Commission for
Communications Regulation

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

Response to Consultation and Decision

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Redacted Information

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Chapter 1

1 Introduction

1.1 As part of its duties under the European Framework for Electronic Communications,[1] the Commission for Communications Regulation ('ComReg'), like all other national regulatory authorities ('NRAs') across the EU, is required to carry out periodic reviews of relevant electronic communications markets.

1.2 Consistent with its regulatory role to review certain electronic communications markets, this Response to Consultation and Decision (the 'Decision') presents ComReg's final views on its analysis of the retail market for access to the public telephone network at a fixed location for residential and non-residential customers ('the Fixed Voice Access (FVA) market(s)').[2] The European Commission has described this market in general terms as the retail market for provision of a connection or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving telephone calls and related services, such as, fax and dial-up[3] internet access.[4] Broadband has superseded dial-up internet access as a means of accessing internet services and therefore a review of connection or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving voice calls is the primary focus of this document.

[1] As set out in European Commission, Revised European Framework for Electronic Communications, 18 December 2009, http://ec.europa.eu/information_society/policy/ecomm/index_en.htm.
[2] 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).
[3] This is a narrowband service implying an upper limit of 128 kbps which would be achieved through channel-bonding using a basic integrated services digital network ("ISDN") connection supporting 2 circuits with 64 kbps each.
[4] Commission Staff Working Document: Explanatory Note accompanying the 2007 Recommendation (13 November 2007, C(2007) 5406), p.21 (the "**Explanatory Note**").

1.3 In accordance with Regulation 12 of the Framework Regulations[5] ComReg carried out the national public consultation on its analysis of the FVA market(s) ('the FVA Consultation')[6] over the period 26 October 2012 to 25 January 2013.[7] Eight parties provided responses to the FVA Consultation ('FVA Consultation Responses')[8] which were published on ComReg's website on 17 October 2013.[9] In addition, in view of the responses received, ComReg undertook a Supplementary Consultation ('the Supplementary Consultation')[10] in particular on the matter of market definition and the treatment of bundled services. In that regard, ComReg instructed independent expert economic consultants, Oxera, to carry out additional specific analyses and review of the evidence, which was presented in the form of a report (the 'Oxera Report').[11] This Supplementary Consultation ran from 17 October 2013 to 18 December 2013. Six parties[12] provided responses to the Supplementary Consultation[13] which were published on ComReg's website on 1 July 2014.

1.4 This Decision, which should be read in conjunction with the analysis and discussion in the FVA and Supplementary Consultations, now sets out ComReg's findings on the following matters having considered Respondents' submissions:

- the definition of the relevant FVA markets from both a product and geographic perspective;
- on the basis of an assessment of competition within the relevant FVA markets, which fixed service providers ('FSPs') are being designated as having significant market power ('SMP'); and

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[5] European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the '**Framework Regulations**'). The Framework Regulations transpose the Framework Directive (Directive EC/2002/21/EC as amended by Directive 2009/140/EC).

[6] 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

[7] 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.

[8] ALTO, Eircom, UPC, BT Ireland, Sky, Telefónica, Magnet and Vodafone.

[9] See ComReg document 12/117s: http://www.comreg.ie/publications/submissions_to_consultation_12_117.583.104473.p.html

[10] Supplementary Consultation to ComReg 12/117, ComReg document 13/95 http://www.comreg.ie/_fileupload/publications/ComReg1395.pdf

[11] The Oxera report is published separately on ComReg's website, as ComReg Document 13/95a: http://www.comreg.ie/publications/oxera_report__market_definition_in_the_fixed_voice_access_market_appendix_a.583.104472.p.html

[12] ALTO, Eircom, UPC, BT Ireland, Sky, and Magnet.

[13] See Submission to Supplementary Consultation, ComReg document 13/95s, 1 July 2014: http://www.comreg.ie/_fileupload/publications/ComReg1395s.pdf

- the specification and imposition of appropriate wholesale access and retail remedies on such SMP FSPs in order to address competition problems that have arisen or could arise in the relevant FVA markets, absent regulation.

1.5 As part of the FVA Consultation, ComReg highlighted that as part of ComReg's last review of the retail FVA markets in 2007 (ComReg Decision No. D07/61),[14] wholesale obligations were imposed on Eircom: single billing wholesale line rental ('SB-WLR')[15] and carrier pre-selection ('CPS')[16] and a selection of remedies supporting these access obligations (obligations relating to access to and use of specific network facilities, transparency, non-discrimination, accounting separation, price control and cost accounting) in the retail FVA markets.

1.6 ComReg consulted on the appropriateness of transferring relevant wholesale measures upstream to the FACO Markets[17] depending on the outcome of the FACO Consultation and any finding of SMP still being identified in that market.[18] The FACO Consultation considers in detail whether it is appropriate to continue to impose SB-WLR and CPS obligations on Eircom and, subject to any proposed SMP finding, it includes a Draft Decision Instrument containing the text of any proposed updated SB-WLR and CPS obligations. However, ComReg's analysis of FACO/Market 2 is not complete and no decision(s) has/have been made in this regard. In view of the regulatory transition,[19] ComReg considers it appropriate to continue to impose the wholesale CPS/SB-WLR and associated remedies in the context of the current FVA market review pending the outcome and decisions in ComReg's consultation on the FACO markets. Depending on the wholesale remedies imposed or otherwise as part of that market review, ComReg may simultaneously remove as relevant some of the wholesale obligations now being imposed.

[14] Decision Notice and Decision Instrument – Designation of SMP and SMP Obligations; Market Analysis: Retail Fixed Narrowband Access Markets (ComReg Decision No. D07/61, Document No. 07/61, 24 August 2007).

[15] SB-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 SB-WLR end-users based on the contracted wholesale narrowband access line and ancillary services from Eircom.

[16] 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.

[17] The market for call origination on the public telephone network provided at a fixed location was identified by the European Commission in its 2007 Recommendation. ComReg as defined the market in broader terms as the market for wholesale fixed voice access and call origination market, the market has also been split by lower level access and higher level access (the 'FACO Market (s)').

[18] Market Review - Fixed Voice Call Origination (FVCO) and Transit Markets, ComReg Document No.14/26 dated 4 April 2014. : http://www.comreg.ie/_fileupload/publications/ComReg1426.pdf (the 'FACO Consultation').

[19] It is noted that the European Commissions' new draft Recommendation on Relevant Markets suggests the removal of the FVA market (Market 1) and the FACO market (Market 2) from the list in any revised Recommendation. Although the Body of European Regulators for Electronic Communications (BEREC) "generally supports" the latest draft recommendation on relevant markets by the European Commission, it thinks that is it "premature" to remove the retail and wholesale fixed telephony access markets (markets 1-2/2007). BEREC agrees with the European Commission that these markets could be tending towards competition in the long term, though it does not think this is the case in the medium to short term. For details see BEREC's opinion

1.7 In addition to the matter of market definition, ComReg in the Supplementary Consultation considered further what remedies may be necessary and appropriate in the FVA markets. ComReg is working on certain amendments to remedies in regulated wholesale access markets that may permit the removal of some regulation in the FVA markets. More specifically, ComReg considered whether the introduction and specification of margin squeeze tests in the wholesale markets for FACO and for wholesale broadband access ('WBA'), if effectively implemented upstream would permit the removal downstream of the current measure to avoid a margin squeeze or Net Revenue Test ('NRT')[20] in the retail FVA market.

Legal basis and Regulatory Framework

1.8 The legal and regulatory framework underpinning the review of the relevant FVA markets was set out in Chapter 1 of the FVA Consultation and is attached as Appendix 1 to this Decision.

Consultation with the Competition Authority and European Commission

1.9 ComReg has consulted with the Competition Authority concerning its proposed draft measures arising from its analysis of the relevant FVA markets.[21] The Competition Authority issued its opinion (the 'Competition Authority Opinion') to ComReg on 30 June 2014 in which it set out its agreement with ComReg's proposed draft measures. The Competition Authority Opinion is attached as Appendix 2 to this Decision.

on the revised Recommendation on relevant markets, public debriefing 19th BEREC Plenary, Brussels, June 2014. ComReg is closely monitoring developments in this regard.

[20] For details on the current form of the NRT see ComReg Decision D04/13, http://www.comreg.ie/_fileupload/publications/ComReg1314.pdf

[21] Pursuant to Regulation 27(1) of the Framework Regulations, ComReg must also carry out an analysis of the relevant markets in accordance, where appropriate, with an agreement with the Competition Authority under section 34 or 47G of the Competition Act 2002 (as amended).

1.10 ComReg is also obliged to make its draft measure in the context of the FVA market review accessible to the European Commission, the Body of European Regulators for Electronic Communications ('BEREC')[22] and the NRAs in other Member States.[23] ComReg is then obliged to take utmost account of comments received.[24] In this regard, ComReg notified the European Commission of its draft measure on 2 July 2014[25] with the European Commission providing comments on 28 July 2014. A copy of the European Commission's comments is attached as Appendix 3 to this Decision (the 'European Commission Comments').[26]

1.11 Insofar as the draft measure which is the subject of this Decision is concerned (definition of the relevant FVA markets, SMP assessment and designation and the imposition of remedies), the European Commission has fully accepted ComReg's position without comment. To the extent that the European Commission has provided comments, these relate to potential future imposition of remedies in the upstream (wholesale) market and assessment of the three criteria. Specifically, it invites ComReg to complete its analysis of the FACO markets and analysis of upstream remedies in the shortest timeframe possible and reassess the need for ex ante retail regulation in relevant FVA markets in the presence of appropriate upstream regulation.

