



Commission for
Communications Regulation

Supplementary Consultation to ComReg Document 12/117

Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market definition

All responses to this supplementary consultation should be clearly marked:-
“Reference: Submission re supplementary consultation to ComReg 12/117” and sent
by post, facsimile, or e-mail, to arrive on or before 5pm, **27 November 2013**, to:

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Please note ComReg will publish all respondents' submissions with the Response to this Consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24.

Further input into Consultation

Reference: ComReg 13/95

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Additional Information

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Redacted Information

Please note that the Oxera report (ComReg document 13/95a) is a non-confidential version. Certain information within the Oxera report has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol . In addition, responses to the FVA Consultation that have been published on the ComReg website (ComReg document 12/117s) in parallel to this Supplementary Consultation are the non-confidential versions.

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1 Introduction

- 1 As part of its duties under the European Framework for Electronic Communications,¹ ComReg, like all other national regulatory authorities ('NRAs') across the EU, is required to carry out periodic reviews of relevant electronic communications markets.
- 2 On the 26 October 2012, ComReg, consistent with its regulatory role to review certain electronic communications markets, issued a public consultation ('the FVA Consultation')² on its analysis of the retail market for access to the public telephone network at a fixed location for residential and non-residential customers³ (referred to for convenience in the FVA Consultation as the Fixed Voice Access ('FVA') market(s)). The national consultation⁴ ran from 26 October 2012 to 25 January 2013.⁵ The purpose of the FVA Consultation was to set out ComReg's preliminary analysis of whether or not there is effective competition in the relevant FVA market(s), whether (absent regulation) any undertaking has significant market power ('SMP') in the relevant FVA market(s) and, if so, what regulatory obligations should be maintained, amended or imposed to address competition problems that have arisen or could arise in the relevant market(s).
- 3 Since the publication of the FVA Consultation, ComReg has considered further the matter of market definition, in particular, the treatment of bundled services⁶ as a number of interesting points of view were put forward in responses to the FVA Consultation. In addition, ComReg has reconsidered what remedies may be necessary and appropriate in the FVA market and, as set out in Section 3 below, are working on certain amendments to remedies in regulated wholesale access markets that may permit the removal of some regulation in the retail FVA market.

¹ European Commission, Revised European Framework for Electronic Communications, 18 December 2009, http://ec.europa.eu/information_society/policy/ecomm/index_en.htm.

² Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers, ComReg Document 12/117, 26 October 2012 http://www.comreg.ie/_fileupload/publications/ComReg12117.pdf and;

Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers (Appendix A), ComReg Document 12/117a, 26 October 2012 http://www.comreg.ie/_fileupload/publications/ComReg12117a.pdf

³ Corresponding to Market 1 listed in the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and services 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 (the "**2007 Recommendation**"), (OJ L 344, 28.12.2007, p. 65).

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In order to provide all interested parties with time to explore additional information relating to survey analysis, ComReg extended the original deadline for the submission of responses to its FVA Consultation to Friday, 25, January 2013.

⁶ A 'bundle' refers to two or more services offered by one operator at a single price.

- 4 More specifically, ComReg is considering the introduction and specification of margin squeeze tests, possibly in the wholesale markets for fixed voice call origination ('FVCO') and for wholesale broadband access ('WBA') and which if effectively implemented upstream might permit the removal downstream of the current Net Revenue Test ('NRT')⁷ in the retail FVA market.
- 5 ComReg commissioned independent consultants Oxera to assess its proposals in respect of market definition as set out in the FVA Consultation and to evaluate them against alternatives particularly mindful of the need to be consistent with the approach to market definition under the European Regulatory Framework (the European Commissions' 2007 Recommendation⁸ and SMP guidelines⁹) as well as with principles of competition law. Oxera was also asked to articulate an economic framework for market definition in the context of FVA and to provide recommendations on appropriate policy options. In that regard, Oxera's additional specific analyses and review of the evidence is presented in the form of a report (the 'Oxera Report') which is attached at Appendix A.¹⁰
- 6 The purpose of this document ('Supplementary Consultation') is to give interested parties the opportunity to express their views about the issue of market definition options in FVA market(s) in light of the Oxera report and therefore this document should be read carefully in conjunction with the Oxera report. ComReg welcomes any comments on its supplementary consultation questions or any aspect of the newly published material. This Supplementary Consultation (the additional analyses contained in the Oxera Report and responses to the FVA Consultation¹¹) should also be read carefully in conjunction with the FVA Consultation.¹² It assumes that the reader has a general understanding of the principles and proposals discussed in the FVA Consultation and for the most part these are not repeated in this document. This document does not respond to submissions received to the FVA Consultation —these and any submissions received with respect to this Supplementary Consultation will be carefully considered before a final decision is reached in relation to this market review.

⁷ ComReg Decision D04/13, http://www.comreg.ie/_fileupload/publications/ComReg1314.pdf

⁸ European 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 OJ L 344 (the '**2007 Recommendation**').

⁹ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>

¹⁰ The Oxera report is published separately on ComRe's website, as ComReg Document 13/95a.

¹¹ The non-confidential responses have been published on ComRe's website, ComReg document 12/117s.

¹² ComReg documents 12/117 and 12/117a.

- 7 ComReg seeks responses to this Supplementary Consultation by 27 November 2013.¹³
- 8 It is noted that the European Commissions' Recommendation on Relevant Markets is up for its second review. It is furthermore noted that the European Commission (DG Connect) has commissioned a study on "*Future electronic communications markets subject to ex ante regulation*"¹⁴ which suggests the removal of the FVA market (Market 1) from the list in any revised Recommendation. ComReg is closely monitoring developments in this regard.

¹³ Section 5 explains how to respond to this Supplementary Consultation.

