Commission for
Communications Regulation

Submissions received in response to Consultation

Market Review: Fixed access & call origination and Transit

Non-confidential submissions received from respondents

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation
Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland
Telephone +353 1 804 9600 *Fax* +353 1 804 9680 *Email* info@comreg.ie *Web* www.comreg.ie

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alto

alternative operators in the communications market

Market Review Consultation: Fixed Voice Call Origination - FVCO - Ref: 14/26

Submission By ALTO

Date: June 24th 2014

ALTO is pleased to respond to the Market Review Consultation: Fixed Voice Call Origination - FVCO - Ref: 14/26.

ALTO welcomes this opportunity to comment on this wide ranging and complex consultation and would like to make the following general remarks before addressing the questions in detail.

Preliminary Remarks

ALTO summarises its preliminary remarks below:

1. Transit Market – ALTO does not agree that the required three criteria test has been passed and considers that competition is, as yet, not fully established in Ireland.
2. Switchless Remedies – Absent access regulatory remedies such as functional separation, which ALTO believes would have created greater upstream competition, and stimulated greater market investment in Ireland, ALTO supports ComReg's initiatives in this area to provide at least some protection to wholesale competitors.
3. Closing the Carrier Pre-Select (CPS) Service – ALTO understands ComReg's concerns in this area, however, there are still undertakings using these services, with no viable alternative. ALTO calls on ComReg to properly consider the seriousness of this decision and insure that the critical nature of such a development is not lost within this Market Review and would request ComReg consult separately on this issue.
4. Unregulated Services VoIP– ALTO notes ComReg does not plan to regulate Wholesale VoIP, as ComReg assume volume alternatives exist, however this is not evident, nor has any evidence been submitted to the extent that we can properly submit meaningful comments. ALTO must simply stat its

competitive concerns in the circumstances. ALTO is concerned that the 3 Euro WLR discount issue is potentially Eircom lining up to lever its dominance into Retail VoIP services.

5. Price Controls – ALTO recognises that ComReg has indicated further consultations (in Q4 2014) for price controls (re. 2.60 and 11.42 of the Consultation paper). ALTO calls on ComReg to expedite these consultations in light of Eircom's removal of the €3 WLR discount that has been announced of late.

6. General points in respect of Regulation:

    a. ComReg must replace the retail minus price control of WLR to a cost orientated rate as soon as possible.

    b. ComReg proposes issuing further consultations on this issue at a later date – that may be too slow as operators are currently facing a de facto €3 per sub price increase from January 1 2015 for CGA/NGA customers in LEAs.

    c. A solution (to the above) would be to determine cost orientation is an appropriate remedy as of January 1, 2015 as part of this Consultation and then bring for a later decision dealing with retail minus to continue until that specified date.

    d. If ComReg's model has been constructed or finalised by that date, then retrospective adjustment to charges could be applied back to that date when the modelling exercise is finished.

    e. A cost orientation obligation from January 1, 2015, with retrospective readjustment, would give the right incentives to Eircom to voluntarily calculate and introduce a cost based rate sooner rather than later.

    f. Eircom's actions with respect to WLR discount are questionable (when viewed in light of this market review) – Eircom launch NGA, link the discount to NGA bundles, Eircom build up a critical mass (over 100k) fibre customers, before any other operator can build up a critical mass Eircom removes the discount which is a de facto 20% price increase. ALTO submits that is this classic case of predatory pricing.

g. Non-discrimination – ALTO submits that the Universal Gateway – UG, Service Level Agreements – SLAs, is vital and ComReg need to take to the action to implement in a short timeframe if industry are unable to quickly negotiate with Eircom.

Response to Consultation Questions:

Q.1. Do you agree that the main developments identified in the provision of RFTS are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

A. 1. ALTO agrees that the main developments identified give a reasoned account of developments over the past number of years.

ALTO submits that the introduction of Next Generation – NG, could have the effect of assisting Eircom to regain traction and indeed dominance in the RFTS market.

ALTO members are extremely concerned at the recent announcement that Eircom plans to remove the 3 Euro WLR/Bitstream bundle and ALTO views this as part of an overall strategy by Eircom to raise the price of existing wholesale voice services – with obvious knock on consequences for competitors utilising RFTS products.

Q. 2. Do you agree that the above identifies the main relevant developments in RFTS market since the previous reviews of the FACO and Transit Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 2. ALTO agrees that section 4 of the consultation identifies the relevant developments in RFTS market since the previous reviews of the FACO and Transit Markets. ALTO views aspects of retail NG offerings as having the potential to be extremely disruptive to the current market environment. ALTO cautions ComReg to apply extreme caution in terms of the removal of any *ex ante* measures at this time and in the near future.

Q. 3. Do you agree with ComReg's preliminary conclusions on the product assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 3. ALTO generally agrees with ComReg's preliminary conclusions on the product assessment for the FACO Markets. That is in the noted absence of the deployment of a functional separation remedy. It is ALTO's view that the Switchless Voice – SV, market is intrinsically linked to the FACO market.

ALTO remains extremely concerned about the viability of wholesale competition in light of Eircom's integration and position in the market. That is, together with Eircom's clear ability to margin squeeze switchless service provision should it so wish.

ALTO notes that there has been and remains a dire lack of transparency throughout the regulatory compliance and checking process within the voice markets.

Q. 4. Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 4. ALTO concurs with ComReg's assessment that the FACO market a national market in its nature. That is when considering that homogenous pricing and service provision is clearly and undoubtedly national in nature. ALTO considers wholesale bundling as tending to distort the market between the LEAs and non-LEAs. We request ComReg to consider this in its deliberations.

Q. 5. Do you agree with ComReg's assessment of SMP? Do you consider that the competition assessment for the FACO Markets would fulfil the three criteria test? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 5. ALTO agrees with ComReg's assessment of SMP.

ALTO agrees that the competition assessment tends to fulfil the three criteria test as outlined in the Consultation document.

ALTO submits that voice access competition at the wholesale layer has not developed in Ireland and almost all wholesale and volume retail service providers are dependent on Eircom's voice access products such as Wholesale Line Rental. Obviously, call origination services are conveyed through voice access points and fixed line call origination is directly and intrinsically linked to the supply of Eircom fixed access that Eircom invariably controls (whether directly or indirectly).

Q. 6. Do you agree with ComReg's preliminary conclusions on the product assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 6. ALTO does not agree with ComReg's assessment in clause 7.31.

ALTO submits that the boundary for of the FVCO component of the FACO market is at the Double Tandem (formerly Tertiary) exchange level. The reason for this position is that Eircom has a choice to either use its own Tandem / Double Tandem or an alternative provider transit from the primary level. ALTO members would originate IDA/WLR calls through the Eircom primary level hence if ALTO members could do this, it clearly must be a matter of selection/preference on the part of Eircom. Fig 26 appears to also indicate a third party transit between primary and primary – including for Eircom.

Q. 7. Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 7. Many ALTO members do not agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant Transit Market. Whilst Eircom may have national coverage in the transit market no other operator has this level of coverage. The likelihood of any other operators having this coverage seems highly unlikely given historical data and assessment.

ALTO submits that it cannot agree that competition is established nationally and consider this is unlikely to happen.

ComReg must also come in for some criticism in respect of this situation. The national interconnect network historically has, and continues to lack the required incentives to allow non-incumbent operators to interconnect and gain competitive synergies through commercial and unregulated market dynamics.

Q. 8. Do you agree with ComReg's 3CT with respect to the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. Respondents are encouraged to provide Internal Transit and External Transit traffic and direct interconnection information as part of their responses.

A. 8. ALTO does not agree with the results of ComReg's three criteria test - 3CT, with respect to the Relevant Transit Market.

- **Criteria 1 – The presence of high and non-transitory barriers to entry.**

ALTO submits that as ComReg clearly acknowledges that the services provided by other operators are patchy, and that the commercial viability of matching Eircom's coverage does not exist, then this leaves both the market and ComReg's assessment in respect of the 3CT in a precarious position. Not to mention susceptible to legal challenge.

- **Criteria 2 – A Market structure which does not tend towards effective competition within the relevant time horizon.**

ALTO considers that in the absence of regulation, the market will not work correctly.

ALTO submits that it expects Eircom to increase its prices in geographic centres where it has incumbent and sole coverage, and to reduce prices, with the effect of driving out competition in other tending to be competitive areas. This strategy tends to have the effect of stranding the investments made by ALTO members.

- **Criteria 3 – The insufficiency of competition law alone to adequately address the market failures(s) concerned.**

ALTO agrees with the assessment of this criteria as market damage can occur whilst the *ex post* procedures are litigated. ComReg need look no further than the Mobile Termination Rate – MTR, appeal to the High Court for actual evidence of the issues that can arise in such instances.

Q. 9. Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 9. ALTO agrees that the competition problems and the associated impacts identified could potentially arise in the FACO Markets in the absence of *ex ante* regulation.

ALTO fully agrees with ComReg's competition concerns as outlined in the Consultation document.

ALTO is not in a position to provide empirical evidence, but members are due to make submissions covering off: (1) margin squeeze/leveraging; (2) inefficiency; (3) transparency: lack information flow/information retention; and (4) discrimination.

ComReg will be aware of the issue surrounding Eircom's White Label offering and the fact that the offering fits within the headings (1) – (4) above.

Q. 10. Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 10. ALTO submits that it agrees with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies however macro and structural changes are urgently needed we would like to add the following comments.

A.10.1 Lack of Functional Separation – ALTO notes that ComReg has not yet auctioned the EC functional separation remedy on Eircom and we consider this has seriously disadvantaged competition in Ireland as there is no clear break point between access (which is an essential facility) and services.

ALTO notes that improvements in technology mean that functional separation could now be implemented with virtual system separation rather than the more onerous physical separation. Our responses are in consideration of the issues local to Ireland.

A.10.2 Lack of EOI – Absent functional separation the next macro approach to stimulate competition would be to implement EOI.

ALTO considers that the introduction of EOI would be a macro change with significant benefit for competition in Ireland.

ALTO submits that ComReg to update its own thinking and use of more modern regulatory techniques to stimulate competition. WLR will continue to exist for many years and now is the time to align with the NGA process developments.

A.10.3 Access remedies

We generally agree with the access remedies but would like to additionally offer the following comments.

- In respect of 9.49 – ALTO remarks that absent associated regulatory intervention to correct the current fixed number portability situation in Ireland, to release Eircom from Wholesale regulation for VoIP would be a catastrophe for competition. We believe it would lead to a situation where Eircom could move its base to VoIP, and even if other operators could develop comparable products (we are not sure they can in a short time frame) there is not an efficient way for customers to switch providers. The current central number data for fixed telephone numbers is not working well and cannot scale to the volume of number ports required for VoIP. The situation is masked by WLR as the service moves rather than the number, but for VoIP the number must transfer to the gaining provider.

- In respect of 9.85 – We welcome this both regarding interconnect and co-location and would request that ComReg provide an additional requirement tantamount to efficient interconnect and co-location, not just cost orientated but process efficient.

- In respect of 9.92 and 9.93 – ALTO agrees with ComReg's proposal and please see our earlier comments to comment A.9.d.

- In respect of 9.101 ALTO supports ComReg's proposal as its possible PACO will also be carried through the WEILs through IBHs to our existing and new co-locations.

- In respect of 9.103 – ALTO believes that ComReg are required to consult separately as to whether the industry is better served by not having to depend on Eircom for routing information as such conveys an on-going competitive advantage on Eircom.

- In respect of 9.142 – ALTO considers that ComReg needs to carry out a full review of the need for EOI. WLR and CGA services are going to continue for many years and improvements in technology and Eircom's NGA developments mean that it is a lot easier to implement EOI.

- In respect of 9.144 – ComReg implies in its text that price discrimination can be partially dealt through *“price controls where the price control obligation results in FCAO prices that are aligned with the efficient costs of the provision of the service.”*

- ALTO submits that the Retail minus price control is allowing Eircom a substantial margin as we discuss in our response to question 9 (A.9.b) thus the cost inefficient. ALTO agrees with ComReg clause 9.145 as the price control is not enough to deal with discrimination.

- In respect of 9.214 – ALTO acknowledges that ComReg to consult later in the year on the price control remedy for WLR, however we disagree that the retail minus price control team should continue for the reasons outlined earlier in our response.

- In respect of 9.258 – ALTO agrees with the proposals for an MST for Switchless services for the reasons outlined earlier.

- In respect of 9.276 ALTO agrees with ComReg’s proposal for accounting separation to provide transparency to the operation of costs with the product.

Q. 11. Do you agree with ComReg’s draft Decision Instrument set out in Appendix H, in particular, that its wording accurately captures the intentions expressed in this Section 9? Do respondents agree with ComReg’s Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating

the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

Decision Instrument 8.3 – SLAs

The industry has spent over a year trying to negotiate a fit for purpose SLA for NGA with little success until the issue was on the verge of being disputed by multiple operators. The proposed decision instrument (Section 8) whilst looking constructive is wholly insufficient for dealing with SLAs as the proposed approach does not work. We therefore consider Eircom must now be mandated to offer fit for purpose SLAs as part of product launch approval. ComReg also need to add to their powers an ability to adjudicate on SLA discussions without the need to go through the long and drawn out dispute process – experience suggests a dispute of this nature could take ComReg 18 months to resolve. We note that European Regulation allows adjudication to happen and such has worked well in the UK. Any such adjudication should be under the control of ComReg.

Obligation of Non-Discrimination: Section 9 –

- The proposal for declaration of compliance is helpful; based on the assumption that ComReg has the necessary detailed understanding of networks. ALTO's view is that the parties best able to judge whether a facility is equivalent is other operators and so the compliance statements should be published.
- EOI for future services – Eircom is currently updating many of its current generation order handling to use the features developed for NGA which have a requirement for EOI.
- ALTO considers that given these developments, Eircom should now be regulated on an EOI based for updated current generation services as they can design this in. Recent events in fault handling and now service provisioning have highlighted that Eircom was not providing equivalent

information to other operators and in the case of service assurance a preferential service was offered to Eircom Retail in terms of opening hours.

- ALTO has not confidence that current Equivalent of Output – EOO, processes are working and are concerned that ComReg is unable to easily detect such. EOI whereby Eircom Retail use the same gateway instance as the rest of industry would lesson suspicion of discrimination and should save Eircom development costs as only one development will be required in future.

ALTO considers ComReg's non-discrimination proposals insufficient to create the correct incentives for Eircom not to discriminate. Serious discrimination is still occurring and until EOI is applied within Eircom that treats Eircom Retail the same as other operators this discrimination will continue.

OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING (Section 12)

ALTO strongly disagrees with the continuance of the Retail minus price control for WLR. This is an out of date price control and is causing huge damage to the industry as we consider it is allowing Eircom to shelter significant margins in what is a key wholesale product for the whole industry – thereby keeping retail prices substantially higher than they should be. Eircom continues is dominance in voice access this proposed remedy simply allows Eircom the freedom to maintain that dominance as a considerable profit.

In ALTO's view this remedy prevents the industry from moving on, as there is no incentive for a volume launch of products such as VoIP into the consumer market. A commercial driver to launch VoIP would be to undercut WLR by say 1 to 3 Euros a customer per month. However the fear is Eircom could easily strand such as investment by simply removing some of its shelter margin.

ALTO notes that ComReg is applying form of cost orientation for all the other aspects of WLR and also WLR is cost orientated in other countries hence it is difficult to understand the logic of this decision other than it protects Eircom Margin.

12.8 Without prejudice to the generality of Section 12.7 of this Decision Instrument, the minus X percentage to be applied in respect of the WLR element of SB-WLR and Ancillary Services on SB-WLR shall be at least 14%.

Q. 12. Do you agree with ComReg's proposed approach to the withdrawal of remedies in the Transit Market, including the proposed sunset period? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 12. ALTO does not agree with ComReg's proposal to remove regulation from the transit market and therefore we do not agree with the proposed approach to the withdrawal of the remedies.

Eircom will have the potential to raise their prices at will, and should this drive investment they could simply reduce prices undermining the investment.

ALTO is therefore of the view that the 1st of the 3CT are therefore failed.

ALTO considers that there is a distortion in the 3CT test in that it has been conducted in an environment that is subject to regulation.

ALTO's view is that the 3CT has not been passed and ALTO does not agree to the de-regulation of this market.

ALTO rejects the proposal that a six months sunset period as being unrealistic and disproportionate. Any sunset period must be of least two years in duration.

Q. 13. Question 13: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your

answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 13. ALTO does not fully agree with ComReg's current Regulatory Impact Assessment – RIA. In particular, we are disappointed that ComReg has not considered and reviewed functional separation or Equivalence of Input.

- ALTO cannot support ComReg's transit findings for the reasons discussed earlier.
- ALTO considers the Retail minus approach to WLR price controls is ineffective as it allows Eircom to both take considerable profit (above the regulated WACC) and the potential to manipulate the market to its benefit. We welcome ComReg's comment including in clause 11.42 to further consult on price control methodologies. In view of Eircom's announcement to remove the 3 Euro discount in the LEAs this is now of utmost urgency.

Except for our EOI concerns and the above points ALTO supports the remainder of RIA conclusions.

ALTO

24th June 2014

2 BT Communications Ireland Limited (BT)

BT Communications Ireland Ltd [“BT”] Response to ComReg’s Consultation:

Market Review

Wholesale Fixed Voice Call Origination and Transit Markets

Issue 1 – 24th June 2014

Introduction

This is an important consultation for the future of key voice services in Ireland. We welcome ComReg’s preliminary proposal to continue the regulation of WLR, however there are a number of ComReg proposals that cause concern for the continuance and future stimulation of competition in the Irish market. Our key concerns are:

1. **Price Controls –** Whilst acknowledging ComReg have indicated further consultations (Q4 2014) for price controls, we consider competition is immediately susceptible to leverage given Eircom’s recent announcement that it intends to remove the 3 Euro WLR bundle discount in the LEAs. We consider an urgent ComReg decision is required to bring about cost orientation for WLR rentals as the current potential for distortion of the market is heightened by Eircom’s actions and ComReg’s proposal in this consultation not to require wholesale VoIP. We are concerned that Eircom will use what is tantamount to a 3 Euro price hike, potentially amplified by an application to increase the cost of call origination, to abruptly and significantly increase the cost input to other operator retail voice services to pave the way for the launch of their own “retail only” VoIP solution. Eircom wholesale pricing should not be manipulated to meet the needs of Eircom retail, and we are seriously concerned that this could potentially happen.