[22] BEREC as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.
[23] Pursuant to Regulation 13(3) of the Framework Regulations.
[24] Pursuant to Regulation 13(6) of the Framework Regulations.
[25] Registered as European Commission Case IE/2014/1629: Retail markets for access to the public telephone network at a fixed location in Ireland.
[26] At https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp

1.12 In this regard, ComReg plans to notify the European Commission, other NRAs and BEREC of its draft measures in relation to the FACO markets by the end of 2014. Additionally, a separate consultation on an appropriate regime in respect of the regulation of retail/wholesale margins to be applied at the wholesale level.[27] If wholesale regulation including SB-WLR and margin squeeze in the FACO and WBA markets adequately supports the competitive constraint on Eircom posed by resellers, it will be appropriate for ComReg to revisit lower level fixed voice access sold inside a product bundle ('Bundled LLVA') and higher level fixed voice access ('HLVA') to identify whether a finding of SMP continues to be appropriate in relation to these FVA services. In this respect, ComReg may consult in early 2015 on a three criteria assessment ('3CT') in respect of the Bundled LLVA and HLVA Markets (i.e. the three criteria that must be cumulatively satisfied in order to determine whether a relevant market should be subject to ex ante regulation).[28]

1.13 ComReg has taken utmost account of the European Commission Comments insofar as they related to matters which are the subject of this Decision and ComReg does not see a reason to materially deviate in its final decision from the draft measures that were notified to the European Commission.

Structure of the report

1.14 The Decision is structured as follows:

- Chapter 2 is an executive summary of the issues and proposals for regulation of the relevant FVA markets;
- Chapter 3 overviews the market structure and key retail trends that have occurred in the FVA market(s) since last market review of FVA in 2007;
- Chapter 4 sets out ComReg's definition of the FVA market(s) in terms of both the product and geographic scope;
- Chapter 5 assesses competition within the relevant FVA market(s) and identifies undertaking(s) as holding a position of SMP;

[27] ComReg Document 14/90 entitled, "*Replicability Test: Further specification of the price control obligations not to cause a margin squeeze: Market 2 and Market 5*," published on the ComReg website: www.comreg.ie.

[28] For details see section 2.2 of the European Commissions' current draft Explanatory Note to the draft Recommendation, in summary, the three criteria are:

(a) the presence of high and non-transitory barriers to entry;

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

(c) the insufficiency of competition law alone to adequately address the market failure(s) concerned. See generally European Commission Recommendation 2007 on relevant product and service electronic communications markets.

- Chapter 6 sets out competition problems that could, absent regulation, occur within the relevant FVA markets, along with obligations that would be imposed on undertakings having SMP to address competition problems; and
- Chapter 7 sets out the Regulatory Impact Assessment ('RIA') of the proposed approaches to regulation in the relevant FVA market(s).
- Appendix 1 Summary Legal Basis and Regulatory Framework;
- Appendix 2 Consultation with the Competition Authority;
- Appendix 3 European Commission Comments;
- Appendix 4 Updated Retail Trends Analysis;
- Appendix 5 Updated Pricing Structures;
- Appendix 6 to 8 Decision Instruments FVA Relevant Markets;
- Appendix 9 Glossary of terms.

1.15 When discussing the FVA market, clarity of terminology is important. This Decision uses the following definitions:

Terminology

– "Narrowband" usually refers to communication links that have a limited bandwidth, generally defined implicitly through "not being broadband";
– Narrowband access comprises PSTN[29] and ISDN[30] 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 (C) 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 (C) and broadband;
– A 'triple-play bundle' refers to a bundle of FVA (C), broadband and TV.[31]

[29] 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.
[30] An ISDN connection provides two or more connections capable of being used simultaneously. ISDN Basic Rate Access (BRA) 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.
[31] Although other forms of triple-play bundles (containing any three products) are available, for the purposes of this report Oxera has used the definition to refer explicitly to FVA or FVAC, broadband and TV and ComReg has also adopted this terminology.

Chapter 2

2 Executive Summary

2.1 This Decision is the culmination of ComReg's third review of the FVA market.[32] ComReg has undertaken a full public consultation and has carefully taken into account all submissions in arriving at its conclusions in relation to market definition, market analysis and obligations to be imposed on the operator being designated with SMP.[33] The draft measure containing ComReg's preliminary conclusions was notified to the European Commission and the NRAs in other EU member states.[34]

2.2 In summary, ComReg is responsible for defining relevant service markets which apply in its national territory and to define the geographical scope of its analyses via relevant geographic markets. In defining the markets, ComReg must take the utmost account of the Commission's 2007 Recommendation. For each market defined, ComReg must establish whether or not there is a position of SMP and, if so, apply remedies in the form of obligations imposed on undertakings with SMP. These processes were set out in the FVA and Supplementary Consultations and are discussed in more detail below.

2.3 In carrying out market definition and market analysis, ComReg has taken the utmost account of the 2007 Recommendation and the SMP Guidelines.[35] The analysis reflects the policy objectives of the Regulatory Framework and Section 12 of the Communications Regulation Acts 2002 to 2011 ('the Act'),[36] which is to promote a vibrant and competitive telecommunications sector in Ireland to the benefit of end users.

2.4 It is important to note that the market definition is a means to the end of identification of competitive constraints rather than an end in itself. Specifically, it is ComReg's objective to ensure that its overall regulatory framework is designed to deal with the competition problems in the FVA markets.

[32] The second review of the FVA market /Market 1 was previously notified to and assessed by the European Commission under Case IE/2007/0632 (SG-Greffe (2007) D/203441).

[33] In accordance with Regulation 25 and 27 of the Framework Regulations.

[34] In accordance with Regulation 13 and 14 of the Framework Regulations.

[35] European Commission guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronic communications networks and services, OJ C 165/6 [2002] (the "SMP Guidelines").

[36] Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) ("Communications Regulation Acts 2002 to 2011').

2.5 The following section contains a brief summary of the Decision Instruments which are attached as Appendix 6 to 8 of this Decision. These are, having regard to respondents' views, based on ComReg's findings as outlined in the FVA and Supplementary Consultations on market definition, on Eircom's market power, and the type of obligations that might be imposed on Eircom.

Market definition

2.6 In light of ComReg's analysis and feedback from the FVA and Supplementary Consultations, ComReg considers that standalone FVA is the appropriate focal product for the purposes of the FVA market review. From this starting point, ComReg's analysis, drawing on expert economic input and having considered the views of respondents, and differently to the market boundaries determined in the 2007 market review, concludes that prospectively the most appropriate approach to FVA market definition is to determine three separate relevant retail FVA product markets ('the Relevant FVA Market(s)') as follows:

- **Market 1a Standalone lower level voice access** comprising access via a PSTN, ISDN BRA or analogous broadband[37] connection (cable, fibre, FWA or DSL), that is used to provide PSTN voice, ISDN voice or Managed VOIP[38] service sold on a standalone basis or in a package with fixed voice calls ('Standalone LLVA');[39]

- **Market 1b Bundled lower level voice access** comprising access via a PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA and DSL), that is used to provide PSTN voice, ISDN voice or Managed VOIP service sold in a product bundle which includes any of broadband, television or mobile services (and which product bundle may include fixed voice calls),('Bundled LLVA');[40] and

[37] Prospectively, a scenario may arise where an operator, in light of evolving access technologies, delivers a standalone managed voice service (i.e. managed VOIP over an IP /broadband access path) equivalent to a standalone narrowband PSTN voice service. For example, from a technical standpoint, it is possible that an operator could use a broadband access path to provide a standalone managed voice over IP/broadband as a product, but without also providing internet access. However, while this type of voice product is somewhat notional at this stage, to be technology neutral and noting the potential for this to emerge to one degree or another within the lifetime of this market review, ComReg includes them within the relevant market so that any future competitive constraints from such could be assessed. However, their inclusion at this point does not affect the SMP assessment later.

[38] Managed VOIP is defined as a service provider providing voice services over an IP access path either directly on its own network or indirectly by renting a broadband access product. A managed VOIP service provider will usually have its own switching platform, interconnected path(s) and numbering allocations. In addition, it will be able to manage the quality of VOIP traffic on the IP access path in order to ensure minimum quality of service requirements.

[39] See Appendix 6 "Market 1a: Standalone LLVA , Section 4.

[40] See Appendix 7 "Market 1b: Bundled LLVA , Section 4.

- **Market 1c Higher level voice access** comprising access via ISDN FRA or ISDN PRA that is used to provide voice service sold either on a standalone basis or in a package with fixed voice calls, or in a product bundle which includes any of broadband, television, or mobile services (and which product bundle may also include fixed voice calls), ('HLVA').[41]

2.7 ComReg considers that access at a fixed location is a separate market from fixed calls, and that there is no distinction between user types (residential, business customers). Moreover, ComReg considers that while in theory there could be a single broader market for LLVA (whether sold on a standalone basis or within a bundle), based on national circumstances it finds it more appropriate to define two separate LLVA markets for standalone FVA and FVA sold within a bundle. ComReg further concludes that access provided by mobile telephony is outside the scope of the market (mainly due to different quality, usage and pricing patterns).

2.8 ComReg has found that each of the Relevant FVA Markets is national in terms of geographic scope. ComReg takes into account emergent localised competitive pressures, particularly insofar as FVA is sold in a bundle, through relevant and proportionate regulatory remedies. In particular, ComReg has previously identified a "Large Exchange Area" or ('LEA') which comprises those exchange areas where inter alia there is the presence of cable infrastructure (i.e. UPC Communications Ireland Limited ('UPC')), LLU[42] based competition and, prospectively, the potential for the roll out of next generation access ('NGA'). Areas outside the LEA (i.e. 'Outside the LEA') are those areas which have less/no infrastructure based competition. The definition of the LEA was set out in ComReg Decision D04/13 (ComReg Document No 13/14[43]) in February 2013 and ComReg applies a more flexible price control via the NRT[44] within LEA in the context of bundles. Each Relevant FVA Market is described in more detail in Chapter 4 of this Decision.

[41] See Appendix 8 "Market 1c: HLVA , Section 4.
[42] Local Loop Unbundling.
[43] Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4" dated 8 February 2013.
[44] That decision was previously notified to the European Commission under Case IE/2010/1054 (C (2010) 2050) and the Commission had no comments. In October 2012 ComReg notified an amendment to its NRT: IE/2012/1381, C (2012) 8836.