¹⁴ [Future electronic communications markets subject to ex-ante regulation - Final report](#)

2 Background

- 9 An important development over recent years in the Irish telecommunications market is the increased prevalence of bundles. Narrowband services¹⁵ are frequently sold in bundles. In Ireland, take up of bundles of voice with another non voice product grew from 46% in Q1 2010 to 59% in Q1 2013¹⁶ and is currently dominated by the dual play (fixed telephony and broadband) bundles. In addition, the prevalence of bundling would appear greatest in cities.¹⁷ When looking at access level substitution it is relevant that suppliers are increasingly providing bundles that include telephony, broadband and very recently pay TV. In that regard, some end-users may switch from PSTN/ISDN to managed VOIP services¹⁸ provided via broadband access networks (the latter service is often tied to other services over the alternative network in a bundle). On the other hand, however, many end users (41%) purchase their electronic communications on a stand-alone basis.
- 10 The increased take-up of bundles raises the question of how bundles including FVA at the retail level might affect market definition at the retail and wholesale levels. It also raises the question of whether recent changes in the market warrant a change or not in approach to market definition such that the bundle '*may become the relevant market*'. It is noted that, so far NRA's have not notified to the European Commission a fixed access market based on bundled products, though the demarcation between access and services would appear to have become more fluid.
- 11 When discussing the FVA market, clarity of terminology is important. This document together with the Oxera report use the following definitions:

¹⁵ Comprises PSTN and ISDN access that permit the making and receiving of calls or related services (e.g. fax).

¹⁶ ComReg Key Quarterly Report data, September 2013.

¹⁷ ComReg 2013 ICT survey at <http://www.comreg.ie/fileupload/publications/ComReg1346.pdf>

¹⁸ Managed VOIP means that the supplier also provides and maintains the customer's access path, either directly on its own network, or indirectly by renting the access path from a third party (e.g. using wholesale inputs). A managed VOIP supplier will also have its own switching platform, interconnect(s) and numbering allocations. Managed VOIP suppliers can manage their broadband network in such a way that prioritises quality of service requirements for the voice service.

Terminology

- “Narrowband” usually refers to communication links that have a limited bandwidth, generally defined implicitly through “not being broadband”;
- Narrowband access comprises PSTN¹⁹ and ISDN²⁰ access over copper and Fixed Wireless Access (‘FWA’);
- Fixed Voice Access (‘FVA’) refers to FVA regardless of whether it is sold inside or outside a bundle;
- Fixed voice access and calls (FVAC) refers to the joint purchase of access and calls in the same transaction from the same supplier;
- FVA(C) refers to FVA or FVAC;
- stand-alone FVA refers to FVA sold without calls and outside a bundle;
- stand-alone FVAC refers to FVA sold with calls and outside a bundle;
- a bundle refers to FVA or FVAC sold with at least one other non-voice product; FVAC does not itself count as a bundle;
- a broadband bundle refers to a two-product bundle of FVA or FVAC and broadband;
- a ‘triple-play bundle’ refers to a bundle of FVA or FVAC, broadband and TV.²¹

Summary of the FVA Consultation Proposals

- 12 ComReg as part of the market review in 2007²² defined two separate markets, a national market for lower and higher level retail narrowband access respectively. Subsequently as part of the market review in 2012, ComReg considered, amongst other things, key market and regulatory developments,²³ notably trends in market shares of suppliers and the supply of bundle offers particularly including managed VOIP telephony. It prospectively considered what impact such developments could have on the FVA market review process—on the precise boundary of the relevant market(s), assessment of competition and, in particular, in the design and updating of remedies. On this basis, ComReg has in the context of the present market review, sought to modify its definition of the FVA market—a wider lower level FVA (‘LLVA’) market comprising narrowband access (PSTN and ISDN), as well as broadband access delivering managed VOIP (primarily over cable). Similar to the 2007 market review, ComReg also identified in 2012 a separate higher level FVA market (‘HLVA’).

¹⁹ This provides a single channel, originally designed to provide voice traffic but capable also of supporting fax and data modems with speeds of up to 56 kbit/s.

²⁰ An ISDN connection provides two or more connections capable of being used simultaneously. Three types of ISDN are generally available: ISDN Basic Rate Access (BRA), which supports 2 channels for user voice and data; ISDN Fractional Rate Access (FRA), which supports between 16 and 30 channels; and ISDN Primary Rate Access (PRA), which supports 30 channels.

²¹ Although other forms of triple-play bundles (containing any three products) are available, for the purposes of this report Oxera uses the definition to refer explicitly to FVA or FVAC, broadband and TV.

²² See ComReg Decision D07/61 “Decision Notice and Decision Instrument – Designation of SMP and SMP obligations.

²³ See section 3, 4 and 5 of the FVA Consultation.

13 Table 1 of the FVA Consultation summarises ComReg’s initial proposals:

2007 Markets	SMP	Remedies	2012 Proposed Markets	SMP	Remedies
Lower level access (PSTN and ISDN BRA access)	Yes	Wholesale obligations: CPS, ²⁴ WLR, ²⁵ supporting obligations Retail obligations RPC ²⁶ Not to unreasonably bundle Transparency Cost accounting Not show undue preference	Lower level FVA over (copper PSTN and ISDN BRA access and broadband using managed VOIP over cable, fibre, FWA and DSL ²⁷) (referred to as “LLVA”)	Yes	Wholesale obligations: CPS and WLR, supporting obligations Retail obligations RPC, Not to unreasonably bundle, Transparency, Cost accounting, Not show undue preference
Higher level access (Business ISDN PRA and FRA access)	Yes	Wholesale obligations: CPS, WLR, supporting obligations Retail obligations RPC, Not to unreasonably bundle, Transparency, Cost accounting, Not show undue preference	Higher level FVA over (ISDN FRA and PRA access) (referred to as “HLVA”)	Yes	Wholesale obligations: CPS, WLR and supporting obligations only

- 14 In the 2012 market review, ComReg started with the smallest possible relevant market and, hence, stand-alone FVA was the focal product of the market review. From this starting point, it proposed that fixed calls and FVA were in separate markets²⁸ and that there was a market for FVA whether sold inside or outside a bundle.²⁹ It also proposed that there are separate national markets for LLVA and

²⁴ Carrier Pre-selection (‘CPS’) the facility offered to customers which allows them to opt for certain defined classes of call to be carried by an operator selected in advance (and having a contract with the customer), without having to dial a routing prefix or follow any other different procedure to invoke such routing.

²⁵ Wholesale Line Rental (‘WLR’) enables FSPs to issue one single bill to end-users for CPS “all calls” and line rental charges and to maintain a primary relationship with the end user. The OAO may offer its own branded telephony service to its WLR end-users based on the contracted wholesale narrowband access line and ancillary services from eircom.