2. **Unregulated VoIP and Fixed Number Portability –** We note ComReg do not plan to regulate Wholesale VoIP as it appears ComReg assume volume alternatives exist and are ready to launch, however this is not evident. As discussed above we are concerned the 3 Euro discount issue is potentially Eircom lining up to lever its dominance into Retail VoIP.

   We consider that ComReg must ensure conditions are established for the wholesale switching processes to be fit for purpose prior to allowing Eircom to launch mass market retail VoIP services. We are concerned that the current fixed number portability processes, which are already considered not fit for purpose, would struggle to support the high volumes of porting transitions a volume launch of VoIP would require. If ComReg are facilitating the launch of Eircom Retail VoIP without the wholesale issues being resolved, this will create a significant competitive distortion in the market contrary to the 2002 Communications Act and contrary to the EC Directive and Regulations on customer switching.

3. **Macro Regulation -** There is an urgent need for ComReg to consider changes of a macro and structural nature to improve the competitive environment. ComReg continues to propose less efficient micro solutions that address the symptoms rather than the causes of discrimination problems. With Eircom upgrading the current generation services for greater alignment with NGA order processing and system upgrades this is an opportune time to bring forward remedies such as EOI at minimum cost.

    a. **Lack of Functional Separation –** ComReg has not yet actioned the EC functional separation remedy or even consulted on it. We consider this a major oversight which continues to disadvantage competition in Ireland as there is no clear break point between access (which is the essential access facility) and services. Improvements in technology mean that functional separation could now be implemented with virtual system separation rather than the more onerous physical separation. We believe ComReg should now consider functional separation as a way of stimulating further upstream competition and investment in Ireland as the micro approach is slow and disproportionately benefits Eircom through delay.

    b. Lack of EOI – Absent functional separation the next macro approach to stimulate competition would be to implement EOI; it’s disappointing that ComReg dismiss EOI in the consultation and don’t acknowledge that a lot of the NGA EOI developments are creating a platform that could increasingly be used for CGA. We consider the introduction of EOI would be a macro change with significant benefit for competition in Ireland. The micro or serial approach addresses one discrimination issue or ‘symptom’ at a time whereas a macro approach addresses the cause – for example EOI order processing through the same front door will considerably reduce the opportunity for Eircom to discriminate in service provision and assurance. We urge ComReg to update its thinking and use these modern regulatory techniques to stimulate competition. WLR will continue to exist for many years in Ireland and now is the time to make the change to align with the increased NGA and CGA process alignment.

    c. **Requirement for a ComReg Adjudication process -** Progress on negotiating SLAs, technical and process issues is proving slow, particularly for SLA improvements. We acknowledge the good work of ComReg facilitating these discussions however the escalation process is problematic as our experience of the ComReg dispute process is poor given it takes about 18 months to resolve complex disputes, by which time any market opportunity is normally lost. The issue is akin to taking a district court case vs. a high court case - it is better to deal with smaller issues in a lower court. A lower level ComReg led adjudication process is required where ComReg can make lower level decisions to maintain progress. We propose ComReg run this process to avoid conflicts of interest to other parties.

4. **Transit Market –** We do not agree that the three criteria tests have failed and consider the market is demonstrating a geographic characteristic.

5. **Switchless Remedies –** Absent access remedies such as functional separation which we believe would have created greater upstream competition we support ComReg's initiatives in this area to provide protection to wholesale 'sell through' competitors.

6. **Closing the Carrier Pre-Select (CPS) Service –** We understand ComReg's concerns however there are a number of issues that still need to be clarified as below:
   a. We consider the seriousness of the decision is lost within the breath of this Market Review and would request ComReg consult separately.
   b. CPS is part of WLR and clarity is necessary that any removal of CPS regulation does not impact the CPS facilities within WLR. We believe this is more properly represented as a proposal to withdraw "CPS-only" order types.
   c. There are still thousands of people using this service and for some there is no easy alternative. Detailed discussion is required as to what should happen to the existing customers and how will this be managed.

BT Response to Detailed Questions

Question 1: Do you agree that the main developments identified in the provision of RFTS are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

A.1.
We generally agree the main developments identified are a reasonable summary of the past years however we believe the introduction of Next Generation Access (NGA) potentially causes an inflexion point where Eircom can leverage its wholesale market influence to entrench its dominance in the RFTS market.

ComReg appear to suggest in clause 9.57 that Eircom Retail are preparing to launch a carrier VoIP product and the proposals in this consultation in our view appear to be facilitating this. I.e. ComReg are proposing not to require Eircom to offer a wholesale variant of carrier VoIP services. We welcome new technology and services provided they are introduced fairly.

We are concerned the recent Eircom announcement to remove the 3 Euro WLR/Bitstream bundle is part of an Eircom initiative to raise the price of existing wholesale voice services – thereby raising the input costs for its competitors RFTS products. We believe that once the price change has been executed, Eircom Retail will potentially have the freedom at some point to launch carrier VoIP at a lower non-regulated price to undermine its competitors on wholesale WLR. This is a speculative view but one we consider could emerge as reality and we will address this in more detail in our response 9.b.

Question 2: Do you agree that the above identifies the main relevant developments in RFTS market since the previous reviews of the FACO and Transit Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.2.
We agree that section 4 of the consultation identifies the main relevant developments in RFTS market since the previous reviews of the FACO and Transit Markets. As discussed in our response to question 1 we agree that VOB is within the market but it is uncertain as to when it will start to grow significantly.

Question 3: Do you agree with ComReg's preliminary conclusions on the product assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.3.
Absent functional separation we generally agree with ComReg's preliminary conclusions on the product assessment for the FACO Markets. In our view the lack of upstream competition in Ireland accentuates the downstream problems which ultimately require additional regulatory remedies. We are concerned that the lack of competitive FACO supply makes the wholesale 'sell through' market vulnerable to Eircom's vertical integration and its ability and motive to margin and product squeeze switchless service provision. We therefore consider SV to be linked to the FACO market.

Question 4: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.4.
We agree that the FACO market is national in nature given national pricing and provisioning. However we consider the recent wholesale bundling approach of Eircom has been tantamount to distorting the market between the LEAs and non-LEAs.

Question 5: Do you agree with ComReg's assessment of SMP? Do you consider that the competition assessment for the FACO Markets would fulfil the three criteria test? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.5.
We agree with ComReg's assessment of SMP and we agree the competition assessment fulfils the three criteria test. Voice access competition at the Wholesale layer has not developed in Ireland and volume retail (RFTS) service providers (other than UPC) are predominantly dependent on Eircom's Fixed Voice Access products (FA) such as Wholesale Line Rental. Call origination (CO) is conveyed through voice access

hence Fixed line call origination is directly linked to the supply of Eircom fixed access which Eircom largely controls. Hence the industry is dependent on FACO.

Question 6: Do you agree with ComReg's preliminary conclusions on the product assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.6.
We do not agree with ComReg's assessment in clause 7.31 that the boundary for of the FVCO component of the FACO market is at the double tandem exchange. The reason for this position is that Eircom has a choice to either use its own Tandem / Double Tandem or an alternative provider transit from the primary level. Operators such as BT would originate WLR calls through the Eircom primary level hence if BT can do this it must be a matter of choice for Eircom. Fig 26 could also indicate a third party transit between primary and primary – including for Eircom.

Question 7: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.7
We do not agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant Transit Market. Whilst Eircom may have national coverage in the transit market only 28% (clause 7.116) of exchanges are served by three providers including Eircom.

Based on the principle adopted in earlier consultations by ComReg that three providers are required for competition this highlights that competition is localised rather than national. We do not agree that competition is established nationally and consider this is unlikely to happen. Please also see our response to question 8 below.

Question 8: Do you agree with ComReg's 3CT with respect to the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. Respondents are encouraged to provide Internal Transit and External Transit traffic and direct interconnection information as part of their responses.

A.8.
We do not agree with the results of ComReg's three criteria test (3CT) with respect to the Relevant Transit Market.

- Criteria 1 – The presence of high and non-transitory barriers to entry;

Consistency in the use of the term competition.
ComReg for the leased lines Decision of 2008 (D06/08) and the Price Regulation of bundles (D04/13) generally considered there had to be three competitors for a market to be competitive. Table 15 at clause 7.116 informs us that only 28% of eircom exchanges meet this criterion for transit services in Ireland. Therefore whilst Eircom may be providing national coverage three operator competition exists in less than a third of this. The EC supported ComReg geographically de-averaging in the bundles decision.

Why is this important?
There are parts of Ireland where there is little or no infrastructure competition and for ComReg to take a blanket national approach for de-regulation could allow Eircom to take advantage of this situation absent regulation. For example in areas where no competition exists Eircom could significantly raise its prices and reduce them again if competitive investment is made.

High barriers to entry.
As regards BT extending its network further our view is that if the remainder of the country had been commercially viable (reasonable barrier to entry) then we would have invested in this over the past 17 years.

BT View
In conclusion we agree that the 3CT is failed in a third of routes but passes in the two thirds of routes. For this reason we consider that a geographic based outcome should have emerged to the 3CT and not an overall fail.

- Criteria 2 – A Market structure which does not tend towards effective competition within the relevant time horizon.

  Today Eircom continues to be the only operator with a full national coverage – some 17 years after the market was opened to competition and as indicated in our response to question 7, three operator competition only exists in 28% of the market. This suggests that competition is limited and after 17 years it would have been expected to have developed further. We therefore consider that the trend to effective competition will be localised rather than national going forward. I.e. as above the 3CT would fail in some locations and pass in others.

  Modified Green field approach to regulation.
  Absent regulation, i.e. a modified green field approach' we consider the incumbent would have had the opportunity and motive to stifle competition. The evidence is that even with regulation only a limited level of competition has established.

  Economies of Scale and Scope
  We are concerned that should ComReg decide to de-regulate this market then Eircom through its beneficial Economies of Scale and Scope will again have the ability and motive to undermine competition.

  We therefore believe a future unregulated transit market will quickly migrate back to Eircom as their scale benefits them with the lowest cost per unit. We therefore consider the 3CT fails.

We consider the 6 month sunset adds little to support competition as issues will quickly emerge once the market is de-regulated.

- Criteria 3 – The insufficiency of competition law alone to adequately address the market failures(s) concerned.

  We agree with the assessment of this aspect of the 3CT as market damage can occur whilst the ex post procedures are litigated.

Question 9: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.9.
We agree the competition problems and the associated impacts identified could potentially arise in the FACO Markets absent ex ante regulation. We would like to offer the following comments.

a. Inefficiency/Inertia
Over the past year the industry has sought to progress improved SLAs from Eircom for its wholesale products in current generation markets. In reality no improvements to the published SLAs have been achieved and BT and industry has been frustrated with the lack of progress. Similar has been true for NGA SLAs until some recent small signs of progress. We consider a truly competitive wholesaler would have come to an agreement with its customers within this time or face losing its customers.

It is disappointing that within the current regulatory framework improvements cannot be achieved demonstrating firstly that regulation is required, but secondly that stronger regulation is required. For example all new products should have agreed SLAs prior to launch and ComReg needs to have powers to act as an adjudicator in technical, process and SLA discussions without the need for the drawn out formal dispute route. A time limit of six months should apply to SLA discussion after which ComReg should actively engage. BT's experience of the formal dispute route is it takes circa 18 months[1] to address complex disputes by which time the market opportunity has been lost. The formal dispute route must remain but it should be an escalation rather than the norm.

b. Leveraging
We agree with ComReg that there is a risk of Price Based Vertical Leveraging from the Incumbent for the following reasons:

Margin for leverage
As below there is significant price margin in WLR for Eircom to leverage.

1. The rental price of Eircom WLR prices is €18.02 exVat (without the 3 Euro discount inside the LEAs).

[1] Reference Nutley and Wholesale Ethernet disputes.

2. Eircom have indicated they intend to remove the 3 Euro discount within wholesale bundles in the LEA. We acknowledge Eircom have asked for comments; however we expect they will maintain their position of removing the discount.
3. The components of the WLR product are the copper line, the line port and associated components in the switch and an allocation for repair.
4. The estimated cost of these components are €9.91for the copper (i.e. akin to the full unbundling line including margin), €2 for the line card per month and circa 1 Euro per month for repair. This gives a bottom up price of 9.91+2+1 = €12.91. As the 9.91 already has a WACC of 10.21% applied an additional 0.3 cent should be added for the remaining components giving a bottom up cost orientation price of circa €13.21. This gives a margin to Eircom of circa €4.81 per customer per month exVat in addition to the 10.21% return for the WACC.
5. This margin is very important, not only as profit for Eircom, but in providing the scope for Eircom to leverage the market. Eircom also offer loyalty promotions to discount other products which we also believe can lever customers from purchasing products such as LLU.

Regulation for leverage

6. Eircom WLR is Retail minus regulated hence wholesale prices are based on the Retail minus price control rather than cost orientation. Although the figures above are for illustrative purposes we consider there is a considerable gap between the current price and cost orientated prices. We believe the situation without Regulation would be worse, but the current regulation is out of date and the price control nurtures leverage and excessive margin.

Potential applications for leverage

Scenario 1 – To flex the WLR price in a WLR/Bundle to assist the launch of NGA by aligning the NGA launch pricing with the prices of mature current generation products. After initial concerns that the proposed discount was too narrow and distortionary it was widened to the whole of the LEA. This highlights the ability to lever WLR prices to impact the market.

Scenario 2 – Eircom has indicated that the 3 Euro LEA bundle discount is to be removed at the end of the year and has sought industry views. We believe this action creates a potential second leverage opportunity that could allow Eircom dominance in current generation WLR voice to be transferred to its Retail VoIP services.

This consultation at clause 9.57 indicates it is likely that Eircom will launch Retail VoIP and separately proposes that Eircom will not be required to offer a wholesale product. Price leverage could potentially occur with the price of WLR increasing by 3 Euro as the discount is removed, and some time afterwards Eircom launching a Retail only VoIP solution to its NGA base at a discounted price. This would convey a significant competitive advantage to Eircom which has been facilitated through the actions of Eircom and the decisions of this consultation.

Further leverage scenarios – We can document further potential examples of price based vertical leveraging behaviour, in particular loyalty promotions and would be happy to discuss these with ComReg. In our view the primary flaw in the current regulations is that WLR is not cost orientated hence it does not convey the correct signals for other to invest. We will address this in our response to the remedies and Decision notice.

c. Information Asymmetries

We agree with ComReg and can cite past experiences. For example:

- **Service Assurance** - Differences in the information provided to operators were only recently rectified through new product developments. The additional information assists operators to be more informative to end users about the expected resolution of their faults.
- ✂
- Both of these issues should not have occurred but issues still exist in 2014.

We consider ComReg need to move from what is dated Equivalence of Output (EOO) regulation towards the stronger Equivalence of Input regime (EoI). If all providers had to use the same Eircom wholesale service facilities then it would be structurally more difficult for discrimination of service assurance and provision to occur.

d. Discriminatory negotiation practices.

We perceive that when Eircom wants a new product it devotes resource and in our view attempts to push the product or issue through industry negotiations and difficult problems appear to be resolved quickly. We cite three examples being NGN, NGA and now eVDSL. However when industry request products or improvements such as to SLAs, we perceive we are faced with delay and reasons why progress can't be made. We appreciate industry discussions are not easy, however the behaviour appears pronounced and an increasing cause for concern. We therefore seek for ComReg to strengthen the requirement to negotiate in good faith and introduce a ComReg adjudication facility – discussed earlier.

✂

e. **Other Issues Identified –** we fully agree with ComReg's competition concerns and consider that updated controls are required.

Question 10: Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.10. We agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies however macro and structural changes are urgently needed as discussed below.

A.10.1 Lack of Functional Separation – We note ComReg has not yet actioned the EC functional separation remedy on Eircom and we consider this has seriously disadvantaged competition in Ireland as there is no clear break point between access (which is an essential facility) and services. We note that improvements in technology mean that functional separation could now be implemented with virtual system separation rather than the more onerous physical separation. Our responses are in consideration of the current regulatory environment and local issues.

A.10.2 Lack of EOI – Absent functional separation the next macro approach to stimulate competition would be to implement EOI; it's disappointing this has been rejected again (clause 9.142). We consider the introduction of EOI would be a macro change with significant benefit for competition in Ireland. The micro or serial approach addresses one discrimination issue or 'symptom' at a time whereas a macro approach addresses the cause – for example EOI order processing through the same front door will lessen the opportunity for Eircom to discriminate.

ComReg imply in clause 9.143 that EOO has been a success but no evidence is provided to support this statement. As an operator in the market we suggest ComReg look at the discrimination issues raised over the years which highlight otherwise. Even this year ComReg had an opinion of non-compliance against Eircom Service Assurance and we note ComReg's own statement at the end of clause 9.147. We strongly disagree with ComReg's view that EOO is working in Ireland and this ComReg position will continue to distract both industry and ComReg compliance teams for years to come.

We urge ComReg to update its thinking and use modern regulatory techniques to stimulate competition. WLR will continue to exist for many years and now is the time to align with the NGA process developments. As discussed earlier we are aware that Eircom have been updating some aspects of the CGA product (e.g. appointments) to align with NGA processes and joint NGA and CGA order types already exist. Hence now is an opportune time to move WLR to EoI.

A.10.3 Access remedies

We generally agree with the access remedies but would like to additionally offer the following comments.

- Comment to 9.49 and 9.85 – We welcome this for interconnect and co-location and would request that ComReg provide an additional requirement tantamount to requiring efficient interconnect and co-location, not just cost orientated but process efficient. We believe aspects of co-location are over engineered thus raising unnecessary costs. E.g. we are required to buy significantly larger power units than we require – this has a detrimental impact on the cost orientation calculation making our costs higher.

- Comment to 9.92 and 9.93 – We agree with ComReg's proposal and please see our earlier comments in our response 9.b.

- Comment to 9.10.1 we support this ComReg proposal as its possible FACO will also be carried through the WEILs through IBHs to our existing and new co-locations.

- Comment to 9.103 – We believe ComReg need to consult separately as to whether the industry is better served by not having to depend on Eircom for routing information as such conveys an on-going competitive advantage on Eircom. We are also concerned that the pricing of such IN dips should be price controlled to a cost orientated price.

- Comment to clause 9.144 – ComReg implies in its text that price discrimination can be partially dealt through "price controls where the price control obligation results in FCAO prices that are aligned with the efficient costs of the provision of the service. “ The Retail minus price control is allowing Eircom a substantial margin as we discuss in our response to question 9 (A.9.b) hence the cost cannot be described as efficient. We agree with ComReg clause 9.145 as the price control is not enough to deal with discrimination.

