updating of Timetable and Formalisation of Product Descriptions;

<sup>65</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

<sup>66</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrcopy1.2.pdf> and as amended from time to time in accordance with agreed processes.

<sup>67</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrsla.pdf> and as amended from time to time in accordance with agreed processes.

<sup>68</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrproddescversionm.pdf> and as amended from time to time in accordance with agreed processes.

<sup>69</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/sbwlrinteroppmanualv.3.1.pdf> and as amended from time to time in accordance with agreed processes.



- D4/04 - SB-WLR – Requirements for 31st March 2004 Launch Date.

- 6.3 Without prejudice to the generality of sections 6.1 and 6.2, Eircom shall in relation to those services referred to in section 6.1:-
- not withdraw access to facilities already granted without the prior approval of ComReg;
  - grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; and
  - provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.
- 6.4 Eircom shall publish and keep updated a reference offer (“RO”) in respect of the services and facilities referred to in section 6 that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. Eircom shall ensure that the RO includes 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.
- 6.5 Eircom shall make public such information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 6.1, as specified by ComReg from time to time.
- 6.6 Eircom shall conclude legally binding Service Level Agreements (‘SLAs’) with Other Authorised Operators (‘OAOs’) in respect of those facilities referred to in section 6.1.
- 6.7 Eircom shall publish all SLAs concluded (and as from time to time amended) in accordance with this Decision.
- 6.8 Eircom shall have an obligation of non-discrimination in respect of the provision of those facilities referred to in Section 6.1.
- 6.9 Without prejudice to the generality of Section 6.8, Eircom shall:-
- I. provide a wholesale equivalent for retail offerings offered by eircom in the Market;
  - II. apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as Eircom provides for its own services or those of its subsidiaries or partners; and

- III. ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to Eircom's retail arm and associates.
- 6.10 The prices charged by Eircom to any other undertaking for access to or use of those facilities referred to in section 6.1 shall be at least 10% less than the retail price charged by Eircom to its end-users for retail access to the public telephone network at a fixed location, which is the retail equivalent of such facilities.
- 6.11 All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision in respect of access and interconnection related to the provision of the facilities referred to in section 6.1, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-
- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
  - D8/99 – Costing Methodology for use in Accounting Separation.
  - D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
  - D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
  - D7/01- Eircom's Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

## 7. REGULATORY CONTROLS ON THE MARKET<sup>70</sup>

### 7.1 In this section 7:-

" $\square$ CPI" means the annual percentage change in the CPI;

"CPI" means the consumer price index number as compiled by the Central Statistics Office;

"first relevant year" means the period of 12 months beginning on the effective date of this Decision;

"relevant year" means the period of 12 months beginning immediately after the end of the first relevant year and each subsequent period of 12 months beginning immediately after the end of the previous 12 month period;

- 7.2 Eircom shall not increase tariffs in respect of the provision of public switched telephone network exchange lines, at a fixed location, in the first relevant year
- 7.3 Eircom shall not increase tariffs in respect of the provision of public switched telephone network exchange lines, at a fixed location, by more than  $\square$ CPI – 0 % in a relevant year.
- 7.4 Eircom shall ensure that its tariffs for products in the Market follow the basic principles of cost orientation.
- 7.5 Eircom shall not show undue preference to specific end-users.<sup>71</sup>
- 7.6 Eircom shall notify ComReg at least 20 working days in advance of proposed changes to the terms and conditions of supply of calls within the Market. Eircom shall publish, in at least one newspaper circulating in the State, in Iris Oifigiúil and its public offices, all changes in to terms and conditions of supply at least 15 working days in advance of their coming into effect. For the avoidance of doubt, Eircom shall, in respect of services within the Market, supply such services only at the published price and in accordance with the terms and conditions published in accordance with this Decision and Regulation 18 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users' Rights) Regulations 2003. For the purpose of this section 7.6, 'working day' means a day (other than a Saturday or Sunday) on which clearing banks are generally open for business in Ireland.

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<sup>70</sup> ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that the Market is not effectively competitive and has concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not achieve the objectives set out in section 12 of the Act of 2002.

<sup>71</sup> The term 'undue preference' means that any scheme which is introduced must not discriminate between similar users. Therefore, consumers which are of a comparable status should be charged the same prices. However, it is not discriminatory to apply different charges to consumers in different circumstances. In short, as long as there are objectively justifiable reasons for applying different tariff structures to different types of consumers, such a scheme will not be discriminatory. Objectively justifiable reasons could include lower tariffs for vulnerable consumers, such as the elderly and disabled, who have little or no income and who need a telephone connection to contact carers in the event of an emergency. Therefore, an allowance for vulnerable users, which is based on objective criteria and applied equally to all users in similar or comparable circumstances, fulfils the requirement of non-discrimination.

- 7.7 Eircom shall not unreasonably bundle services.
- 7.8 Without prejudice to the generality of section 7.7, where Eircom offers a number of services in a bundle, it shall ensure that end-users are able to purchase an individual service included in such bundle without purchasing the entire bundle of services and that tariffs for such individual services reflect the principle that end users should not be required to pay for facilities which are not necessary for the service requested.
- 7.9 Eircom shall continue to comply with the obligations in relation to cost accounting applicable to it prior to the date of this Decision until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.
- 7.10 In order to fulfil its obligations of cost orientation and its obligations in relation to cost accounting, Eircom shall keep separated accounts. All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-
- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
  - D8/99 – Costing Methodology for use in Accounting Separation.
  - D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
  - D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
  - D7/01- Eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

**Isolde Goggin**  
**Chairperson**  
**The Commission for Communications Regulation**

**Dated the [●] day of [●] 2005**

## Appendix B – Draft Decision -Retail Fixed Higher Level Access Market

### 1 STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and imposing the obligations set out herein, ComReg has, amongst other things, assessed the proportionality of these obligations relative to the objectives of ComReg set out in section 12 of the Act of 2002,<sup>72</sup> has taken the utmost account of the EU Commission's Recommendation<sup>73</sup> and the Guidelines<sup>74</sup> and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister.<sup>75</sup> This Decision is based on the market analysis and reasoning conducted by ComReg in relation to the market for the retail fixed calls related to the Consultation Paper entitled *Market Analysis: Retail Narrowband Access Markets* ('Document No. 05/25) dated 22 March forms part of this Decision.
- 1.2 This Decision is made pursuant to Regulations 25, 26 and 27 of the Framework Regulations<sup>76</sup>, Regulations 14 and 16 of the Universal Service Regulations<sup>77</sup>, Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations<sup>78</sup> and having regard to sections 10 and 12 of the Act of 2002.

### 2 MARKET DEFINITION

- 2.1 This Decision relates to the market for retail domestic access from a fixed location. The market in this Decision is defined as the market for higher level retail access from a fixed location<sup>79</sup> and differs from any defined in the EU Commission's Recommendation.

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<sup>72</sup>The Communications Regulation Act 2002.

<sup>73</sup>EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>74</sup>Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

<sup>75</sup>Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

<sup>76</sup>S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>77</sup> S.I. No. 308 of 2003 the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>78</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>79</sup>Higher Level Access – including services over ISDN FRA and PRA

- 2.2 The relevant geographic market for the market for higher level retail access from a fixed location<sup>80</sup> is defined as Ireland.

### **3 DESIGNATION OF UNDERTAKINGS WITH SMP**

- 3.1 [e]ircom Limited (“Eircom”) is designated as having significant market power in the market for [higher level retail access from a fixed location]<sup>81</sup> in Ireland (the “Market”).

### **4 SPECIFIC OBLIGATIONS**

- 4.1 ComReg has found that the Market is not effectively competitive and, accordingly, shall impose obligations on Eircom in accordance with Regulations 10, 11, 12, 13 and 14 of the Access Regulations and Articles 14 and 16 of the Universal Service Regulations.

### **5. CARRIER SELECTION AND PRE-SELECTION**

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

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

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

- 5.3 Without prejudice to the generality of sections 5.1 and 5.2, all of the obligations in relation to provision of those facilities referred to in Section 5.1, applicable to Eircom immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of those facilities referred to in Section 5.1 of the type, and in accordance with the processes, described in the Eircom Reference Interconnect Offer – Annex C -Service Schedule 120.<sup>82</sup>

- 5.4 Eircom shall not discriminate with regard to the provision of access and interconnection related to the provision of the facilities referred to in section 5.1. Without prejudice to the generality of the foregoing, Eircom shall apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent

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<sup>80</sup>Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA

<sup>81</sup>Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA

<sup>82</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

services and shall provide services information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.

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



- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

## 6. WHOLESALE LINE RENTAL

6.1 Eircom shall have an obligation to meet reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities, by undertakings requesting access or use of such access products, features or additional associated facilities, which enable such other undertakings to provide retail equivalents to the retail products offered by eircom in the Market. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of a wholesale line rental products of the type, and in accordance with the processes, described in:-

- Eircom Reference Interconnect Offer – Annex C -Service Schedule 401<sup>83</sup>;
- Single Billing through Wholesale Line Rental Code of Practice Version 1.2;<sup>84</sup>
- Single Billing through Wholesale Line Rental Service Level Agreement 31/03/04;<sup>85</sup>
- Single Billing through Wholesale Line Rental Product Description Version M;<sup>86</sup>
- Single Billing through Wholesale Line Rental Interoperator Process Manual Version 3.1.<sup>87</sup>

6.2 Without prejudice to the generality of sections 6.1, all of the obligations in relation to provision of those facilities referred to in Section 6.1, applicable to Eircom immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations. Without limiting the generality of the foregoing, Eircom shall continue to comply with, inter alia, the various requirements described in the following Decision Notices previously issued by ComReg:-

- D13/02 - CPS in Ireland 2002;
- D2/03 - Implementation of CPS Single Billing Products: Wholesale Line Rental (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS);

<sup>83</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

<sup>84</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrcopy1.2.pdf> and as amended from time to time in accordance with agreed processes.

<sup>85</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrsla.pdf> and as amended from time to time in accordance with agreed processes.

<sup>86</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrproddescversionm.pdf> and as amended from time to time in accordance with agreed processes.

<sup>87</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/sbwlrinteropprocmualv.3.1.pdf> and as amended from time to time in accordance with agreed processes.

- D9/03 - Implementation of CPS Single Billing Products – Wholesale Line Rental and Agency Rebilling Updating of Timetable and Formalisation of Product Descriptions;
  - D4/04 - SB-WLR – Requirements for 31st March 2004 Launch Date.
- 6.3 Without prejudice to the generality of sections 6.1 and 6.2, Eircom shall in relation to those services referred to in section 6.1:-
- not withdraw access to facilities already granted without the prior approval of ComReg;
  - grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; and
  - provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.
- 6.4 Eircom shall publish and keep updated a reference offer (“RO”) in respect of the services and facilities referred to in section 6 that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. Eircom shall ensure that the RO includes 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.
- 6.5 Eircom shall make public such information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 6.1, as specified by ComReg from time to time.
- 6.6 Eircom shall conclude legally binding Service Level Agreements (‘SLAs’) with Other Authorised Operators (‘OAOs’) in respect of those facilities referred to in section 6.1.
- 6.7 Eircom shall publish all SLAs concluded (and as from time to time amended) in accordance with this Decision.
- 6.8 Eircom shall have an obligation of non-discrimination in respect of the provision of those facilities referred to in Section 6.1.
- 6.9 Without prejudice to the generality of Section 6.8, Eircom shall:-
- I. provide a wholesale equivalent for retail offerings offered by eircom in the Market;

- II. apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as Eircom provides for its own services or those of its subsidiaries or partners; and
  - III. ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to Eircom's retail arm and associates.
- 6.10 The prices charged by Eircom to any other undertaking for access to or use of those facilities referred to in section 6.1 shall be at least 10% less than the retail price charged by Eircom to its end-users for retail access to the public telephone network at a fixed location, which is the retail equivalent of such facilities.
- 6.11 All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision in respect of access and interconnection related to the provision of the facilities referred to in section 6.1, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-
- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
  - D8/99 – Costing Methodology for use in Accounting Separation.
  - D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
  - D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
  - D7/01- Eircom's Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

## 7. REGULATORY CONTROLS ON THE MARKET<sup>88</sup>

### 7.1 In this section 7:-

"□CPI" means the annual percentage change in the CPI;

"CPI" means the consumer price index number as compiled by the Central Statistics Office;

“first relevant year” means the period of 12 months beginning on the effective date of this Decision;

"relevant year" means the period of 12 months beginning immediately after the end of the first relevant year and each subsequent period of 12 months beginning immediately after the end of the previous 12 month period;

- 7.2 Eircom shall not increase tariffs in respect of the provision of public switched telephone network exchange lines, at a fixed location, in the first relevant year
- 7.3 Eircom shall not increase tariffs in respect of the provision of public switched telephone network exchange lines, at a fixed location, by more than □CPI – 0 % in a relevant year.
- 7.4 Eircom shall ensure that its tariffs for products in the Market follow the basic principles of cost orientation.
- 7.5 Eircom shall not show undue preference to specific end-users.<sup>89</sup>
- 7.6 Eircom shall notify ComReg at least 20 working days in advance of proposed changes to the terms and conditions of supply of calls within the Market. Eircom shall publish, in at least one newspaper circulating in the State, in Iris Oifigiúil and its public offices, all changes in to terms and conditions of supply when such changes come into effect. For the avoidance of doubt, Eircom shall, in respect of services within the Market, supply such services only at the published price and in accordance with the terms and conditions published in accordance with this Decision and Regulation 18 of the European Communities (Electronic Communications Networks and Services)(Universal Service and Users’ Rights) Regulations 2003. For the purpose of this section 7.6, ‘working day’ means a day (other than a Saturday or Sunday) on which clearing banks are generally open for business in Ireland.