Competition analysis and assessment of SMP

2.9 In view of its analysis, as set out in the FVA and Supplementary Consultations and having considered responses to the FVA and Supplementary Consultations, ComReg has identified that Eircom Limited ('Eircom') has SMP in each of the Relevant FVA Markets. This is supported by ComReg's detailed analysis of a number of key criteria which are grouped into three categories: (i) existing competition (market shares, relative strength of competitors, pricing); (ii) potential competition (barriers to entry, control over infrastructure, strength of potential competitors); and (iii) countervailing buyer power. Further details are set out in Chapter 5 of this Decision.

Remedies

2.10 In light of designating Eircom as having SMP ComReg is required by Regulation 27(4) of the Framework Regulations to impose on it such specific obligations as it considers appropriate. Accordingly, ComReg has considered the appropriateness of imposing on Eircom obligations to address its position of SMP, notably, interim obligations (pending the outcome of the FACO market review) relating to wholesale access SB-WLR and CPS and a selection of remedies supporting these access obligations (obligations relating to access to and use of specific network facilities, transparency, non-discrimination, accounting separation, price control and cost accounting),[45] as provided for by Regulation 8(1) of the Access Regulations.[46]

2.11 In addition, ComReg considers such regulation at the wholesale level will not be sufficient to address the competition law concerns it has identified with respect to the Relevant FVA Markets and consequently has considered the appropriateness of imposing on Eircom the following remedies at the retail level:

- A requirement not to charge excessive prices;
- A retail price cap measure;
- Obligation not to unreasonably bundle services;
- Transparency obligation; and
- Cost accounting obligation.

[45] See ComReg Sections 5 and 6 of ComReg D07/61 which are being maintained in interim (notified as IE/2007/0632: Retail Fixed Narrowband Access Markets).
[46] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the 'Access Regulations').

2.12 Having regard to the analysis in the FVA and Supplementary Consultations and having considered responses to the FVA and Supplementary Consultations, and taking into account the regulatory transition, ComReg is now imposing on Eircom a number of regulatory obligations, summarised in Table 1 Remedies below. For all three Relevant FVA Markets ComReg is imposing on Eircom an obligation to provide SB-WLR and CPS wholesale access. However, ComReg considers that the imposition of wholesale remedies will not suffice by itself over the period of the review to constrain Eircom's behaviour on the retail markets, this is relevant in particular for Market 1a Standalone LLVA, as consumers who purchase standalone fixed access do currently not value broadband (or other bundles) to such an extent that they would be willing to switch to bundles.

2.13 Furthermore, as the WLR prices are set on the basis of retail-minus, absent regulation, Eircom would have the ability and incentive to increase its retail standalone LLVA prices and also the charges for WLR (hence, limiting the impact of its competitors at the retail level). Therefore, ComReg finds it appropriate to maintain the current Retail Price Cap (the 'RPC')[47]. ComReg also maintains for all three markets the obligation not to unreasonably bundle, which encompasses an obligation not to engage in tying practices for market 1a Standalone LLVA (i.e. no pure bundling), and for market 1b Bundled LLVA and market 1c HLVA, an obligation to comply with the NRT (measure aimed at avoiding a margin squeeze). For the reasons set out below, including for reasons of proportionality, ComReg also intends to remove the existing retail obligation on Eircom not to show undue preference to end users in each of the Relevant FVA Markets.

[47] "SMP Obligation: Retail Price Cap Remedy - Fixed Narrowband Access Markets", ComReg Document No. 07/76, Decision No. 07/07 dated 1 October 2007.

Table 1: Remedies

	Market 1a Standalone LLVA	Market 1b Bundled LLVA	Market 1c HLVA
Wholesale remedies			
SB-WLR / CPS + supporting suite of remedies	Yes – interim pending FACO market review in 2014	Yes – interim pending FACO market review in 2014	Yes – interim pending FACO market review in 2014
Retail remedies			
Requirement not to charge excessive prices	Yes	No	No
Price cap	Yes – Decision D03/07	No	No
Not to unreasonably bundle	Yes, encompassing an obligation not to engage in tying practices	Yes encompassing an obligation to comply with the NRT (Decision 04/13) in interim	Yes encompassing an obligation to comply with the NRT (Decision 04/13) in interim
Transparency	Yes	No	No
Cost accounting	Yes Decision 08/10	Yes Decision 08/10	Yes –Decision 08/10
Undue preference	Withdraw	Withdraw	Withdraw

2.14 The nature and impact of these regulatory obligations on competition and consumers is discussed in Chapter 6 and 7 of this Decision. The Final Decision Instruments, contained in Appendix 6 to 8, specify in legal terms the nature of the SMP obligations that ComReg is imposing on Eircom on each Relevant FVA Market.

2.15 In accordance with the spirit of the European regulatory framework and, as discussed throughout this Decision, ComReg's general regulatory approach is that where satisfactory competition exists at the wholesale level and/or where competition at the retail level is adequately underlined by effective regulation in place upstream at the wholesale level, regulation of affected retail markets could be relaxed or lifted. Such an approach may achieve the objectives pursuant to (inter alia) Section 12 of the Act of protecting the consumer and promoting competition by the least intrusive means, thus lightening any regulatory burden.

2.16 In this respect, ComReg has considered all regulatory options, including the option of de-regulation or regulatory forbearance at the retail level in order to ensure that regulation remains focused and responsive to the needs of a changing environment. ComReg has set out its preliminary proposals to transfer the SB-WLR remedy into the relevant upstream FACO markets[48] as well as impose a margin squeeze test, should SMP be found in the FACO markets and the latter remedies are considered to be appropriate in that regard. The presence of these remedies in the relevant upstream markets, notably FACO and WBA, may in the future obviate the need to regulate the downstream retail FVA market.

2.17 However, in view of the regulatory transition (i.e. transfer of wholesale measures from the Relevant FVA Markets to the FACO markets) and in accordance with the modified Greenfield approach[49] when assessing competition in the Relevant FVA Markets, ComReg can assume the absence of SMP regulation. Without prejudice, however, ComReg has considered Eircom's existing obligations at the wholesale level including in relation to adjacent markets, and while it may be possible in the future to remove regulation at the retail level on the completion of the FACO market review (note that no decision has been made in this regard at this stage), ComReg remains of the view that Eircom, in particular by reference to the Standalone LLVA Market, is not currently sufficiently constrained at the retail level as a result of regulation upstream or otherwise.[50] Unless and until effective and functional wholesale regulation is set out (notably the regulation of the FACO markets and the appropriate regime in respect of the regulation of retail/wholesale margins to be applied at the wholesale level), ComReg does not consider Eircom is currently sufficiently constrained in the provision of FVA.

[48] Related to the proposal in the FVA Consultation to transfer upstream wholesale access remedies as relevant, the FACO Consultation published in April 2014 expressed a preliminary view that Eircom has SMP in the FACO markets, and proposed to impose obligations on Eircom to provide SB-WLR along with a range of supporting remedies.

[49] This means that ComReg assumes the FVA market to be unregulated (i.e. it assumes that the retail and wholesale regulation notably the CPS and WLR remedy that currently is imposed in the retail FVA market is absent), yet it assumes that LLU and WBA are regulated. In this respect, SMP regulation present in other markets or regulation in place through the general regulatory framework is considered. See paragraph 5.18 to

2.18 If, and at such time that, an SB-WLR and or a margin squeeze remedy are ultimately imposed in the FACO markets, these may address the competition problems identified in at least some of the Relevant FVA Markets. In that case, ComReg would review as relevant the competition problems in light of these remedies being available upstream. At that point ComReg may consult in 2015 on a 3CT assessment in respect of the LLVA Bundled Market and HLVA Markets.

5.19 of the FVA Consultation. In addition, see the European Commissions' current draft Explanatory Note to the draft Recommendation, p12 at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=4968

[50] ComReg while noting Eircom's comments regarding Market 1 in particular, furnished as part of its submission in respect of Market 2 ("Eircom Response to 14/26 Market 2 Consultation", dated 24 June 2014), does not consider anything represented materially impacts on ComReg's conclusions in this final Decision.

Chapter 3

3 Retail Market Structure and Trends

3.1 ComReg in the FVA Consultation reviewed the broad structure of the retail markets and overall trends that may have impacted the provision of FVA since the time of ComReg's last review of the FVA market(s) in 2007 and invited interested parties' views on them. ComReg considers below the responses to the issues raised and, as appropriate, sets out it final position on such matters.

Overview of the structure of the retail market

3.2 ComReg examined the structure of the retail market and noted in that regard:[51]

- the starting point for the assessment of the retail market comprises a connection or access (at a fixed location or address) to the public telephone network which enables end-users to use voice[52] and related services[53] typically referred to as "plain old telephony services" ('POTS'). POTS have traditionally been provided in Ireland by fixed service providers ('FSPs') such as the incumbent operator (i.e. Eircom) and other authorised operators ('OAOs').
- FVA is provided at the network termination point to the local loop and may be supplied by a variety of technical means including over the Public Switched Telecommunications Network (PSTN) and ISDN telephone lines (typically referred to as 'fixed narrowband access'); and broadband infrastructure using managed VOIP (which may be via cable, fibre, fixed wireless connections or a Digital Subscriber Line ('DSL')[54]).
- FVA may be offered directly (the end-user is connected directly to the FSP's network) and indirectly (Eircom's wholesale input products such as SB-WLR and CPS are used to offer retail access services to the end-users).
- Eircom is the largest provider in the direct access market in terms of competitive supply. Other FSPs offering direct access include UPC, Magnet, Digiweb/Smart as well as a number of FSPs offering direct fixed telephony services to specific types of end-user, mainly large businesses.

[51] FVA Consultation paragraphs 3.2 to 3.12.
[52] That is, for the purpose of making and/or receiving various types of telephone calls, including, local, national or international calls and calls to mobile and non geographic numbers.
[53] Such as, fax and functional internet access ('FIA').
[54] Digital Subscriber Line technologies use the traditional copper network to deliver digital broadband signals.