- Comment to clause 9.146 and following paras. We welcome the initiative by ComReg to seek statements of compliance, however we do not understand why such cannot be made available, even the non-confidential parts for operators to use their expertise to review.

- Comments to clause 9.189 (a) 9.189 (b) and clause 9.1.1. We welcome that ComReg recognise making material changes, including changes that are not backward compatible could take longer than the timescales proposed. We also welcome the use of the words “at least” in front of the timescales in the draft decision, however we could not locate where the material issues are picked up in the draft decision.

- Comment to clause 9.214 – We acknowledge ComReg is planning to consult later in the year on the price control remedy for WLR, however given the recent announcement to remove the three euro discount we consider the consultation and implementation of cost orientation is now a matter of urgency. Please see our earlier comments and in particular our response 9.b.

- Comments to clause 9.276 we agree ComReg’s proposal for accounting separation to provide transparency to the operation of costs with the product.

Question 11: Do you agree with ComReg’s draft Decision Instrument set out in Appendix H, in particular, that its wording accurately captures the intentions expressed in this Section 9? Do respondents agree with ComReg’s Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

A.11.
We generally agree with the draft decision Instrument set out in Appendix H but would like to offer the following additional comments.

- Comment to clause 7.4 Interconnect – we consider the clause should be amended to make it clear co-location applies to VoIP interconnect/interoperability services as we are likely to use existing in building WEIL handovers.

  … Eircom shall meet all reasonable requests from Undertakings for the provision Next Generation Interconnect ‘and co-location’ Services’.

- Comment to clause 8.3 SLAs. The industry has spent over a year trying to negotiate a fit for purpose SLA for CGA without success. The proposed decision instrument (Section 8) whilst looking constructive is insufficient for dealing with SLAs as the proposed approach is already proven not to work in a reasonable time frame (i.e. it already exists in many ComReg Decisions to no effect). We therefore consider Eircom must now be mandated to offer fit for purpose SLAs as part of product launch, or following an operator request to update the SLAs and a maximum of six months should be set at which point ComReg will impose a solution. We consider ComReg also need to add to their powers an ability to adjudicate on SLA, process and technical discussions without the need to go through the long and drawn out formal dispute process. Experience suggests a dispute of this nature could take ComReg 18 months to resolve which is far too long and the market would have to suffer during this extended period.

- Comments to clause 9 –
  - Obligation of Non-Discrimination. The proposal for declaration of compliance is helpful; however it assumes that ComReg has the necessary detailed understanding of networks. In our view the parties best able to judge whether a facility is equivalent is other operators and so the compliance statements should be published.
  - EoI. Eircom is currently updating some of its current generation order handling to use the features developed for NGA which have a requirement for EoI. We consider that given these developments, Eircom should now be regulated on an EoI based for updated current generation services as they can design this in. As discussed in our earlier responses discrimination is still a problem and in our view EOO is not working.

  In conclusion we consider the non-discrimination proposals insufficient to create the correct incentives for Eircom not to discriminate. Discrimination is still occurring and until EoI is applied within Eircom that treats Eircom Retail the same as other operators we believe provisioning and assurance discrimination will continue.

- A comment to clause 10.9 – Transparency and product changes - The proposed text does not appear to address the situation where it is not possible to implement a non-pricing change in six months. The text appears to be seeking for Eircom to request changed timescales whereas the option must exist for ComReg to mandate changed timescales where appropriate.

- Comment to clause 12 - Obligations relating to price control and cost accounting. As discussed previously we do not agree with the continuance of the Retail minus price control for WLR. This is an out of date price control and is causing damage to the industry as we consider it affords Eircom the ability to unreasonably leverage the market. We refer ComReg to our earlier response in answer 9.b.

Question 12: Do you agree with ComReg's proposed approach to the withdrawal of remedies in the Transit Market, including the proposed sunset period? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A.12.

We do not agree with ComReg's proposal to remove regulation from the transit market and therefore we do not agree with the proposed approach to the withdrawal of the remedies. As indicated earlier we consider ComReg has not demonstrated that the whole market has been addressed by competition and we consider this is highly unlikely to happen within the period that the review covers. Please see our responses to questions 7 and 8 for further details

Question 13: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A.13. We have reviewed the Regulatory Impact Assessment (RIA) provided by ComReg and are disappointed that it has not adopted functional separation or Equivalence of Input. For the reasons discussed earlier we find this disappointing and a missed opportunity.

- As discussed in A.12 we do not support the transit findings for the reasons discussed in our response to questions 7 and 8.
- In view of Eircom's announcement to remove the 3 Euro discount in the LEAs we consider an urgent review of the WLR price control is required to avoid leverage that would cause considerable distortion to the market. We support technology progress, but not through leverage that we believe will transfer Eircom's WLR dominance to its retail arm.
- We are concerned that the fixed number portability process is manual in nature and would not scale without considerable redevelopment to support a volume VoIP environment. This would add create market distortion concerns and issues of compliance with customer switching.

For Enquiries please contact john.odwyer@bt.com

3 Eircom Limited

eircom Ltd.

Response on behalf of eircom Group to ComReg Consultation 14/26:

Market Review

Wholesale Fixed Voice Call Origination and Transit Markets

24 June 2014

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1 EXECUTIVE SUMMARY

1.1 Fixed Access and Call Origination

eircom supports, in principle, ComReg's proposal to define a market for Fixed Access and Call Origination ("FACO"). eircom, however, does not agree with ComReg's competitive assessment of the proposed FACO market, or the imposition of more stringent regulatory remedies than currently apply to eircom's provision of these services.

Of particular concern is the fact that ComReg's market assessment fails to consider obvious and important industry trends and fails to take a forward-looking approach. Amongst other concerns:

- ComReg appears to be overly reliant on research conducted for the Market 1 consultation from December 2012 (the "Market 1 Consultation")[1], which is incomplete and out of date;

- The statistics presented by ComReg on the take-up and use of Retail Fixed Voice Access ("RFVA") services do not accurately reflect current customer attitudes/trends;

- ComReg has not given sufficient consideration to the individual and combined impacts of a number of major market developments since 2012, including:

    - the entry of Sky into the voice and broadband retail markets;

    - the elimination of the Department for Social Protection (the "DSP") Telephone Allowance Scheme;

    - the launch and rapid take-up of Next Generation Network Access ("NGA"); and

    - the launch of standalone broadband in Ireland.

- ComReg's retail market assessment fails to properly appreciate the scope and competitive nature of Retail Fixed Telephony Services ("RFTS"), particularly that:

[1] ComReg 12/117a – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers.

  - mobile is a potential substitute for standalone RFTS;
  - increased use of over-the-top voice substitutes;
  - separate product markets exist for the supply of standalone RFTS and RFTS within a wider (broadband) bundle;
  - sub-geographic markets exist for the supply of RFTS within and outside of a wider (broadband) bundle;
  - eircom is constrained by its Universal Service Obligation (the "USO"), which imposes a national geographically averaged price, to set the charges for RFTS in areas where there is less competition at the same level as in areas that are effectively competitive.

eircom therefore believes that ComReg's Market 2 definition and review process requires further analysis, insofar as:

- ComReg is proposing regulation for the period 2015 through 2017 but has not conducted a forward-looking analysis that takes account of likely market developments over that time;
- ComReg's proposed definition of the FACO market ignores the presence of strong demand side substitution and indirect competitive constraints from mobile and voice over broadband ("VoB"); and
- the proposed definition of FACO ignores the existence of sub-national geographic markets for RFVA supplied in a wider (broadband) bundle.

eircom submits that the proposed FACO market does not meet the Three Criteria Test if the test is rigorously applied. At the very least, the significant increase in competition in the RFTS market and the intensity of the constraints imposed by mobile voice and a range of over-the-top voice substitutes means that the remedies applied should be reduced and not substantially increased, as ComReg proposes.

1.2 Call Transit Services

eircom welcomes ComReg's assessment of the transit market and its proposal to remove existing *ex-ante* regulation from this market. However, eircom disagrees with the narrow definition of the transit market that ComReg proposes to deregulate. eircom also strongly objects to the proposed six month sunset period for the withdrawal of existing regulation, which is unnecessary, unreasonable, disproportionate and contrary to the interests of consumers.

1.3 Next Steps

eircom is concerned that the issues raised by ComReg's Consultation Document 14/26 (the "Consultation Document") are extremely detailed and complex, but that not all of the information needed to make an informed judgement about the near-term development of the relevant market has been gathered or considered (for example, the impact of the "phantom line" phenomenon). Furthermore, the Consultation Document fails adequately to consider or resolve a number of inter-dependent issues, the resolution of which is essential to an informed and reasonable assessment of what is being proposed by ComReg. These issues include, for example: whether and how the proposed cost accounting rules will operate as applied to FACO; how the Net Revenue Test ("NRT") will apply when using wholesale rather than retail products as the focal point of the assessment; the plan and timetable for removing Market 1 from *ex-ante* regulation; and the treatment of a FACO sub-market in which *all* operators appear to have bottleneck control of call origination to Number Translation Codes ("NTCs").

Under the circumstances, eircom considers that the Consultation Document provides an inadequate basis upon which to comment and for ComReg to issue a reasoned decision. Therefore, it would be appropriate and helpful to all stakeholders for ComReg to publish a supplemental consultation document that addresses the main concerns raised in these comments, provides the necessary details around implementation of the proposed approach, and allows an opportunity for further (or reply) comments. Given the extraordinary length of time that has passed since ComReg's last review of Market 2, a few additional months of consideration will not make a material difference.

2 THE MARKET DATA RELIED ON BY COMREG ARE OUTDATED AND INCOMPLETE

ComReg's retail market assessment relies on market data that are at least twelve months old, and, in some cases, much older. Par. 1.40 of the Consultation Document confirms that the newest data relied on for the purposes of the proposed market analysis dates from June 2013. Reference is also made to responses received to specific information requests made as far back as October 2011 and early 2011.

For example, while ComReg concedes that primary call origination comprises 70% of all call origination (and not 66% as per D07/11), eircom understands the real position is that primary call origination is increasing as a percentage of all call origination and is already over 75%.

The market data and research underpinning ComReg's Market 2 review does not take account of the important commercial developments that have taken place on the fixed voice telephony market over the past year (as discussed in Section 4 below). Moreover, the data relied on by ComReg fail to give adequate consideration to the important changes caused to competitive market conditions by the evolution of consumer attitudes and behaviours during the past year (as discussed in Section 3 below).

ComReg also relies, to a significant extent, on market data obtained in the context of the Market 1 Consultation. ComReg states that it has used this market data to "*inform*" its understanding of consumer and business attitudes and behaviours in the retail fixed voice markets[2]. eircom has previously pointed out the serious shortcomings in the research in both its response to the Market 1 Consultation in January 2013[3], and its response to the supplementary consultation on Market 1 issued by ComReg in October 2013[4] (the "Supplementary Consultation")[5].

eircom will not repeat its previous arguments but wishes to incorporate them by reference in this response. Suffice it to say that the decline of RFTS since eircom submitted its previous comments on these issues has intensified. The fixed voice market is currently in freefall globally and in Ireland – largely because traditional voice telephony services are competing, directly and indirectly, with free (or very cheap) over-the-top VoB and messaging services, mobile "all you can eat" packages, pay television bundles that include voice as an incidental add-on, and other alternatives.

3 THE STATISTICS PRESENTED BY COMREG ON THE TAKE-UP AND USE OF RFVA DO NOT ACCURATELY REFLECT CURRENT CUSTOMER ATTITUDES/TRENDS

The statistics relied upon by ComReg (par. 3.6) that relate to the take-up and use of RFVA show a small increase in the number of connections between 2010 and 2013. For a number

[2] Consultation Document 14/26, par. 1.39.
[3] See eircom response to 12/117, Annexe 1.
[4] See eircom response to 13/95, p. 10.
[5] ComReg 13/95.

of reasons, these figures are flawed and present a misleading picture of what is instead likely to be a distinct downward trend.

To begin with, the data include a significant proportion of RFVA lines that are no longer in active use to make or receive calls, which can be referred to as “phantom lines”. These occur when consumers purchase FVA as part of a wider bundle due to the pricing dynamics but make no use of the fixed voice service.

The reasons for the pervasiveness of “*phantom*” fixed lines are varied, but include the following:

- A significant minority of eircom’s voice and broadband customers (✂) have either stopped using their fixed telephone lines altogether, or have significantly reduced usage to a "de minimus" level in recent years. These customers have not, however, chosen to migrate to a standalone broadband product, usually because the pricing differentials are not sufficient to motivate them to change their package.

- Sky, which has expanded its market share significantly in the past six months, does not offer a standalone broadband product without RFVA. If eircom’s own experience is any guide, it is likely that a substantial minority of Sky end-users have either very low, or no usage at all of the fixed voice component of Sky’s broadband bundle.

- UPC offers primarily triple-play bundles of RFVA, broadband and TV, often at a cheaper bundled rate than standalone broadband or broadband and TV bundles. In essence, UPC offers RFVA as an add-on to a bundle at very low or even negative cost. If eircom’s own experience is any guide, it is likely that a substantial minority of UPC’s customers have either very low, or no usage at all, of the fixed voice component of UPC’s broadband bundles.

The existence of these phantom lines is significant for a number of reasons. First, they contribute to a false picture of continued growth in the real number of RFVA lines. Second, they provide an important indication of consumer attitudes toward the use of RFVA in Ireland when purchased as part of a wider bundle. This phenomenon is also consistent with the growing substitutability of mobile and/or VoB, and other over-the-top services, for traditional RFTS.

Without having further information about the extent of the phantom line phenomenon and the growth trend over the past two to three years, ComReg is not in a position to assess the real market dynamics, which – based on eircom's own observations and those of most industry analysts – are contributing to a growing decline in demand for traditional fixed voice telephony lines. eircom considers that this issue is sufficiently important to justify a data request by ComReg to all operators as part of this review process. The results should be considered in light of trends associated with Ireland's age demographics, particularly the habits of 18-34 year olds, and reflected in ComReg's final decision on Market 2.

In a similar vein, eircom notes ComReg's reliance on estimates (in pars. 5.155 - 5.158) to derive the Price-Cost Ratios for FACO. These estimates appear to mix average customer usage derived from the Q3 2013 quarterly report with prices from February 2014. ComReg should have requested operators to supply actual data for usage of ISDN customers, with accurate figures for basic rate, Fractional Rate Access ("FRA") and Primary Rate Access ("PRA"). ComReg should have also considered ancillary service charges, and future price evolution (not least, call termination charge reductions and other changes proposed by ComReg) before calculating any existing gross profit margins, and considering whether pass-through would occur at all. This work gives the illusion of thoroughness and completeness, but in fact requires a more robust factual basis that takes into account the real number of access lines in active use.

Finally, eircom would point out that the Critical Loss Test that ComReg has used to assess the impact of indirect constraints on the FACO market contains a number of errors. To begin with, there seems to be a typographical error in Appendix F, par. F.4. The sense of the argument appears to be turned on its head by the use of the word "no" before "wider" in line 7 of that paragraph.

eircom presumes that the sentence was meant to read as follows:

> "[...] *if more customers would switch than the critical loss value then the SSNIP is considered to be unprofitable and the market is thus wider than the focal product(s)*".

In essence, the fact that a substitute product exists for customers who are leaving as a result of the price increase renders the SSNIP unprofitable. These substitute products should therefore be included in the correctly defined market.

4 COMREG HAS FAILED TO TAKE ADEQUATE ACCOUNT OF KEY RECENT DEVELOPMENTS AFFECTING THE RFTS MARKET

ComReg's retail market assessment fails to take adequate account of a number of recent developments that have had a significant impact on competitive conditions on the RFTS market. These developments, which have emerged after the Market 1 Consultation was completed by ComReg in 2012, either have been given short shrift by ComReg or have not been considered at all in the retail market assessment underpinning ComReg's Market 2 review. As a result, ComReg's proposed Market 2 review is based on assumptions and conclusions that do not reflect the reality on the ground. The relevant developments are summarised below.

4.1 The entry of Sky into the market

Sky entered as a national player onto the Irish broadband and voice market in February 2013. ComReg has, however, taken little account of Sky's entry in its Market 2 review. While the Consultation Document acknowledges Sky's entry into the market, it does not consider the rate at which Sky's market share has increased since its entry or the significance of this important new market dynamic for RFTS. In this respect, it is notable that ComReg's Quarterly Key Data Report indicates that Sky's market share of the fixed broadband market share increased by 21% from Q4 2013 to Q1 2014 (with growth over the last three quarters being well above 160%).[6]

This is a serious omission, particularly considering Sky's growth prospects over the forecast period and its ability to leverage a substantial and well-established base of existing TV customers.

4.2 The withdrawal of the DSP Telephone Allowance scheme

ComReg's analysis ignores the withdrawal by the DSP of the Telephone Allowance scheme in January 2014. The elimination of this subsidy is now having a substantial impact on the take-up and use of eircom's standalone fixed voice services. eircom has recently provided ComReg with evidence of abnormally high churn across its former DSP customer base, and

[6] ComReg 14/61, Figure 3.1.10.

the number of cessations is also providing increasing indications of affordability[7] issues. These developments, and the implications for the future volumes of fixed lines, are not, however, reflected by ComReg at all in the Market 2 review.

4.3 The roll-out of NGA

ComReg's analysis fails to consider the impact of the ongoing deployment of NGA in Ireland, including Long Term Evolution in the mobile market. The increased availability of higher speed broadband means that, over the forecast period, there will be increased usage of free or very cheap VoB and a growing array of messaging applications that many customers, especially the younger generations, view as attractive alternatives to traditional fixed-line voice calls. ComReg's Market 2 assessment has made no attempt to evaluate the projected growth or impact of this important trend over the next two to three years.

4.4 The launch of standalone broadband in Ireland

ComReg has not taken proper account of the launch of standalone broadband in 2013, nor has it considered how this type of service is likely to evolve over the course of the proposed review period. There are clear indications that, assuming the existence of a favourable pricing differential, the availability of the standalone broadband product will lead to a reduction in the number of RFTS subscriptions purchased as part of a wider broadband bundle. This eventuality has not been factored into ComReg's review.

This means that ComReg has missed a major turning point in the dynamics of the RFTS market. Whereas in days gone by, RFTS was the main driver in demand for fixed bundles, it is clear that today RFTS is, for the vast majority of consumers, an incidental element of the larger broadband package (if it is of any interest to them at all). The fact that most new applicants for RFTS immediately attach broadband suggests we have already passed the point where broadband has become the core service, and RFTS is the cheap, and relatively unimportant, add-on.

[7] It is important to note that most former DSP customers have access to a mobile phone, so they are not dropping off-net: rather a significant portion might be deciding that mobile is sufficient: they cannot or will not pay for a fixed line as well.