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<sup>88</sup> ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that the Market is not effectively competitive and has concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not achieve the objectives set out in section 12 of the Act of 2002.

<sup>89</sup> The term ‘undue preference’ means that any scheme which is introduced must not discriminate between similar users. Therefore, consumers which are of a comparable status should be charged the same prices. However, it is not discriminatory to apply different charges to consumers in different circumstances. In short, as long as there are objectively justifiable reasons for applying different tariff structures to different types of consumers, such a scheme will not be discriminatory. Objectively justifiable reasons could include lower tariffs for vulnerable consumers, such as the elderly and disabled, who have little or no income and who need a telephone connection to contact carers in the event of an emergency. Therefore, an allowance for vulnerable users, which is based on objective criteria and applied equally to all users in similar or comparable circumstances, fulfils the requirement of non-discrimination.

- 7.7 Eircom shall not unreasonably bundle services.
- 7.8 Without prejudice to the generality of section 7.7, where Eircom offers a number of services in a bundle, it shall ensure that end-users are able to purchase an individual service included in such bundle without purchasing the entire bundle of services and that tariffs for such individual services reflect the principle that end users should not be required to pay for facilities which are not necessary for the service requested.
- 7.9 Eircom shall continue to comply with the obligations in relation to cost accounting applicable to it prior to the date of this Decision until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.
- 7.10 In order to fulfil its obligations of cost orientation and its obligations in relation to cost accounting, Eircom shall keep separated accounts. All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision, Eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:-
- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
  - D8/99 – Costing Methodology for use in Accounting Separation.
  - D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
  - D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and Eircom.net.
  - D7/01- Eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
  - D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by Eircom.

**Isolde Goggin**  
**Chairperson**  
**The Commission for Communications Regulation**

**Dated the [●] day of [●] 2005**

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

### Market Definition

#### Scope of the review

C.1 The scope of this market review 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?

C.2 In assessing competition within the access market, ComReg 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.**

#### *Views of respondents*

C.3 All respondents commented on this question.

C.4 Eight respondents focused on a single issue, which is the perceived need to define and enforce a functional internet access (FIA). A range of possible definitions were proposed, but respondents shared the underlying principle that the enforcement of Universal Service Obligations required the definition of FIA.

C.5 Five respondents broadly agreed with the scope of the review proposed by ComReg. However, one of these respondents suggested that ComReg was rolling over existing legislation rather than taking the opportunity for a fresh approach. A second respondent believed that ComReg's approach was unduly conservative, and that it underestimated the potential impact of new technologies and services such as Wi-Fi, VoIP and WLR.

#### *ComReg's position*

C.6 ComReg notes concern expressed on the issue of Functional Internet Access. ComReg is currently considering requirements as provided for in the Universal Service Regulations, and intends to publish proposals in the first half of 2005.

C.7 The starting point for ComReg's analysis of the fixed retail access market is the European Commission recommendations, and this has been broadly accepted by all respondents. Specific comments on ComReg's approach to the analysis are dealt with further in the sections on market definition and analysis.

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

C.8 ComReg proposed that, at present, the access market and the calls market in Ireland are complementary, and are not substitutes. The conditions of supply are different for

access than for calls, and there is greater potential for an access provider to enter the calls market, than for a calls provider to enter the access market. ComReg noted areas of change in the market, such as bundling calls and access, and proposed that it should monitor whether such service offerings change the competitive dynamics of supply.

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

### *Views of respondents*

- C.9 Four respondents agreed that retail calls and retail access should be considered as separate markets. One of these noted that the distinction may be broken down as bundling increases, and suggested that this should be kept under review.
- C.10 One respondent proposed that the growth of CPS and WLR has been underestimated, and that this growth, combined with increased bundling, indicates that calls and access will be in the same market within a three year period.

### *ComReg's position*

- C.11 ComReg's time horizon for this review is less than the three years assumed by the respondent who proposed a more radical dynamic, but ComReg takes note of the need to monitor developments.
- C.12 ComReg notes broad agreement with respondents on likely directions of change in the market, and suggests that the differentiating factor is of timing and speed of change. ComReg notes that the shared view of the need for change in the market underpins its previous and continuing regulatory efforts in WLR and CPS.
- C.13 ComReg's time horizon for this review is less than the three years assumed by the respondent who proposed a more radical dynamic, but ComReg takes note of the need to monitor developments.

### **Are fixed access and mobile access in the same market?**

- C.14 ComReg proposed that the level of substitution at present does not act as a constraint on the price setting behaviour of a fixed supplier, and that this is unlikely to change sufficiently in the timeframe of this review. The evidence in the Irish market suggests that, at present, fixed and mobile are complementary products. On the demand side, the key differentiating factor is price. Mobile is still significantly more expensive than fixed, and cost is the prime reason to choose fixed over mobile when both are options. On the supply side, the price differential is such that entry is unlikely to occur if a hypothetical monopolist fixed supplier were to increase prices between 5 and 10%.
- C.15 ComReg is aware that in several other countries, there are proposals for converged fixed and mobile products. ComReg recognises that such a service could be introduced very quickly in Ireland, as it does not involve heavy investment in infrastructure or in product development, and mobile operators can match the ubiquity of the PSTN. In ComReg's view, such a product would represent a form of "added value" to the fixed access network, rather than a substitute for it.



**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.**

### *Views of respondents*

- C.16 Four respondents agreed that fixed and mobile calls should be considered in separate markets. However, one of these respondents, while agreeing with the conclusion, disagreed with ComReg's reasoning. It was this respondent's view that the markets were separate due primarily to functional differences and not to distinctions in price, service quality or scope. The respondent suggested that ComReg had underestimated the potential impact of 3G. The respondent believed there was an increasing one way substitution from fixed to mobile. This issue of unidirectional substitution was picked up by another respondent, who suggested that ComReg should keep this under review.
- C.17 One respondent strongly disagreed with ComReg's analysis and conclusions. The respondent proposed that fixed and mobile calls have been substitutes for some time, and that the trend is increasing. The respondent outlined detailed criticisms of ComReg's methodology, and suggested that ComReg should undertake robust econometric modelling to better judge substitutability.

### *ComReg's position*

- C.18 The European Commission has, in a number of decisions, found that there is a market for mobile communications services that cannot be seen as being substitutable to fixed communications services. The European Commission notes that the key difference between mobile and fixed services is the mobility inherent in all mobile services (i.e., mobile numbers are associated with individuals on the move, rather than a fixed location). Thus, even though technological advances may mean that similar services could be offered over both fixed and mobile networks, fixed services do not offer this mobility.<sup>90</sup>
- C.19 Although fixed and mobile access services provide many of the same basic functions, an important difference between the two remain, with mobile service being distinguished by its mobility, while fixed service boasts superior transmission quality and bandwidth. Among consumers mobility is perceived to be an important functional characteristic which differentiates mobile to fixed access. In a recent consumer survey over 75% of respondents either 'strongly agreed' or 'agreed' that being permanently contactable or being able to make a call whenever they wish is important. Technically speaking, mobile can be a substitute at least for voice services because users can place and receive calls just as they do with fixed service. The relevant question is whether an increase in mobile access prices would cause customers to switch to fixed services.
- C.20 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

<sup>90</sup> See, for example, Commission Decision of 10 July 2002, Case No. COMP/M.2803 – Telia/Sonera, Commission Decision of 20 September 2001, Case No. COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia, Commission Decision of 20 September 2001, Case No. COMP/M.1439 – Telia/Telenor and Commission Decision of 12 April 2000, Case No. COMP/M.1795 – Vodafone Airtouch/Mannesmann.

- 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 generally a separate connection fee.
- C.21 ComReg notes that the mobile access charge in Ireland is perceived, among consumers, to be higher than fixed access. A recent finding<sup>91</sup> noted that 42% of respondents ‘strongly agreed’ with the statement that if the price levels for fixed and mobile phones were similar, it would encourage respondents to give up the fixed phone at home.
- C.22 On the question of pricing, ComReg is aware that, for some users making calls to certain numbers (notably on-net mobile phones), mobile can compete favourably with fixed. However, ComReg does not agree that this process will advance sufficiently within the lifetime of this review to challenge the conclusion that fixed and mobile access should be in separate markets.
- C.23 ComReg’s most recent market research<sup>92</sup> indicates that when consumers were asked, what was the main reason for not having a fixed line telephone in their house, the most common response (approximately half of respondents) noted that ‘having a mobile subscription’ was the primary driver. This response was particularly predominant among respondents in the 25-34 age band. However this research also shows that currently 81% of consumers interviewed had mobile access and 79% had fixed access which would indicate that from the demand side, users are likely have access to both fixed and mobile services and will use either depending on different circumstances. Thus the two products are not seen as substitutes. This is supported by further consumer research<sup>93</sup> which reported that only 2% of consumers use a mobile phone to make calls from home because ‘they do not have a fixed phone at home’, this would indicate the mobile calls are not considered to be a substitute for fixed calls when the person has the option of making a fixed call. ComReg holds that from the demand-side, pricing and functional characteristics are sufficiently different to define separate markets for fixed and mobile access. ComReg does recognise a trend towards mobile only households (from 12% in 2003 to 15% in 2004<sup>94</sup>), however ComReg takes the view that this trend is more indicative of younger age bands who are more likely to be in rental accommodation, and does not reflect the market as a whole.
- C.24 In the consideration of supply-side substitution, ComReg is aware that in other countries, there are proposals for converged fixed and mobile products<sup>95</sup>. Considering supply-side substitution between the fixed and mobile markets, ComReg notes that the development of 3G mobile networks may impact on whether mobile networks can provide a range of converged voice and data services on a single platform. Furthermore, in the future, the emergence of 4G solutions and the technological convergence of WiFi, GSM, 3G and WiMax technologies may provide opportunity for a mobile voice and high band-width data offering that would provider users with a

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<sup>91</sup> TNS mrbi 102498/Residential Telecommunications survey/January 2004

<sup>92</sup> Amarach Consulting November 2004

<sup>93</sup> TNS mrbi 102498/Residential Telecommunications survey/January 2004. ComReg also notes that as 79% of respondents have a fixed line, then 21% do not have a fixed line. This does not mean that respondents have a mobile instead. As recognised below 15% have mobile only access the difference between equates to persons with no access.

<sup>94</sup> Source: IPSOS survey for the European Commission, 2004.