²⁶ Retail Price Cap.

²⁷ Digital Subscriber Line.

²⁸ See section 4 paragraphs 4.21 to 4.56 of the FVA Consultation.

²⁹ See section 4 of the FVA Consultation.

HLVA markets, for both residential and non-residential consumers.³⁰

- 15 Having defined the product market, ComReg considered on a preliminary basis that the relevant geographic market for both the LLVA and HLVA markets is national in scope (notwithstanding the emergence of some localised competitive pressures, particularly insofar as FVA is sold as part of a bundle with other services). In the absence of a clearly identifiable break in conditions of competition across geographical areas to justify separate relevant geographical markets, ComReg has in the past acknowledged emergent competitive pressures which it has (consistent with the European Commissions' guidance) taken into account when designing relevant regulatory remedies. For example, it has recognised differing intensity of infrastructure based competition across the state in designing the current NRT in this market. The concept of the Larger Exchange Area ('LEA') was introduced in 2011 to recognise that different conditions are considered to be present in more urban areas with respect to bundles.³¹
- 16 In the 2012 market review, ComReg proposed on a preliminary basis that Eircom had SMP in both LLVA and HLVA markets, though the assessment of SMP in the LLVA market took explicit account of the fact that the market was defined to include broadband access capable of delivering a managed VOIP service. Consequently, ComReg proposed to impose on Eircom ex-ante price and non price remedies. The FVA Consultation also proposed to 'transfer' CPS/WLR remedies, currently remedies in the retail FVA market, upstream to the wholesale market for FVCO if necessary and appropriate subject to a future consultation in relation to this market review.

Summary Views of Respondents

- 17 Eight parties provided responses to the FVA Consultation.³² Possibly the most important matter raised by respondents was in respect of market definition.

³⁰ See section 4 paragraphs 4.82 to 4.128 of the FVA Consultation.

³¹ ComReg (2011), 'Review of the Appropriate Price Controls in the Markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access', October. ComReg Document No. 11/72.

³² ALTO, Eircom, UPC, BT Ireland, Sky, Telefónica, Magnet and Vodafone.

- 18 Although most of the respondents agree with ComReg's proposed market definition, Eircom was of the view that it is not consistent with the market evidence. More specifically, it believes that ComReg should have defined the retail FVA relevant market on the basis of separate product bundles comprising Voice Only³³ and Bundled Voice³⁴ (and hence ComReg's reasoning for dismissing a bundled approach is flawed) – take up of bundled services is very high and retail offers do not reflect consumers 'unpicking' bundles. The natural starting point for defining markets, in Eircom's view, should be bundles of services rather than around specific elements of the bundles. This respondent is also of the view that when assessing the potential for market power, ComReg should separately consider 'Voice Only' and 'Bundled Voice' given the clear distinction between the characteristics and preferences of the different groups of customers and the demand-side substitutes available to them. The latter market should be further broken down into separate geographic markets defined to recognise the differing competitive constraints that exist within and outside of the LEAs.³⁵
- 19 The following is a brief summary of other key aspects highlighted in the responses:
- The majority of the respondents agreed that mobile access was an insufficient constraint on fixed access. According to Vodafone, the dynamic at play in the wider retail market is not a substitution of mobile access for fixed access but rather an independent assessment by end users of whether the incremental utility that they derive from having FVA in addition to their mobile justifies the additional cost. Other respondents commented that a) if fixed mobile integration had occurred why would mobile operators support both fixed voice access and mobile access and b) the views of the European Commission is that there insufficient evidence to prove mobile and fixed access were in the same market;
 - Concerning fixed-mobile substitutability ('FMS'), Eircom considers that the reduction by Department of Social Protection ('DSP') of the subsidy paid to certain end-users in relation to their voice telephony service is likely to lead to a significant increase in the substitution towards mobile services by fixed customers;

³³ According to Eircom, this market includes fixed Voice Access and Calls offered with complementary offerings of the stand-alone services by the same provider, whether bundled and sold at a single fixed price or not.

³⁴ According to Eircom, this market would include the provision of Broadband along with fixed Voice Access and Calls, as well as provision of the component parts on a stand-alone basis by the same provider.

³⁵ For definition of LEA see ComReg Document 13/14:
http://www.comreg.ie/_fileupload/publications/ComReg1314.pdf

- Respondents, generally, were in favour of a national FVA market. However, Eircom suggests the Voice Only product market is national while sub-national markets for Bundled Voice (LEA and non LEA) are appropriate;
- All respondents, with the exception of Eircom, agreed with ComReg's preliminary positions on SMP and with the types of competition problems that might flow from a finding of SMP;
- Respondents, generally, agreed with ComReg's proposal to move CPS/WLR obligations (and various related supporting obligations) upstream to the FVCO market;
- The responses are mixed with regard to ComReg's proposals for retail remedies. Eircom suggested the removal of retail regulation for LLVA in view of the sufficient constraints from mobile and bundles (primarily manage VOIP over cable) on its network. However, the majority of respondents considered that retail regulation should be maintained for LLVA as well as HLVA and furthermore that it is essential that the obligation 'not to unreasonably bundle' be retained and the transparency obligations be strengthened for both LLVA and HLVA markets.

20 It is important to note that this Supplementary Consultation is not intended to summarise or analyse all submissions received at this stage in detail. Rather it seeks comments on the non confidential responses to the FVA Consultation. Responses to the FVA Consultation and any submissions received with respect to this Supplementary Consultation will be carefully considered before a final decision is reached.