5 COMREG'S RETAIL MARKET ASSESSMENT FAILS TO APPREHEND THE SCOPE AND COMPETITIVE NATURE OF THE RFTS MARKET

ComReg has already undertaken a Market 1 Consultation and Supplementary Consultation. eircom provided detailed comments (supported with robust evidence) in response to both consultations. eircom's responses showed that there were serious deficiencies in ComReg's approach towards defining the scope of the relevant market and analysing the actual competitive dynamics at play in the market.

ComReg has elected to focus on stale data and an increasingly outdated narrative in conducting its retail market assessment as part of its review of the FACO and transit markets by hewing to the same lines that it followed in the Market 1 review[8]. In so doing, ComReg relied on a flawed understanding of the scope of the RFVA market and the competitive conditions that characterise this market today. The shortcomings in ComReg's assessment are summarised below.

5.1 Mobile is a potential substitute to RFTS

ComReg concludes in its retail market assessment that, while there is some evidence of substitution between retail fixed and mobile services, end-users consider these to be complementary, as opposed to substitutable, products.

In its response to the Market 1 Consultation and Supplementary Consultation, eircom presented evidence showing that mobile has in fact become a substitute for standalone fixed voice services. This included evidence of:

- consumers' continued migration to mobile;
- fixed customers switching to a mobile connection; and
- increasing competition from mobile services[9] in the fixed space.

[8] Because the inclusion of Fixed Access in Market 2 is expected to go hand in hand with the elimination of eircom's SMP designation in Market 1, it is entirely appropriate for ComReg to update its review of the associated retail markets in this review process.

[9] For example, existing Vodafone offerings such as Unified Communications and Sure Signal allow end-users to use a mobile as if it was a fixed line, with a fixed number. While such services are fairly new and have limited take-up, ComReg has not considered the potential of these services to displace

For example[10], important shifts in working practices are driving down demand for fixed lines and channels in the market generally. Mobile-only is now seen as an accepted contact method in the small business arena. In larger businesses the trend has seen employees replacing their fixed line usage with mobiles as businesses become more flexible. In the business space, mobile operators are targeting their customers with products that are specifically designed to incentivise the customers to replace RFTS with mobile services. eircom is aware of a number of instances in which mobile operators have targeted fixed customers with specific promotions, such as line rental reductions. Likewise, Vodafone’s "Onenet Express" is designed to replace fixed access with the entire service delivered over Vodafone’s mobile network.

Indeed, the regulatory environment itself has, in recent years, led to an accelerated level of fixed to mobile substitution. The steady fall in regulated Mobile Termination Rates (“MTRs”), has meant that users and businesses no longer view mobile usage in place of fixed line usage as cost prohibitive.

Mobile as a replacement for fixed line has gained significant traction in recent years with mobile operators now providing Geographic Number Portability (“GNP”) of geographic numbers onto mobile services as part of their standard offering.

eircom is also aware that many alarm monitoring services use mobile networks, rather than fixed. Many payment systems use mobile networks as well. Customers with such requirements are not “*captive*” users of RFTS who cannot avail of Managed VoB: they can easily use a mix of technologies to meet their total set of requirements.

It is worth noting that the trends towards increasing fixed-mobile substitution are likely to further accelerate with the entry of new Mobile Virtual Network Operators (“MVNOs”) into the market, including Carphone Warehouse and UPC. Analysts predict, as well, that this trend will be accelerated as a result of Ireland’s age demographics, which ComReg does not appear to have taken into account at all. Thus, for example, as a result of the pricing constraints exerted on standalone RFTS by mobile, younger people are likely *never* to subscribe to fixed voice services. BMI forecasts that by 2015, 0-29 year olds will represent 39.71% of the population of Ireland. On the basis that this generation, and those that follow,

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traditional fixed voice over the period 2015-2017, or indeed whether over-regulation of traditional voice might be inhibiting innovation in such services.

[10] See eircom response to 13/95, pp. 36 – 38.

will never subscribe to fixed voice services, BMI forecasts that by 2020, those never subscribing to fixed voice lines will increase to almost 50% of the population of Ireland[11].

In its review of retail market trends and developments, ComReg appears to suggest that, while mobile voice traffic initially spiked in 2008, it has remained "*relatively flat*" in recent years. eircom notes, however, that the data relied upon by ComReg in this context includes both data and voice minutes. In reality, therefore, and contrary to what ComReg appears to be representing, mobile voice has been on a continual growth pattern since 2007[12].

We note also that, even where ComReg has actually considered up-to-date[13] market prices, the conclusions it has drawn are likely to be proven incorrect. For example, ComReg acknowledges at par. 4.161 that it is not straightforward to compare prices for Retail Fixed Voice Calls ("RFVC") with mobile prices. Nonetheless, ComReg seems to place some emphasis on the fact the some out-of-bundle calls are more expensive in mobile packages than in many RFVC bundles. Elsewhere, ComReg emphasises that end-users do not know actual call prices, and are vague about the limits in bundles; instead, they focus primarily on their monthly bills.[14] Therefore, the price of an incremental out-of-bundle call may not be very significant to an end-user. Although price elements such as call set-up and allowances are mentioned, ComReg does not draw attention to the fact that these structural elements reduce the total difference in charges. The emergence of "*unlimited*" mobile bundles makes the comparison for specific call prices, and local calls in particular, irrelevant.

We also note that, in a situation where several members of a household have individual mobile phones, the sum of the incremental costs to each member might be far less than the cost of providing a fixed voice service for the household. As noted above, the emergence of standalone broadband suggests that RFTS is no longer the prime fixed network platform and has largely been replaced by broadband. The contrary assessment by ComReg, set out at par. 4.163 of the Consultation Document, is simply not consistent with the actual evidence.

Finally, a comparison of fixed and mobile prices should properly include an analysis of the impact of regulation. Mobile operators can offer pre-pay with no fixed charge and high call

[11] On the basis that BMI forecasts that by 2020, 45.7% of the population of Ireland will be aged between 0 and 34: Business Monitor International, Ireland Telecommunications Report Q2 2014, page 92.
[12] Consultation Document, Figure 5, p. 51.
[13] January 2014 snapshot, as opposed to considering Industry analysts expectations of future price evolution.
[14] Consultation Document, par. 5.148

prices, and post-pay bundles with a fixed element and varying allowances of “free” calls, texts and data. The offerings in the fixed market are constrained by past regulation that led to high fixed rental prices and low call prices, and effectively precluded pre-pay type offerings because these offerings would not pass ComReg’s NRT.

In comparing the pricing points of fixed and mobile voice services, ComReg’s assessment relies on somewhat circular logic. ComReg has historically applied heavy regulation to fixed market prices at both the retail and wholesale levels, which has effectively constrained the pricing of these services to certain structural forms. No such constraints have ever applied to retail mobile offerings: they have never had to pass a margin squeeze test against the own-use MTR, for example. As ComReg has employed "green field" analysis elsewhere in its market review, it should do the same in considering fixed-mobile substitution from a pricing perspective. A proper analysis would evaluate what retail fixed offerings might now exist in the absence of past retail and wholesale regulation, and how fixed and mobile offerings would likely evolve over time if the current regulations were removed or relaxed. We consider that such an analysis would conclude that fixed voice offerings are effectively constrained by mobile offerings.

In summary, eircom considers that there is ample evidence that mobile and RFVA are in the same market, and that mobile access now imposes a strong constraint on eircom’s provision of standalone fixed voice telephony.

5.2 Increased use of over-the-top voice substitutes

Any credible forward-looking analysis should be based on: (1) up-to-date technologies; (2) expected demand for certain services; and (3) future cash flows (in terms of both costs and revenues) that are expected to arise from a service.

In this respect, ComReg’s competitive assessment fails to acknowledge the increasing use of over-the-top applications as substitutes for real-time fixed voice telephony. The increasing importance and competitive impact of free, or very cheap, applications, and the high valuation given to these applications in the larger electronic communications marketplace cannot be overstated. These include applications like "WhatsApp Messenger", "Google Chat", "Apple's iMessage", "Blackberry Messenger" and increasingly versatile VoB services like Skype and Viber, social networking (such as Facebook) and micro-blogging sites.

The appeal of these increasingly popular forms of communication to the younger generation, coupled with the fact that usage within closed user groups is often free or for a very low subscription fee, makes them extremely attractive alternatives to fixed voice. These over-the-top applications exert a significant constraint on the demand for and pricing of traditional fixed voice telephony services. eircom notes in this regard that Ofcom has acknowledged that the increasing use of such forms of communications is likely to have been the main driver in the decline of fixed voice volumes.[15]

The rapidly changing dynamics of the entire internet ecosystem will see the availability, functionality and popularity of these types of applications become even greater over the next two to three years, and with it the intensity of the impact on traditional fixed voice volumes and revenues. The age distribution of these types of applications is much more heavily biased towards the 18-34 age group and in Ireland, BMI has estimated that in 2013 this age group represented approximately 25% of the total population[16]. This generational divide in consumers' usage of communications services means that, over time, the 18-34 age group will continue to play a decisive role in the continual decline in the use of fixed voice services[17]. ComReg has not factored this important trend into its Market 2 assessment.

5.3 Separate product markets exist for the supply of standalone RFVA and RFVA within a wider (broadband) bundle

There is a compelling argument that separate markets exist in Ireland for the supply of RFVA on a standalone basis, and the supply of RFVA within a wider bundle. eircom has presented robust evidence to this effect in its responses to the Market 1 Consultation and Supplementary Consultation.

The evidence demonstrates that:

1. End-user behaviour is consistent with users not viewing the individual elements of a bundle as a substitute for the bundle as a whole. Analysis of switching behaviour suggests that consumers do not switch from a bundle to standalone elements of the bundle (or piece together various elements of the bundle) or *vice versa*, except for customers who are taking broadband services for the first time. Instead, the analysis demonstrates that:

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[15] Ofcom, Communications Market Report, 1 August 2013, page 336.
[16] BMI estimates that in 2013, 28.16% of the population in Ireland were aged between 15 and 34: Business Monitor International, Ireland Telecommunications Report Q2 2014, page 92.
[17] See http://www.analysysmason.com/About-Us/News/Insight/Connected-Consumer-voice-messaging-Jun2013/

- when switching, the vast majority of consumers that purchase RFVA bundled with broadband (which is the most common form of service bundle that includes RFVA) switch to other broadband bundles;

- very few consumers purchase RFVA and broadband separately because bundles are (1) significantly cheaper; and (2) offer advantages of convenience in taking telecommunications from a single provider; and

- the vast majority of standalone RFVA customers switch to standalone RFVA.

2. There are significant economies of scope between the provision of RFVA and other elements of the bundle, which implies that suppliers prefer to compete in the provision of bundles. This explains why the prices of bundles are significantly less than the sum of the prices of the elements of the bundle.

3. Competitive conditions are very different for standalone RFVA and RFVA sold in wider bundles. The suppliers are different; they have different commercial strategies; and the intensity of competition is different. For example:

    - In the provision of bundles, UPC, Sky and Vodafone all compete strongly. These providers either do not compete, or compete to only a limited extent, in the market for standalone voice. In the supply of standalone RFVA, the situation is very different. eircom principally competes with Pure Telecom in this space.

    - The key suppliers of RFVA bundled with another service (eircom, UPC, Vodafone and Sky) compete fiercely with one another to attract customers. During 2013, there was a significant re-alignment by all major players in the bundles market in response to the increased competitive pressure posed by UPC, and the entry of Sky in February 2013. In addition, all four operators are now launching new products and engaging in selective discounting to attract customers. In contrast, eircom remains the main provider of standalone RFVA. Its competitive constraints come principally from Pure Telecom and mobile voice services[18].

[18] See eircom response to 13/95, pp. 12-27.

In spite of this evidence, the retail market assessment that underpins ComReg's proposed Market 2 analysis fails to recognise the important difference between the supply of retail RFVA on a standalone basis, and its supply within a wider bundle.

5.4 The existence of sub-national geographic markets for the supply of RFVA within and outside of a wider (broadband) bundle

Significantly different competitive conditions prevail for the supply of RFVA in the urban areas (Large Exchange Areas ("LEAs")), in which UPC is present, and the non-urban areas ("non-LEAs"). This was acknowledged by ComReg in D04/13 (par. 4.76).

In LEAs where UPC has a footprint, it is a strong competitor for bundled RFVA, and has a larger market share than eircom. eircom has articulated this point to ComReg in its responses to the Market 1 Consultation and Supplementary Consultation, and has, on the basis of hard evidence, demonstrated the existence of intense retail competition in LEAs where UPC is present.[19]

This information is consistent with the existence of sub-national geographic markets for RFVA supplied in a wider (broadband) bundle. This reality has not, however, been acknowledged in ComReg's retail market assessment. This means that the differences in the competitive conditions on the RFVA market within and outside of the LEAs have not been reflected in the geographic scope of the proposed wholesale FACO market (which ComReg proposes is national as opposed to sub-national).

5.5 eircom's USO

ComReg Decision D07/12 designates eircom as the Universal Service Provider ("USP") and imposes, alongside a number of pre-existing measures, a specific nationwide "Geographically Averaged Pricing" obligation. ComReg's retail market assessment fails to take adequate account of the obvious pricing constraints imposed on eircom by this USO. ComReg's assessment fails to appreciate that, even in the absence of any competitive constraint on the RFVA market, the existence of this national "Geographically Averaged Pricing" obligation would prevent any excessive pricing for RFVA in non-urban areas.

[19] See eircom response to 12/117, pp. 38 – 50. Further, it is worth noting that ComReg's Quarterly Key Data Report indicates that UPC's overall share of the fixed broadband market share continues to increase towards 30%, currently standing at 28.8%: ComReg 14/61, Figure 3.1.10.

6 COMREG'S PROPOSAL TO *INCREASE EX-ANTE* WHOLESALE REGULATION IS MISGUIDED

6.1 ComReg's Market 2 is not forward-looking as required for a reasonable SMP assessment

The European Commission's Recommendation on relevant product and service markets (the "Commission Recommendation") makes it clear that the market definition and analysis process should be forward-looking in nature[20]. The Explanatory Memorandum accompanying the Commission Recommendation confirms that markets must be defined prospectively, and that such definitions must take account of expected or foreseeable technological or economic developments over a reasonable forward-looking timeframe[21].

Notwithstanding this, ComReg's proposed review of the FACO market is largely focused on the past. As discussed above, the assessment, as it now stands, fails to take adequate consideration of the evolution of consumer attitudes and developing trends that are critical to the process of market definition and review. The assessment also ignores the recent developments discussed in Section 4 above, which have fundamentally altered the conditions of competition on the RFVA market. Moreover, ComReg's wholesale market analysis fails to consider imminent or foreseeable technological and economic developments over a reasonable forward-looking timeframe that are widely expected to impact the market definition and the competitive assessment.

[20] Commission Recommendation of 17 December 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) (see Recitals 4 and 6 for example).

[21] Commission Staff Working Document, Explanatory Note accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, SEC(2007) 1483 final, p. 4.

6.2 ComReg's proposed definition of the FACO market ignores the presence of strong demand side substitution and indirect competitive constraints from mobile and VoB

ComReg states in the Consultation Document that its definition and competition assessment of the FVCO and transit markets is "*informed*" by its retail market assessment[22]. As explained above, ComReg's retail market assessment is deficient for a number of important reasons. This is particularly owing to the fact it fails to appreciate the strong competitive dynamics that already exist and are intensifying in respect of RFVA, and the degree to which these dynamics act as a constraint on eircom.

As a consequence of this fundamentally flawed assessment of the competitive dynamics that are at play at the retail level, ComReg's assessment of the wholesale FACO market fails to take proper account of the constraints that are having a significant impact on this market. For this reason, the market definition proposed by ComReg is too narrow, and ignores the existence of strong demand side substitutability with mobile and VoB.

As explained above, eircom has presented ComReg with evidence which shows that mobile is, in fact, a substitute for standalone fixed voice services. The availability and increased take-up of standalone broadband and mobile broadband also strongly indicates that there is growing demand side substitutability from VoB and other over-the-top services. This would seem to be confirmed by the fact that customers are purchasing RFVA as part of a wider (broadband) bundle, without making use of the fixed voice component. eircom notes that the Romanian national regulatory authority has recently defined Market 2 to include call origination services through managed Voice over Internet Protocol ("VoIP") technology, which has resulted in the deregulation of the market for call origination in Romania[23].

[22] Consultation Document, par. 4.1.
[23] Commission Decision concerning Case RO/2013/1533: Access to the public telephone network at a fixed location for residential and non-residential customers in Romania and Case RO/2013/1534: Call origination on the public telephone network provided at a fixed location in Romania, Brussels, 16.12.2013 C(2013)9619 final

6.3 ComReg's proposed wholesale FACO market definition ignores the existence of sub-national geographic markets for RFVA supplied in a wider (broadband) bundle

The Commission's Notice on Market Definition states that the relevant geographic market is:

> "[…] *an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.*"[24]

This is acknowledged by ComReg at par. 5.218 of the Consultation Document.

As explained above, eircom has provided evidence showing the existence of sub-national geographic markets for RFVA supplied in a wider (broadband) bundle. In LEAs where UPC has a footprint, it is a strong competitor for bundled RFVA, and has a larger market share than eircom. Competition is intense in the LEAs, which is reflected by the clear differences in the type and quality of the products available in areas where UPC competes, and where it does not.

ComReg acknowledges the emergence of "*some*" localised competitive pressure in the provision of retail bundles in the Consultation Document[25]. In spite of this, ComReg goes on to conclude that the conditions for competition appear to be sufficiently homogenous on the FACO market such that there are no sub-geographic markets. This is clearly not the case. eircom submits that there are marked differences in the competitive conditions on the RFVA market within the LEAs (where UPC is present), and outside of the LEAs, and that these differences should be reflected in the geographic scope of the proposed wholesale FACO market.

At a minimum, ComReg should reflect the significantly different conditions for the supply of RFVA in LEAs and non-LEAs when determining what remedies to apply to the provision of FACO in these different areas.

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[24] European Commission Notice on Market Definition, par. 8.

[25] Consultation Document, par. 5.235.

In light of these substantial shortcomings in the analysis, the Market 2 assessment should be reconsidered by ComReg by applying a forward-looking approach and taking full account of the existing competitive conditions and dynamics, and of the clearly emerging trends that are affecting this market.