<sup>95</sup> Yankee Group Report. Wireless/Mobile Europe, October 2004. Matt Hatton. Cost and convenience will determine the success of fixed mobile convergence.

seamless solution as a complete substitute for fixed line services. ComReg notes from the SMP Guidelines<sup>96</sup> that supply-side substitution involves no significant additional costs, whereas potential entry occurs at significant costs. ComReg concludes that supply side substitution is unlikely to take place within the time frame of the review and should therefore be considered in the assessment of potential competition in Section 4.

C.25 Additionally, ComReg's view is that such a bundled product would represent a form of "added value" to the fixed access network, rather than a substitute for it, and so its introduction would not change the conclusions of this analysis. This view is supported by market developments in other jurisdictions<sup>97</sup>.

C.26 ComReg notes that all respondents agreed that the overall direction of change in the markets for fixed and mobile access is towards increasing substitutability between fixed and mobile access, and that substitution applies to technology, use and pricing. The main area of difference among respondents is in their perceptions of how quickly this change will come about. ComReg does not agree with one respondent who proposed that substitution has already taken place to a sufficient extent to justify the definition of a single market.

### Conclusion

C.27 ComReg holds that it is unlikely that within the timeframe of the review, sufficient demand or supply-side substitution will take place between the fixed and mobile access markets, thus it would be inappropriate to define a single market.

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

C.28 In considering access to the PSTN in the original consultation, ComReg concluded that fixed exchange lines, 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. ComReg refers 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.

C.29 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. ComReg refers to this market (including ISDN FRA and PRA) as higher level access.

C.30 ComReg therefore proposed that fixed retail access to the public telephone network includes two relevant markets.

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

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<sup>96</sup> para 38

<sup>97</sup> BT BluePhone (UK)

**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.**

### *Views of respondents*

- C.31 Four respondents agreed that retail fixed lower level narrowband access and retail fixed higher level narrowband access constituted separate relevant markets. However, one of these respondents questioned whether, given low penetration levels, FWA were realistic substitutes for access to the PSTN without significant investment and development.
- C.32 One respondent did not agree that lower and higher level markets were distinct. The respondent suggested that there may be demand and supply side substitution between the two, and also believed that FWA and VoIP would impact on lower level as well as higher level access within the next three years.

### *ComReg's position*

- C.33 ComReg does not accept the respondent's argument that a supplier could easily move into the supply of ISDN BRA from ISDN PRA and FRA. 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.
- C.34 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.
- C.35 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.
- C.36 ComReg's analysis of functional substitutability, pricing and supply side dynamics led it to conclude that on all of these measures, lower and higher level access are in separate markets.
- C.37 ComReg's agrees that the penetration of alternative access such as FWA is currently low, but this does not change the conclusion that when we consider their characteristics, they are part of the same market as PSTN fixed line access. ComReg notes also that its assessment of the potential impact of technologies such as VoIP and FWA assumed a shorter timescale than that assumed by the respondent who sees a more dynamic growth.

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

- C.38 ComReg's analysis of business and residential customers acquiring fixed access indicated 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.

- C.39 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.

**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.**

### *Views of respondents*

- C.40 Four respondents agreed that business and residential calls should be in the same market, and one respondent confirmed ComReg's proposal that the decision to supply residential and non-residential access was primarily a commercial distinction for operators. The respondent did not see any barriers on the supply side which would prevent suppliers switching between the supply of residential and non-residential access. Another respondent, while agreeing in principle that residential and non-residential should be defined in the same market, proposed that demand for products and services showed different characteristics.
- C.41 One respondent strongly disagreed, and put forward a detailed analysis of differences in terms of demand and price elasticities, respective cost bases, switching costs, and utility derived from fixed access. This respondent noted that many suppliers to the business market have invested in fibre networks. The respondent's view was that ComReg has not presented any substantive evidence to explain why the EC Recommendation does not apply to the Irish market.

### *ComReg's position*

- C.42 In its analysis of the retail access market, ComReg proposed that the Irish market for retail access was sufficiently distinctive to warrant different definition than that suggested by the European Commission. All but one respondent agreed that there was little differentiation between residential and non-residential fixed access, and that generally this applied both to demand and to supply characteristics.
- C.43 ComReg has considered whether competitive conditions can vary by customer group, and so whether the market definition should be narrowed to reflect particular customer types.

- C.44 For a market to be defined on the basis of customer characteristics, the key question would be whether the hypothetical monopolist is able to price discriminate between one category and another. This then requires a definition of these categories which can show that a sufficient number of customers in one category could switch supplier in a way which would make it unprofitable for the hypothetical monopolist to raise prices for all customers. If customer types can be defined objectively, and no price discrimination is possible between customer types, then the market definition should be narrowed.
- C.45 ComReg's main issue is with the definition of customer types. While the notion of large corporate user can be readily applied in a marketing context, in ComReg's view it is not an objective definition, and cannot be defined adequately enough for the purposes of a market review exercise.
- C.46 ComReg has considered whether it is possible to define such a group on the basis of a measure such as turnover, or number of employees, or total telecoms spend. ComReg's consideration is that the use of any criterion, or combination of criteria, would be arbitrary. It is ComReg's view that, while there may indeed be distinctive characteristics shared by the largest users of access services, there is no obvious way of defining the boundaries of such a group.
- C.47 ComReg notes further that other NRAs have considered ways in which a narrower definition of the largest users of access services could be constructed. There is a consensus that it is not feasible within the standard market definition principles shared by NRAs and the European Commission.
- C.48 In conclusion, ComReg recognises that it is conceivable to define two separate markets in accordance with the *Relevant Markets Recommendation*, in the event that operators *started* to a sufficient extent to offer differentiated residential and non residential services (as is the case in other member states), it may be appropriate for ComReg to take this approach. At present there is nothing to indicate that this is likely to happen within the timeframe of the review, however ComReg will monitor the market for such developments. ComReg further notes that that regardless of whether the access market was sub divided into a residential and non-residential market or not, this would be unlikely to change ComReg's conclusion in terms of its SMP designation, taking into consideration market share and other criteria used to measure market power. ComReg therefore proposes to undertake its analysis under a single market.
- C.49 ComReg suggests that its separation of the markets for higher and lower level access more usefully captures the different needs of larger and smaller users of access, primarily by defining them in terms of the services they use rather than in terms of other features they may have in common.
- C.50 ComReg concludes that, in Ireland, residential and non-residential access are defined in the same relevant market.

### **The relevant geographic market**

- C.51 ComReg proposed that the relevant geographic market for the markets considered in this review is the state of Ireland.
- C.52 ComReg believes that the conditions of supply of access services are homogeneous across Ireland. In particular, while the access services provided by some entities other than eircom do not cover the whole of Ireland, they all compete with eircom's access services. eircom's 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.**

### *Views of respondents*

- C.53 Four respondents agreed that the relevant geographic market for retail fixed access is Ireland. One of these respondents qualified its response by suggesting that regional markets may exist as technology options develop.
- C.54 One respondent did not agree, and proposed that the main urban areas differed from the rest of the country in terms of competitive conditions. The respondent put forward its view that the conclusion should not be based on eircom's national pricing, as eircom may have regulatory as well as commercial reasons for this. The respondent also noted that if competition continued to increase in urban areas, it may signal the end of geographical averaging.

### *ComReg's position*

- C.55 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of services, in relation to which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those in those areas.
- C.56 According to the Guidelines, the definition of the geographical scope of the relevant market is generally determined with reference to the area covered by a network, and to the existence of legal and other regulatory instruments.
- C.57 ComReg has considered the view that competitive conditions are sufficiently different in some urban areas to warrant their definition as separate geographical markets. ComReg view remains that eircom offers its services for fixed access on a national basis, under the same terms and conditions. Where other services are or might be offered by other operators on a less than national basis, such services will compete with eircom's national services. For this reason, the relevant geographical market is the state of Ireland. Should circumstances change, whether through commercial or regulatory imperatives, then this conclusion would be reviewed.

### **Summary of preliminary conclusions**

- C.58 ComReg proposed that, at present, the access markets and the calls market in Ireland are complementary, and are not substitutes. They are therefore defined as separate markets.
- C.59 ComReg concluded that fixed exchange lines, narrowband FWA and ISDN BRA currently belong in the same relevant market, for lower level narrowband access. They are products which offer the same function, for the same end use, and operate under similar price constraints.
- C.60 ComReg also concluded at this stage that there is a separate market for higher level access to include access via ISDN FRA and PRA. Functional substitutability is

limited. Pricing for connection shows price progression from multiple PSTN lines, but the monthly rental is significantly different.

C.61 ComReg concluded 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. ComReg intends to monitor this area closely.

C.62 ComReg's analysis of the supply of fixed access to business and residential customers indicated that there is no differentiation in terms of pricing, and that there is little differentiation in the conditions of supply. The impact of any differentiation is modified by the fluid way in which residential and business are defined.

C.63 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, , 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.**

#### *Views of respondents*

C.64 All respondents agreed that calls and access should currently be defined as separate markets.

C.65 Four respondents agreed that the lower level market consisted of fixed exchange lines, narrowband FWA and ISDN BRA. The respondent who did not agree believed that the penetration of FWA was so low that it could not be considered as a viable substitute.

C.66 Four respondents agreed with the separation of lower and higher level access. The main issue for the respondent who did not agree was a perceived underestimate by ComReg of the potential impact of new technologies and services, based on the assumption that the market review looked forward over the next three years.

C.67 Four respondents agreed that fixed and mobile access did not currently belong in the same market. The respondent who did not agree eircom believed the level of substitution between fixed and mobile access was already high enough to warrant definition within the same market.

C.68 Four respondents agreed that residential and non-residential access should be defined in the same market. The respondent who did not agree eircom proposed that the needs of business users, particularly the largest business users, were sufficiently distinct, and must be distinctively supplied, to indicate definition as a separate market.

#### *ComReg's position*

C.69 ComReg notes broad agreement with the market definition exercise, and recognises that where there are differences of opinion, these are generally to do with differing perspectives on the rate of change, rather than fundamental differences on the nature or direction of change.



C.70 ComReg is aware of the potential for rapid development in the defined markets, and recognises that alternative interpretations of the rate of change are to do with respondents expecting faster change in the market than that proposed by ComReg. However ComReg holds that it is more appropriate to define the market in terms of product type rather than user type. ComReg intends to monitor developments closely, and identifies the converging calls and access markets, and the increasing substitution in the fixed and mobile access markets as requiring particular attention.

C.71 ComReg will maintain the definition of two markets at the retail level for access to the public telephone network from a fixed location:

- Lower Level Access – including services over PSTN, narrowband FWA and ISDN BRA
- Higher Level Access – including services over ISDN FRA and PRA

## **Market Analysis**

### **Conclusions of market analysis**

C.72 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, 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.

C.73 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.

C.74 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.

C.75 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.

C.76 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.

C.77 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.

C.78 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.

- C.79 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.
- C.80 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.**

### *Views of respondents*

- C.81 ComReg notes that all respondents agreed with the overall conclusion of the market analysis, that there is market failure in the markets for lower and higher level access, and that market forces are not able to constrain the pricing and behaviour of the SMP operator. Respondents agreed that eircom had, and would continue to have, SMP in both markets. Where there were differences of opinion, this was generally to do with some respondents proposing that eircom's dominance would be reduced at a faster rate than that indicated by ComReg and some of the other respondents.
- C.82 One respondent, while accepting the conclusions of the market analysis, suggested that ComReg's view of market developments was overly conservative, particularly in its view of the potential impact of WLR. The respondent believed that growth in WLR/CPS would be significant, and challenged the view that eircom would remain dominant in the provision of combined calls and access. This respondent also suggested that lack of customer knowledge could not act as a barrier to switching for long, and while this may be in evidence in early stages of market development, mass marketing would soon remove it as a barrier. The respondent disagreed with ComReg's analysis of countervailing buyer power, suggesting that eircom's pricing behaviour would be constrained by customers in the higher level access market. They held that users have a feasible choice of an alternative supplier and that this is evident by the higher OAO market share in the relevant market. Thus they concluded, eircom could not act independently from its competitors in relation to its pricing behaviour.
- C.83 Another respondent expressed dissatisfaction with the robustness and comprehensiveness of the analysis, and suggested that ComReg was relying on market share data to determine SMP.
- C.84 The respondent disagreed with ComReg's analysis of economies of scale and scope. It proposed that the evidence of economies of scale is inconclusive, that USO negates any advantages resulting from economies of scope, and that some operators in the Irish market were able to benefit from economies of scale and scope because they were part of international organisations.
- C.85 The respondent proposed that the provision of combined calls and access packages strengthened rivalry and improved the welfare of consumers. It did not constitute a barrier to entry. The respondent suggested that the no contact obligation imposed on

the SMP operator also failed to improve the position of consumers, and in fact created an artificial barrier for consumers to avail of competing offers.