3 Additional analysis of Fixed Voice Access market definition

Introduction

- 22 The increased prevalence of bundling in the retail market provides a further layer of complication to the consideration of access level substitution. Although Oxera sets out a framework for market definition in the context of FVA, it should be borne in mind that this is not a mechanical or abstract process. The approach should be a dynamic one based on ComReg's overall understanding of the FVA relevant market(s), taking account of available evidence of past behaviour as well as the prospective analysis, reflecting the characteristics of the FVA relevant market(s) and associated wholesale markets and the factors likely to influence their competitive development. ComReg has already acknowledged that the issues under consideration in the FVA Consultation are of a complex and dynamic nature.
- 23 The central point therefore is that market definition is not an end in itself, and what ultimately matters is how the overall regulatory framework is designed to deal with the potential competition problems identified in the FVA market, however that market is defined. This is particularly so when the 2012 FVA market review is a subsequent review, which can take into account the implementation of remedies imposed in previous rounds. In the case of retail FVA markets, the overall picture is also formed by the view of the wholesale markets.
- 24 Where there is uncertainty about the specific boundaries of the relevant markets, it is appropriate and expected that ComReg would exercise discretion. This regulatory judgement will be based on understanding the implications that different market definition scenarios could have for the preliminary finding of SMP and the design of appropriate remedies. With this in mind, ComReg considers it useful to undertake a sensitivity and robustness check of market definition scenarios —particularly involving the definition of the relevant markets by product bundles —and implications for competition and ultimately consumers. The objective is to inform where possible the scenario most appropriate to Irish national circumstances and consistent with the principles for market definition and competition law.

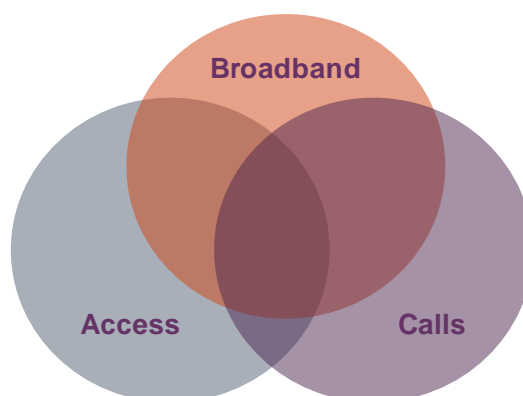
- 25 ComReg’s preliminary views summarised above in Table 1 in respect of the relevant FVA market(s), assessment of SMP and obligations to address competition concerns are based on the substantial body of empirical analysis previously published in the FVA Consultation and associated documents. This section summarises in brief Oxera assessment of ComReg’s proposals in respect of market definition and evaluation of those against possible alternatives. It is noted that the supplementary consultation questions set out below should therefore be read in conjunction with the FVA consultation which reviewed the relevant issues as well as the Oxera report.

Conceptual framework for FVA market definition

- 26 The market definition methodology is set out by the European Commission in its SMP Guidelines, consistent with competition law principles, and thus the economic principles of market definition are in general well understood. In summary, the purpose of defining markets is as a means to undertaking an analysis of competitive conditions. In order to establish the boundaries of a market, two dimensions are considered: the relevant products and services within that market, and the geographical extent of the market. The boundary is determined by identifying constraints on the price-setting behaviour of firms. The constraints which are generally considered are those on the demand side, where it considers the extent to which it is possible for customers to substitute other services for those in question, and constraints on the supply side, where it considers the extent to which suppliers are likely to switch production to supply the relevant products and services. In addition, particularly when considering the geographic dimension of the market, it may be useful to consider whether there is evidence of sufficiently homogeneous conditions of competition (‘HCCs’) and in particular common pricing constraints across customers, services or areas.
- 27 However, there is no definitive guidance as to the treatment of bundles in the market definition (market analysis process). Each product market is defined in isolation. This was recognised also by the body of European regulators for electronic communications (‘BEREC’) in its report on bundles.³⁶ While BEREC identified a range of options for defining markets (and hence possible outcomes), it did not provide practical guidance for an NRA undertaking a market review. Nevertheless, BEREC’s assessment of options and the implications of different approaches provide useful background.

³⁶ BEREC (2010). ‘BEREC report on impact of bundled offers in retail and wholesale market definition’, BOR 10 (64), December.

- 28 The Explanatory Note accompanying the Recommendation on relevant markets³⁷ acknowledges the importance of bundled products in market definition and states that the small but significant, non transitory increase in prices ('SSNIP') test³⁸ should be used in determining the definition of a separate market for bundles if necessary. At the retail level, BEREC suggested that the use of SSNIP to assess whether bundles would occur under competitive conditions would remain potentially relevant.
- 29 On the other hand, the 2007 Recommendation lists electronic communications markets that ComReg must analyse. FVA is the only retail market listed in the 2007 Recommendation and hence is susceptible to ex-ante regulation. It is noted that all NRAs (except for the Netherlands, the UK and Finland) currently consider that FVA is not entirely or effectively competitive and is susceptible to ex ante regulation. The overall theme seems to be an acceptance that there is still some form of relevant market susceptible for ex ante regulation, either for stand-alone FVA or for FVA whether sold inside or outside a bundle.
- 30 When defining a relevant market, the first key question addressed in the Oxera framework is choice of focal product (e.g., whether the focal product of the exercise should be stand-alone FVA, or FVA sold inside a bundle). If starting from bundles as a focal product there is a further question as to which of the many bundles sold in the market could be a focal product in a particular context, for example.³⁹



³⁷ EC, Explanatory note accompanying 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 the Council on a common regulatory framework for electronic communications networks and services, www.ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/eu_consultation_procedure/sec_2007_1483_2.pdf

³⁸ Also known as the Hypothetical Monopolist Test ('HMT'). The test asks whether a hypothetical monopolist of a focal product would be able to profitably impose a SSNIP—typically 5–10%. If the answer is no, this would indicate that the relevant market comprises additional products or a larger geographic area. In the alternative, answering in the affirmative suggests that, for market definition purposes, products/services outside the chosen set are not in the same market and that the chosen set itself comprises a market in its own right.