6.4 ComReg should reconsider its competitive analysis of the FACO market and its SMP designation

ComReg acknowledges that, in order to determine whether this newly-defined relevant market should be subject to *ex-ante* regulation in this case, the three criteria set out in the Commission's Recommendation must be cumulatively satisfied[26]. Although ComReg has paid lip service to this important threshold test, its assessment of the criteria appears to be largely perfunctory.

Criteria two and three of the test are inherently forward-looking in nature, *i.e.:*

- a market structure which does not tend towards effective competition within the relevant time horizon; and

- the insufficiency of competition law alone to adequately address the market failure(s) concerned.

As explained above, ComReg's review of the wholesale FACO market is, in the main, backward-looking in nature. ComReg's assessment of the Three Criteria Test cannot, therefore, be considered adequate in respect of these criteria.

ComReg's competitive assessment of the FACO market fails, in any case, to take adequate account of the strength of indirect pricing constraints in the RFVA market, and their impact on competition in the proposed upstream FACO market. The indirect constraints placed on the supply of RFVA by mobile and VoB are once again highlighted in this context.

eircom notes that the finding that mobile exercises a "*competitive constraint*" on the fixed retail market was a critical factor in Romanian regulator's decision to remove *ex-ante* regulation from Market 2 in December 2013. Though concluding that mobile access and fixed call origination do not form part of the same product market, ANCOM nevertheless found that mobile exercises a sufficient competitive constraint on the fixed retail market to

[26] Commission Recommendation, par. 2.

limit the possibility of the Romanian incumbent, Romtelecom, acting independently of competition on the upstream market.

eircom submits that ComReg should conduct the same forward-looking and thorough assessment as its Romanian counterpart.

eircom considers that, for the above reasons, ComReg should reconsider its competitive analysis of the FACO, and its SMP designation of eircom in this market. At the very least, ComReg should be considering ways to lighten the burden of regulation on a market that is clearly in decline, rather than imposing more and more regulatory obligations on it.

6.5 ComReg has failed to consider whether, if eircom is deemed to have SMP, other operators might also have SMP in a relevant FACO sub-market

In assessing the wholesale markets and determining whether SMP exists, ComReg has omitted to consider whether other operators might also have SMP in a relevant FACO sub-market and, if so, whether there is a need for regulation to be imposed on these operators. In particular, all operators – not just eircom – have the incentive and the ability to charge excessive prices for call origination to NTCs absent price controls, regardless of whether these calls originate on a fixed or mobile network. eircom considers that if eircom is determined to have SMP in this sub-market, all operators should be treated the same.

At paragraph 9.231 of the Consultation Document, ComReg proposes to continue a price control on eircom by cost orientation with respect to the regulated retention charged for calls to NTCs. This is done on the basis of an earlier finding at paragraph 8.38 that eircom has incentives to leverage power horizontally from the FVCO market to the adjacent market for hosting NTC services. This analysis is correct but incomplete.

By definition, and much like termination, all network operators have bottleneck control over the origination of calls from directly connected customers to calls to NTC services – and so have the same ability and incentive as eircom. ✂.

For these reasons, eircom believes that ComReg should take the opportunity in this consultation and market analysis to evaluate the nature and competitive dynamics of call origination to NTC services for *all* operators, not just eircom. To do otherwise would be unfairly discriminatory and contrary to the interests of captive consumers. The appropriate control of regulated retention at eircom's efficiently incurred costs should apply to all operators originating calls to NTC services.

eircom accepts that it would appear to be disproportionate to impose other remedies (i.e. access, non-discrimination, transparency, cost accounting or accounting separation) in this regard.

7 EIRCOM URGES COMREG TO RECONSIDER THE MANNER IN WHICH IT PROPOSES TO DEREGULATE THE WHOLESALE TRANSIT MARKET

eircom has advocated the removal of *ex-ante* regulation from the wholesale transit market for some time now, and welcomes ComReg's current proposal to de-regulate this market in Ireland. eircom has a number of concerns, however, as to the manner in which ComReg proposes to withdraw *ex-ante* regulation from this market. Various other issues relating to the market assessment are addressed in eircom's responses to Questions 6, 7 and 8 in Section 9 of this response document.

7.1 ComReg has shifted the boundary between the wholesale call origination and transit markets to reflect the deregulation of call transit services

eircom notes that, at Sections 5.19 to 5.37, and 7.31 to 7.34 of the Consultation Document, ComReg has changed the boundary between transit and FVCO. In the 2007 market analysis,[27] call origination included primary call origination and the primary component of tandem and double tandem call origination. Tandem and double tandem were regarded as having a transit component in addition to the primary component. ComReg now proposes to regard tandem and double tandem as being part of the call origination market only, and as having no transit component at all. So, the transit market which is being deregulated is a much smaller market than the transit market defined in 2007.

We understand that ComReg has reached this conclusion for two main reasons. First, the absence of code hosting has in the past made it difficult for operators to purchase the "transit" component of call origination independently of the primary origination element. Second, the imminence of IP interconnect makes it likely that even if code hosting were now introduced, operators would not avail of it, because an investment in the technology and processes required would be short lived, and any investment funds available might have a better return if invested in IP interconnect. While we welcome this forward-looking analysis, it

[27] ComReg 07/02 Market Analysis: – Wholesale Call Origination and Transit Services, par. 4.61.

contrasts somewhat with common practice which at times seeks to preserve the option of legacy services at the expense of encouraging migration to next generation services.

However, it is not clear that ComReg has carefully worked through the implications of this decision. There may be immediate implications for accounting separation, but there are requirements to consider the various levels of call origination in cost models. The resulting price controls, if they result in declining prices for all forms of call origination, will not just impact eircom's revenue, but may have serious implications for any wholesale operator selling switchless voice ("SV"). Such operators, if they do not match any price reductions made by eircom, may face a situation where their customers could avail of cheaper call origination from eircom, or cheaper SV from eircom (because the SV prices will decline with the call origination prices).

eircom further notes that the FVCO Top-Down LRAIC+ model envisages call origination prices being set on the basis of a glide path from a circuit switched environment to an IP interconnect environment. The latter, in effect, does not have tandem or double tandem layers, and in such an environment there may only be a single layer of national handover. The pricing implications of this cost model need to be carefully considered in a supplemental consultation and certainly prior to Sections 12.3 and 12.4 of the Draft Decision Instrument ("Draft Decision") coming into effect.

There appears to be no recognition of these facts in ComReg's Regulatory Impact Assessment in Section 11 of the Consultation Document.

7.2 A six month sunset period for the withdrawal of existing remedies on the transit market is neither reasonable nor proportionate

ComReg suggests that current purchasers of wholesale transit services may, as a consequence of the proposed de-regulation of this market, wish to re-arrange existing or secure alternate sources of transit supply. It also suggests that such operators may wish to implement any necessary operational or network changes to facilitate this. For this reason, ComReg proposes that a six month sunset period for the withdrawal of existing remedies on the transit market is "*reasonable and proportionate*"[28].

eircom does not accept that a six month sunset period for the withdrawal of the extent remedies from the wholesale transit market is either reasonable or proportionate. The purchasers of wholesale transit service have been on notice of the likely deregulation of these services since the withdrawal of this market from the Commission's Recommendation in 2007.

ComReg's proposal in this regard is all the more unusual considering that it acknowledges the prospective competitive nature of this market in the Consultation Document, and the expectation that eircom would continue to provide wholesale transit services on a commercial basis following deregulation. eircom considers that the prospective competitive nature of the market for wholesale transit services alone should suffice to guarantee continued security in the supply of transit services.

Given the level of competition in the market, and the ease and speed with which operators can respond to changing prices, a six month transition period is neither necessary nor proportionate, and appears to be an unjustifiable extension of the existing situation, in which eircom is effectively prevented from competing with the two other providers of transit services in Ireland. eircom strongly encourages ComReg to eliminate the proposed transition period (since by the time the decision takes effect, the market will have had several additional months to prepare for the withdrawal of regulation).

8 EIRCOM'S COMMENTS ON THE PROPOSED REMEDIES IN THE FACO MARKETS

ComReg proposes to impose remedies in the FACO markets under the following headings:

[28] Consultation Document, par. 10.7.

a) access;

b) transparency;

c) non-discrimination;

d) price control and cost accounting; and

e) accounting separation.

eircom considers that a number of the proposed obligations are unnecessary and/or unduly onerous on eircom. ComReg has provided no evidence that these new or enhanced remedies are either necessary or proportionate under the circumstances. In fact, ComReg's reasoning[29] appears to repeat the same justification for each remedy, namely that remedy 1 would not be effective without remedy 2, and remedy 2 would not be effective without remedy 3, and so on. There seems to be no real consideration as to whether a certain combination of remedies (if any at all are required) may be more effective, or as effective, and at lower cost to ComReg, the industry and eircom, than ComReg's chosen approach of applying all possible remedies to the maximum extent. ComReg's approach is all the more concerning in light of the fact that the market in question is one that is in obvious decline as a result of direct and indirect competition from a burgeoning over-the-top applications industry, as well as increasingly cheap mobile voice services.

eircom also has concerns that ComReg is proposing a "pick and mix" approach to price control, utilising the following elements of FVCO:

- retail minus;
- LRAIC+ (using the FVCO Top-Down LRAIC+ model);
- actual incurred costs adjusted for efficiencies (plus a reasonable rate of return).

Taken together with the pure LRIC approach for call termination, the combination of pricing remedies may lead to anomalous results in Historical Cost Accounts ("HCA") Separated Accounts. In addition, there is a probability that the prices arising from these inconsistent

[29] Much of ComReg's reasoning is set out in the Regulatory Impact Assessment, although only four different combinations are considered.

approaches will lead to a significant under- or over-recovery of the relevant efficiently incurred costs. These concerns are described in greater detail in Section 8.5 below.

In eircom's view, in light of the strong and diverse competitive constraints that are imposed on FACO services, the regulatory levers that are applied by means of price controls to services in Market 2 should be the least onerous possible, and be consistent across all components. A more draconian approach is, in the circumstances, unnecessary, unreasonable and disproportionate.

8.1 Access Remedies

(a) Proposed withdrawal of existing CPS, Carrier Access, Carrier Select access remedies

eircom broadly welcomes the withdrawal of obligations for carrier access, carrier selection and forms of carrier pre-selection other than CPS-All-Calls with SB-WLR.

eircom considers that Carrier Access and Carrier Select obligations (and indeed some forms of CPS other than the All-Calls versions) are unnecessary. eircom has incurred considerable costs in developing and maintaining these services but they have rarely been used, if at all. The withdrawal of these obligations is therefore entirely proportionate and will have no impact on the marketplace.

8.2 Non-Discrimination Remedies

(a) Statement of Compliance

In principle, eircom accepts ComReg's proposal that it should be required to submit a written "Statement of Compliance" ("SoC") demonstrating its compliance with the non-discrimination obligations. However, eircom submits that the proposed scope of the SoC is disproportionate and not justified.

ComReg acknowledges that a requirement for eircom to demonstrate that it has put in place appropriate risk identification, control and governance processes in order to demonstrate its ongoing compliance with its non-discrimination obligations is broader than the obligations imposed with respect to other regulated markets[30]. These obligations are particularly

[30] Consultation Document, pp. 338 – 342.

onerous, will be expensive to implement, and will require eircom to put in place various internal governance and control-related measures that go well beyond what is required to verify the implementation of an equivalency of outputs obligation. ComReg has failed to provide a reasonable justification for increasing the regulatory burden in a market that should, on a forward-looking assessment, be a candidate for deregulation.

8.3 Transparency Remedies

ComReg proposes to introduce new and, in some cases inordinately lengthy, timescales in the transparency section of the Consultation Document (pars. 9.189 -9.190). ComReg has not provided any justification for, or reasoning behind, the proposed changes to the existing regime. This is especially problematic insofar as ComReg proposes to extend considerably the minimum notice period for the introduction of new products from eight weeks to seven months. Any new FACO products are unlikely to be relatively complex and should not take much time for alternative network operators to adopt. The unduly lengthy timescale proposed for the introduction of new products should be reduced to no more than one month.

eircom also requests ComReg to reconsider the proposed timings for the submission of compliance statements to ComReg (Section 9 of the Draft Decision) and their interaction with the timescales set out Section 10).

ComReg also proposes to require eircom to publish Performance Metrics on its publicly available website, but no details of what will be required in this respect have been provided by ComReg. Again, these details are important in order to enable eircom to assess the proportionality of this obligation.

8.4 Price Control and Cost Accounting Remedies

(a) Price Control Obligations of Cost Orientation

(i) FVCO component of SB-WLR

ComReg proposes to apply LRIC+ to the Fixed Voice Call Origination (“FVCO”) component of the Single-Billing Wholesale Line Rental (“SB-WLR”) product.

However, owing to the way in which historically-incurred costs must be presented in the regulated accounts, the concurrent application of a LRIC+ cost methodology to FVCO, and a pure LRIC cost methodology to fixed voice call termination, may have the effect of:

- making wholesale voice call origination look artificially profitable in eircom's regulated accounts, and
- making wholesale voice call termination look artificially loss-making in eircom's regulated accounts.

(ii) Interconnection Services, co-location and order handling process costs associated with Wholesale Line Rental ("WLR")

ComReg proposes to subject transaction charges to cost orientation, while at the same time maintaining the 14% retail minus control for the WLR component of the SB-WLR product. eircom acknowledges that this approach could work in respect of certain transactions. For example, when the transaction at the wholesale level has no retail equivalent, or when the activity undertaken in providing WLR is the same as a corresponding activity in respect of Local Loop Unbundling ("LLU").

ComReg's proposed approach to subject transaction charges to cost orientation would not, however, work for Customer Premises Equipment ("CPE") or call management services. Firstly, there is a question as to what the appropriate cost standard should be. If connection transaction activity is essentially priced using a BU-LRAIC model, and rental charges are to continue to be set using a retail minus methodology, eircom questions whether it is may be more appropriate to charge ancillary services using a bottom up ("BU-") LRIC approach.

Secondly, even where reliable costs are obtained for a group of services, differential margins, and differences in mix between retail and wholesale layers may be problematical. The case of call barring services is a good example. It is probable that the cost of call barring is approximately the same for every call type, or combination of calls types. However, operators are required, under retail regulation, to block premium rate calls free of charge. As a result, the share of the cost applicable to this must be recovered elsewhere: either in line rental or in charges for barring other call types.

For example, if operators do not all have the same mix of barring requirements, where operator A has no users requiring premium rates barred, operator B has a large percentage of users requiring only premium rate barred, and operator C has end-users requiring various combinations of call barring that include premium rate. The treatment of call barring costs may cause market distortions, which may best be corrected by applying a retail gradient (based on eircom Retail's prices) to the cost calculated. To avoid distortion, this gradient must also consider other products bought by end-users who purchase call barring. It is probable that the eventual outcome would be to construct a very complex cost and gradient model that would actually intend to ensure a result where all operators have the same margins on call barring as eircom Retail: it might in fact lead to the very same prices that would be achieved by retail minus approach.

(iii) Price control of Cost Orientation for Ancillary Services on SB-WLR, including Low Value CPE Rental

ComReg proposes that Ancillary Services on SB-WLR (such as call barring, call waiting, calling line identity restriction, and including Low Value CPE Rental) should move from pricing controlled at retail minus 14% to a price control obligation of cost orientation, while leaving underlying rental elements subject to the retail minus obligation.[31]

By then proposing in par 9.239 that retail minus price control is applied in respect of the underlying rental elements of SB-WLR, ComReg implicitly accepts that there is sufficient competitive pressure at the retail level for the relevant line rental services. As the ancillary services at issue can only be sold to customers who also take the line rental, eircom submits that it is not reasonable to propose that the degree of retail competition for the ancillary services is sufficiently less so to justify a distinct form of price control for a wholesale service that amounts to the simple re-sale of the retail equivalent.

eircom submits that the level of cost analysis required to separately identify the appropriate allocations of network, wholesaling, and retailing costs to the multitude of individual ancillary services (as distinct from the rental services) will require an effort that cannot be justified by the potential level of end-user benefit to be derived from a move to cost oriented wholesale prices. Indeed, the changes to wholesale prices may not lead to any movement in retail prices for the ancillary services.

Also, the move to cost oriented charges for a full range of SB-WLR ancillary services, while leaving the rental service pricing controlled at retail minus 14%, carries an unacceptable risk for eircom that revenues from the entire SB-WLR service will not allow eircom to recover the

[31] Consultation Document, par. 9.237

efficient costs of delivering the service including an appropriate return on the capital employed.

(b) Price Control Obligations of Retail Minus

(i) Price Control of retail minus for the Wholesale Line Rental ("WLR") element of SB-WLR

(A) ComReg's assumptions regarding eircom's ability to raise retail prices

ComReg states in the Consultation Document that eircom has the "*ability and incentive*" to set prices (including with respect to FACO products, services and associated facilities) at an excessive or inefficient level. ComReg further states that such practice could result in adverse impacts on downstream markets to the ultimate detriment of end-users. As a result, ComReg considers that the imposition of price control obligations of retail minus on eircom with respect to the WLR component of SB-WLR is justified and proportionate[32].

ComReg further notes that, given the nature of a retail minus price control obligation, the ability for eircom to recover its investment, including a reasonable rate of return, is within eircom's control. ComReg suggests that eircom could achieve this by, for example, adjusting its retail prices. It is also stated that the fact that wholesale charges are calculated net of retail charges provides an "*incentive*" for eircom to sell SB-WLR.

ComReg appears to be suggesting that eircom has the ability to increase retail line rental charges. ComReg omits, however, to acknowledge the following two pertinent factors relevant to the application of the retail minus cost methodology:

1. the existence of retail price control that requires that such increases are in line with inflation; and

2. eircom has not increased retail line rental since 2007, despite significant inflation over these years. This is because eircom actually faces significant competitive constraints on the retail market which prevent it from availing of even the limited increased opportunity allowed by the regulation.

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[32] Consultation Document, par. 9.239.

(B) eircom Retail's costs

ComReg goes on to consider the appropriate retail minus price control obligation to impose on eircom. Based on eircom's 2006/07 regulatory accounts, the 2008 SB-WLR Pricing Direction[33] imposed a retail minus X-Parameter of 14%. This 14% measure was, in fact, an aggregate weighted average of four main components:

- PSTN connection;
- PSTN rental;
- ISDN connection; and
- ISDN rental.

The weighted average also included ancillary elements. ComReg concludes that it remains appropriate, at this time, to impose a retail minus obligation on eircom regarding the provision of SB-WLR on the basis of an "Equally Efficient Operator" ("EEO") standard, with the X-Parameter being set as at least a 14% margin between the retail price charged by eircom to its own customers for RFA and the WLR price (pars. 9.256 - 9.257).