C.86 Finally, the respondent suggested that there was evidence of the existence of countervailing buyer power, particularly in the large corporate and government markets. This applied to a small number of large players who had substantial bargaining power. The respondent suggested that ComReg should undertake an appropriate level of analysis on this point, and proposed that failure to do so would represent a grave limitation in the ComReg approach and would not conform to the Market Definition Guidelines.

### ***ComReg's position***

C.87 ComReg notes that all respondents agreed with the overall conclusion of the market analysis, that there is market failure in the markets for lower and higher level access, and that market forces are not able to constrain the pricing and behaviour of the SMP operator. Respondents agreed that eircom had, and would continue to have, SMP in both markets.

C.88 ComReg recognises the impact of change in the markets defined, and notes comment from respondents on the likely direction and rate of change. Specific note was made of the impact which WLR would have on the access markets. At the time the market review was prepared, WLR had very recently been introduced into the market. ComReg notes that the take up of WLR to date is accounted for by operators switching their existing customers to WLR, and that it remains to be seen what the growth rather of WLR is when this process has been completed. ComReg welcomes the positive introduction of WLR, but does not believe that WLR will significantly challenge eircom's dominance in the retail access market within the lifetime of this review.

C.89 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 may act as a barrier to entry.

C.90 One respondent was of the view that the no contact obligation resulted in a barrier to switching for consumers. ComReg notes that this obligation ensures the viability of the product in the long term and the availability to consumers of a choice of operators for their call services. This has been subject to detailed consultation in ComReg's *Review of CPS in Ireland, (Document Number D20/03)*

C.91 Respondents who commented on this issue generally agreed that the incumbent benefited from economies of scale and of scope, and from vertical integration.

C.92 It was proposed by one respondent that economies of scale and scope may be achieved by operators other than the incumbent, where these operators were part of international organisations. From the information available to ComReg, it is difficult to see what, if any benefit a subsidiary operator can enjoy from being part of a wider organisation group. The respondent did not provide any detail regarding the potential competitive advantage.

C.93 ComReg agrees that the introduction of CPS/WLR will reduce the extent to which the provision of combined calls and access packages constitute a barrier to entry. ComReg notes that this introduction was mandated by regulatory intervention, and maintains its view that, while early signs of market development are encouraging, it is still too soon to consider the development of this market without regulatory input.

C.94 It is ComReg's view that economies of scale and of scope are less significant in the market for higher level access than they are in the lower level access market. This is because higher level access is not a mass market product, and so economies relating to network density and ubiquity are less important.

C.95 On the question of countervailing buyer power, ComReg notes that two respondents identified this as a major issue in the higher level access market, specifically amongst the largest customers. These respondents provided anecdotal evidence of the existence of countervailing buyer power. In their view, countervailing buyer power would act to constrain eircom's pricing, so reducing market power. ComReg notes that both respondents agreed that countervailing buyer power was not an issue amongst residential users, and was not likely to be an issue for small or even medium sized business users. The issue therefore potentially applied to a very small number of very large customers, and in both the private and the public sectors. ComReg recognised in the consultation that it was possible that the largest users could influence the SMP operator's behaviour, but noted that ComReg has been provided with no evidence that this happens to a significant enough extent to change the conclusions of our analysis.

## Remedies

### Competition Problems in the retail access markets

C.96 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

C.97 ComReg noted that its experience in introducing wholesale products, and in particular the WLR product, had provided many examples in Ireland of the types of competition problem discussed.

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

### *Views of respondents*

C.98 Two respondents agreed with ComReg's analysis of competition problems. One of these respondents stated that in its view, the competition problems identified both actually arise and could potentially arise. The respondent suggested that it was not appropriate to identify specific abuses of dominance or market power in response to a general consultation, but that it recognised some of the types of behaviour from its experience in the market.

C.99 One respondent suggested that it was not possible to assess the effect of competition problems in an unregulated environment because the SMP operator is already subject to ex ante regulation.

C.100 One respondent strongly rejected ComReg's approach and analysis. This respondent characterised the list of competition problems set out in the consultation paper as a textbook list of possible problems, presented without any evidence that the

respondent had or intended to engage in these practices. This respondent alleged that ComReg had not complied with the obligations arising from Article 7 of the Framework Directive or Section 4 of the SMP Guidelines. In addition this respondent stated that it did not provide any insight into the proportionality and justification of the remedies subsequently proposed in Section 6.

- C.101 The respondent characterised ComReg's analysis as biased, unbalanced and misleading, and detailed several paragraphs where it claimed false and misleading facts were put forward. The respondent provided an alternative interpretation of several of ComReg's examples of competition problems. The respondent agreed that there are lessons to be learnt from the introduction of WLR, but pointed out that over 50,000 lines had been transferred, and lack of functionality was not delaying market entry.
- C.102 It was the respondent's view that ComReg's approach was heavy-handed and interventionist, undermining the economic incentives of the market.

### ***ComReg's position***

- C.103 In line with the *SMP Guidelines*, ComReg has conducted its market analysis on a forward-looking basis, similar to that carried out in a merger analysis, rather than ex post, as would be carried out under Article 82 of the EC Treaty or Section 5 of the Competition Act 2002. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation.
- C.104 ComReg considers that the justification for considering *ex ante* remedies must therefore be broader than if solely based on demonstrable acts of past behaviour. ComReg instead has to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. ComReg suggests that this is a key difference in approach between ex ante and ex post analysis, and ComReg notes that its approach has been developed in line with other NRAs.
- C.105 ComReg does not agree with the assertion that the competition problems identified are purely theoretical. ComReg has used the evidence gathered through market analysis, its own experience in regular meetings with both eircom and OAOs, and its regulatory interventions over recent years to identify these competition problems. ComReg also participated, in collaboration with other NRAs, in a 'stock taking' exercise to feed these into the ERG Common Position on Remedies<sup>98</sup>.
- C.106 ComReg notes that respondents from the OAO community have stated that the competition problems identified by ComReg were entirely reflective of the issues in this area and have provided evidence to support the existence of these problems. ComReg has provided analysis of the proportionality and justification of remedies when setting out the detailed remedies and in the accompanying Regulatory Impact Assessment.
- C.107 ComReg's analysis indicated that there is a differentiation in pricing on the basis of the volume of calls made, and high volume users tend to be businesses. However, the

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<sup>98</sup> ERG Common Positioning on the approach to Appropriate remedies in the new regulatory framework (ERG (03) 30rev1) – page 88  
[http://erg.eu.int/documents/index\\_en.htm#ergdocuments](http://erg.eu.int/documents/index_en.htm#ergdocuments)

offering of preferential pricing for volume is not restricted by a strict and clear-cut residential/business classification. Rather, it is based on volume itself.

- C.108 ComReg notes growth in the market for WLR since this market review was prepared, and agrees that the rate of growth has increased in the last few months. However, ComReg also notes that this has not been accompanied by a decrease in OAO requests for ComReg to intervene. In other words, there is a continuing requirement for ComReg to support the development of this market, and this serves to further confirm ComReg's interpretation of previous development.

### **Principles in selecting remedies**

- C.109 ComReg noted its obligations under the Framework Regulations, the Access Regulations and the Universal Service Regulations.
- C.110 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 as having significant power on that market. 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.
- C.111 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.
- C.112 In choosing remedies, ComReg will also take account of potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg has conducted, *inter alia*, a Regulatory Impact Assessment (Section 7) in accordance with the Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with section 13 of the Communications Regulation Act, 2002) published in February 2003.
- C.113 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?**

### ***Views of respondents***

- C.114 All respondents who commented on this question agreed in general with the principles outlined by ComReg. Several issues were raised regarding the interpretation or application of the principles.
- C.115 One respondent noted that the principles and remedies which are derived from them were absolutely vital to ensure that the perceived current market failure was rectified. The respondent proposed that ComReg needed to be particularly cognisant of Service Level Agreements, so that best practice, European benchmarked agreements were

developed and enforced. The respondent's experience in the launch of WLR was that implementation was very difficult, but it noted greater difficulties post launch, where a lack of SLAs or fit for purpose SLAs could substantially inhibit the ability of OAOs to compete on a level playing field.

- C.116 One respondent questioned the use of the expression 'least burdensome effective remedy', and suggested that there should be a consideration of the relative burdens and effectiveness in the RIA. The respondent's view was that the principle of proportionality did not always require the least burdensome option to be chosen but rather that the remedy should only be as burdensome as was required to meet the required effectiveness objectives.
- C.117 Another respondent questioned the extent to which the principles were followed by ComReg. The respondent had specific concerns in three areas. First, the respondent suggested that there was no clear timescale for the review. This meant that there was no context for considering the market analysis, and that different conclusions could be drawn depending on whether, for example, the timeframe was 18 months or 3 years. This applied particularly to the introduction and development of technologies and services such as FWA, Wi-Fi and VoIP. Second, the respondent did not believe that ComReg adequately substantiated market failure, and so was not justified in extending regulation at the retail level. Third, the respondent was critical of the approach to Regulatory Impact Assessment, and suggested that there should have been a comparison of the net benefit accruing from the imposition of ex ante regulation with that of relying on market forces alone.
- C.118 One respondent expressed disappointment with ComReg's approach, which was seen as a missed opportunity to introduce a regulatory regime which was light-handed, proportionate and justified, in favour of a heavy-handed interventionist approach which undermined the economic incentives of this market.

### ***ComReg's position***

- C.119 ComReg notes general agreement with the principles which were laid out in the consultation as a basis for selecting remedies.
- C.120 Three respondents raised issues to do with the implementation of a Regulatory Impact Assessment. This is dealt with in Section 7.
- C.121 ComReg agrees that the duration of the review period will affect the view taken of likely changes in the market, and notes that one respondent rightly pointed out that a 3 year horizon would produce different conclusions to an 18 month horizon. ComReg has based its market assessment on a time horizon of around 2 years. ComReg wishes to emphasise that this timescale is to aid market assessment and in no way commits ComReg to a rigid review timetable. This is particularly important given the qualification throughout this response noting areas which require close monitoring.
- C.122 ComReg does not agree that it has failed to substantiate market failure. The nature of an ex ante analysis is that actual and potential instances of market failure must be considered, and ComReg notes that several OAOs concurred with ComReg's presentation both of actual and of potential examples.
- C.123 ComReg does not agree with the criticism of its overall approach. ComReg is obliged, where a designation of SMP has been proposed, to impose at least one obligation<sup>99</sup>. Therefore some form of ex ante regulation is required. ComReg notes that dominance

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<sup>99</sup> SMP Guidelines paras. 21 and 114.

in these markets is not marginal. All respondents have agreed that eircom's market share is 99% of the lower level market and 77% of the higher level market. It is ComReg's view that, based on its analysis of competitive conditions in the markets, it is highly unlikely that any current service provider could impose a sufficient competitive constraint on eircom. ComReg cannot see this situation as changing significantly within the lifetime of this review.

### **Remedies Proposed**

C.124 SMP may give rise to a range of problems associated with single market dominance, and vertical and horizontal leveraging. Intervention will be necessary at both the wholesale and the retail markets to mitigate potential competition problems.