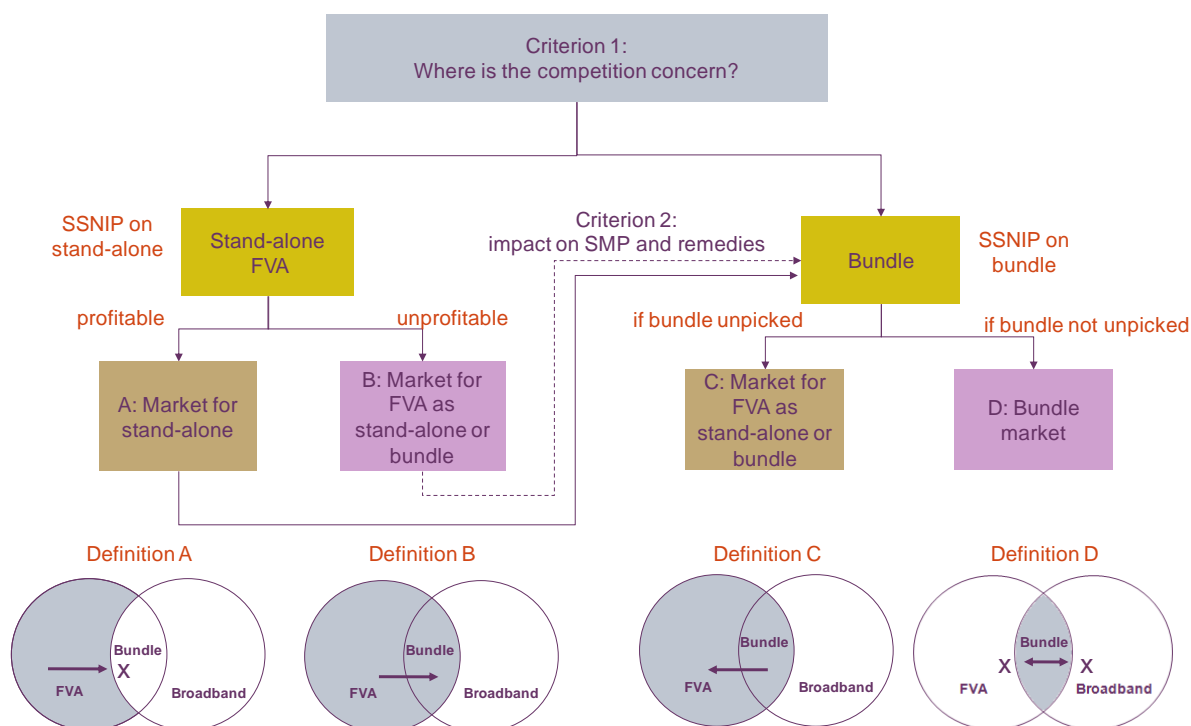
³⁹ See Oxera report p 11 and 12.

- 31 Taking account both of first principles and of the recommendations of the European Commission and BEREC, Oxera have identified a number of criteria in order of importance to answer this question —see section 2.2.1 of the Oxera report:
- Criterion 1: what is the competition concern and where is its source?
 - Criterion 2: what are the implications for SMP assessment and design of remedies?
 - Criterion 3: which is the most popular product consumed by consumers in the market?
- 32 It is recognised that defining the relevant FVA market could in principle be approached in various ways —a range of possible markets may exist (bundle, stand-alone FVA, FVA sold inside or outside a bundle). However, as set out in section 4 of the FVA Consultation, ComReg, in accordance with the Framework and taking utmost account of the SMP guidelines, undertook a market analysis following the standard SSNIP test approach. ComReg started with the narrowest possible relevant retail market and, hence, stand-alone FVA as the focal product (i.e. access market failure), with a view to testing whether the existing remedies imposed in the previous 2007 market review continue to be appropriate and justified in light of competition problems identified. In the absence of effective wholesale regulation (and in the absence of sufficient substitutes) the finding of SMP is likely to persist in relation to FVA and if so that might warrant continued ex-ante regulation to address the potential competition problems.⁴⁰
- 33 Oxera suggest that, consistent with the European Commissions' Recommendation and ComReg's approach to the starting point of the market definition (market analysis process), it is reasonable to use stand-alone FVA as the focal product (i.e. the starting point of the SSNIP process). There are *a priori* concerns with competition issues around the stand-alone FVA/FVAC product, such as, leverage of market power and/or exploitation of captive customers.⁴¹ This has been the key rationale to date for most NRAs to use stand-alone FVA as the focal product when reviewing Market 1 (i.e. FVA).
- 34 Figure 1⁴² outlines a conceptual framework and decision tree developed by Oxera for FVA market definition from first principles.

⁴⁰ As set out in Section 6 of the FVA Consultation.

⁴¹ Certain customers may perhaps be unable or unwilling to switch from PSTN based services to managed VOIP services delivered over broadband access and hence are 'captive' to the PSTN based services (delivered over narrowband).

⁴² Oxera report page vii and section 2.2.2, page 12.

Figure 1 A general framework for FVA market definition

Note: Arrows in the Venn diagrams represent consumer substitution. 'X' represents an insufficient number of consumers switching for that product to be considered a competitive constraint.

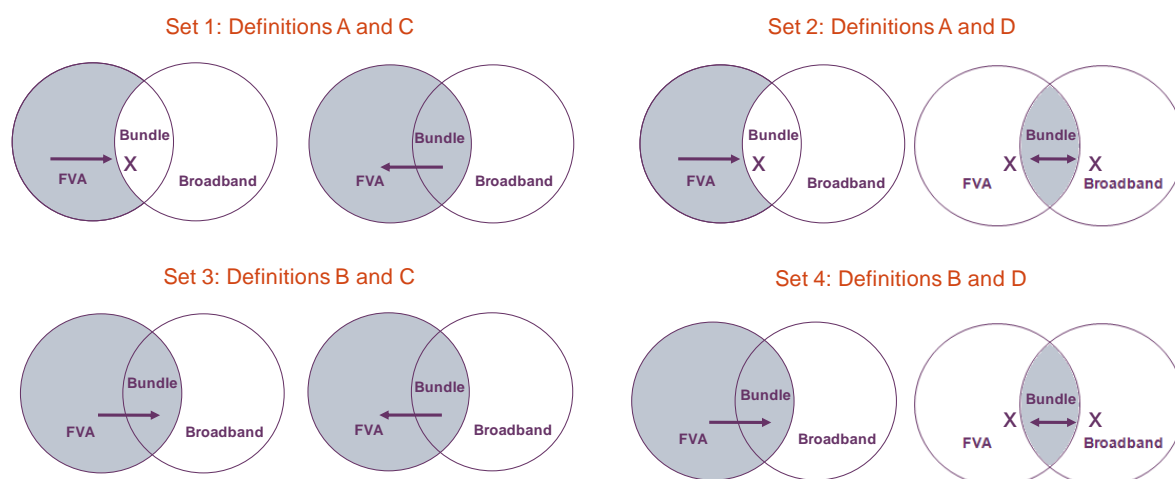
Source: Oxera

35 Figure 1 outlines how the SSNIP test may work in the context of stand-alone FVA as well as bundles where,

- Definition A: is a market for standalone FVA/FVAC ;
- Definition B: is a market for FVA/FVAC whether sold inside or outside of bundles;
- Definition C: is a market for FVA/FVAC whether sold inside or outside of bundles; and
- Definition D: is a market for bundles.