- Allowing an FSP to purchase wholesale inputs, such as, SB-WLR or bitstream, thereby not requiring long term investment by that FSP in physical access infrastructure, enables easier entry into the retail FVA market than would otherwise be the case. The SB-WLR product primarily impacts on competition for POTS by facilitating the provision of access and calls to end-users by one FSP using single billing.

3.3 It was also noted that the level of infrastructure competition was limited in 2007 and that there have been major developments in the FVA market(s) since ComReg's 2007 market review. While PSTN and ISDN networks continue to be the predominant form of FVA used by end-users in Ireland today, alternative access technologies (primarily cable) and providers with the potential to compete with Eircom in the provision of voice services have become more prevalent.

3.4 The emergence of OTT suppliers, such as, Skype, Google Voice and Viber who provide access to "unmanaged" VOIP services[55] and general growth of VOIP was also highlighted as a trend of relevance, with UPC,[56] Imagine, Magnet, Digiweb/Smart[57] and Blueface offering "managed" VOIP services.[58]

3.5 Lastly, it was noted that the gradual shift to an all IP environment will likely enable other FSPs to compete more strongly with multi-product operators, such as, UPC when bundling fixed telephony, broadband and TV services. Hence, FSPs are increasingly offering a similar range of products. As a result, end-users with preferences for bundles of higher value services (with voice as an "add on" service) have more choices in relation to their FVA supplier when compared to the end-users wishing to avail of FVA only.

Regulatory and Market Developments

3.6 ComReg also set out what it considered were the main regulatory and other market developments since the conduct of the previous analyses of FVA market(s) in 2007.[59]

[55] "Unmanaged" services are provided over the networks of third parties and the supplier has very limited control over the quality of the service experienced by the end user. In addition, the end user would also need access to a non telephone access device e.g., a computer.
[56] NTL and Chorus were merged having been purchased by Liberty Global Inc. who established UPC Ireland ('UPC') in 2005 on the basis of the acquired and combined assets.
[57] It should be noted that the Digiweb Group acquired the entire business and residential customer base and assets of Smart Telecom in December 2009 (see: http://media.digiweb.ie/news/2009/12/08/smart-telecom-joins-digiweb-group-and-exits-examinership-process/). The Digiweb Group currently operates under both the "Digiweb" and "Smart" brands.
[58] "Managed" services are provided over a managed network allowing the supplier to retain some control over the quality of the service. Managed VOIP in Ireland includes only services provided by switched licensed operators in the Republic of Ireland and does not include web based services such as Skype and Viber.
59 FVA Consultation paragraphs 3.13 to 3.57.

Developments in wholesale SMP Regulation

3.7 ComReg highlighted the changes to the wholesale services supporting the delivery of retail FVA and fixed voice calls to end-users,[60] and further development of a set of appropriately priced wholesale input services, such as, LLU[61] and SB-WLR.[62] Other developments in relation to the CPS, SB-WLR and LLU services included:

- the growth in residential and business retail FVA providers (Appendix 4);
- the gradual decline in Eircom's market share in the narrowband FVA markets defined by ComReg in 2007, albeit Eircom continues to maintain a high share of voice over copper;
- migration from CPS-only to SB-WLR which is driven by the convenience of receiving a single bill for the end-user (Figure B, Appendix 4);
- a marginal overall decline (down 3.4%) in total CPS and SB-WLR lines over the period since April 2007 (although the number of these lines has been increasing since December 2010), see Figure B, Appendix 4; and
- limited growth of LLU (despite the fall in wholesale LLU prices) with shared LLU connections more recently forming the majority of LLU connections purchased by operators.

Retail Trend Analysis

3.8 The key changes in the retail FVA markets noted in the FVA Consultation included:

- falls in the more traditional fixed phone lines (PSTN lines decreased by 20% while ISDN lines decreased by 22% over the period Q1 2007 to Q2 2012);
- growth of different types of telephone access available within the home and businesses;
- dramatic increase in internet penetration and usage including mobile internet;
- migration from narrowband to broadband connections to access the internet;

[60] FVA Consultation paragraph 3.15.
[61] See ComReg document 10/10 available at http://www.comreg.ie/_fileupload/publications/ComReg1010.pdf
[62] ComReg reviewed the margin available to FSPs in 2009 where a 10% margin applied since 2003. Following a review of the available margin to FSPs when selling retail narrowband services, it was concluded that a 10% margin was insufficient and the margin was increased to at least 14%. This margin is still in place.

- growth in the use of managed and unmanaged VOIP services and evidence of complexity in consumer needs of those using multiple telephone access devices;
- growing attractiveness and take up of bundled services by end-users who place greater emphasis on value;
- signs of increasing fixed mobile substitution for voice services; and
- rollout of Next Generation Networks ('NGN').

Consultation responses and ComReg analysis

3.9 Of the seven responses received,[63] the majority broadly agreed that ComReg had correctly identified the main relevant developments in the provision of FVA. However, UPC considered that ComReg had overstated UPC's network impact on competition, pointing to the limited uptake of UPC's telephony services. Eircom while not disagreeing with the identified developments argued that the analysis of these developments failed to take into consideration the prospective changes over the period of the market review. In doing so, Eircom presented its own summary (which is broadly similar to the list of developments identified in the FVA Consultation) on key market trends and developments that have occurred since ComReg's 2007 market review. In addition, Eircom highlighted the potential factors that will, in its view, further stimulate competition in the retail FVA markets and lead to a greater competitive pressure on Eircom on a forward-looking basis.

3.10 Respondents' views primarily focussed on the issues which can be generally captured under these two broad themes:

1. The intensity and key drivers of competition; and
2. Significant differences in competitive conditions between urban and rural areas;

3.11 Having updated the principle trends and developments presented in the FVA Consultation the issues raised within these two broad themes by respondents is discussed in turn below.

[63] Sky Ireland did not express views on this question.

Recent market developments

3.12 Since the FVA market review in 2007, a number of developments have taken place in the telecoms market in the available infrastructure, but also in the products available and in end user behaviour. ComReg has updated the principle trends and developments presented initially in the FVA Consultation, attached as Appendix 4 (the 'Updated Retail Trends Analysis'). In general, apart from that which is noted below, the Updated Retail Trends Analysis shows no major changes to those trends identified in the FVA Consultation, such that they would materially impact upon the analysis set out in the FVA Consultation or impact the conclusions of this Decision.

3.13 Since the FVA Consultation the most relevant trends and developments in the communications market include:

- **Wireless access technologies (LTE or 4G)**–the results of the Multi-Band Spectrum Auction announced on 15 November 2012 by ComReg allowed acquiring rights in 800MHz, 900MHz and 1800MHz spectrum bands.[64] Three mobile operators acquired rights in 800MHz band and four operators acquired rights in 900MHz and 1800MHz bands. Mobile operators are using the acquired spectrum bands to improve the quality of existing networks and to deploy advanced technologies, such as, LTE.[65] Meteor and Vodafone commercially launched LTE services at the end of 2013, while H3GI commercially launched LTE services in Q1 2014;

- **Wholesale pricing**–in February 2013, monthly rental prices for LLU and SLU were reduced by 20% and 14% respectively.[66] These reductions contributed to the growth in the number of unbundled local loops with total number of LLU lines increasing by 28% in the year to Q4 2013. However, the total number of LLU lines remains relatively low and line share remains the predominant form of LLU accounting for 80% of all LLU connections (see Figure C, Appendix 4);

[64] ComReg Document 12/123, Information Notice, Results of the Multi-Band Spectrum Auction, 15 November 2012.
[65] Also referred to as 4G networks.
[66] ComReg Document 13/01, Information Notice, Price reductions to local loop unbundling ('LLU') and sub loop unbundling ('SLU'), 11 January 2013.

- **Sky Ireland ('Sky') entry**–in Q1 2013 it started to provide fixed voice and broadband services to residential customers. These services can be purchased either in a bundle (including Sky's pay TV service) or on a standalone basis. In order to provide retail FVA and fixed broadband, Sky uses wholesale switched voice[67] and Wholesale Broadband Access services purchased from BT Ireland (inter alia BT re-sells Eircom's WBA[68] product to Sky). Since the launch of its FVA and broadband bundle, Sky's market share in terms of total FVA subscriptions (whether FVA is sold standalone or in a bundle) has reached 3.8%.[69] Sky's growth is likely aided by its ability to cross sell to its extensive existing base of Pay TV customers and its ability to offer bundled services, including triple play bundles;[70]

- **Stronger uptake of UPC's voice and broadband products**–since the FVA Consultation, UPC has grown to become the second largest provider of FVA services, with 19% of total FVA subscribers as at Q4 2013[71] (see Figure F, Appendix 4);

- **Growth in the take up of bundles continues** –the take up of bundles of FVA with another product grew from 46% in Q1 2010 to 63% in Q4 2013, and is still largely dominated by broadband bundles.[72] Most net additions are for bundles (see Figure I Appendix 4);

- **Investment upgrades by Eircom**–it commercially launched NGA services in May 2013 and continues to expand the coverage of NGA network with ✄ premises passed as of 30 April 2014. At the retail level Eircom offers VDSL broadband bundles that include broadband and fixed telephone services as well as TV[73]/mobile services as add-ons. Retail customers can also purchase standalone DSL and VDSL broadband services. At a wholesale level, Eircom offers DSL and VDSL products bundled with WLR as well as naked DSL and naked VDSL products. Eircom also offers Virtual Unbundled Access ('VUA') bundled with WLR and VUA on a standalone basis;

[67] Wholesale Switched Voice product also known as White Label Access allows fixed service providers to purchase end-to-end wholesale voice services so that they can provide retail fixed telephone services without the need to have their own network or interconnection infrastructure.
[68] "WBA" means wholesale broadband access comprising non-physical or active network access including "Bitstream" access at a fixed location. It includes current generation WBA and next generation WBA and is synonymous with the relevant WBA Market defined in ComReg document 10/81.
[69] See ComReg Document 14/19, Quarterly Key Data Report, Data as of Q4 2013, 14 March 2014 (page 20).
[70] Triple play bundles typically refer to as a retail bundle of television, broadband and fixed telephone services.
[71] ComReg Document 14/19, Quarterly Key Data Report.
[72] ComReg Document 14/19, Quarterly Key Data Report.
[73] Eircom has launched pay TV services in Q4 2013.