### **Wholesale remedies**

#### **Mandated remedies**

C.125 Given the finding of SMP in the retail fixed access market, ComReg is obliged to impose obligations to ensure that subscribers of the SMP operator have access to CA/CS and CPS.

#### **Wholesale Line Rental**

C.126 ComReg proposed 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. ComReg noted that the provision of the product until now has required a high level of regulatory intervention to ensure the implementation of the specification. At the time of carrying out the market review, the WLR product had very recently been introduced to the market, and the extent and nature of its potential impact could not be fully clear.

C.127 ComReg believes that the market analysis and identification of competition problems carried out in the 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.

C.128 ComReg considered that there was a continuing need for regulatory involvement in the direction of product development and implementation, such that ComReg would continue to be actively involved in negotiating the content and development of the WLR product

**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.**

### ***Views of respondents***

C.129 Four respondents noted that, where there is a finding of SMP, a wholesale remedy such as WLR was consistent with EC Recommendations and with the Ministerial Direction issued in February 2003.

C.130 Three of these respondents commented on ComReg's role in the WLR process to date. All felt strongly that ComReg's continuing role was essential to the development of the product in the market. One stated its view that provision of WLR had only come about as a result of long and detailed negotiation between industry and eircom and had



relied heavily on intervention by ComReg to force eircom to open up this product. A second described the WLR product development as a long and tortuous experience, and suggested that without much more solid and robust SLAs, the product could not succeed.

- C.131 One respondent believed that the proposal to provide a product in line with requirements as determined by ComReg was excessively onerous and interventionist, impractical, and unhelpful to end-users and OAOs. The respondent suggested that ComReg did not have the expertise or commercial ability to determine the optimum market outcome in terms of the products and service required. The respondent considered that the current single billing product, combined with an access obligation to meet reasonable requests for wholesale input products, should remove the need for ComReg to be involved in further specification of the SB-WLR product.

### ***ComReg's position***

- C.132 ComReg considers that there are two issues to consider. First is the proposal that eircom should offer a WLR product under the obligations of the Access Regulation. All respondents broadly agree with this, and note that it is consistent with EC Recommendations and with the Ministerial Direction.
- C.133 The second issue concerns ComReg's role in the development of the WLR product. ComReg has described the process of developing the WLR product, and notes that OAOs have confirmed its experience. It is ComReg's view that there is a continuing need for regulatory involvement in product development and implementation, and again, this view is supported by OAOs.
- C.134 ComReg notes that, in the time since this market review was launched, there have been further requests from OAOs to review SLAs due to concern over several elements of the SLA. This is further confirmation that it is not sufficient to ensure the existence of the wholesale inputs necessary to offer the product, but that there is a continuing concern with how these inputs are provided.
- C.135 ComReg finds somewhat disingenuous the concern of the respondent with the proposal that requirements should be determined by ComReg. In common with ComReg's other determinations, these are not ComReg's requirements. Rather, they are based on Access obligations, and are as agreed with industry. ComReg will ensure that this point is clearly expressed.

### **Access to and use of specific network facilities**

- C.136 ComReg proposed 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.
- C.137 To support this proposal, ComReg noted 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.

**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.**

*Views of respondents*

- C.138 Four respondents agreed that an access obligation mandating Wholesale Line Rental should be imposed on the SMP operator. Two noted the Ministerial Direction of February 2003, which confirmed the need for intervention.
- C.139 One respondent strongly refuted ComReg's view of the requirement up till now for regulatory intervention in the introduction of wholesale access products. The respondent cited the increase in WLR orders in recent months as evidence that the relevant wholesale products and associated access requirements were being met.

*ComReg's position*

- C.140 ComReg notes that all but one respondent supports the proposal that an access obligation be imposed mandating WLR. The respondent who disagrees disputes ComReg's version of the development of the product up till now.
- C.141 ComReg welcomes the increase in WLR orders, particularly in the last few months. However, as noted earlier, there has been a continuing requirement for regulatory intervention. ComReg's experience continues to be that the implementation of this product requires ongoing intervention, and this is supported by OAOs.

Access to wholesale products

- C.142 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?**

*Views of respondents*

- C.143 All respondents agreed in principle. One noted that access should only be provided to those wholesale elements necessary for the provision of a viable WLR offering. A second proposed that the SMP operator should be obliged to provide fully robust and European best practice SLAs under its access obligation. A third respondent suggested that it would be acceptable to place an obligation to meet reasonable requests for wholesale products based on a reasonable assessment regime.

*ComReg's position*

- C.144 ComReg notes agreement that the SMP operator should be obliged to permit access to the wholesale products relevant for the offer of WLR. ComReg agrees that the

obligation refers to those elements which are necessary for the provision of a viable offering.

#### Open Access

- C.145 ComReg considered that, insofar as it is required to avail of access, the SMP operator should also grant open access to relevant information, technical interfaces, protocols, or other key technologies, and should be required to provide such OSS or similar software necessary to ensure fair competition in the provision of services.
- C.146 Comreg noted that when products are mandated 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.

**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.**

#### *Views of respondents*

- C.147 Four respondents agreed with the proposal. One respondent suggested that much of the development and success of new products revolves around whether or not sufficient and non-discriminatory access was provided.
- C.148 One respondent, while agreeing with the proposal, noted that there should be a minimum level of information provided, and suggested that the point of interface between the SMP and the OAO needed to be clearly delineated, and an interface protocol agreed by the industry. The respondent's view was that the SMP operator should be mandated to provide information up the industry agreed interface, but not to the level that would equate to technical advice in adopting the interface.
- C.149 One respondent did not believe that it was appropriate for ComReg to raise this level of operational detail in this type of consultation, particularly where industry has already agreed a specific approach. This was characterised as an example of regulatory micromanagement which was seen as unnecessary and inefficient. The respondent considered that all necessary information and technical interfaces necessary to support WLR have already been made available.

#### *ComReg's position*

- C.150 ComReg notes broad support for the proposal that the SMP operator should be required to grant open access to relevant support elements for the provision of WLR.
- C.151 ComReg does not agree that the requirement to grant open access constitutes an operational detail. ComReg views it as fundamental that OAOs are able to access the supporting elements necessary to provide a WLR product. ComReg agrees that a basic level of open access has been made available, but notes that this level is not considered adequate by OAOs and is indeed the subject of many referrals to Comreg.

*Withdrawal of Access*

- C.152 ComReg proposed 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.
- C.153 ComReg noted that 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 proposed 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.**

*Views of respondents*

- C.154 Three respondents agreed that the SMP operator should be required not to withdraw access without prior ComReg approval following public consultation. One noted that failure to impose this obligation would be a significant backward step in opening up these markets
- C.155 One respondent did not believe it was practical or appropriate to initiate a public consultation every time facilities are withdrawn. In this respondent's view, it would be adequate if, where facilities become redundant, the SMP operator provided sufficient notice to the industry and ComReg that it planned to withdraw. If no objection was raised, there should be no need for a public consultation.
- C.156 One respondent considered that this was a new obligation imposed without justification. It was the respondent's view that requirements were met by the industry agreed disputes process, whereby objection to the withdrawal of a wholesale product could be referred to ComReg.

*ComReg's position*

- C.157 ComReg considers that it is necessary to balance the need to provide OAOs with certainty regarding products against the practicalities of ensuring this certainty.
- C.158 ComReg has considered whether relying on ex post disputes on the withdrawal of facilities would be an adequate safeguard for OAOs, and believes that it would not. ComReg believes that there is validity in the point that it may not be practical to initiate a public consultation automatically should access to a facility be withdrawn.
- C.159 ComReg therefore considers that the SMP operator should be required not to withdraw access to facilities already granted, except with ComReg approval. ComReg's response would be based on appropriate consultation, which may, but not necessarily, include public consultation.

*Approach to SLAs*

- C.160 ComReg proposed 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.**

### *Views of respondents*

- C.161 Three respondents agreed with this approach. One proposed that punitive penalties should apply to ensure that non-discrimination was enforced, and believed that without this the market would not develop. The respondent's view was that serious gaps had already occurred in the SLA for WLR. A second respondent emphasised the need for the enforcement of SLAs.
- C.162 One respondent did not consider that this consultation should deal with the detail of SLAs. The respondent noted its view that SLAs should be a means for establishing that discrimination was not taking place between the SMP operator's retail arm and OAOs. Penalties should be considered only if failure to meet service levels could be predicted with reasonable certainty. The respondent's experience was that the introduction of penalties could lead to the development of lengthy requirements around transactions which may not be key to the wholesale offering.
- C.163 One respondent believed that there was a set of SLAs in place which met the market demand of the OAO community. The respondent questioned ComReg's power to impose penalties, and suggested that the level of penalties should be negotiated by industry.

### *ComReg's position*

- C.164 While ComReg agrees that the SLA is a means of ensuring that there is no discrimination between the SMP operator's retail arm and the OAOs, it is ComReg's view that the SLA also dictates the quality of wholesale inputs, and that this shapes the service which can be offered. In ComReg's view, the SLA is key to making the product fit for use.
- C.165 On the issue of penalties, ComReg notes that there are penalties in place for other SLAs. It was not ComReg's intention to suggest that it would impose penalties – clearly, this is a contractual matter between the SMP operator and the OAO. However, generally, ComReg supports the use of penalties as a means of making sure that the SLA is effective.

### *Non-Discrimination*

- C.166 ComReg proposed that an obligation of non discrimination was necessary to provide the same ability to OAOs to purchase wholesale access to retail lines as would apply to eircom's direct provision of access.
- C.167 ComReg proposed 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.

- C.168 The imposition of a non-discrimination obligation would mean that the SMP operator 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 it 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 the SMP operator's retail arm and associates. The SMP operator's downstream arms should not have privileged access to 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.**

### *Views of respondents*

- C.169 Four respondents agreed in principle with this proposal. One noted that it was a fundamental principle of competition law. Another respondent who supported the proposed obligation requested that ComReg provide transparent guidelines as to what would be viewed as "equivalent", and also as to how this would be monitored and enforced. The respondent referred to approaches carried out by other NRAs.
- C.170 One respondent stated that, as in its view there was no evidence of past discrimination, this obligation should not be imposed. Any possible future discriminatory behaviour would be dealt with via competition law.

### *ComReg's position*

- C.171 ComReg agrees with most respondents that an obligation of non-discrimination is an essential remedy to target the kinds of actual and potential competition problems which have been identified in the retail access markets. ComReg believes that the potential for the SMP operator to discriminate, justifies the imposition of non-discrimination as an obligation.
- C.172 In assessing what would be viewed as an equivalent product, ComReg's concern is that OAOs should be able to offer a fit-for-purpose product, and this requires access to the same wholesale products and services as is available to the SMP operator's retail arm.

### Transparency

- C.173 ComReg proposed that an obligation of transparency should be placed on the SMP operator. This obligation ensures that OAOs have sufficient information and clear processes to which they would not otherwise have access. This assists their entry into the market and hence promotes competition. Transparency also provides a method of ensuring compliance with a non-discrimination obligation, as the information needed to measure this would not otherwise be available.
- C.174 Currently eircom publish – as part of the Reference Interconnection Offer – Service Schedules for the WLR<sup>100</sup>. ComReg believes that this obligation should be

<sup>100</sup> See in particular Service Schedule 401

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.

- C.175 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?**

### *Views of respondents*

- C.176 Four respondents agreed that an obligation of transparency should be imposed on the SMP operator. One noted that it was necessary to verify that the SMP operator was not engaged in discriminatory practices.
- C.177 One respondent stated that there was no evidence of a lack of transparency and therefore no need for a remedy.
- C.178 On the question of reference offers for the WLR product set, four respondents agreed that reference offers should be maintained, and one suggested that Reference Offers should only apply to new offerings inextricably linked to the WLR product. One respondent proposed that more detail was required about the SMP operator's costs, or at least about components of costs.
- C.179 One respondent believed that the existing level of publication satisfied the requirement for transparency.