- 36 Having chosen a focal product (possibly using the three criteria identified by Oxera above), the standard SSNIP test could then be applied to analyse whether the market was any broader than the focal product, in this case stand-alone FVA (or, in the case of bundles, whether there is a bundle market or a market for the bundle's components). For example, having chosen standalone FVA as the focal product (the left hand side of Figure 1), ComReg then extended it on the basis of an analysis of substitution to a wider lower level FVA ('LLVA') market comprising narrowband access (PSTN and ISDN), as well as broadband access delivering managed VOIP (or definition B) —distinct from the HLVA market.
- 37 However, it is noted that where a market definition exercise is conducted on the two different focal products (standalone FVA and a bundle simultaneously), Figure 2 of the Oxera report illustrates four possible sets of market definitions.⁴³

Figure 2 Possible market definitions



Note: Arrows in the Venn diagrams represent consumer substitution. 'X' represents an insufficient number of consumers switching for that product to be considered a competitive constraint.

Source: Oxera

- 38 In applying the SSNIP framework it is usually more practical to define the relevant product market before exploring the geographic dimension of the market. As regards geographic market definition, the application of the SSNIP test is less clear-cut. A more practical approach that is often followed is to identify areas with sufficiently HCCs.⁴⁴ This is still consistent with the SSNIP framework and implicitly captures supply-side substitution.

⁴³ See Figure 2 page viii of the Oxera report; see section 2.2.3 and 2.3 for a detailed explanation of the possible sets of product market definitions.

⁴⁴ European Regulators Group (2008), 'ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies)', October, p. 23.

- Q. 1 In the context of the market review and, in view of the 2007 Recommendation and SMP guidelines, is the focal product stand-alone FVA the correct starting point of the market definition (market analysis process), or is a bundle (e.g., of voice and broadband) a more appropriate focal product? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.
- Q. 2 Do you agree that the traditional competition analysis tools such as the SSNIP (Hypothetical Monopolist) Test are appropriate for market definition in the presence of bundles? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

39 Drawing on the framework set out in Figure 1, Oxera assessed ComReg's approach, as well as, alternative approaches to FVA market definition. Oxera's specific additional analyses of the FVA Consultation have focused on three aspects: market definition for stand-alone versus bundled products, geographic aspects, fixed-mobile substitutability.

Bundles—product definition and geography

40 A range of aspects of the market could be considered when inferring substitutability of bundled and unbundled products and, therefore, assessing the appropriateness or not to define separately a market as a bundle. As identified by BEREC, the key evidence are economies of scope in bundling to firms and transaction cost savings for consumers, by consuming services as part of a bundle. Other potential evidence could be switching costs between the bundle and individual products and the take up of bundles compared to individual products. It is important to note that overall the assessment should be 'holistic'.

- 41 In relation to whether FVA sold inside a bundle is part of the same relevant market as stand-alone FVA, Oxera found with reference to the Irish context the evidence to be less clear-cut. On the one hand, the SSNIP test conducted using the survey data collected as part of the FVA Consultation suggests that stand-alone FVA (and calls) could be a separate market in its own right.⁴⁵ On the other hand, there is an observed degree of switching towards bundles of voice and broadband, albeit primarily for customers who currently purchase broadband separately (and hence suggests that a market for FVA sold inside or outside bundle exists, as ComReg has identified in the FVA Consultation or definition B). However, there is also evidence of a rump of stand-alone FVAC customers (particularly those who do not currently purchase broadband from any provider) who probably would be less likely to switch to a bundle (i.e. managed VOIP over broadband) in response to a SSNIP on standalone FVA/FVAC.
- 42 Nevertheless, Oxera, based on available data and using broadband bundles as a focal product, set out that broadband bundles could constitute a separate relevant market. Having defined a wide LLVA market encompassing both stand-alone FVA and FVA bundles, consistent with the European Commissions' guidance and the conceptual framework defined by Oxera (e.g., Figure 1), it would not likely be an absolute necessity to start another market definition exercise taking bundles as the focal product and/or identify them as separate markets in their own right. In any case, ComReg defining the market to include FVA sold inside and outside bundles is reasonable since the effects of bundling are taken into account throughout the market review process, including the design of remedies.
- 43 The geographic differences are clearest in the context of certain broadband bundles, whereas Eircom continues to hold a significant share of the stand-alone FVAC customers throughout Ireland. The approach on geographic market definition depends on the approach with respect to the relevant product markets. In principle, the geographic market definition should be carried out separately for each of the identified product markets, the potential scenarios could be, on the one hand, separate geographic markets for bundles sold inside and outside the LEA; a national stand-alone FVA market (if defined as a separate product market) —see section 4 of the Oxera report for a detailed evaluation.

⁴⁵ See section 3.2 and 3.4 of the Oxera report.

- 44 If the product and geographic market definition is inconclusive, it is reasonable to consider any differences in competition conditions with respect to bundles in the context of the design of remedies. ComReg (consistent with European Commissions' guidance that sub national markets may not be appropriate where market boundaries are unclear) has already recognised emerging structural differences in both the supply and the demand side for bundles in the design of the NRT for FVA bundles (i.e. LEA, non-LEA). As with the product market definition, geographic market definition is a means to an end and what matters ultimately is that the remedies are imposed in a way that reflects the degree of competition problems across different areas.

Fixed Mobile Substitution

- 45 Oxera further assessed this question using the SSNIP test and critical loss analysis framework, based on available data.⁴⁶ Overall, taking into account the qualitative factors and the SSNIP it conducted, Oxera are of the view that there is no strong evidence at this stage to suggest that fixed and mobile access should be treated as effective substitutes. In a scenario where downstream fixed and mobile access were to become potential substitutes (the voice calling, broadband and other services consumed on a mobile are reasonable substitutes for those consumed on Eircom's fixed platform), possibly upstream services could also in such a context be debated as substitutes such that WLR could be removed. ComReg welcomes comments, together with evidence, on whether or not there have been any significant changes since the FVA Consultation was published, or whether there are any developments over the review period (i.e. to 2015), that would suggest sufficient substitutability between fixed and mobile access.
- 46 Views are also invited on whether or not the potential impact of the reduction by the DSP of the subsidy paid to certain end-users in relation to their voice telephony service is such that would indicate sufficient substitution between fixed and mobile access and hence it would be appropriate to have fixed and mobile access in the same relevant market (i.e. a SSNIP would be unprofitable).