- **Some differentiation of wholesale pricing**–Eircom had reduced on a promotional basis in 2013 the price of WLR when purchased with bitstream or Line Share within the LEA. It has recently announced the withdrawal of this wholesale promotion: and

- In December 2013 the Government approved the Electronic Communications Network Act 2013.[74] This has enabled the national electricity supplier ('ESB') to ''*engage, now or in the future, in the business of installing and operating an electronic communications network and providing electronic communications services, either alone or in conjunction with another company'*.'[75] The ESB intends to provide a wholesale broadband service that would see fibre broadband reach some 500,000 homes. The proposed wholesale network will use existing ESB infrastructure to provide FTTH.[76]

3.14 The potential impact of these further recent market developments on market definition, SMP assessment and remedies is assessed in Chapters 4, 5 and 6. In formulating its final view on the main developments that have occurred in retail FVA markets, ComReg considers the issues raised by respondents, having regard to amongst others things, market and regulatory developments set out in this Chapter and the Updated Retail Trends Analysis (Appendix 4).

The intensity and key drivers of competition

3.15 Four Respondents (Magnet, UPC, Vodafone, and Eircom), presented their views on the intensity and key drivers of competition in the retail FVA markets.

[74] See http://www.irishstatutebook.ie/2014/en/act/pub/0005/index.html
[75] ESB (Electronic Communications Network) Bill 2013, Explanatory Memorandum, available at http://www.oireachtas.ie/documents/bills28/bills/2013/13513/b13513d-memo.pdf
[76] http://www.independent.ie/irish-news/esb-will-roll-out-broadband-to-500000-homes-29942493.html and see: http://www.esb.ie/main/press/pressreleaseWS.jsp?id=4074

1. The growth of VOIP and its impact on competition in FVA markets

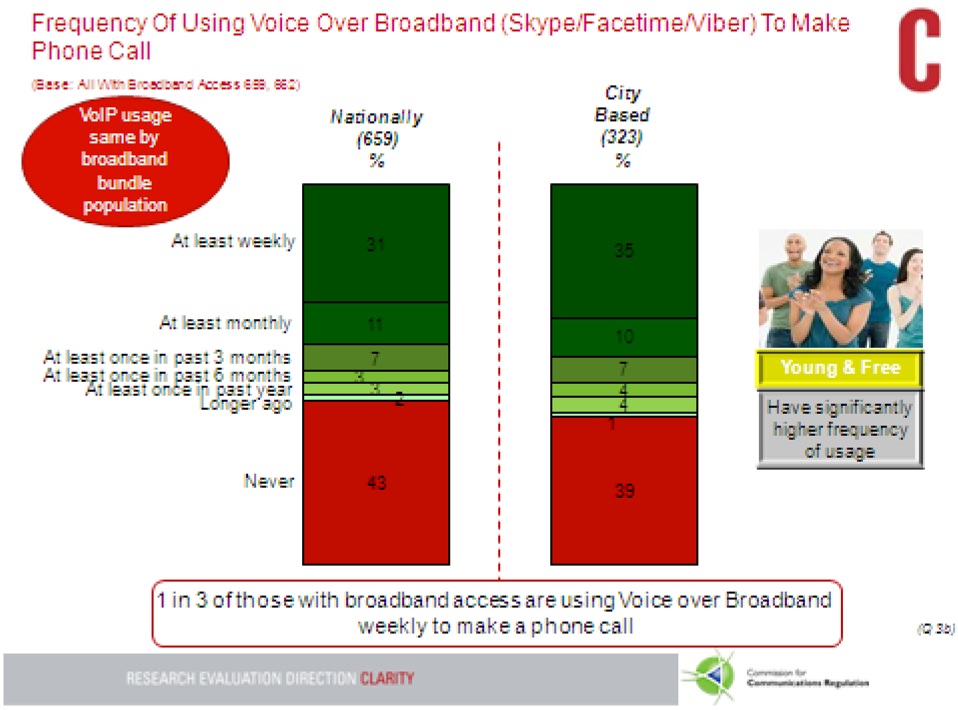
3.16 Vodafone, while agreeing that ComReg had identified the main market developments in the provision of FVA since the 2007 market review, expressed their doubts regarding the sufficiency of ComReg's distinction between the calls made within closed unmanaged VOIP user groups and calls made to or from the Public Telephone Network. Vodafone noted that this alleged lack of distinction could have resulted in the potential overstatement of the impact of unmanaged VOIP on the FVA markets. However, ComReg in the FVA Consultation did make a clear distinction between what it considered managed VOIP (voice service provided over broadband connection analogous to PSTN) which differs from unmanaged or web-based VOIP service.[77] As noted in the FVA Consultation, ComReg broadly considered VOIP services according to three main service types—managed, partially managed, and unmanaged. Managed VOIP means in ComReg's view 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. ComReg considered that partially-managed VOIP means that the supplier has interconnect(s) and its own switching platform and numbering allocations. The partially managed VOIP provider does not, however, provide the access path to its customers and the customer uses it own broadband service to access the supplier‘s voice platform. Unmanaged, or —Over the Top ('OTT') VOIP in ComReg's view means that the supplier does not necessarily have a switching platform with interconnects and does not itself provide access paths to its customers. Its customers must access the service via the internet using their own broadband connections.

3.17 In addition Chapter 3 of FVA Consultation at paragraphs 3.38 to 3.40 highlighted low usage of unmanaged VOIP services (when compared to the usage of other types of voice telephony) as well as the difference in usage preferences between unmanaged VOIP service users and other types of voice telephony users.

[77] FVA Consultation at paragraphs 3.9 to 3.11.

3.18 Taking the latter trends into account, ComReg then in the context of market definition considered whether managed and unmanaged VOIP services fall within the relevant FVA market. For the reasons set out in Chapter 4 of FVA Consultation,[78] ComReg concluded on a preliminary basis that broadband with managed VOIP services are likely to fall within the boundary of the same market as narrowband FVA, though unmanaged VOIP services are excluded. The limited impact of unmanaged VOIP services on the FVA market at least over the period of this review is supported by 2013 Residential ICT Survey.[79] This indicates a relatively limited usage of unmanaged VOIP services with only 31% of respondents with broadband access using unmanaged voice services to make phone calls on a weekly basis. Furthermore, 43% of respondents reported that they have not used unmanaged VOIP services at all, as illustrated by Figure 1.

Figure 1: Usage frequency of unmanaged VOIP services



[78] FVA Consultation paragraphs 4.132 to 4.168.
[79] ComReg Consumer ICT Survey, April 2013, ComReg document 13/46 and ComReg Business ICT Survey, May 2013, ComReg document 13/61.

3.19 Thus, contrary to Vodafone's view, ComReg does not consider that the impact of unmanaged VOIP services on FVA market(s) was overstated. Although ComReg acknowledges that VOIP (managed and unmanaged) is increasing, it is expected that this shift to IP will be gradual and the demand for traditional FVA will remain strong at least over this review period. On that basis, ComReg considers that it is unlikely that a sufficient number of consumers would give up their fixed voice connection and switch to unmanaged VOIP services in response to a SSNIP in their FVA service to render such SSNIP unprofitable. Whether FVA delivered over broadband with managed and/or unmanaged VOIP services possibly constitutes an effective substitute to the narrowband FVA is, having regard to respondents' views and the more recent developments, further discussed in Chapter 4 of this Decision.

3.20 Magnet, in agreeing with ComReg's preliminary conclusions regarding trends and developments considered that the two major developments in retail FVA markets has been the emergence of bundles and the growth of VOIP usage (managed and unmanaged). UPC, however, disagreed with ComReg's estimated impact of UPC's cable network on competition in the FVA markets and pointed to the limited uptake of UPC's telephony services and the fact that PSTN/ISDN access is still the predominant form of FVA. ComReg has also considered these comments. As previously noted the number of broadband with managed VOIP subscriptions continues to increase with the average annual rate of growth equalling 39.8%[80] since 2011. As of Q4 2013, broadband with managed VOIP subscriptions accounted for approximately 22% of total fixed telephony subscriptions (up from 14.8% in Q4 2011).[81] In addition, managed VOIP minutes accounted for approximately 12% of total fixed voice minutes (up from 8.0% in Q4 2011).[82] ComReg expects this trend to continue and would note that it is consistent with the findings across other Member States, as reported in Ecory's report.[83]

[80] ComReg Quarterly Report Data.
[81] ComReg Quarterly Report Data.
[82] ComReg Quarterly Report Data.
[83] To support its second review of the Recommendation on Relevant Markets , the European Commission (DG Connect) commissioned a study carried out by Ecory's, published in 2013 as Future electronic communications markets subject to ex-ante regulation - Final report

3.21 Regarding UPC's impact on competition in the FVA market(s), as noted broadband with managed VOIP subscriptions continue to grow. Further UPC's subscribers accounted for a significant proportion (89%) of total managed VOIP subscriptions. Therefore, ComReg considers that the current and prospective competitive constraint that UPC exercises and will exercise on the FVA and broadband markets are relevant and need to be assessed. As noted the number of UPC's fixed voice telephony subscribers continued to grow strongly, as shown in Appendix 4, Figure E and Figure F, with the average quarterly rate of growth equalling 10% since 2011. While UPC's national market share of fixed telephony subscriptions was equal to 19% as of Q4 2013. ComReg considers further the potential impact of this development at the market definition and competition assessment stage as relevant.

2. The increasing uptake of bundled services

3.22 According to Magnet, in addition to the growth of VOIP usage (managed and unmanaged), a major development in retail FVA market has been the emergence of bundles. Further Eircom, in disagreeing with ComReg's interpretation of key developments in the retail FVA market, outlined market developments that, in its opinion, significantly intensified competition and led to a declining Eircom's retail share in the FVA markets. Eircom considered the trend towards the increasing uptake of bundled services by end-users (including FVA, fixed voice calls and broadband), their suggestion being that other retailers (UPC and retailers that rely on Eircom's wholesale products) intensified competition in the FVA markets by offering product bundles.