### *ComReg's position*

- C.180 ComReg notes broad agreement with the principle of transparency, which is essential to promote competition and to ensure that there is no discrimination. ComReg notes also that there was broad agreement that reference offers should be maintained for the WLR product and any new developments of it.
- C.181 ComReg does not agree with the respondent who believed that any requirement for transparency is satisfied by current practice. ComReg has been generally supported by all other respondents in its assessment of competition problems in this market, and in its identification of actual and potential difficulties. ComReg can therefore not accept the proposal that there have been no problems in this market, and will therefore be no problems in the future.

### Price Control & Cost Accounting

#### *Price control*

- C.182 ComReg proposed to continue with the application of the retail minus price control for WLR for the period of this review.
- C.183 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. Given that WLR is a relatively new product, 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.

- C.184 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.

**Q. 20. 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?**

### *Views of respondents*

- C.185 All respondents agreed that retail minus price control was pragmatic and reasonable in the short term.
- C.186 One respondent suggested that the period for which retail minus would apply
- C.187 should align with the period proposed for the control of fully unbundled metallic path at a price increase of CPI-0%. The respondent noted that the unbundled metallic path was the main element of the WLR service and was the network element that access seekers would purchase from eircom to offer their own-build line rental services.
- C.188 One respondent noted that the key point was that the rationale underlying the retail minus methodology was that access to monopoly networks should be priced in such a way as to enable efficient entry downstream. The calculation of the minus element was therefore critical.
- C.189 Another respondent suggested that, while retail minus was reasonable in the short term, the margins were too small. This respondent asked that ComReg should provide more evidence that competition was feasible at this level.
- C.190 The question of margin was picked up by another respondent, who indicated that retail minus should not continue for too long. The respondent believed that room should be provided to allow for better margins between the wholesale and retail products, and saw ComReg's proposal as setting out an ambiguous timeframe in relation to maintaining the status quo.
- C.191 The final respondent generally agreed with the proposal, but stated that, in its view, the current retail minus formula had not stimulated price competition and should therefore be kept under review.
- C.192 On the question of whether a move to FL-LRIC was appropriate in the lifetime of this review, three respondents suggested that it was not appropriate, and that the retail minus formula should remain in place.
- C.193 One respondent stated that FL-LRIC was well-established internationally as the appropriate basis for setting interconnect tariffs, and that ComReg should move to this. The respondent accepted that the current retail-10% would have to remain as a minimum margin between wholesale and retail rates until an appropriate cost-based



wholesale rate was developed and proven. The respondent suggested that, if a FL-LRIC + EPMU<sup>101</sup> cannot for some reason be calculated for a given service, then FAC<sup>102</sup> should be considered.

- C.194 Another respondent stated its belief that FL-LRIC was the best way of setting the price of monopoly services, as it most closely reflected the prices that would be set in a competitive market and sent the correct signals to all participants in the supply chain.

### *ComReg's position*

- C.195 ComReg notes some agreement that the application of the retail minus price control should continue for the lifetime of this review, but that in the longer term, a move towards cost-orientation on the basis of FL-LRIC could be considered. The appropriateness of moving towards FL-LRIC will be considered in context of market development as part of ComReg's next market review of the relevant market.
- C.196 ComReg notes comments from respondents on the level of the margins set under the present formula. WLR is a new service. Its growth rate so far suggests that a good price point has been achieved, and it is ComReg's view that the market would be best served by a period of certainty and predictability as regards prices. The current level of retail minus compares favourably with that of other European markets. ComReg sees the logic of aligning the period for which retail minus would apply with the period proposed for the control of the fully unbundled metallic path.

### *Cost Accounting Systems*

- C.197 ComReg proposed to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim ComReg proposed that it maintains the existing level of cost accounting system obligation on eircom until such time as any further consultations are completed.
- C.198 ComReg outlined its view that the obligation of cost accounting systems supports the obligations of cost-orientation and accounting separation. 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.
- C.199 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.

**Q. 21. Do you agree that obligations in respect of cost accounting systems should be imposed on eircom? Please detail your response.**

### *Views of respondents*

- C.200 Four respondents agreed that an obligation in respect of cost accounting systems should be imposed on the SMP operator, and all respondents supported further consultation. One of these respondents' view was that cost accounting obligations

<sup>101</sup> Forward Looking Long Run Incremental Cost + Equal Proportionate Mark Up.

<sup>102</sup> Fully Allocated Costs.

should only apply with regard to identifying the inputs to the retail minus calculation for the purposes of calculating WLR.

- C.201 Another respondent regarded the imposition of cost accounting and in particular the publication of the methodologies as a vital component of any truly pro-competitive regulatory regime. The respondent indicated that publication and audit of the methodologies which support the cost accounting systems gave confidence to other market players, thereby increasing regulatory certainty and the likelihood of entry.
- C.202 One respondent refuted ComReg's view that the imposition of cost accounting systems was not an onerous burden. This respondent argued that the current level did constitute an undue burden, and should be relaxed.

### ***ComReg's position***

- C.203 ComReg set out in the market review its reasoning of the need for obligations relating to cost accounting. ComReg notes that all but one respondent agree with ComReg's principles.
- C.204 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. It was therefore proposed that a consultation would consider cost accounting systems and the accounting separation methodologies which support these systems. Current systems and obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents support the need for further consultation.

### **Accounting Separation**

- C.205 ComReg proposed to consult further on accounting separation but in the interim, ComReg is proposing to maintain the existing level of accounting separation on the SMP operator until such time as any further consultations are completed.
- C.206 ComReg outlined how an obligation of accounting separation supports the obligations of non-discrimination and cost-orientation.
- C.207 At present, ComReg requires 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.
- C.208 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.
- C.209 ComReg proposed to implement accounting separation on a by service and/or product basis, in order to ensure that products and services are being provided on a non-discriminatory basis, and to discourage possible cross-subsidisation of pricing at a service level.

**Q. 22. Do you believe eircom should have an obligation of accounting separation? Please detail your response.**

*Views of respondents*

- C.210 Three respondents agreed strongly that an obligation of accounting separation should be imposed on the SMP operator. One noted that accounting separation helped to disclose market failures, and could provide evidence of discrimination or margin squeeze by making wholesale prices and internal transfer prices more visible. Another put forward the view that accounting separation was an essential part of any pro-competitive regulatory regime, and without it, pricing abuses could go undetected. This respondent suggested that there should be an independent audit of the methodologies used, and a periodic review of their effectiveness.
- C.211 One respondent did not believe that accounting separation was relevant to this consultation.
- C.212 One respondent expressed concern at the proposal to “implement accounting separation on a service by service and/or product basis.” In the respondent’s view this was impractical and would impose an even more burdensome obligation on eircom than that arising from the existing obligation.

*ComReg’s position*

- C.213 ComReg set out in the market review its reasoning of the need for obligations relating to accounting separation. ComReg notes that three respondents agreed with ComReg’s principles, and two did not.
- C.214 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. It was therefore proposed that a consultation would consider cost accounting systems and the accounting separation methodologies which support these systems. Current systems and obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents support the need for further consultation.

**Retail remedies****Background**

- C.215 Without prejudging the outcome of other market reviews, ComReg noted 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.
- C.216 ComReg noted 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.
- C.217 For these reasons, ComReg proposed to consider additional remedies in the retail fixed narrowband access markets.

- C.218 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 .
- C.219 In most areas, competition problems are common to the lower level narrowband access market and to the higher level narrowband access 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

#### *Background*

- C.220 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.
- C.221 An overall price cap of CPI-0% has been in place since February 2003. Additional protection is offered to relatively low users through the Vulnerable User Scheme, which was introduced in order to limit the increases in the size of the vulnerable users' telephone bills<sup>103</sup>.
- C.222 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 with cost.
- C.223 ComReg has recently determined the cost of the local copper loop as being €14.65 per month. Given that the retail line rental is €19.98 per month<sup>104</sup> ComReg believes that, even allowing for the additional costs over and above the cost of the local copper loop required to provide access to voice services (such as the line card, fault repair, and retail costs), eircom's retail charges for access are now fully rebalanced.
- C.224 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

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<sup>103</sup> It is a condition of the Telecommunications Tariff Regulation Order 2003 (the 'Order') that a vulnerable user scheme be put in place by eircom in order for the price cap formula of CPI - 0% to apply to the basket of services to which the Order applies. If such a scheme is not in place, the price cap formula in the Order will be adjusted so that, in respect of the lower quartile bill, the price cap will be CPI + 0%

<sup>104</sup> Prices are exclusive of VAT

it does apply. It does however constrain the overall increase in customer bills for the services subject to the price cap<sup>105</sup>.

- C.225 ComReg noted also that the Vulnerable User Scheme constitutes a means of price control. The VUS was not a subject for consultation, and no respondent commented on it. ComReg expects that eircom will continue to offer this product<sup>106</sup>.
- C.226 In considering price controls as a remedy for problems identified in the fixed access market, ComReg identified options in two key areas. These are:
- Price cap (considered separately for lower level narrowband access market and higher level ISDN markets)
  - Cost orientation
- C.227 Each is discussed in turn below.

*Price Cap: Lower Level Narrowband Access market*

- C.228 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, 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 D3/03'<sup>107</sup> provides a fuller discussion of the current price cap.
- C.229 ComReg invited comment as to whether the state of the market and its likely development warrants the maintenance of a price cap, its extension, or its removal.
- C.230 ComReg proposed to maintain the current price cap until markets are next reviewed for SMP designation and remedies. At that time, a full review of the price cap would be carried out. In addition, ComReg proposed that because of eircom's likely continued strong position in this market and persistent high market share, some form of upper limit price control could be applied specifically to retail fixed lower level access prices. This could, as at present, take the form of a general cost-orientation obligation, or 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.

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<sup>105</sup> 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.

<sup>106</sup> It is a condition of the Telecommunications Tariff Regulation Order 2003 (the 'Order') that a vulnerable user scheme be put in place by eircom in order for the price cap formula of CPI - 0% to apply to the basket of services to which the Order applies. If such a scheme is not in place, the price cap formula in the Order will be adjusted so that, in respect of the lower quartile bill, the price cap will be CPI + 0%

<sup>107</sup> (ComReg Document Number 03/14)

**Q. 23. 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.**

### *Views of respondents*

- C.231 Three respondents favoured a separate subcap for access. One of these respondents argued that if access prices now better reflected costs, they should be controlled at this level via a subcap, and the respondent felt strongly that a cost orientation requirement was not sufficient to restrain eircom's pricing of access. A second respondent suggested that line rental prices were amongst the highest in Europe, and a subcap of CPI-X% was needed, with  $X > \text{CPI}$ . A third respondent, while noting its opposition in principle to price controls, gave qualified acceptance to the proposal of establishing a separate subcap for access. The respondent's view was that the current situation caused difficulties, and needed to be changed. It was suggested that there should be a separate consultation on the price cap, and that any price caps should be subject to review.
- C.232 One respondent proposed that wholesale remedies should be sufficient. The respondent noted that the existing price cap had brought eircom's access charge to a more cost-oriented level, and that the access charge which had been identified for LLU would act as a constraint on access prices at a retail level. The respondent believed that a subcap would not be justified and would constitute excessive application of regulation at a retail level.
- C.233 One respondent accepted the continuation of the current price cap, but believed that it was not appropriate for ComReg to extend the period covered by the current price cap by suggesting that it would be reviewed as part of the next market review. This respondent's overall view was that the introduction of a wholesale price cap would be an adequate response in this market. The respondent believed that there was clear evidence from pricing of access services that there were other constraints on the SMP operator, and so a subcap was unjustified.