Q. 3 Does mobile access sufficiently constrain Eircom's SMP in fixed access to belong in the same relevant market? Are there other factors or additional analysis that ComReg should consider? Please explain the reasons for your answer, clearly indicating the relevant section of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

⁴⁶ See section 5 of the Oxera Report.

Oxera recommendations for options

47 On the basis of Oxera additional specific analyses, it concludes that the following could be plausible scenarios for FVA market definition and remedies:

Option/product dimension	Geographic dimension	Possible SMP finding?	Implications for retail remedies	Implications for complementary wholesale level remedies
Option 1: definition A only Stand-alone FVA(C)	National	Yes	Unchanged	Unchanged
Option 2: definition B only, or set 3 (equivalent to ComReg's approach) FVA(C), whether sold inside or outside of bundles, national	National	Yes	Possible relaxation of RPC (eg, removal of RPC from the HLVA market)	Unchanged (except for taking account of competitive dynamics in the design of the remedy— eg, pricing flexibility in the LEA in the net revenue test)
Option 3: definition B only, or set 3 FVA(C), whether sold inside or outside of bundles, LEA non-LEA	Non-LEA LEA	Yes No?	No change in non-LEA Possible removal of all remedies in LEA	Unchanged in non-LEA Possible impact on Net Revenue Test ('NRT'). May transition to a wholesale margin squeeze test.
Option 4: set 2 Two markets: (1) stand-alone FVA(C) sold outside bundle (2) FVA sold inside of bundles of broadband	Market 1 National Market 2 Non-LEA LEA	Market 1 Yes Market 2 Yes No	Market 1 No change Market 2 No change All remedies removed in LEA	Market 1 Unchanged Market 2 Unchanged Possible impact on NRT. May transition to a wholesale margin squeeze test.
Option 5: set 4 Two markets: (1) FVA(C), whether sold inside or outside of bundles (2) FVA sold inside of bundles of broadband	Market 1 National or LEA/non-LEA split? Market 2 Non-LEA LEA	Market 1 'Yes' in non-LEA; possibly 'no' in LEA Market 2 Yes No	Market 1 Possible removal of all remedies in LEA Market 2 No change All remedies removed in LEA	Markets 1 and 2 Unchanged under a national or non-LEA definition Possible impact on NRT in LEA. May transition to a wholesale margin squeeze test.

48 Of the plausible scenarios for market definition, two are recommendable on the basis of the available evidence in light of the Oxera report:

- **Recommended option 1.** A national relevant market for FVA (with calls), whether sold inside or outside bundles— that is, ComReg's original market definition as set out in the FVA Consultation;
- **Recommended option 2.** Two separate relevant product markets: a national market for stand-alone FVA (and calls); and FVA sold inside of bundles of broadband, split by geography between the LEA and non-LEAs.

- 49 Having conducted a market definition assessment,⁴⁷ ComReg has set out its preliminary view on the relevant FVA market definition —(i) a national relevant market for FVA whether sold inside or outside bundles (which includes broadband access delivering managed VOIP, primarily over cable networks) and ii) a national relevant market for higher level FVA. In the context of the FVA market review, ComReg, based on the European Commissions' guidance on market definition (market analysis process) and available data, is of the view that its market definition of FVA sold inside and outside bundles is appropriate to Irish national circumstances as well as consistent with market definition and competition law principles. Nevertheless, it is recognised that there could be alternative scenarios for FVA market definition depending on the specific context. In Oxera's view and, in any case, either of the recommendable market definitions outlined above would in principle allow ComReg address the potential competition concerns identified as part of the FVA Consultation —essentially, to design remedies that ensure the replicability of Eircom's bundles, and/or mitigate or remove any concerns of risk of excessive pricing of FVA at the retail level, to the benefit of consumers.
- 50 Views are invited on market definition scenarios and also the potential implications for remedies in light of the Oxera report. ComReg is furthermore interested in eliciting views of stakeholders, together with evidence, on which of the recommendable options set out above and in detail in the Oxera report are likely most appropriate to Irish national circumstances and consistent with the principles for market definition and competition law. ComReg will consider all responses to this further consultation to assist in informing its overall regulatory approach.

Q. 4 In the context of the FVA market review process and based on national circumstances in Ireland, do you believe that ComReg should define a single market for FVA sold within and outside a bundle? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 5 Alternatively, do you believe that ComReg should define separate product markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

⁴⁷ See section 4 of the FVA Consultation.

Q. 6 If FVA sold inside of bundles of broadband is defined as a separate product market, should ComReg geographically define the latter market (e.g., inside/outside the LEA)? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Margin Squeeze

- 51 In accordance with the spirit of the EU framework, ComReg's general regulatory approach is that where satisfactory competition exists at the wholesale level, regulation of affected retail markets could be relaxed or lifted. Such an approach may achieve the objectives pursuant to section 12 of the Communications Regulation Act of protecting the consumer and promoting competition by the least intrusive means, thus lightening any regulatory burden.
- 52 ComReg, in the FVA Consultation set out on a preliminary basis⁴⁸ that the wholesale regulated access to CPS and WLR as well as access to regulated unbundled local loops ('LLU') and WBA will continue to support retail competition in FVA and adjacent markets. Without access to these wholesale services, fixed service providers ('FSPs') that have entered the retail FVA markets and won market share would not have ability to serve customers effectively. The FVA Consultation indicated that continuation of CPS and WLR access was likely to be needed to support competition in the FVA market. In that regard, ComReg plans to consult on the detail of 'transfer' of CPS and WLR remedies (currently remedies in the retail FVA market) to the wholesale market for FVCO if necessary and appropriate as part of the FVCO market review. To date, in any region, FVA has not been supplied as a stand-alone product over purchased WPNIA⁴⁹ inputs. The latter option is generally not deemed economically viable⁵⁰ and, since LLU can realise more functions than telephone calls, it is not usually economical that an FSP buys an LLU access product for the sole purpose of voice services; it likely wants to bundle with broadband services. In that regard, the FVA Consultation previously indicated that while LLU was currently somewhat limited (the demand for LLU has recently stagnated) it could possibly in the future provide an alternative means of delivering bundles of broadband and voice.