3.23 ComReg takes into account Magnet's and Eircom's comments on the growth of bundled subscriptions. As noted at paragraph 3.13 and Appendix 4 of this Decision,[84] the growth of bundled subscriptions continues to increase. For example, double play and triple play subscriptions now account for 52%[85] of all fixed subscriptions to voice, internet and TV services (see Appendix 4 Figure I). It is also noted that since the FVA Consultation, competition in the provision of bundled telecommunication services continues to evolve and in this regard:

- Eircom, started to offer triple-play bundles combining fixed voice, broadband and mobile (with e-mobile brand) in Q4 2012. In Q4 2013 Eircom launched its TV services (e-vision brand) enabling it to offer the first quadruple-play bundle in Ireland;
- In Q1 2013 Sky Ireland started to provide fixed voice and broadband services to residential customers. These services can be purchased in a bundle with Sky Ireland's pay TV service; and

[84] FVA Consultation paragraphs 3.41 to 3.45.
[85] ComReg Document 14/19, Quarterly Key Data Report, Data as of Q4 2013, 14 March 2014.

- In Q2 2013 Vodafone started to offer loyalty discounts on the fixed voice and broadband services to its mobile voice subscribers, thus lowering the price[86] for customers who avail of 2 or more services from Vodafone.

3.24 The increasing uptake of bundles is adequately acknowledged by ComReg in the FVA and Supplementary Consultations. The potential implications of these trends and more recent developments in this regard are taken into account at the relevant stages throughout the market analysis process, Chapters 4, 5 and 6 of this Decision respectively.

3. Increasing Fixed Mobile Substitution ('FMS')

3.25 Magnet agrees that end-users use fixed and mobile services in a complimentary manner and that there is still high fixed voice access penetration in Ireland. However, Eircom, disagreeing with ComReg's interpretation of key developments in the retail FVA market, outlined market developments that, in its opinion, significantly intensified competition with the result that Eircom's retail share in the FVA markets is declining. According to Eircom mobile voice services are imposing significant competitive constraints on the providers of what it terms fixed voice only services, as evidenced by the increasing proportion of mobile only households in Ireland.

3.26 With regard to Eircom's comments related to increasing fixed-mobile substitution ('FMS'), this trend was acknowledged by ComReg.[87] In this regard, trends and evidence on originated voice calls, type of access to voice and other services as well as pricing of fixed and mobile services was taken into consideration when assessing FMS and its potential impact on the FVA market. ComReg's preliminary view on FMS is supported by the update of that information. For example, while the share of fixed voice originated call volumes continued to decline (fixed traffic accounted for 31.0% of all traffic in Q4 2013 compared to 36.9% in Q4 2011), the number of fixed voice subscriptions has increased by 4.4% in the year to Q4 2013. Increasing number of fixed voice subscriptions is the result of the growing bundle uptake as the majority of bundles (94%) include fixed voice service. The emergence of bundles with both fixed and mobile services during the time since the FVA and Supplementary Consultations (there were ✄ subscriptions to bundles that include fixed and mobile voice services) illustrates that subscribers place a distinct complementary value on these services, rather than considering them to be substitutes (this issue is analysed in further detail and the market definition and competition assessment stages of the review).

[86] Vodafone offers €3 and €10 discounts on the fixed services to its mobile subscribers. In order to avail of €10 discount, customer has to purchase certain tariffs.
[87] FVA Consultation paragraphs 3.46 to 3.54.

3.27 Whether retail mobile access is an effective substitute for retail fixed access is further discussed in Chapter 4, paragraphs 4.121 to 4.155 of this Decision. For the reasons set out therein, within the period considered for this market analysis, ComReg does not consider that mobile access would be an effective demand side substitute for a fixed voice access or that it would place a constraint on a Hypothetical Monopolist ('HM') supplier of FVA such that it would prevent it from increasing its FVA charges by a small but significant amount above the level that would pertain in a competitive market outcome.

4. Developments that will impact competition in the retail FVA markets

3.28 In addition, Eircom highlighted the potential factors that will, in its view, further stimulate competition in the retail FVA markets and lead to a greater competitive pressure on Eircom on a forward-looking basis. The factors include:

- the reduction of the Department of Social Protection ('DSP') subsidy for line rental;
- the introduction of naked broadband services; and
- Sky Ireland's provision of fixed voice and broadband services in the retail market.

3.29 As noted in the FVA consultation, ComReg took a prospective view of the relevant FVA markets. It did acknowledge as assess as relevant the possible introduction of naked broadband services on a greater scale and that such developments as well as Sky's entry to the FVA market(s) may intensify competition.

Availability of naked bitstream products

3.30 As noted in the FVA Consultation naked DSL (i.e. standalone broadband or 'SAAB') services had yet to be made available to end users on any significant scale and that ComReg would closely monitor such developments. ComReg considered that with the launch of naked bitstream products some households possibly would cancel their fixed voice subscriptions and opt for broadband services only or, indeed, have a broadband connection and use mobile for their voice services instead of a PSTN connection.

3.31 On 1 July 2013, Eircom launched naked bitstream services. However, ComReg notes that the take up of standalone broadband services based on DSL and VDSL platforms remains at a nascent stage with ✄ standalone DSL/VDSL based broadband subscriptions as of Q4 2013. In addition, Eircom in its responses to the FVA and the Supplementary Consultations has not presented any evidence of pent up demand for the naked broadband services. Given the significant uptake of bundled services ComReg considers it unlikely that a significant number of households would switch to the naked broadband services within the period of this market review. The possible implications of these relevant developments are considered in more detail by ComReg below at the market definition and competition analysis stages.

Sky Ireland's retail provision of fixed voice and broadband services

3.32 As mentioned at paragraph 3.13, Sky started to provide fixed voice and broadband services to residential customers in Q1 2013. While ComReg acknowledges that this development will have a positive effect on the intensity of competition in the provision of retail telecommunication services in Ireland, it is uncertain whether Sky Ireland's subscriber base would be predominantly formed from former Eircom's subscribers, because there is a number of competing FSPs in the FVA market(s). Since the launch of its fixed voice and broadband services, Sky's market share in terms of total FVA subscriptions has reached 3.8%. However, ComReg notes that residential ICT survey indicated[88] the relative stickiness of end users with 66% of respondents that avail of fixed voice services staying with their provider for more than 3 years. This evidence suggests that a substantial amount of time[89] is likely to be required before Sky Ireland establishes a significant presence in the market for provision of retail fixed voice services. However, the potential impact of Sky on the relevant FVA markets is further discussed in Chapter 4 and 5 of this Decision.

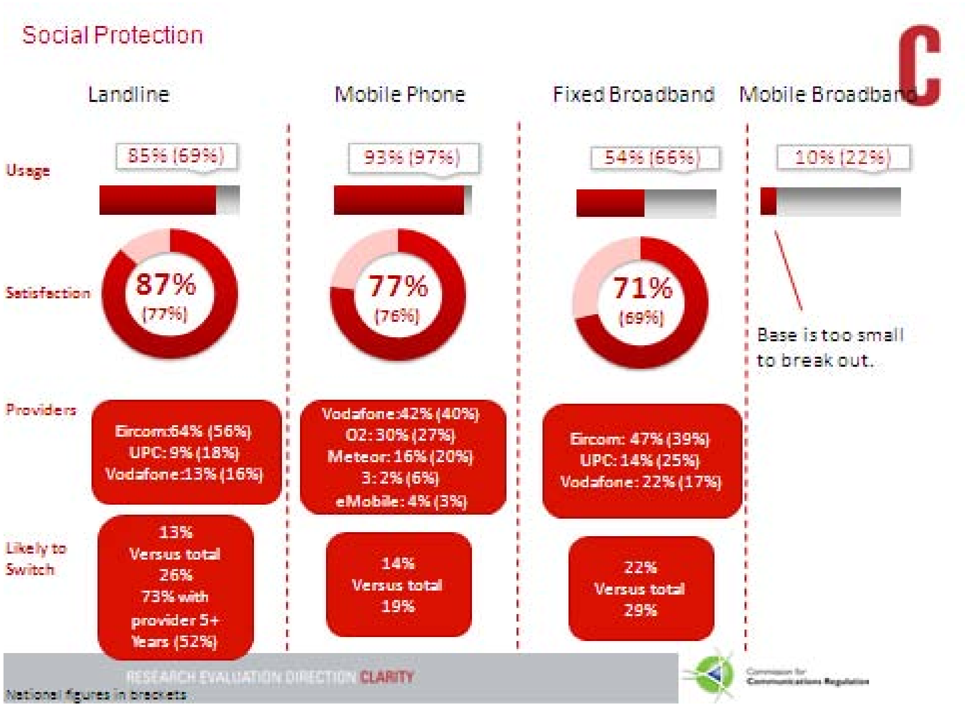
[88] See ComReg Document 13/46, Consumer ICT Survey, 14 May 2013.
[89] For example it took UPC almost 4 years to grow its market share of fixed voice subscriptions from 5% to 19%.

Removal of the Department of Social Protection subsidy for line rental

3.33 In December 2012, the Government ('Department of Social Protection', 'DSP') announced[90] that from January 2013 the telephone allowance[91] will be reduced from €22.58 to €9.50, a reduction of over €13. In December 2013 the DSP announced[92] that the telephone allowance will be discontinued from January 2014. ComReg acknowledges that these changes will likely have some impact on the usage patterns of certain recipients of telephone allowance. However, ComReg considers that any subsequent change in usage patterns does not necessarily mean switching to a different type of voice access, such as mobile.