### *ComReg's position*

- C.234 ComReg notes that all respondents viewed the current price cap as unsatisfactory. For two of the respondents, the favoured route would be to maintain a remedy at the wholesale level, and to reduce regulation at the retail level. However, the other three respondents favoured an increase in regulation at the retail level via the introduction of a subcap on access.
- C.235 One respondent expressed concern that this market review was being used as a means of extending the current price cap. ComReg notes that under the new regulatory framework, it was obliged to review competition in the markets for retail fixed access

- as soon as possible after adoption of the directive check legal language, and that the shape and direction of any regulation of the fixed access markets would be determined by the outcome of that analysis.
- C.236 The Price Cap Order will stand as is currently the case as the valid legal measure in respect of price control. As at present, eircom shall continue to comply with the Price Cap Order until a review of the Price Cap Order. A review of the price cap will be carried out as soon as is practical. The current cap applies to PSTN and ISDN access and therefore it will be the effective upper limit on price (CPI-0%) for lower and higher level access markets. ComReg has demonstrated market failure in the supply of fixed access, and has stated that its analysis of market shows that there will be no significant challenge to eircom's dominance within the lifetime of this review.
- C.237 ComReg notes the level of dissatisfaction with the current price cap, and notes also the range of views presented by industry as to how this should be addressed. In response ComReg intends to impose a subcap on PSTN line rental. This will ensure that the alignment of costs and price is maintained. ComReg in accordance with Regulation 14 (2) of the Universal Service Regulations, to impose a sub cap on PSTN line rental only in the lower level access market at a rate of CPI-CPI in the first year and move to a CPI-0% cap in subsequent years if appropriate. This constraint on PSTN lower level access will run in parallel to the Price Cap Order. ComReg will carry out a review of the price cap as soon as is practicable
- C.238 The sub cap on line rental will not be imposed on the other relevant products contained in the lower level access market, as ComReg notes that tariffs have been rebalanced only in relation to the PSTN. ComReg notes that historically eircom have not increased its line rental for ISDN BRA access, which is indicative of a competitive constraint imposed by OAOs. Additionally, the sub cap aims to protect users under the Vulnerable User Scheme, who are more likely to avail of PSTN rather than ISDN BRA or hi-speed services.
- C.239 ComReg noted in the consultation that, in its view, access prices are now aligned with costs. ComReg therefore expects that it will no longer be necessary for eircom to increase access prices in order to rebalance tariffs.
- C.240 ComReg intends to impose a subcap on PSTN line rental. This will ensure that the alignment of costs and price is maintained. ComReg intends to apply this subcap to PSTN line rental only, at a rate of CPI-CPI. This subcap will be applied until such time as the price cap is reviewed.

*Price Cap: Higher Level Narrowband Access Market*

- C.241 ComReg proposed 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 proposed that because of eircom's likely continued strong position in this market and persistently high market share, some form of upper limit price control could 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, in addition to the current price cap. 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.
- C.242 ComReg suggested that there was 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 (in recognition of the lower barriers to entry and greater prospect of competition developing in the higher level market).

**Q. 24. Do you agree that the current price cap should be maintained and that some from 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.**

### *Views of respondents*

- C.243 One respondent proposed a separate subcap on higher level access prices. The respondent suggested that a combination of cost plus prices upstream and a margin squeeze test downstream was the set of remedies most likely to provide a regulatory regime which both provided an incentive for market entry and allowed SMP operators to get a fair return on their assets.
- C.244 One respondent suggested that a separate consultation was needed on the subject of price caps.
- C.245 One respondent considered that wholesale obligations were sufficient, and that no further price caps should be introduced.

### *ComReg's position*

- C.246 ComReg recognised in its analysis of the higher level market that there is more competition than in the lower level markets, and that this is evident in the structure and dynamics of the market as well as in eircom's market share. However, ComReg notes that eircom has a persistently high market share and strong market position, and this must be taken into account when considering remedies.
- C.247 It is ComReg's view that it is not appropriate to extend the level of regulation in the higher level access market, given that the analysis of the market indicates a trend towards it becoming more competitive, albeit slowly. ISDN FRA and PRA access prices will therefore remain subject to the current price cap. A price cap review will be carried out as soon as is practicable

### *Cost Orientation for Retail Prices*

- C.248 ComReg noted that 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. 25. 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.**

*Views of respondents*

- C.249 Three respondents agreed that there should be an obligation of cost-orientation on the SMP operator. One of these respondents stated that cost orientation was needed in addition to a price cap on access, and not as an alternative.
- C.250 One respondent believed that wholesale remedies were sufficient to address competition problems in the market and that retail remedies should not be imposed.
- C.251 Another respondent noted the complex process involved in determining cost oriented prices, and questioned how there could be a single cost-oriented price level for each of the PSTN, ISDN-BRA and ISDN-PRA services that could be determined conclusively. The respondent suggested that a more balanced approach would include those access services offered into markets where eircom was designated with SMP in a retail price control to guard against excessive price control and to reward efficiency gains. In this respondent's view, the availability of wholesale access services at retail-minus prices supported competitive market entry without intrusive and arbitrary regulation.

*ComReg's position*

Obligation not to show undue influence

- C.252 ComReg proposed 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 the display of undue influence. ComReg therefore proposed to place an obligation not to show undue influence on the SMP operator.
- C.253 An obligation not to show undue influence 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.

**Q. 26. Do you agree that an obligation not to show undue influence should be placed on the SMP operator?**

*Views of respondents*

- C.254 All respondents agreed that an obligation not to show undue influence should be placed on the SMP operator. It was noted that this principle was a fundamental aspect of competition law.

*ComReg's position*

- C.255 ComReg welcomes agreement that there should be an obligation not to show undue influence.

## Transparency: Publication and notification of terms and conditions

- C.256 At present, eircom notifies ComReg and publishes any changes to terms and conditions 21 days before they come into effect. Current practice is that eircom has usually and voluntarily provided an additional 7 days' notification to ComReg before publication.
- C.257 ComReg noted that there are two key issues to consider. First, advance publication of changes to terms and conditions allows other operators and consumers time to respond to changes, but has the potential disadvantage that other operators may simply follow the price changes of the SMP operator, and this might reduce the degree to which they introduce innovative or aggressive price changes. Second, advance notification to ComReg of changes in terms and conditions gives ComReg the opportunity to raise concerns relating to principles such as transparency, cost-orientation, and non-discrimination before any changes become effective.
- C.258 Currently, ComReg does not formally approve changes to terms and conditions offered by eircom, but will intervene where ComReg believes that eircom may be in breach of its obligations.
- C.259 The consultation asked for comment firstly on advance publication of changes to terms and conditions, and secondly on advance notification to ComReg of changes in terms and conditions. ComReg proposed also that there should be some administrative clarification of the process, by measuring time periods in working days rather than calendar days. ComReg proposed to retain the current obligation that the SMP operator should publish changes in at least one national newspaper, in *Iris Oifigiúil*, and in its public offices.
- C.260 ComReg would also expect the SMP operator to ensure that planned changes to terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.

**Q. 27. Do you agree with ComReg's proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers.**

*Views of respondents*

- C.261 Four respondents agreed with the approach proposed by ComReg. One of these respondents stated that, in its view, price changes should be approved by ComReg, and should not be announced before formal approval.
- C.262 One respondent viewed prior publication of changes as a hindrance to competition. In this respondent's opinion, undertakings were now required to set out sufficient detail for customers to have a full understanding of retail charges, and this should also provide enough information for ComReg to identify any anti-competitive behaviour. The respondent stated that ComReg may justify prior notification, but that prior publication should not be required.

*ComReg's position*

- C.263 ComReg notes that all respondents agreed that ComReg should be notified in advance of proposed changes to terms and condition in fixed access.
- C.264 ComReg understands the concern of the respondent who did not agree with advance publication of changes, and recognises the possible disadvantages in terms of

- competition. However, given the very low level of competition in the lower level access market, and the relatively recent introduction of services such as WLR, ComReg believes that it is too soon to relax the obligation to publish proposed changes to terms and conditions in advance.
- C.265 ComReg does, however, recognise that there is increasing competition in the higher level access market. While eircom's market position remains at a level which warrants some regulatory intervention at the retail level, ComReg has decided to remove the requirement to publish changes to terms and conditions in the higher level market in advance of their coming into effect. ComReg has carefully considered the advantages and disadvantage of advance publication of retail terms and conditions, and believes that, in the higher level market, competition is best served by relaxing this obligation.
- C.266 ComReg notes the proposal that it should formally approve changes prior to their coming into effect. ComReg is not currently responsible for approving changes. ComReg's prime concern in being notified in advance is that it facilitates the identification of potential anti-competitive behaviour. In ComReg's view, it would be unnecessarily intrusive to extend its role.
- C.267 ComReg notes agreement with its proposed administrative changes.
- C.268 ComReg concludes that the SMP operator should be obliged to notify ComReg at least 20 working days in advance of proposed changes to terms and conditions in the lower and higher level access markets. The SMP operator should be obliged to publish changes to terms and conditions in the lower level access market at least 15 working days in advance of their coming into effect. The SMP operator should be obliged to publish changes to terms and conditions in the higher level access market when they come into effect. The obligation that the SMP operator should publish changes in at least one national newspaper, in *Iris Oifigiuil*, and in its public offices should be retained.

### *Retail Bundling*

- C.269 ComReg proposed to impose an obligation that the SMP operator shall not unreasonably bundle services. This would apply 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.
- C.270 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. The main purpose of a bundling obligation is to prevent foreclosure of markets through leveraging of market power which could have a detrimental effect both on operators and consumers. Bundling by its nature can also lead to a lack of transparency as two or more products are sold as a single package. However, ComReg recognises that bundling can lead to economies of scale or scope for operators and this in turn can lead to savings for consumers.
- C.271 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.
- C.272 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.

- C.273 ComReg asked for comment in this review of the retail access markets on whether an obligation should be placed on the SMP operator to prevent unreasonable bundling. ComReg would consider it unreasonable to bundle products or services in such a way that customers can only purchase any product/service included in the bundle by purchasing the bundled product. In practice this means that ComReg would expect the SMP operator to be offering all the unbundled elements of the bundled product /service as separate products/services.

**Q. 28. Do you agree that the SMP operator should be obliged to ensure that services are not unreasonably bundled?**

*Views of respondents*

- C.274 Two respondents saw no justification for the regulation of bundling, and one suggested it could only be considered where wholesale remedies were proven to be inadequate. It was noted that, provided elements in the bundle were available at a wholesale level, it was relatively straightforward to identify anti-competitive practice. Both of these respondents cited the economic benefits of bundling as a means of passing on cost savings to customers.
- C.275 One respondent questioned the definition of “unreasonable”, suggesting that it was highly subjective and could not be legally enforced.
- C.276 Two respondents were concerned that other operators should be able to replicate bundles if they wished, and noted that this depended on access to wholesale products which were suitably priced and provided. Access needed to be available prior to retail launch. These respondents expressed concern over the bundling of SMP and non-SMP services.
- C.277 Two respondents believed that ComReg should consult more widely and more formally before imposing a bundling obligation.
- C.278 One respondent questioned the circumstances in which ComReg would require an SMP operator to offer each element of a bundled product as a separate item. The respondent asked whether the total aggregated price of the unbundled products could exceed that of the bundled offering. That is, whether a bundled product would be made available as a wholesale equivalent at a retail minus price or whether the elements of the bundle would each be available separately to allow the OAO to make up a bundled offering.

*ComReg’s position*

- C.279 ComReg considers that there are two key issues. First, a customer should be able to purchase a product or service included in a bundle without having to purchase the whole bundle. None of the respondents commented on this point, and it is ComReg’s view that it is reasonable to require the SMP operator to offer the elements of a bundle as individual products or services.
- C.280 The second issue is to do with access at the wholesale level to the elements of a bundle. ComReg notes the economic benefits associated with bundling, and that respondents agree that bundling can benefit the market, the operator and the consumer. ComReg’s approach to bundling is to ensure that it cannot be used to abuse market dominance. Therefore, any remedy must address the prevention of anti-

- competitive practice. It is ComReg's view that OAOs must be able to access wholesale equivalents of the elements of a bundle where eircom is dominant. ComReg proposes to consider in further detail the pricing issues where the bundled product is comprised of elements from SMP and non SMP markets.
- C.281 ComReg wishes to note that further issues relating to bundling will be considered in its review of margin squeeze, which is due to be published in the first half of 2005.
- C.282 ComReg notes that one respondent was concerned with the legal status of "reasonable". ComReg's legal basis for proposing this obligation is Regulation 14 (2) (d) of the *Universal Service Regulations* which states that "obligations imposed may include requirements that the identified undertakings do not...unreasonably bundle services".
- C.283 In responding to the question as to whether bundled retail offerings would be made available as bundled wholesale offerings or as separate unbundled wholesale components ComReg can express a clear preference for the latter. Purchase of unbundled wholesale components, allowing combination as preferred by each OAO separately, perhaps in combination with directly provided components of a total retail bundle will allow far greater scope for product innovation. However, it is impossible to anticipate all possible instances where such a situation might arise and these will have to be considered on a case by case basis since such a recipe of unbundled wholesale components may not be practical for all bundled retail products.