ComReg should, however, be aware of the following points:

1. Despite eircom's strenuous efforts to constrain retail costs, the decline in volumes, prices (and hence retail revenue) is faster than the decline in costs. Retail unit costs, as a percentage of retail revenue, have therefore increased. However, it is not clear whether the 14% margin is correct for:
    - both PSTN and ISDN, and in particular for the combination of PSTN and LL-ISDN compared to HL-ISDN;
    - connection activity and rental activity: especially in the context where ComReg is considering some connection or transaction activity be charged using cost-based prices; and
    - services sold within a bundle, and services sold outside bundles.

[33] See letter from ComReg to eircom dated 22 February 2008.

2. ComReg recognises that, according to eircom's HCA Separated Accounts, eircom's retail costs for the provision of narrowband access/retail fixed access (in essence being its self-supply of WLR) has increased to approximately 15% of the total price (para. 9.256), which suggests the 14% figure is not significantly out of line with current trends or the expected future evolution of costs. Most importantly, ComReg notes that the prevalence of bundles (either WLR with voice, or WLR with voice and broadband) in the retail market, and the use of the NRT to deter margin squeeze, should allay any concerns that using an approximate margin could lead to margin squeeze.

3. eircom has been offering WLR alongside broadband access at a €3 discount in LEAs. With the growth of the LEAs, and the increased take-up of broadband access services, eircom's effective WLR revenue has fallen. The weighted average revenue for WLR for 2013/14 and 2014/15 will therefore be considerably lower than 86% of the retail prices applicable to such lines.

4. Taking these factors into account, eircom considers it would be appropriate to maintain all elements of WLR including ancillary services at retail minus 14% and to focus the available costing resources on bundles and NGA.

(c) Price Control Obligation not to Margin Squeeze

eircom is concerned that ComReg has not focused sufficient attention to the way in which the margin squeeze test will be applied if fixed access is included in Market 2 and, in parallel, eircom is no longer designated as having SMP in Market 1.

eircom considers that a NRT in the wholesale Market 2 would be subtly different from a similar NRT in the Retail Market 1. The difference may be analogous to the difference between top-down TD-LRIC and bottom-up BU-LRIC. In a retail market test, every retail product is tested. In a wholesale market test, every wholesale product is tested. If there is a one-to-one relationship between wholesale and retail products, there is no difference.

However, if there were, for example, R retail products combining W wholesale products in various combinations, the Retail NRT would currently comprise R tests, each considering the retail product revenue against the cost of the Weighted Average Wholesale Network Inputs ("WAWNI") for the relevant retail product. A wholesale test would comprise a test of W wholesale products, where each is used to achieve a Weighted Average Retail Product Output ("WARPO"). This is because the focal point of the test will become the wholesale products, and whether the wholesale price is too high against a “fixed” retail revenue, and not the reverse, as has been the case previously.

This is an important issue which requires greater clarity and detail in terms of exactly what ComReg intends, so that the impact of the application of the NRT in these changed circumstances is fully transparent. Furthermore, eircom and other stakeholders should have an opportunity to comment on the details of ComReg’s proposed approach.

8.5 Accounting Separation Remedies

(a) Proposed Accounting Separation Obligations

Although ComReg groups cost accounting remedies with price control, eircom considers that the cost accounting system and the published Separated Accounts and other Regulated Accounts produced with that cost accounting data, should be considered together.

eircom considers that the Cost Accounting and Separated Accounts sections of the Consultation Document are confusing as to what may or may not actually be required of eircom. For example, ComReg refers to maintaining the framework mandated by the 2010 accounting separation decision, while at the same time referring to the need to ensure that eircom “*maintains*” a costing accounting model at the appropriate level.

In practice, eircom would face a number of difficulties if it is obliged to prepare a statement to show the revenues and costs associated with the proposed high level (“HL”)-FACO and low level (“LL”)-FACO markets:

- eircom does not separate call origination between ISDN and PSTN, let alone ISDN BRA and ISDN PRA/FRA;
- on the retail side, eircom does not split ISDN traffic between Basic Rate Access ("BRA") and non-BRA originated traffic, and, as a result, transfer charges may prove difficult;
- eircom has only one set of Routing Factors for each call type and might need to develop separate Route Factors for HL and LL markets. eircom has only recently “frozen” a Route Factor study that it had been conducting, on the basis that the network usage pattern is fairly stable and it is wasteful of scarce resources to conduct studies which are not likely to impact on outcomes. Significant costs will be

incurred if there is a requirement on eircom both to update this work, and carry it out on two occasions (once for PSTN/ISDN-BRA, and again for ISDN FRA and PRA);

- the lower level of materiality of the ISDN PRA/FRA market is likely to increase the level of the audit scrutiny (and cost) across all the markets as the materiality thresholds tend to be driven by the revenues and costs of the smaller markets; and

- cost oriented prices for low materiality WLR ancillary services and provisioning/repair services will be drivers of more effort in cost allocations and audit review, as the accounts will probably be used to inform some of the charges.

In addition, ComReg's proposal to set the prices for WLR "ancillary services" on the basis of cost orientation would be likely to prove very time consuming, and would probably also have knock on effects on the cost accounting model and separated accounts. This is because eircom would need to undertake more detailed reviews of less material services, and would probably be required to define additional detailed studies to allocate costs at a more granular level.

9 RESPONSES TO CONSULTATION QUESTIONS

Q.1 Do you agree that the main developments identified in the provision of RFTS are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

No. eircom does not consider that ComReg has given sufficient weight to key recent developments in retail markets, and is not sufficiently forward-looking in considering potential developments over the period under consideration, including, amongst other things:

(a) the entry of Sky into the market;
(b) the withdrawal of the DSP Telephone Allowance scheme;
(c) the roll-out of NGA;
(d) the launch of standalone broadband in Ireland;
(e) evidence of continued migration to mobile;
(f) increased use of over-the-top voice substitutes;
(g) evidence of existing fixed customers switching to a mobile connection; and
(h) evidence of increasing competition from mobile services in the fixed space.

Please refer to eircom's response at Sections 4 and 5 above.

Q.2 Do you agree that the above identifies the main relevant developments in RFTS market since the previous reviews of the FACO and Transit Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. Please see eircom's response to Question 1 above.

Q.3 Do you agree with ComReg's preliminary conclusions on the product assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. eircom considers the relevant product market to be too narrow (by excluding VoB, at a minimum). Please refer to eircom's response at Section 6.2 above.

Further, ComReg should identify a FACO sub-market covering call origination to NTCs, in which all originating operators have SMP. Please refer to eircom's response at Section 6.5 above.

Q.4 Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. Please refer to eircom's response at Section 6.3 above.

Q.5 Do you agree with ComReg's assessment of SMP? Do you consider that the competition assessment for the FACO Markets would fulfil the three criteria test? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. Please refer to eircom's response at Section 6.4 above.

Q.6 Do you agree with ComReg's preliminary conclusions on the product assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Please refer to eircom's response at Section 7.1 above.

Q.7 Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. eircom considers that there may be different competitive conditions within components of the transit market, either geographically based, or destination based (e.g. transit to mobile, compared to transit to fixed; and in particular as all operators might have a large volume of traffic terminating on the largest network, and could therefore contemplate a direct link, although transit to Vodafone might be a special case).

However, given that eircom agrees with ComReg that the national transit market, or any sub-national markets, would fail the Three Criteria Test, eircom does not see much value in developing this analysis further. In the event that ComReg was to change its preliminary position and impose *ex-ante* regulation in the transit market, eircom requests that it is given an opportunity to respond further on this point.

Q.8 Do you agree with ComReg's 3CT with respect to the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. Respondents are encouraged to provide Internal Transit and External Transit traffic and direct interconnection information as part of their responses.

eircom welcomes ComReg's conclusion that *ex-ante* regulation is not appropriate for the transit market.

Q.9 Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. Please refer to eircom's response at Section 6 above.

Q.10 Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for

your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. Please refer to eircom's response at Section 8 above.

Q.11 Do you agree with ComReg's draft Decision Instrument set out in Appendix H, in particular, that its wording accurately captures the intentions expressed in this Section 9? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

Rather than repeat its agreement or objection to every substantive item in the Draft Decision, eircom treats this question very narrowly, and addresses only the issue of whether the Draft Decision is sufficiently transparent and accurately captures the intentions expressed in Section 9 of the Consultation Document.

Overall, the Draft Decision seems clear and reflects ComReg's intentions. eircom particularly welcomes the approach of removing several earlier decision instruments in their entirety, so that all parties using the new document can do so without having to cross reference earlier decisions.

However, at Section 16.1(iv) of the Draft Decision, ComReg appears to propose withdrawing SMP obligations set out in ComReg Document 08/19 and replace the same with a new price control for WLR as set out in Section 12.8 of the Draft Decision. However, ComReg 08/19 is in fact an Information Notice advising interested parties that a Direction Letter was issued to eircom directing it to:

- amend the retail minus percentage applicable to Single Billing Wholesale Line Rental ("SB-WLR") from the current margin of retail minus 10% to retail minus 14% which reduces wholesale line rental charges payable by other operators; and

- to give effect to the resulting amendments to wholesale prices for SB-WLR in all bills issued by eircom to other authorised operators on and after 1 May 2008.

In this instance, ComReg issued the directions to eircom by letter dated 22 February 2008,[34] and then issued an Information Notice, rather than following the usual practice of having consultation, draft decision and final decision. eircom believes that Section 16.1 of the Draft Decision should therefore be amended to rescind the directions referred to in ComReg 08/19 rather than simply withdrawing the Information Notice itself.

eircom is also somewhat concerned that certain parameters are enshrined in the Draft Decision, and the manner of doing so appears inconsistent. For example, the weighting of different call types for Wholesale SV (66%,[35] 24% and 10%) appears in the definition of "Weighted Average Level" in Section 2.1 (Definitions) of the Draft Decision[36] whereas the percentage for WLR retail minus appears in Section 12.8. Similarly, several different cost standards or calculation models are cited in Sections 12.3 to 12.7 of the Draft Decision. eircom had understood from comments in Sections 2.57 to 2.60 of the Consultation Document that these costing methods, or specific price controls, may be reviewed in the near future. Any subsequent decision notice may therefore amend values or cost standards embedded in the Draft Decision now under consideration. There may be a case for collecting such items into a schedule which could be amended from time to time.

eircom considers Section 11.1 of the Draft Decision to be unclear. The Draft Decision is not the correct mechanism to impose an obligation to maintain separated accounts, and this section should specify that it is imposing that obligation in respect of the relevant market. In this respect, eircom is unclear whether the concept of FVCO market incorporating SB-WLR will require any significant changes to the layout of the HCA Separated Accounts. eircom assumes it will remain appropriate to record costs and revenues (including inter-business unit trading) in wholesale access and in call

[34] The directions were contained in Annex 1 of the direction letter ✂.

[35] In the Consultation Document, ComReg concedes that primary call origination was over 70% of call origination at the time of the data request, and eircom is aware that primary call origination is currently over 75% of call origination volumes. As these parameters may require frequent updating, there is a case to be made for putting them in a schedule which could be updated annually.

[36] Further, where Section 12.10 of the Draft Decision refers to the SV margin squeeze, the parameters are not clear. It is necessary to first refer to the "Margin Squeeze Test Model for SV" in the definitions section to find a reference to "Weighted Average", and then refer to the definition of "Weighted Average Level" to find the parameters. There is a further anomaly in that the definition of "Margin Squeeze Test Model for SV" refers to D07/11, which is withdrawn (albeit only the information notice referring to the directions (see below)) by Section 16.1 of the Draft Decision.

origination, rather than in some merged FVCO market element. The way in which ComReg has redefined the transit market may also have implications for the format of the accounts, and for the values that will appear under each heading (e.g. whether all or part of the revenue attributable to double tandem call origination should appear in the call origination account as opposed to the call transit account).

eircom notes the distinction between “no more than its actual incurred costs” in Section 12.5 of the Draft Decision and “no more than the costs associated with” in Section 12.6. Neither phrase is very clear, but if the intention is that some costs are based on HCA Regulated Accounts and others are not, eircom believes that this should be made clearer.

In addition, eircom submits that Section 12.5 of the Draft Decision needs to be carefully amended to impose SMP on all operators who provide call origination to NTCs, and to impose a suitable price control remedy on all operators. eircom believes that the remedy for such operators should limit the charge to ensure that each operator "recovers no more than the amount charged by eircom for such services". eircom accepts that it would appear to be disproportionate to impose other remedies (i.e. access, non-discrimination, transparency, cost accounting or accounting separation) on such operators in this regard.

Q.12 Do you agree with ComReg’s proposed approach to the withdrawal of remedies in the Transit Market, including the proposed sunset period? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

No. Please refer to eircom's response at Section 7 above.

Q.13 Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

For the reasons discussed throughout Sections 1-8 of eircom's response, many aspects of the Consultation Document are unclear, preliminary in nature and/or lack adequate justification. As such, it is difficult to see how a properly informed and reasoned regulatory impact assessment can have been developed. In these circumstances, eircom requests ComReg to publish a supplemental consultation document that addresses the main concerns raised in this response, provides the necessary details around implementation of the proposed approach, and allows an opportunity for further (or reply) comments. The supplemental consultation should be based on a forward-looking analysis and should, at a minimum, address the following issues, the resolution of which is essential to an informed and reasonable assessment of what is being proposed by ComReg:

- whether and how the proposed cost accounting rules can be applied to FACO;
- how the NRT will apply when using wholesale rather than retail products as the focal point of the assessment;
- the plan and timetable for removing Market 1 from *ex-ante* regulation; and
- the treatment of a FACO sub-market in which *all* operators appear to have bottleneck control of call origination to NTCs.

The supplemental consultation document should be accompanied by a regulatory impact assessment that evaluates the proportionality of the proposed measures after they have been more fully developed in the supplemental consultation document.

4 Magnet Networks Limited

Magnet Networks welcomes ComReg's thorough consultation on fixed voice call origination and transit network. This was a voluminous consultation and with all other questionnaires and consultations outstanding was difficult to answer in more detail. However, Magnet feels that the answers that it has provided below are reflective of its position.

Question 1

Magnet does not agree that there is a significant increase in FSP as the only real new provider is UPC, Sky and Vodafone are effectively just replacing Smart and BT who have left the FSP market. Thus, there hasn't been a significant increase just a reshuffling of market share amongst new entrants while existing entrants have left.

Magnet agrees that managed VOB is on the rise from all operators but more particularly UPC as outlined in this consultation. However, Magnet would like to point out that bundles have been very much a part of the marketplace for the last 7-8 years and do not feel that this should be a factor in this consultation. Magnet would like to point out that these trends were there prior to Sky/UPC market entry. Providers such as Magnet, Smart, BT and Eircom offered bundled products namely voice and broadband or voice, TV and broadband (Smart and Magnet) over the last 7-8 years. Thus, bundling products is not a new phenomenon and shouldn't be treated as such by ComReg.

Magnet believe that NGA will potentially change the way voice in delivered in the short/medium term and ComReg have even acknowledged this at paragraph 9.57 (footnote 722). Magnet overall, agree some sentiments outlined by ComReg in their conclusion but where Magnet disagree the reasons are outlined above.

Question 2

Magnet agree that RFVA and RFTS are in one market as not many are buying access and voice separately unless an unmanaged voice product. However, Magnet believes in the short to medium term that managed VOB services will become available and it will become more prevalent. Magnet would like to point out that number portability for managed VoIP services have not been finalised and to ensure effective rollout this has to occur to allow number porting independent of access.

Magnet agrees that generally customers are aware of their costs however, it is debateable at what detail they are aware of costs i.e. rental versus call costs. Customers are generally able to compare call and rental in a bundled charge rather than independent of that i.e. free local/national calls etc. The only see call types in the retail bundles rather than the underlying costs and thus, able to make price comparisons and potential savings.

Magnet agree with ComReg's conclusion at 4.220 (c) that eircom's managed VOB services is a substitute for RFTS and ComReg should ensure that appropriate regulation is in place for when this service is launched, which looks to be in the short term.

Magnet agrees with the conclusion outlined in 4.220 (d) that RFTS product market includes copper, managed VOB utilising FTTC/FTTX, CATV and Magnet believe that ADSL should be included here.

Magnet believes that companies like Blueface are utilising VOB successfully over ADSL and thus, don't agree with ComReg's contention at 4.220(e) and believes that ADSL should be included herein. Magnet does agree that MTS does not fall within the RFTS remit.

Magnet generally agrees with the statement here, however, if someone were to rollout a national FWA than that maybe an effective competitor to RFTS.

Magnet tend to agree with 4.220(h) however, would like to note that LEA pricing reduction is being reversed from December 2014.

Magnet has outlined above its comments on the conclusions drawn by ComReg in this consultation.

Question 3

Magnet agrees with the direct constraints that have been outlined by ComReg. There is no alternative FACO provider and no one will emerge. Eircom have the ubiquity of access and the sunk costs in their network to ensure that barrier to entry are high as to replicate their ubiquity today is impossible. It must be remember that eircom's ubiquity comes from its historic position within a government department and that its sunk costs and network build out was originally fully funded by the tax payer.

Magnet agrees with ComReg's assessment of indirect constraints and agrees that there is no real threat from localised FTTx and from MTS. As a small FTTx provider our limited network poses no threat to Eircom, even more so the Eircom network poses a threat to our small holding.

Managed voice over xDSL should be included in the market especially with Eircom intending to launch a new VOB product in the short term and Blueface successfully selling such a product. Magnet believes that a SSNIP would ensure that customer moved from POTS to VOB irrespective of their underlying access product.

Magnet agrees with ComReg at 5.216 that RFTS on an alternative platform is not a direct constraint.

Question 4

Magnet would like to point out that the LEA discount is being withdrawn in December 2014 (see attached notice) Magnet feel that this will have an effect on the consultation and on pricing (5.231) as it will raise due to the increase in LEA pricing and bundle pricing. This would need to be closely monitored by ComReg to ensure that no margin squeeze takes place. Also, increasing the price also notes that Eircom may not face the competition that it originally stated when requesting the reduction.

Magnet agrees with ComReg's assessment that the market is national in scope.

Question 5

Magnet agree with ComReg's assessment that there is no or very limited self-supply of FACO. Also as there is limited interconnect it in turn means that FACO is not competitive. Also, due to the failure of LLU within the regulated environment means that there is little choice of alternative providers for the consumer i.e. not just buying white label Eircom products.

With SIP trunking still being in its infancy and managed VoIP still emerging these are not real competitors for FACO in the short term. However, eircoms VoIP proposals should be monitored and pre-emptively be included in this designation.