3.34 Rather the 2013 Residential ICT survey illustrates that the telephone allowance recipients when compared to the general population of respondents were more likely to have FVA at home. Figure 2 also shows that telephone allowance recipients who avail of FVA reported higher satisfaction levels with landline services and lower likelihood of switch their FVA provider when compared to the rest of the respondents (the implication being some stickiness among this cohort of FVA users). It is important to note that this residential survey evidence provides only high level indications of the potential reactions of telephone allowance recipients in response to the reduction to subsidy.[93]

Figure 2: The descriptive characteristics of telephone allowance recipients



[90] See http://per.gov.ie/wp-content/uploads/Expenditure-Report-2013-Parts-I-IV.pdf
[91] Telephone allowance was a part of Household Benefit Scheme.
[92] See http://per.gov.ie/wp-content/uploads/Expenditure-Report-2014.pdf.
[93] For example, the switching rates indicated by surveys usually differ from the actual switching rates due to response bias. In addition, in light of telephone allowance removal, telephone usage, respondents' satisfaction and likelihood to switch might have changed since April 2013 when the respondents were surveyed.

3.35 Furthermore, the analysis of Quarterly report data does not indicate that there was a marked increase in the reduction of standalone voice (access and calls) subscribers[94] since the telephone allowance was reduced. On the contrary, during 2013 total number of standalone voice subscriptions decreased by ✄ subscriptions in comparison to ✄ during 2012. Thus, headline trends indicate that further analysis is necessary prior to drawing more definite conclusions about the impact of the telephone allowance reduction and its subsequent removal on competition in the FVA market(s). ComReg considers in more detail the potential impact of the reduction of the DSP subsidy for line rental on the precise boundary of the relevant FVA market(s) in Chapter 4 below, in particular whether this development significantly impacts on any degree of fixed mobile substitution. ComReg will continue to monitor trends and developments that can potentially change the competitive landscape in the FVA market(s).

5. Significant differences in competitive conditions between urban and rural areas

3.36 Eircom commented on the differences in competitive conditions between urban and rural areas. It considered that ComReg's analysis failed to acknowledge the increasing level of competition in urban areas. Eircom argued that the emergence of major competitors, such as UPC and Vodafone, combined with the continuing expansion of LLU and the entry of Sky Ireland has made urban areas highly competitive as opposed to the less competitive rural areas. Eircom also pointed to its decreased national market share and argued that the reductions are much more pronounced in the urban areas. In doing so, Eircom presented their analysis of projected urban, rural and national market shares in the FVA market for lower level services.

3.37 All important trends and market developments, such as, the presence of operators relying on LLU as well as other Eircom wholesale inputs, the continuing expansion of UPC's cable network and presence of other FSPs including those prospectively providing broadband with managed VOIP were described in detail in the FVA Consultation and taken into account in the subsequent analysis. Essentially, ComReg analysed in detail the potential impact of these trends and market developments on market definition, market power and the need for any regulatory obligations, Chapters 4 and 5 of the FVA Consultation. On that basis, ComReg considers that geographically differentiated competitive conditions were adequately assessed in the FVA Consultation.[95]

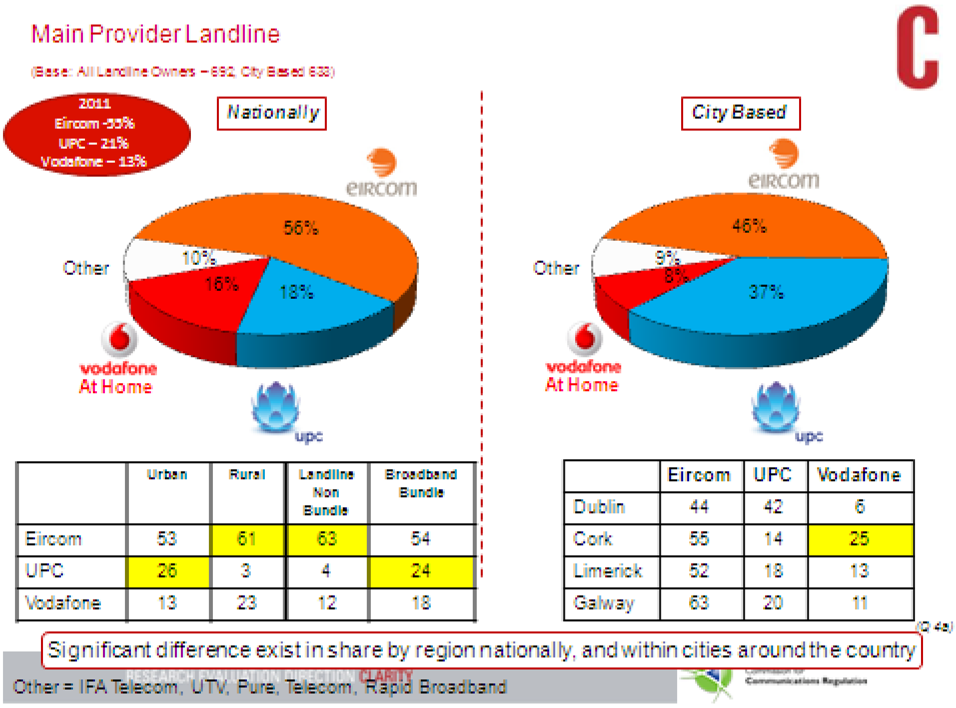
[94] ICT survey indicated that telephone allowance recipients are more likely to be standalone voice subscribers when compared to overall sample of respondents.
[95] FVA Consultation paragraphs 4.209 to 4.241.

3.38 With regard to Eircom's analysis on the likely development of market shares in the LLVA market, ComReg notes that Eircom has not provided detailed documentation of the forecasting model. While Eircom listed the factors taken into consideration when producing the forecast of market shares it is not clear what weight was assigned to each of these factors. Furthermore, information on the selected forecasting methodology was not provided. Thus, ComReg considers that there cannot be attached much weight to the projections of the market shares in the LLVA market. However, ComReg considers this information together with the wider market share information and trends that is available.

3.39 ComReg notes that due to the limited availability of reliable data, the precise market shares in the FVA market(s) in urban and rural areas are not known. Figure 3 which is based on household survey evidence categorised at county level, gives some high level indication of the growing residential presence of UPC's cable service in particular urban areas, particularly in the Dublin region. However, it is important to note that Figure 3 does not represent actual market shares for Dublin and other regions where UPC is present – it is based on survey evidence only and hence can be interpreted only as indicative evidence. In addition, it should be recalled that ComReg identified a relevant FVA product market that incorporates both residential and non-residential services. UPC's share of the non-residential customer segment is likely to be significantly lower than that of Eircom across all regions, with the 2013 Business ICT Survey[96] indicating only a 3% national share of business FVA customers for UPC.

[96] See ComReg Document 13/61, Business ICT Survey, 25 June 2013.

Figure 3: 2013 Residential ICT Survey Snapshot of FVA Market Shares by Location.



	Urban	Rural	Landline Non Bundle	Broadband Bundle
Eircom	53	61	63	54
UPC	26	3	4	24
Vodafone	13	23	12	18

	Eircom	UPC	Vodafone
Dublin	44	42	6
Cork	55	14	25
Limerick	52	18	13
Galway	63	20	11

3.40 Having updated the information of relevant to its analysis, in Chapter 4 of this Decision ComReg considers further taking into account respondents views whether a geographic market for the Relevant FVA Market(s) should be national or sub-national. As noted in the FVA Consultation, ComReg continues to monitor any developments that might necessitate revisiting geographical definition in relation to the relevant FVA market(s) over the timeframe of this review.

Conclusion

3.41 ComReg in the FVA Consultation considered the main structural and behavioural trends that have occurred in the retail FVA market(s) since the previous reviews of the FVA market(s). Having considered Respondents' views, ComReg considers that its presentation and analysis of such developments (coupled with the updated trends and analysis in this Decision, including Appendix 4) and their relevance to the subsequent analysis (of the Relevant FVA Market(s), the competition and SMP assessment and rational for any obligations) remains valid.

Chapter 4

4 Market Definition

Summary

4.1 In this section ComReg sets out its conclusions relating to market definition and its reasoning in reaching these conclusions.

4.2 The purpose of this section is to define prospectively the retail FVA market(s) in which the assessment of SMP will be undertaken. ComReg considers the product market before considering the geographic scope of the market(s).

4.3 The first step in ComReg's analysis is to identify the appropriate focal product(s) and its analysis of the scope of the relevant market(s) flows from this. In light of ComReg's analysis and feedback from the FVA and Supplementary Consultations, ComReg considers that standalone FVA is the appropriate focal product for the purposes of this market review. From this starting point, ComReg's analysis, drawing on expert economic input and having considered the views of respondents, concludes that prospectively the most appropriate approach to FVA market definition is to determine three separate relevant retail FVA product markets as follows:

- **Market 1a Standalone lower level voice access** comprising access via a PSTN, ISDN BRA or analogous broadband[97] connection (cable, fibre, FWA or DSL), that is used to provide PSTN voice, ISDN voice or Managed VOIP service sold on a standalone basis or in a package with fixed voice calls ('Standalone LLVA');

- **Market 1b Bundled lower level voice access** comprising access via a PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA and DSL), that is used to provide PSTN voice, ISDN voice or Managed VOIP service sold in a product bundle which includes any of broadband, television or mobile services (and which product bundle may include fixed voice calls), ('Bundled LLVA'); and

[97] Prospectively, a scenario may arise where an operator, in light of evolving access technologies, delivers a standalone managed voice service (i.e. managed VOIP over an IP /broadband access path) equivalent to a standalone narrowband PSTN voice service. For example, from a technical standpoint, it is possible that an operator could use a broadband access path to provide a standalone managed voice over IP/broadband as a product, but without also providing internet access. However, while this type of voice product is somewhat notional at this stage, to be technology neutral and noting the potential for this to emerge to one degree or another within the lifetime of this market review, ComReg includes them within the relevant market so that any future competitive constraints from such could be assessed. However, their inclusion at this point does not affect the SMP assessment later.

- **Market 1c Higher level voice access** comprising access via ISDN FRA or ISDN PRA that is used to provide voice service sold either on a standalone basis or in a package with fixed voice calls, or in a product bundle which includes any of broadband, television, or mobile services (and which product bundle may also include fixed voice calls), ('HLVA').