#### *Cost accounting and accounting separation*

- C.284 The *Universal Service Regulations* states that ComReg must ensure that, where an undertaking is subject to retail tariff regulation or other retail controls, the necessary and appropriate cost systems are implemented. ComReg may specify the format and accounting methodology to be used, and must cause a statement of compliance to be published annually. Overall compliance with the cost accounting system should be verified by ComReg or another suitably qualified independent body.
- C.285 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.
- C.286 Accounting separation is necessary to fulfil any obligations of cost orientation and cost accounting. Since deregulation of the market, ComReg has required eircom to supply financial information on an annual basis in order to support regular monitoring of its decisions. Such data allows ComReg to perform its duties to ensure that prices are not set at an excessive level, and to provide evidence of the presence or absence of discrimination and margin squeeze and greater certainty about the cost base. This is obviously vital to support the obligations in relation to cost orientation and cost accounting systems.
- C.287 In the consultation, ComReg suggested that the accounting separation obligation was designed to help provide evidence from eircom which may demonstrate the presence or absence of margin squeeze. ComReg indicated that the obligation was necessary in order to monitor margin squeeze problems, to determine if costs are set at an excessive level, and to monitor margins in the retail business.
- C.288 ComReg proposed to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. In the interim, ComReg

proposed to maintain the existing level of cost accounting systems and accounting separation obligations on eircom until such time as any further consultations are complete.

**Q. 29. 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?**

*Views of respondents*

- C.289 Four respondents supported ComReg's proposal to consult further on cost accounting systems and accounting separation methodologies. Three of these respondents viewed the accounting obligations as essential, and the current level as a minimum.
- C.290 One respondent did not consider accounting separation relevant to this consultation, and believed that the cost accounting obligation should apply only with regard to identifying the inputs to the retail minus calculation for the purpose of calculating WLR.
- C.291 One respondent refuted ComReg's view that the current accounting separation requirement did not constitute an onerous burden. Specifically, this respondent expressed concern that ComReg would consider implementing accounting separation on a service by service and/or product basis. The respondent found this proposal impractical, and likely to result in an even more burdensome obligation. The respondent did not believe that ComReg had demonstrated that there was a proven requirement for accounting separation in order for competition to develop.

*ComReg's position*

- C.292 ComReg set out in the market review its reasoning of the need for obligations relating to cost accounting systems and accounting separation. ComReg notes that three respondents agreed with ComReg's principles, and that two did not. However, ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts, and without cost accounting systems which can suitably relate costs to products and services, it is not possible to fulfil the obligations of cost orientation and non-discrimination.
- C.293 ComReg therefore believes that the principle of the need for cost accounting and accounting separation is clearly established and justified.
- C.294 ComReg recognised in the market review that further consultation is needed on the implementation of this principle. It was therefore proposed that a consultation would consider cost accounting systems and the accounting separation methodologies which support these systems. Current systems and obligations will be maintained pending the outcome of these consultations. ComReg notes that all respondents supported the need for further consultation.

## Appendix D – Opinion of the Competition Authority

### 1 The Competition Authority An tUdaras Iomaíochta

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

4<sup>th</sup> February 2005

**Re: ComReg Market Review - retail narrowband access markets**

Dear Isolde,

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

#### The Process

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

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

#### The Market Recommendations

In its *Relevant Market Recommendation*, the European Commission recommended that National Regulatory Authorities (NRAs) should review the relevant markets for:

- (a) Access to the public service telephone network at fixed location for residential customers; and
- (b) Access to the public service telephone network at a fixed location for non-residential customers.

ComReg proceeded with its market review as recommended by the Commission but concluded that there are two discrete *retail narrowband access markets* in Ireland:

- (a) Lower level retail narrowband access market consisting of access via analogue exchange lines over copper, cable, fixed wireless access (FWA) and ISDN Basic Rate Access (ISDN BRA); and
- (b) Higher level narrowband access consisting of access via ISDN Fractional Rate access (FRA) and Primary Rate Access (PRA).

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As in the *retail fixed calls markets*, ComReg concluded that the Irish circumstance do not support a delineation of the markets into residential and non-residential customers.

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

The Authority also takes the view, at this time, that ComReg's finding that the Irish *retail narrowband access markets* are not delineated into residential and non-residential customers is supported by the market facts. The Authority notes that although it is possible to define narrow retail product markets, ComReg's analysis showed that the Irish market situation does not depict evidence to support a further delineation of these markets into residential and non-residential customers. The Authority will nonetheless urge ComReg to monitor market developments in this regard.

ComReg's assessment of the retail narrowband access markets showed that eircom accounts for 99% of the lower level narrowband access market and over 70% of the higher level access market measured in terms of channels. ComReg found that eircom's market share figures have remained fairly stable over the last three years. Despite these findings, ComReg examined the competitive environment in each of these markets and found that there is evidence of market failure which indicates that eircom's prices for both lower and higher level, narrowband access are not constrained by the presence of alternative operators. domReg expects this situation to continue at least for the period under review.

ComReg concluded that the proposed markets are characterised by a lack of effective competition, at least for the period under review, and as such eircom should be designated as having SMP on the Lower level retail narrowband access market and the Higher level retail narrowband access market. On this basis ComReg concludes that regulatory measures are justified in the retail narrowband access markets identified.

With regard to a finding that *eircom* holds an SMP position in each of the above markets, the Authority is of the view that the analysis carried out by ComReg supports this view, at least for the period under review. Nevertheless, the Authority welcomes ComReg's undertaking to monitor competitive dynamics and review the markets to analyse any such developments. The Authority would also urge ComReg to take an holistic approach<sup>i</sup> in carrying out its regulatory impact assessment on this and the related output retail calls markets in deciding what measures are necessary to promote the development of effective competition in these markets.

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

Sincerely,

(CUA 2

Dr. Paul K. Gorecki  
Member, Competition Authority



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

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

Under Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg document 04/95. This consultation ran from 01 September 2004 and ended 05 November 2004. The responses to this consultation have been taken into consideration and ComReg has now reached decisions in market definition, designation of SMP and regulatory obligations, which are contained in ComReg document 05/25.

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

### Section 1 - Market Definition

Please state where applicable:

1.1	<p>The affected relevant product/service market (s).</p> <p>Is this market mentioned in the Recommendation on relevant markets?</p>	<ul style="list-style-type: none"> <li>• Lower level retail narrowband access (which includes access via analogue exchange lines over copper and FWA and ISDN BRA, also including ‘hi-speed’), which is referred to as <b>Lower Level Access</b></li> <li>• Higher level retail narrowband access (which includes access via ISDN FRA and PRA) which is referred to as <b>Higher Level Access</b></li> </ul> <p>Yes</p>	Pages 10-21 and pages 78-88
1.2	The affected relevant geographic market (s)	Ireland	Page 18 and page 85
1.3	A brief summary of the opinion of the national competition authority where provided;	The Authority supports the approach and findings of this market definition exercise.	Pages 118-120
1.4	A brief overview of the results of the public consultation to date on the	Five detailed responses to the consultation were provided by :	Page 10-21 and 78 - 93

	<p>proposed market definition (for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it)</p>	<ul style="list-style-type: none"> <li>• Chorus</li> <li>• eircom</li> <li>• energis</li> <li>• EsatBT</li> <li>• Vodafone</li> </ul> <p>There was general agreement among respondents on the analysis and conclusions reached. However there was some disagreement relating to the market definition, no robust alternative market definition was put forward. Overall, the proposed conclusions remained unchanged after the consultation.</p>	
1.5	<p>Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified the proposed market definition by reference to Section 2 of the Commission's Guidelines on the definition of the relevant market and the assessment of significant market power<sup>108</sup>, and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and Section 3.2 of the accompanying Explanatory Memorandum<sup>109</sup>.</p>	<p>ComReg has concluded that there are not separate markets for residential and non-residential users in Ireland, this is different to the EU recommendation.</p> <p>ComReg concluded that its separation of the markets for higher and lower level access more usefully captures the different needs of larger and smaller users of access, primarily by defining them in terms of the services they use rather than in terms of other features that they may have in common.</p>	<p>Pages 13-18 and pages 82-85.</p>

<sup>108</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services, OJ C 165, 11.7.2002, p. 6.

<sup>109</sup> Commission Recommendation of 11.2.2003 on Relevant Product and Service Markets with the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for ECNs and ECSs, C (2003) 497

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

2.1	The name(s) of the undertaking(s) designated as having individually or jointly significant market power. Where applicable, the name(s) of the undertaking(s) which is (are) considered to no longer have significant market power	eircom Ltd should be designated as having SMP in the fixed retail market for <b>Lower Level Narrowband Access</b> to the public telephone network.  eircom Ltd should be designated as having SMP in the fixed retail market for <b>Higher Level Narrowband Access</b> to the public telephone network.	Page 29
2.2	The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power	<ul style="list-style-type: none"> <li>• Market Share</li> <li>• Potential Competition and Barriers to Entry</li> <li>• Absence of Countervailing Bargaining Power</li> </ul>	Pages 21-29 and 88-91
2.3	The name of the main undertakings (competitors) present/active in the relevant market.	EsatBT, Chorus, energis, and MCI, ntl	Pages 21
2.4	The market shares of the undertakings mentioned above and the basis of their calculation (e.g., turnover, number of subscribers)	<ul style="list-style-type: none"> <li>• In total OAO market share is less than 1% for lower level access market, on a channel basis.</li> <li>• In total OAO market share is less than 23% for higher level access market, on a channel basis.</li> </ul>	Pages 23

**Please provide a brief summary of:**

2.5	The opinion of the national competition authority, where provided	The Authority supports the approach and findings of this analysis exercise.	Pages 118-120
2.6	The results of the public consultation to date on the proposed designation(s) as undertaking(s) having significant market power (e.g., total number of comments received, numbers agreeing/disagreeing)	<p>There were eight respondents who provided comments on specific issues in the market whose views were also taken into consideration. Five detailed responses to the consultation were provided by :</p> <ul style="list-style-type: none"> <li>• Chorus</li> <li>• eircom</li> <li>• energis</li> </ul>	Pages 21-29 and 88 - 91.

		<ul style="list-style-type: none"> <li>• EsatBT</li> <li>• Vodafone</li> </ul> <p>There was general agreement among respondents on the analysis and conclusions reached. Overall, the proposed SMP conclusions remained unchanged after the consultation.</p>	
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### Section 3 - Regulatory Obligations

Please state where applicable:

<b>3.1</b>	The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC (Access Directive))	<p>The following obligations are proposed:</p> <p>Under the Access Regulations which transpose Articles 9 to 13 of Directive 2002/19/EC (Access Directive):</p> <ul style="list-style-type: none"> <li>• Transparency – Regulation 10</li> <li>• Non-discrimination – Regulation 11</li> <li>• Accounting Separation – Regulation 12</li> <li>• Access to, and use of, specific network facilities – Regulation 13</li> <li>• Price Control and Cost Accounting – Regulation 14</li> </ul> <p>Under the Universal Service Regulations - Articles 14 and 16.</p>	Pages 30- 53 and 91-118
<b>3.2</b>	The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found	Such information can be found in sections 6 & 7 and Appendix C of this document.	Pages 32-63 and 96-125
<b>3.3</b>	If the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC (Access Directive), please indicate	Not Applicable	

	<p>which are the 'exceptional circumstances' within the meaning of Article 8(3) thereof which justify the imposition of such remedies.</p> <p>Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found</p>		
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#### Section 4 - Compliance with international obligations

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

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