Magnet agrees that Eircom have SMP due to CBP, that there is no alternative supplier and there does not look that there will be an alternative supplier in the future. OAO's do not have any bargaining power when negotiating contracts for supply with Eircom. Thus, ComReg's designation of SMP is justified. The infrastructure is not easily replicated, thus, ensuring high barriers to entry. Also mobile technology is not a true alternative; it is more a complimentary product. This is evident with the bundles being offered by the incumbent Eircom.

Question 6

Magnet believes that the handover point is at the double tandem exchange level. The reason is that it is very expensive to interconnect at the primary exchange.

Magnet agrees with ComReg that RFVC include calls to all number types. There is insufficient supply side substitution for geographical and international transit.

Question 7

By its very nature and urban/rural divide there will always be more calls terminating and originating in an urban area. This is down to population density. Thus, it is important that the transit market is defined in a national scope.

Question 8

Magnet would like to point out that a full consultation should take place in relation to the transit market and it should not be hidden away in a few pages of a voluminous consultation. This question is broken down into the 3 criteria test, and Magnet will deal with each criteria outlined.

1. Barriers to entry

   Comreg have concluded that there are low barriers to entry into the transit market and that cost advantaged that Eircom are perceived to have are not there. Though there are several operators with interconnect however, as ComReg have noted earlier UPC is not a switched network, thus, really only one real alternative. Magnet therefore considers a duopoly exists and that barriers to entry are high and only companies with a large international presence are able to afford to enter the marketplace on a meaningful level.

2. Market allowing effective competition

   ComReg have stated that the market will allow for effective competition. However Magnet would like to point out that ComReg also stated that VoIP would make switching trunk costs redundant and thus if this were to happen in the short to medium term, operators will withdraw from this market, or alternatively not enter this market. If this were to happen there would not be affective competition in this area.

3. Competition law is not an effective remedy

> Magnet agrees with ComReg that competition law (ex post) regulation is not enough. As outlined by Magnet, that criteria one of the test, there may not be a monopoly but there may be a duopoly, which too needs ex ante regulation. Also, with the emergence of VoIP some operators may withdraw from this market leaving a monopoly and thus, it is necessary to regulate the market to ensure that there is an operator existing in this marketplace to ensure smooth transition to VoIP.
> Also, ex ante regulation is required to ensure that no collusion takes place with an increase of prices absent regulation.

Overall, Magnet does not believe that the transit market has passed the 3 Criteria Test and insists that ComReg undertake a further, more indepth consultation on this matter. Magnet is confident that absent regulation the market will be foreclosed by Eircom and that small operators like Magnet would have little or no choice and with no bargaining power will be unable to seek recourse in the courts due to the length of time the legal process takes and will thus be removed for the market.

Question 9

Magnet agrees with ComReg's conclusion in relation to competition problems. As absent any regulation Eircom would be incentivised, especially in light of this vertical and horizontal integration to engage in price hikes to third party, unfavourable terms and any other anti-competitive actions.

Question 10

Magnet feels that IP Based FVCO should be included in Access regulations and obligations. The cost of VoIP is expensive and until such a market exists and to climb the ladder of investment operators will purchase IP Based FVCO and thus, it should be regulated.

Magnet Networks agree that SBWLR obligations and those assigned to ICH/IBH and ISH should also exist. As the incumbent and SMP Eircom should be required to negotiate in good faith and not withdraw from facilities already granted. This is especially important in areas such as LLU and any co-located facilities. Magnet agrees in relation to co –located obligation including open access infrastructure but ComReg fail to mention that VoIP interconnect should also be regulated as it will be a requirement for the future and could be in the shorter term. (An inference can be drawn from paragraph 9.57 footnote 377 that Eircom will be launching a VoIP service in the short term).

Magnet believes that a paragraph on the removal of CS and CPS obligations is insufficient to enable OAO's to understand the reasoning and logic behind such a huge decision. Magnet feel that such a decision should not be taken so flippantly and that a consultation is required to come to a conclusion about remedies for CS, CPS. If ComReg does not agree to a consultation that Magnet feel that CS and CPS are names that can be used for managed VoIP as they are preselecting the carrier of their voice service irrespective of the underlying technology.

In relation to non-discrimination obligation, it is imperative that this obligation and remedy is enforced rigorously. As to date Magnet has seen non discriminate findings by ComReg take months if not years to come to a conclusion. Based on this Magnet would like to see an independent adjudication facility whereby operators could take their issues to such a facility and it would be ruled on swiftly and investigated in a very timely manner.

Magnet feel that there is a huge need for transparency in the marketplace and would suggest that equivalence of input is put in place to require Eircom retail to go through all the same channels including OSS and gateway that the OAO's have to submit too. Currently, this is not the case and there is clear evidence of it being to Eircom retails advantage e.g. engineer updates retail get them instantly OAO's receive them batched twice daily.

Magnet agrees that without price control the marketplace will have been foreclosed. However, Magnet feels that it is necessary to replace the retail minus price control in SBWLR with cost orientated pricing. As the Industry moves into a NGA era there is a huge cross over between products and product functionality that are equivalent to each other, especially as one aspect of one product is now being used in an auxiliary product. Thus, to ensure that there is true price control and to encourage and enable competition it is necessary to review SBWLR pricing in light of cost orientated pricing. As price controls are linked to inputs i.e. LLU and line rental are linked etc, then it is necessary to review the SBWLR product in this cost orientated price light.

Magnet agrees with ComReg conclusions on accounting separation. However, Magnet would like to see regulation taken one step further and impose functional separation on Eircom. As NGA is emerging the lines are being blurred between products, product inputs and the use of the underlying infrastructure. If each operator had to purchase their inputs from a wholly independent operator from a downstream arm then transparency, discrimination and accounting separation become easier to manage from a regulatory aspect. What Magnet would essentially like to see is a BT OpenReach type structure where it is that companies best interest to exploit its assets irrespective of the buyer. Currently, this does not seem to be the way in which Eircom are working.

Question 11

Magnet does not agree with Part IV of the draft decision. Magnet believes that the transit market should not be deregulated and that a consultation should take place in order to properly gauge the industry's reaction to deregulating this market. Magnet does not agree that the market passes the 3 criteria test. Also it is noted throughout this consultation that Eircom has ubiquity at exchange level and this has not been replicated by any other operator. Magnet feels ComReg need to take a more detailed look at the market in order to come to a conclusion and not just a mere by-product of another consultation. Thus, discrimination can occur across the network with transit charges, leveraging those unserviced exchanges when offering terms and conditions.

Magnet does not believe that it is appropriate to shoe horn such a large decision within a paragraph of a consultation.

In relation to the remainder of the draft decision Magnet has no issue with the language used.

Question 12

Magnet disagrees strongly with the withdrawal of ex ante regulation in the transit marketplace. Magnet reiterates the need for a consultation on this matter to provide further analysis on this matter and a further investigation into the marketplace.

Though a sunset period is recommended the suggested period of 6 months is too short. A period greater than 12 months is required. The reason for this is due to contract terms and termination notice periods as well as facilitating renegotiations of contract terms. Magnet disagrees with deregulating the market without a more detailed consultation.

Question 13

Magnet does not agree with section 7 and believe a full consultation on this matter. It is very important that there is a further analysis of the market including the level of transit minutes sold and the cost of each minute. It is imperative that all operators get to consult on the transit market on its own and not hidden within the pages of a voluminous consultation. To try and shoe horn this decision in a few pages is remiss of ComReg.

However, besides this the overall sentiments expressed in the RIA are acceptable to Magnet. However, the suggestions outlined about in relation to cost orientation being imposed on WLR.

Also Magnet believe that until a further consultation has taken place on the effect of removing remedies from CPS, CS and CA then no such removal of remedies should occur.

Otherwise all the other remedies such as access request, transparency, price control and cost accounting obligations are all necessary. Magnet of course would like to see functional separation to ensure that there can be no discrimination in the marketplace, as well as equivalence of input by eircom's retail arm. In the interim whilst ComReg is putting functional separation in place, Magnet would like to see an independent adjudicator appointed in order to oversee any complaints relating to discrimination and all other regulations imposed on Eircom.

Conclusion

Magnet overall welcomes this consultation as it is thorough. However, Magnet believes that it has given rise to two further consultations namely CS and CPS remedies removal and transit market removal of regulatory obligations.

Magnet agrees FACO is national in scope and covers all numbers. It agrees that MTS in not a substitute product but a complimentary product. Magnet encourages ComReg to include VoIP interconnect and VoIP services within the remit of this consultation and regulate them as necessary.

Magnet is of the opinion that now is a good time to enforce functional separation and whilst waiting for this to occur fully to ensure that all regulatory obligations are adhered to that an independent adjudicator is established in order to access complaints by OAO's relating to breach of eircom's regulatory obligations.

5 Sky Ireland Limited

SKY IRELAND RESPONSE TO COMREG MARKET REVIEW CONSULTATION ON WHOLESALE FIXED VOICE CALL ORIGINATION AND TRANSIT MARKETS

1. SUMMARY

1.1 This is the response of Sky Ireland ("Sky") to ComReg's consultation entitled: *"Market Review Wholesale Fixed Voice Call Origination and Transit Markets"*, dated 4 April 2014 (the "Consultation").

1.2 Sky welcomes this opportunity to respond to the Consultation. While Sky is in general agreement with ComReg's market analysis and the remedies it proposes to impose on the operator with significant market power ("SMP") the proposed remedies need to fully address the competition problems that ComReg has identified. In this regard, eircom should be obliged to offer cost oriented prices for wholesale line rental ("WLR") and the provision of WLR should be supported by stronger service level agreements ("SLAs").

1.3 ComReg should also review the evidence for some of its preliminary conclusions in relation to market analysis and carefully consider if it is appropriate to remove regulation on the Transit market at this time.

2. MARKET DEFINITION

2.1 Sky notes that ComReg proposes a market definition that is broader than fixed voice call origination ("FVCO") to include fixed access leading to a Fixed Access Call Origination ("FACO") market definition. Sky considers that this market definition should not materially alter the regulatory outcome, in terms of SMP remedies. This is because even under a standalone FVCO market definition, the imposition of an obligation on eircom to provide a WLR product would still be appropriate, proportionate and justified in light of ComReg's regulatory objectives to amongst other things, promote competition.[1]

2.2 Sky notes ComReg's preliminary conclusion that the Lower Level-FACO[2] market is national in scope[3] and that eircom should be designated as having SMP.

2.3 Sky also notes ComReg's preliminary view that the boundary of the FVCO component in the FACO market, should be extended up to the double tandem exchange level.[4] This is important given the lack of availability of a code hosting facility on eircom's network that would allow third party competition for trunk transiting where operators are not interconnected to some or all of eircom's primary exchanges.

1 See Regulation 8 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

2 Sky does not sell services that comprise the Higher Level-FACO market and so its response is restricted to the Lower Level-FACO market.

3 Paragraph 5.238 of the Consultation.

4 Page 129 of the Consultation.

3. MARKET ANALYSIS

3.1 Before addressing the issue of SMP market remedies, we make a number of observations in relation to ComReg's preliminary market analysis findings. Whilst these observations should not materially alter ComReg's preliminary conclusions, they raise issues for further analysis and clarification by ComReg.

3 (A) The absence of differentiated pricing is not because of competition

3.2 ComReg refers a number of times to the fact that eircom does not differentiate pricing of its retail fixed telephony service ("RFTS") by geographic area. ComReg uses this fact to support its conclusions about the geographic market definitions of FVCO/FACO. However, Sky notes that eircom is currently designated by ComReg as the universal service provider ("USP") in the State and one consequence of this is that eircom is obliged to maintain geographically averaged prices for services.[5] In a recent consultation, ComReg has also proposed to maintain this obligation on eircom.[6] Therefore, the fact that eircom does not have reduced/differentiated pricing for standalone RFTS, within or outside of Large Exchange Areas ("LEAs") may not be as a result of competitive factors at play in the market, but may be as a result of regulation.

3.3 Nonetheless, it could be the case that even absent a regulatory obligation; eircom would choose to maintain uniform pricing nationally for RFTS. Indeed, ComReg has found no evidence of sub-national pricing by other operators, who (unlike eircom) are not constrained by regulation.

3 (B) ComReg should review the evidence for its preliminary conclusions on bundling

3.4 ComReg notes that:

> "*There is a trend for increased consumption of services in packages and bundles. RFVC and RFVA are typically purchased together and such RFTS are often bundled with broadband and/or television services…These trends appear to have corresponded with the entry of UPC and Sky into the broadband and RFTS market, both of which offer product bundles to consumers.*"[7]

3.5 While it may be the case that the trend described above is observable since the last market review, ComReg has not presented evidence of a connection between such a trend and Sky's entry into to the broadband market 14 months ago (in April 2013).[8] ComReg's observations in this regard are unlikely to have a fundamental bearing on this market review, but they could be significant if applied to other contexts and ComReg would need cogent evidence to support them.[9]

3.6 Sky also notes that ComReg appears to make assumptions as to how Sky retails so called "triple play" bundles in the market. Sky sells both broadband, RFTS and Pay TV services, but the latter is excluded from our bundled offers. Firstly, Sky customers enter into separate contracts for Telecoms services on the one hand (RFTS plus broadband) and Pay TV services on the other, even when these are purchased at the same time (or ultimately

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5 See section 2.10 of Decision Instrument contained in Chapter 6 of ComReg Document No. 12/71.

6 Paragraph 2.3 of ComReg Document No. 14/48.

7 Paragraph 3.71 of the Consultation.

8 There is more likely to be an observable trend as a result of UPC's entry into the broadband market 7 years ago, in 2007.

9 ComReg might for example examine whether Sky's entry initiated a new observable trend, or altered the momentum of an existing, observable trend or had a neutral impact on an observable trend.

purchased together). Moreover, Sky does not offer cross-product discounts on standard pricing i.e. Telecoms products pricing is unaffected, whether they are purchased alone, or with TV, or vice versa.[10] Therefore, in the economic sense, Sky does not sell bundles in the manner as described by ComReg.

3.7 Furthermore, Sky's *ability* and *incentive* to bundle services is quite different to that of its main competitors. For example, eircom and UPC provide broadband and TV services over the same, vertically integrated platform, while Sky provides telecoms products over a combination of BTI's and eircom's network and provides Direct to Home ("DTH") TV services over a satellite network. In the case of eircom, its IPTV[11] service can <u>only</u> be purchased by bundling it with eircom's fibre broadband product. Therefore, eircom cannot sell RFTS with TV and exclude broadband from any bundled offer. In UPC's case, RFTS can be purchased as part of a bundle with broadband, or with TV, or as part of a bundle with all three services. Furthermore, unlike Sky, UPC offers cross-product discounts, depending on the mix of RFTS, broadband and TV services purchased by the customer.

3.8 Again, while ComReg's observations seem unlikely to have a fundamental bearing on this market review, they could be significant if applied to other contexts (especially if service bundling was under consideration) and ComReg would need cogent evidence to support them.

4. SMP REMEDIES

4 (A) eircom should be obliged to offer cost oriented prices for WLR

4.1 Sky notes ComReg's preliminary conclusion that continued *ex-ante* regulation of the FVCO market is warranted. Sky also notes that ComReg has proposed the imposition/maintenance of an obligation on eircom to provide WLR under the FVCO market review, rather than the retail narrowband access ("RNA") market. We would refer ComReg to Sky's response to ComReg Document No. 12/117, which deals specifically with eircom's obligation to provide WLR and which should be treated as forming part of our response to the Consultation.

4.2 ComReg has indicated that *"…the question as to whether the existing 'retail minus' price control obligation for the WLR element of SB-WLR remains appropriate will also be considered in a third separate consultation in Q4 2014*." Sky considers that a decision to impose an obligation for cost oriented WLR should be made in the decision that follows this Consultation for a number of important reasons:

1) Cost orientation is preferable to Retail Minus, as it is likely to result in wholesale price reductions for eircom's competitors, that can be passed on to consumers. As ComReg notes: *"…retail minus price controls can, in the absence of effective competitive pressures at the retail level (say from competing service providers), potentially result in excessive retail, and in turn, wholesale charges being set."*[12]

2) The existing retail price cap (CPI-0%) coupled with a static retail minus (-14%) price control for Single Billing-WLR has not led to any price decreases (either for retail or wholesale customers) for several years. In addition, despite extensive cost cutting by eircom (which has led to a 35% reduction in headcount over the last 18 months) WLR charges have not been reduced.[13] Instead, eircom now intends to remove the €3 WLR

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10 Sky has run a limited number of promotional offers in the past on upgrading premium TV content with Telecoms services.

11 Internet protocol television.

12 Page 360 of the Consultation.

13 The €3 WLR discount in LEAs was not promoted by eircom as a discount resulting from any achieved cost savings.

discount in LEAs later this year, which will result in a 20% increase to the current WLR price for operators who have broadband customers, on both Current Generation Access ("CGA") and Next Generation Access ("NGA") in the LEAs.[14]

3) A key justification for the current Retail Minus pricing structure is that it, supports a particular regulatory objective of encouraging efficiencies and investment by eircom in the network, whilst recognising that there is a trade-off between this and not having cost-oriented WLR rates. One would therefore expect to have seen evidence of such investment by eircom, but its failure to meet its universal service obligation ("USO") targets and the very poor performance of the eircom network last winter, suggest that investment is not taking place and that the current 'carrot' approach of Retail Minus is not achieving this key objective. Therefore, the maintenance of Retail Minus in pursuit of this objective no longer appears justified and it would be better pursued by an approach, involving appropriate SLAs and/or regulatory fines.[15]

4.3 Sky has previously raised concerns with ComReg about the asymmetry of information between eircom and competing operators in relation to (i) longer term price planning; and (ii) the competitive advantage this gives to eircom. This asymmetry arises where eircom has a degree of flexibility in how it prices wholesale inputs (in the markets where it has SMP) as it has under its Retail Minus obligation (which it would not have under a stricter alternative).

4.4 It was widely believed (including by ComReg) that the €3 WLR discount would continue beyond December 2014, but eircom now proposes to remove it on 31 December 2014. It appears that eircom can do this in the absence of other regulatory controls and it causes no disruption to its business. The flexibility eircom has with WLR pricing (as exemplified by the WLR discount) has however very serious implications for its competitors, in terms of business planning and their ability to compete. It appears likely that eircom's decision to implement the WLR discount and it proposal to now discontinue it, are being driven by retail, rather than wholesale considerations.[16] If that is so, then eircom retail's market power is enhanced, because of its wholesale arm effectively being able to exercise more control over the retail pricing decisions of its competitors (through for example, the giving/withdrawal of the WLR discount).