⁴⁸ See sections 3 and 6 of the FVA Consultation.

⁴⁹ Wholesale Physical Network Infrastructure Access.

⁵⁰ The last mile is still considered as a natural monopoly and thus involves high and non-transitory entry barriers.

- 53 In order to maintain prospectively the competitiveness of the fixed telephony market—including subscriptions and calls, it is essential that enough suppliers have the ability to provide the bundles that consumers demand. In the absence of effective wholesale regulated access, Eircom currently with SMP across a range of retail and wholesale markets is likely not only to be able to defend its position in the SMP market(s), but can potentially also leverage its SMP into the adjacent markets of the bundle's other components.⁵¹
- 54 ComReg has noted in the past⁵² the possibility of foreclosure by Eircom at the retail level by way of horizontal leverage from FVA to other (potentially more competitive) retail markets. ComReg has furthermore noted in the FVA Consultation⁵³ that there is a risk that Eircom would (in the absence of regulation) have ability and incentives to apply a margin squeeze between wholesale costs and retail prices that would leave an insufficient margin between the upstream and downstream prices, so that an efficient downstream FSP is forced to exit the market or is unable to compete effectively (i.e. a form of vertical leveraging). There is also the risk of wholesale remedies imposed on stand-alone products (FVA, broadband) being undermined by potential margin squeeze in the presence of bundles.
- 55 FSPs would need to have access to effective wholesale products enabling them to replicate Eircom's bundle offers. Otherwise, subscribers to Eircom's bundles will be unwilling or unable to switch to a competitor if the latter cannot replicate all components at competitive costs. As noted above, an increasing number of consumers now choose to take bundles from their providers. The ability for consumers to switch bundles is ever more important as the practice of bundling increases (from double play to triple play and so forth). For ComReg, these ongoing trends and competition concerns continue to make regulatory policy regarding the replicability of bundles a relevant issue when analysing the FVA market (and hence the definition of the relevant FVA market and analysis of SMP) and imposing remedies.

⁵¹ See section 6 of the FVA Consultation.

⁵² First as part of the 2007 FVA market review (ComReg decision D07/61) and, subsequently, under ComReg Decision D04/13 – price control for bundles.

⁵³ Paragraphs 6.23 and 6.24 of the FVA Consultation.

- 56 ComReg's objective is to ensure that regulatory remedies are targeted and designed to address competition problems that would prevail in the absence of regulation. While a wholesale obligation 'not to cause a margin squeeze' between retail and wholesale prices also exists in one wholesale market (Market: 5 the market for WBA) it has not been necessary to specify this in detail in the presence of the current NRT as an obligation in the retail FVA market. However, another approach is possible whereby, if concerns remain about margin squeeze (and ComReg believes that such concerns do exist in the context of FVA sold inside and outside bundles),⁵⁴ reliance could in the future be placed on an effective margin squeeze (replicability) test at the wholesale level. If this were designed in an appropriate manner upstream it might be possible to dispense with the current NRT downstream. This would, in effect, remove most of existing retail price regulation from FVA sold inside or outside a bundle.
- 57 It is recognised, however, that retail regulation is partly or fully predicated on the effectiveness of wholesale remedies, notably, CPS/WLR, and also LLU and WBA. In view of the close inter-relationships between retail and wholesale markets, it is important that the regulatory framework underlying the competition in FVA markets and adjacent bundles markets is not currently or in the future undermined. In that regard, any withdrawal of the current NRT would likely be subject to there being an effective margin squeeze (replicability) test applied at wholesale level. ComReg plans to consult in more detail on this issue as soon as possible, most likely in early 2014. In the meantime preliminary views are invited on the idea of placing reliance on margin squeeze (replicability) tests deployed at the wholesale level and whether this would obviate the need for the NRT at the retail level.

Q. 7 Do you believe that an introduction and specification of margin squeeze tests in the future possibly in the wholesale markets for FVCO and/or WBA could be sufficient and likely obviate the need for the NRT at the retail level?

⁵⁴ See section 6 of the FVA Consultation as well as the responses to the FVA consultation, ComReg document 12/117s.

4 Submitting comments and next steps

- 58 The consultation period will run from 17 October 2013 until 27 November 2013 and all comments on the questions set out in this Supplementary Consultation, or any aspect of the newly published material (the Oxera Report and non confidential responses to the FVA Consultation) are welcome. In so doing, respondents are requested to clearly explain the reasoning for their response, indicating the page/sections of the relevant documents to which their response refers, along with all relevant factual evidence supporting views presented.
- 59 This consultation is supplemental to the FVA Consultation which is still under consideration. There is no need for respondents to restate previous comments unless there is a desire to revise commentary already provided to ComReg.
- 60 ComReg will review the proposals set out in the FVA Consultation, maintain or amend its proposals, as appropriate, including with respect to the draft measures set out in the Draft Decision Instrument at Appendix 3 of the FVA Consultation.
- 61 Respondents should submit views in accordance with the instructions set out on the cover page of this Supplementary Consultation. Any responses received after the closing date for responses may not be considered. Respondents should also be aware that all non-confidential responses to this Supplementary Consultation will be published, subject to the provisions of ComReg's guidelines on the treatment of confidential information.⁵⁵ Confidential elements of responses should be clearly marked as such and, preferably, be set out in a separate document. If the submission contains confidential information an additional document labelled "public version" should be provided. In submitting comments, respondents are also requested to provide a copy of their submissions in an unprotected electronic format in order to facilitate their subsequent publication by ComReg.

⁵⁵ See ComReg Document 05/24, "Guidelines on the treatment of confidential information", March 2005.

Appendix A: Oxera report – Market definition in Fixed Voice Access market

A 1.1 The non-confidential version of the Oxera report entitled “*Market definition in the FVA market – analytical framework and review of economic evidence*” (Appendix A) has been published separately as ComReg Document 13/95a and is available on ComReg’s website www.comreg.ie