4.5 eircom introduced the WLR discount by linking it to roll out of its NGA network. In the 13 months since it launched NGA, eircom has used that discount to lower the price of retail fibre broadband (bundled with FACO) and in the process, has rapidly signed up c. 100,000 retail fibre customers.[17]

4.6 Therefore, despite ComReg's attempts to prevent eircom gaining a 'first mover advantage' on fibre (through certain non-discrimination and transparency obligations) and to prevent market foreclosure, eircom has, helped by its flexibility in wholesale pricing,[18] captured 75%

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14 This would appear to run contrary to ComReg's consistently held view that competition pressures are stronger in the LEAs.

15 See Sky's response to ComReg Document No. 12/117.

16 In this regard we refer to eircom's notice of 10 June, 2014 on its proposed discontinuation of the WLR discount. In the notice, eircom wholesale states that the WLR discount was introduced for industry's benefit as a whole, in order to encourage the take up of NGA services. However, given that the discount applied equally to both CGA and NGA broadband bundles in LEAs, it is difficult to see how it would encourage greater uptake of NGA (in preference to CGA) among eircom wholesale's customers. A more plausible rationale for the WLR discount seems to be that it facilitated an aggressive NGApricing strategy by eircom retail, by alleviating concerns in relation to its obligation not to cause a retail margin squeeze.

17 As of 31 March, there was a total of 103, 420 VDSL (very-high-bi- rate digital subscriber line) according to ComReg's Q1, 2014 Quarterly Key Data Report.

18 Through the WLR discount, combined with a backhaul Ethernet pricing structure, which Sky has previously argued is discriminatory by not respecting the fundamental legal principle of technological neutrality.

of the market for fibre customers on its own network. Having attracted this critical mass of subscribers by initially decreasing the WLR price, eircom now intends to (effectively) increase wholesale prices by 20%, through the removal of the WLR discount. These customers are now effectively 'locked in' and cannot be competed for by eircom's competitors, because of the absence in the future of the WLR discount (used by eircom to initially attract customers) coupled with the fact they are committed to contracts of up to 18 months in duration.[19]

4.7 Sky considers that there is now an urgent need for a cost oriented WLR rate, given eircom's proposal to remove the WLR discount in the LEAs on 31 December 2014.

4.8 The further consultations and various iterations of a cost modelling exercise that ComReg has planned are likely to take well beyond that date to conclude. Sky considers that ComReg should instead:

1) Following this Consultation, issue a decision which imposes an SMP obligation for cost oriented WLR on eircom, at a high level, effective from 1 January 2015 and in the interim, maintain a regime that is at least as favourable as the current Retail Minus one, until the actual calculation and determination of a cost oriented WLR price. This approach avoids further, protracted consultation about imposing cost orientation *at a high level* (where it is already evident that it is justified to impose it) while preserving the *status quo* for long enough to allow the transition to cost orientation (and possibly, for eircom to volunteer a cost oriented rate[20]).

2) Once a cost oriented rate for WLR is determined after 1 January 2015, require eircom to rebalance charges so as to take account of the difference (any overpayment) between the prevailing Retail Minus price and the new, cost oriented price. The difference/overpayment would be in respect of the period spanning 1 January 2015 up to the date ComReg actually determines a cost oriented rate, pursuant to eircom's SMP obligation (that would be in force from 1 January 2015).

4 (B) eircom's access obligation needs to have stronger SLA conditions

4.9 ComReg recognises that there is an 'imbalance in bargaining power' between eircom and competing operators. In this regard, Sky refers to section 3 of its response to ComReg's "*Draft Strategy Statement for Electronic Communications 2014-2016*" as to how Sky considers that imbalance might be better addressed.

4.10 With respect to the discussion in the Consultation about SLAs, Sky refers to its response to ComReg Document No. 12/117 (in particular, section 2) where we propose that ComReg should strengthen eircom's incentives to comply with its quality of service targets at retail and wholesale level. These points remain valid for the FACO market and should be treated as forming part of our response to the Consultation.

4.11 Sky notes ComReg's view that access to eircom's Operational Support Systems ("OSS") is essential "*…to the effectiveness and efficiency of the operational aspects of the supply of wholesale FACO products. Services and facilities that are used as inputs to the supply of RFTS to end-users.*"[21] As ComReg is aware, industry recently signalled its intention to file a statement of requirements ("SoR") for a SLA in relation to eircom's Unified Gateway ("UG") performance. Notwithstanding assurances from eircom that problems with its order

19 ComReg should consider any competition law implications arising from these observations.

20 Sky considers that eircom has adequate time between now and 1 January 2015 to determine an appropriate, cost oriented rate and that as a consequence of a rebalancing requirement that ComReg could impose, eircom would have the incentive to properly assess that rate and implement it voluntarily and quickly, without ComReg necessarily having to intervene to ensure it complied with the SMP obligation of cost orientation.

21 Paragraph 9.106 of the Consultation.

handling system/UG experienced last year (as documented at several industry meetings) were fully resolved following software and hardware upgrades, problems persist with several periods of no availability or slow responses times recorded as recently as April 2014.

4.12 It is important that ComReg presses eircom to strive for improvements in the quality of service it delivers. Taking account of the imbalance of bargaining power that ComReg identifies in the SLA negotiating process, ComReg should facilitate the implementation of a SLA for the UG in a timely manner. If eircom does not voluntarily agree appropriate service levels (and compensation for when they are not met) then it should be a matter for ComReg to intervene and to mandate appropriate SLAs and compensation. As noted by ComReg: "…*SLAs are intended to prevent eircom from engaging in actual or constructive refusal to supply effective and efficient access to FACO products, services and facilities*."[22]

4 (C) eircom's non-discrimination obligation

4.13 Sky notes ComReg's proposal that eircom should be required to submit a written statement to ComReg, demonstrating compliance with its non-discrimination obligations. Such a requirement appears appropriate, particularly in the absence of Equivalence of Input ("EoI") standards on FACO services. However, in the interest of greater transparency, Sky considers that such compliance statements should be published by eircom/ComReg, with any confidential information redacted. This is because in many cases, eircom's wholesale customers may be able to challenge claims of compliance by eircom by reference to operational experience and data and it is appropriate for ComReg to be properly aware of any views they express with regard to compliance by eircom.

4.14 In Sky's response to ComReg Document No. 12/117, we noted that where one or more services included in a bundle already carried an EoI obligation, that standard should extend to other services in the bundle as otherwise the EoI obligation is effectively diluted a lower equivalence of output ("EoO") standard on other services in the bundle. We refer ComReg to section 4 of our response to ComReg Document No. 12/117 for further information on this point (should be treated as forming part of our response to the Consultation).

4 (D) Proposal to remove regulation on eircom in the Transit market

4.15 Sky notes ComReg's preliminary view that the case for the continued regulation of the Transit market is "finely balanced."

4.16 Sky also notes ComReg's view that the "…*advent of IP Interconnection is likely to more easily support the Relevant Transit Market tending towards effective competition in the longer term (within the next 3-5 years)*." However, this point, which appears to be used by ComReg to support the potential removal of regulation in the Transit market, seems to contradict its analysis of the FVCO/FACO market. In this regard, ComReg notes that over the period of the market review, eircom's copper based narrowband network would continue to be used to provide FVCO,[23] in particular, for customers outside the NGA footprint, or within the footprint not availing of NGA services. ComReg also notes that a migration to 'next generation' IP based interconnection at industry level would be somewhat dependent on eircom migration to such arrangements and that significant coordination (with the assistance of ComReg) would be required at industry level before this could happen. Given that ComReg considers the case for removing regulation in the Transit market to be finely balanced and if one also assumes that IP interconnection is unlikely to be prevalent in the Irish market in the longer term (i.e. within 3-5 years) the implications of removing

22 Paragraph 9.121 of the Consultation.

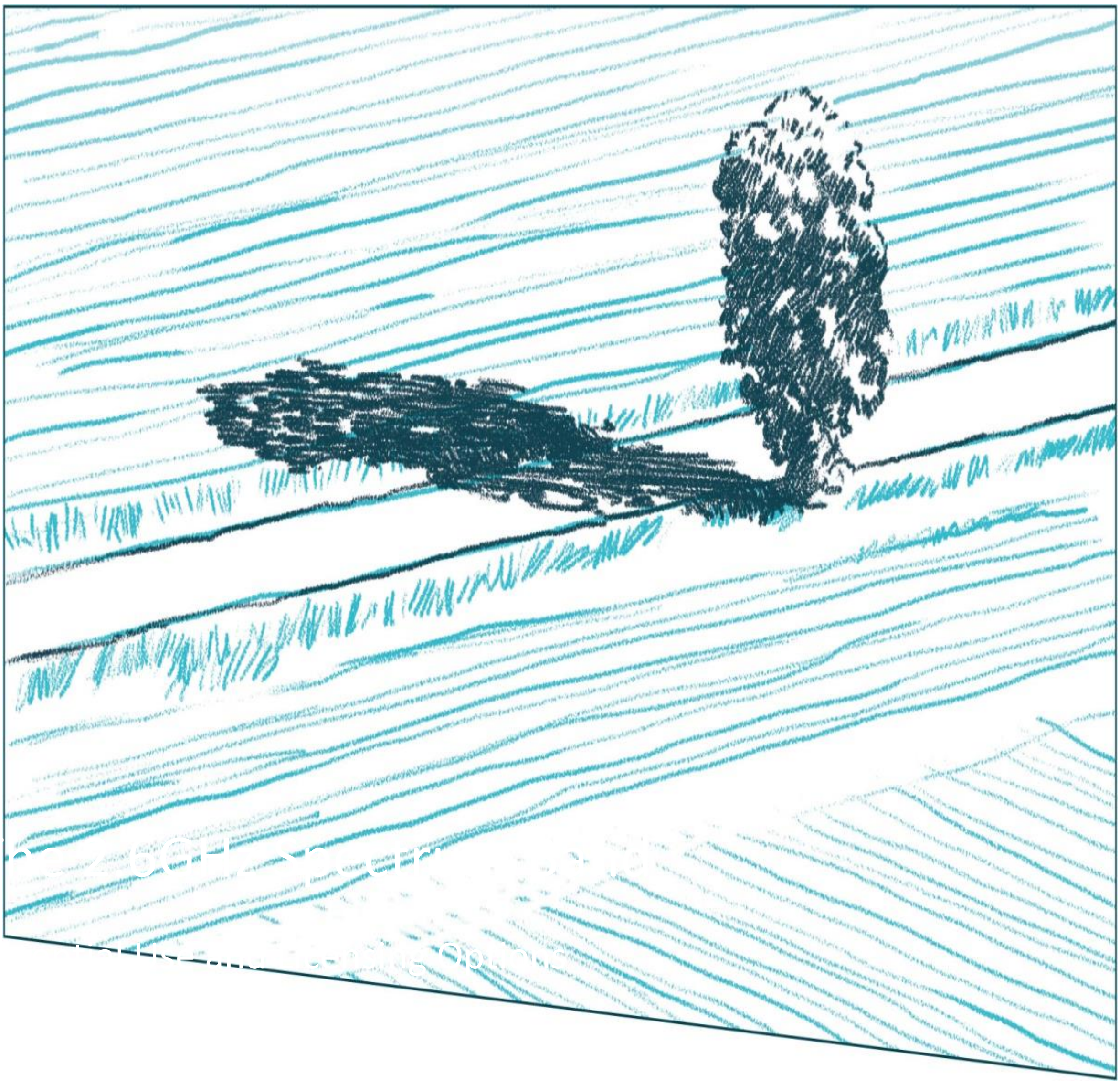
23 Paragraphs 3.41-3.42 of the Consultation.

regulation in the Transit market could be significant. Therefore, ComReg needs to carefully consider the appropriateness of removing regulation from the Transit market at this time.

4.17 Finally, if ComReg does withdraw Transit obligations on eircom, the proposed 'sunset period' of 6 months should be extended as it does not give operators sufficient time to find alternative suppliers, in the event that eircom decides to withdraw access to the service, or to increase prices. Sky considers that ComReg should allow a period long enough for operators to resolve these issues.

Sky **24 June 2014**

6 Telefonica Ireland Limited



Market Review: Wholesale Fixed Voice Call Origination and Transit Markets

24th June 2014

Telefónica

Question 1: Do you agree that the main developments identified in the provision of RFTS are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

Telefonica agrees with the main points made by ComReg in identifying the RFTS market. Telefonica would particularly note the increasing blurring of product definitions through bundling and marketing of combined access and voice products.

Question 2: Do you agree that the above identifies the main relevant developments in RFTS market since the previous reviews of the FACO and Transit Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with the assessment made by ComReg. In coming year the investment in fibre will diminish the dominance of the narrowband network and ComReg should monitor developments in the roll out of VOB services.

Question 3: Do you agree with ComReg's preliminary conclusions on the product assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's conclusions

Question 4: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's conclusions

Question 5: Do you agree with ComReg's assessment of SMP? Do you consider that the competition assessment for the FACO Markets would fulfil the three criteria test? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's assessment of SMP. The market, as defined, meets the 3 criteria test specifically as the market does not and is not likely to tend towards competition.

Question 6: Do you agree with ComReg's preliminary conclusions on the product assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's conclusions

Question 7: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's conclusions

Question 8: Do you agree with ComReg's 3CT with respect to the Relevant Transit Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. Respondents are encouraged to provide Internal Transit and External Transit traffic and direct interconnection information as part of their responses.

Telefonica agrees with ComReg's conclusions in relation to the three criteria test.

Question 9: Do you agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with the problems identified

Question 10: Do you agree with ComReg's approach to imposing access, non-discrimination, transparency, price control and cost accounting and accounting separation remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with set of remedies proposed

Question 11: Do you agree with ComReg's draft Decision Instrument set out in Appendix H, in particular, that its wording accurately captures the intentions expressed in this Section 9? Do respondents agree with ComReg's Definitions and Interpretations as set out in Part I of the Draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers in the Draft Decision Instrument to which your comments refer.

Telefonica has no comments on the draft decision

Question 12: Do you agree with ComReg's proposed approach to the withdrawal of remedies in the Transit Market, including the proposed sunset period? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Telefonica supports the sunset proposal put forward by ComReg in para 10.7.

Question 13: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees with the RIA conclusions

7 Vodafone Ireland Limited

Preliminary Vodafone Response to ComReg Consultation :

Market Review Wholesale Fixed Voice Call Origination and Transit Markets

Ref. ComReg Document 14/26 Response Date: 24 June 2014

Summary

This document sets out Vodafone's high level position on what it sees as key consultation issues. Vodafone will provide a supplemental response setting out its detailed reasoning in due course.

Vodafone notes the move from grounding the imposition of network access obligations on SMP in the retail market for fixed narrowband access to the grounding of these in the wholesale market for fixed voice call origination. The analysis and rationale underpinning this move will provide regulatory certainty beyond the current review period.

Market Definition

Vodafone agrees with the inclusion of IP voice services in the market however Vodafone has concerns regarding the definition of the market boundary as it relates to eircom's switching hierarchy. Vodafone believes that this does not take account of market conditions, is not entire technology neutral and is in measure based on an eircom centric view of the market.

While we agree with ComReg's approach as regards the consideration of a combined access and calls service set we would note that ComReg's justification is incomplete as it fails to recognise that even if its market definition was limited to voice only then it is likely that OAOs could and would request that network access be provided as an associated facility within a voice only market. This means that the risk that ComReg's approach results in an overly expansive regulatory intervention is further reduced by a substantial margin.

IP voice

We disagree with ComReg's proposal not to mandate the provision of an IP equivalent of WLR/CPS. The rationale used by ComReg to reach this conclusion is flawed as it significantly underestimates the operational, technical and financial thresholds facing OAO who wish to deploy IP voice services. In particular ComReg has failed to take adequate account of the difficulties associated with implementing terminating voice services including portability and number management.

ComReg's approach, combined with the proposed price control gives rise to an existential risk that eircom will maintain the prices of retail and wholesale circuit switched services at a premium allowing its retail arm to undercut the market using IP based solutions. We believe that this will initially manifest itself in the Enterprise space.

EoI/EoO

Vodafone does not agree with ComReg's proposed approach in relation to the non-discrimination standard to be applied. From a practical point of view where eircom embarks on any new IT development related to its retail BSS systems it faces the choice of developing against a set of retail systems interfaces to an EoO standard or developing against the Unified Gateway to an EoI standard. In the longer term designing new IT developments against the EoI standard evolves the eircom retail IT estate towards only one interface design. This should be more cost and operationally efficient. The the only reason why eircom would not do this is that it perceives a competitive advantage to its retail arm from maintaining the EoO approach. In this context for ComReg to facilitate this advantage by an SMP operator means that the proposed remedy does not address the completion problem identified.

Price Control

Vodafone strongly believes that the price control as it relates to SB-WLR should be on a cost orientated basis (whatever the cost orientation methodology). To anchor the wholesale pricing of the mandated access of an SMP operator to the SMP operator's retail activity provides too much scope for the SMP operator to leverage its wholesale SMP into the retail market. This is typified by the recent proposals by eircom to withdraw wholesale WLR discounts which will have consequential knock-on into retail pricing by OAOs reliant on these wholesale inputs to provide retail services.

Standalone CPS

Vodafone disagrees with the proposal to withdraw the obligation to provide standalone CPS. While this is a declining portion of the market for those customers who use it (primarily in the Enterprise space) it is a key enabler to allow competitive market entry. ✂ The withdrawal of this service is therefore likely to gift eircom retail a substantial portion of this portion of the market.

SLAs

Given the length of time that it has taken to reach even partial agreement on an updated NGA which is grounded in a similar obligation to that proposed here it is clear that a more effective remedy is required which will provide an adequate regulatory imperative for the effective development of fit for purpose SLAs. These include an explicitly obligation to negotiate in good faith on SLAs, a requirement that the SLAs meet reasonable market requirements and that any Service Level Guarantees and their method of calculation act a proper incentive for provision of adequate levels of service.

Transit

Vodafone notes ComReg's application of the Three Criteria Test. As the technical boundary of the Transit product must align with the call origination and termination products the market boundary definition issues that we have outlined above mean that ComReg's analysis is flawed. Based on the proposed market boundary there would still be tranches of the transit market which would be amenable to regulation. If the boundary issues are address then ComReg's approach to the 3CT is valid.

Conclusion

While Vodafone agrees with the overall thrust of ComReg's approach the issue outlined above must be incorporated in order to ensure that the market intervention proposed adequately addresses the competition problems identified, fosters infrastructure investment and benefits Consumers through increased retail diversity and competition.