4.4 ComReg concludes that each of the FVA sub markets defined at paragraph 4.3 are national in scope.

Structure of this section

4.5 In the rest of this section ComReg summarises the proposals it made in the FVA Consultation as well as the proposals it made in the Supplementary Consultation. ComReg then sets out its response to respondents' views on its proposals and its final decisions. The discussion is divided into the following sections:

A. Overview of ComReg's approach

B. Appropriate focal product

C. Product market definition

D. Geographic market definition

E. Overall conclusion on the relevant FVA market definition

A. Overview of ComReg's Approach

4.6 ComReg as part of the market review in 2007[98] defined two separate markets, a national market for lower and higher level retail narrowband access respectively. Subsequently as part of the FVA Consultation, ComReg considered the definition of the relevant market in a prospective manner by analysing, amongst other things, key market and regulatory developments,[99] notably likely future trends in market shares of suppliers and the supply and take up of bundle offers particularly including managed VOIP telephony.[100] It prospectively considered what impact such developments could have on the precise boundary of the relevant FVA market(s) (and, as set out below in detail, the potential impact on the assessment of competition in the relevant market(s) identified and, in particular, in the design and updating of remedies).

[98] ComReg Decision D07/61 "Decision Notice and Decision Instrument – Designation of SMP and SMP obligations.

[99] FVA Consultation, section 3, 4 and 5.

[100] More generally ComReg took into account respondent's views, qualitative factors and SSNIP analysis, the views of independent consultants Oxera, updated trends and European Commission guidance and relevant case law: see in particular European Commission Notice on the definition of relevant market for the purposes of

4.7 On the basis of the analysis of the retail product market definition set out in the FVA Consultation,[101] ComReg in the context of the present market review, considered it appropriate to modify its definition of the FVA market—a broader national lower level FVA (‘LLVA’) market comprising narrowband access (PSTN and ISDN BRA), as well as, broadband access (which may include cable, fibre, FWA and DSL) with managed VOIP (i.e. LLVA sold inside or outside a bundle). Similar to the 2007 market review, ComReg also identified a separate national HLVA market consisting of access via ISDN FRA and PRA.

4.8 In the FVA Consultation ComReg highlighted that the purpose of market definition in this review is to structure and inform ComReg’s forward looking assessment of whether SMP exists in the supply of retail FVA. Therefore, market definition is not an end in itself, but is carried out with the aim of understanding whether, during the course of the review period, FVA customers will be protected by effective competition, or whether ex ante regulation is required.

4.9 In making its initial proposals, and in light of the increasing prevalence and take up of broadband and bundles of wider services, ComReg first considered the question of the focal product. ComReg, noting inter alia that the European Commission Recommendation which describes the market as the retail market for “*access to the public telephone network at a fixed location for residential and non-residential customers*”,[102] considered the appropriateness of standalone FVA as its starting point. ComReg proposed that standalone FVA was the appropriate focal product, for the reasons set out, and its analysis of the scope of the relevant market(s) flowed from this. ComReg considered on a preliminary basis that, at the retail level:

- FVA and fixed calls are in separate markets;[103]
- Residential and non-residential services are in the same FVA market;[104] there are, however distinct markets for narrowband lower level access and higher level access[105] which more usefully captures the different needs of larger and smaller users of FVA;
- There is a distinct relevant market for HLVA consisting of access via ISDN FRA and PRA only;

Community competition law (97/C/372/03) (European Commission Notice on Market Definition), which ComReg took into account.

[101] FVA Consultation, chapter 4, paragraphs 4.14 to 4.208.

[102] Euroepan Commission (2007/879/EC) Commission p.5 (Annex).

[103] FVA Consultation paragraphs 4.21 to 4.56.

[104] FVA Consultation paragraphs 4.82 to 4.111.

[105] FVA Consultation paragraphs 4.112 to 4.131.

- Broadband connections with managed VOIP are included in the relevant FVA market, unmanaged VOIP is excluded;[106]
- FVA and mobile access are currently in separate markets, though there are indications that there is an increasing level of competition for FVA and calls from mobile;[107] and
- Both the LLVA and HLVA market are national in scope (notwithstanding the emergence of some localised competitive pressures, particularly where FVA is sold as part of a bundle with other services).

4.10 Although most of the respondents agreed with ComReg's proposed market definition, in particular the delineation between lower and higher FVA, Eircom disagreed, stating that ComReg should have defined the relevant retail FVA market on the basis of separate product bundles comprising Voice Only[108] and Bundled Voice.[109] The natural starting point for defining markets, in Eircom's view, should be bundles of services rather than around specific elements of the bundles. Eircom considers that there is a clear distinction between the characteristics and preferences of the different groups of customers depending on whether they are voice only or bundled voice. The latter market should, according to Eircom be further broken down into separate geographic markets defined to recognise the differing competitive constraints that exist within and outside of the LEAs.

[106] FVA Consultation paragraphs 4.132 to 4.168.
[107] FVA Consultation paragraphs 4.169 to 4.208.
[108] 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.
[109] 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.

4.11 As part of its consideration of these issues, ComReg conducted a Supplementary Consultation and considered further the matter of the candidate market (i.e. the appropriate focal products) and market definition, regarding in particular, the treatment of bundled services. In that regard, ComReg commissioned independent expert economic consultants, Oxera, to assess its proposals in respect of market definition as set out in the FVA Consultation and to evaluate them against alternatives, including those advocated by Eircom. ComReg was particularly mindful of the need to be cognisant of the approach to market definition set down under the European regulatory framework (including the European Commissions' 2007 Recommendation, the European Commission Notice on Market Definition, and SMP guidelines) as well as with principles of competition law. Oxera's additional specific analyses and review of the evidence is presented in the Oxera Report.[110]

4.12 When defining a market, a preliminary issue is the selection of the focal product that is the subject of the SSNIP (and other) analysis. Oxera identified three, non-mutually exclusive, considerations when choosing the appropriate focal product as follows (in descending order of importance):[111]

- Criterion 1: what is the competition concern that the regulator is trying to solve and where is its source?
- Criterion 2: what are the implications for the SMP assessment and design of remedies?
- Criterion 3: which is the most popular product consumed by consumers in the market?

4.13 In general, defining the relevant FVA market could be approached in various ways —a range of possible markets may exist ((i) standalone FVA, (ii) FVA sold inside or outside a bundle, (iii) bundle etc. To assist in its analysis, Oxera also developed a conceptual framework (consistent with the approach suggested by BEREC[112]) to define the FVA market based on the well-established 'hypothetical monopolist' test, as illustrated by Figure 4.[113]

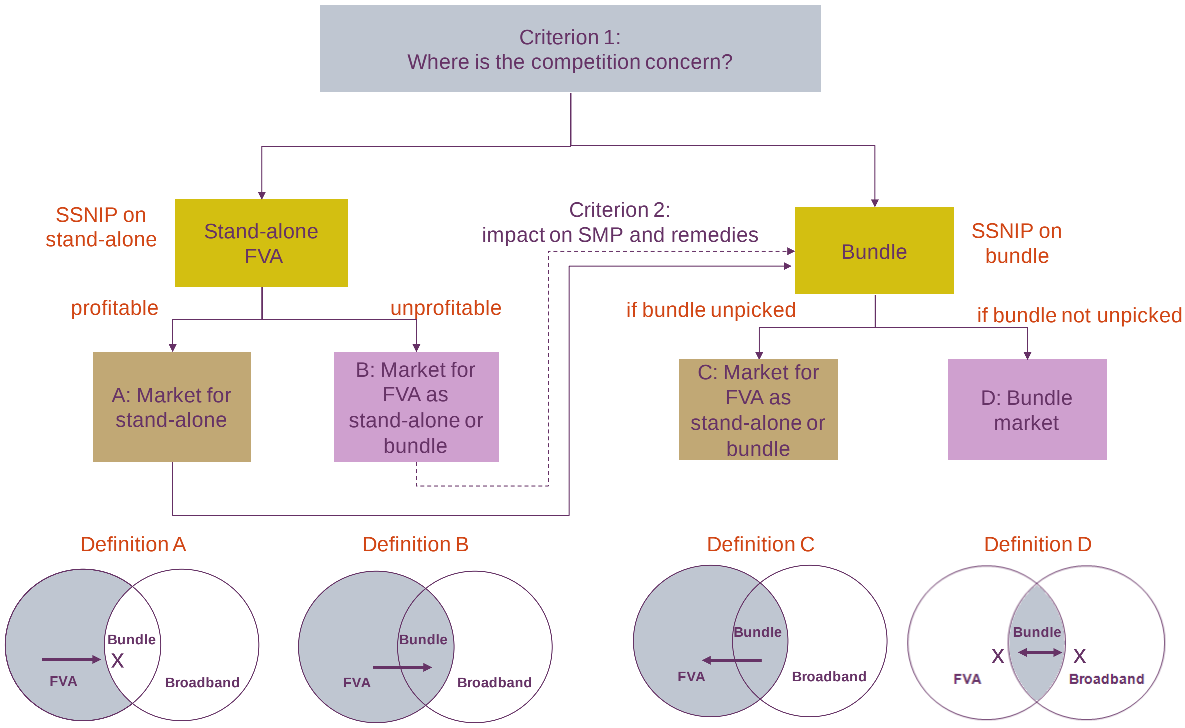
[110] The Oxera report is published separately on ComReg's website, as ComReg Document 13/95a: http://www.comreg.ie/_fileupload/publications/ComReg1395a.pdf

[111] Oxera report section 2.2.1, page 9-12. Considerations and other potentially relevant criteria concerning the focal product are discussed in further detail at paragraph 4.25 to 4.37.

[112] BoR (10) 64, Report on the Impact of Bundled Offers in Retail and Wholesale Market Definition, December 2010.

[113] Figure 4 outlines how the SSNIP test may work in the context of stand-alone FVA as well as bundles. For further detail see the Oxera report page vii and section 2.2, page 12 to 16. As will be discussed throughout this Decision, other criteria and considerations also informed ComReg's decision in relation to the focal point and market definition.

Figure 4: 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

4.14 Drawing on the framework set out in Figure 4, Oxera assessed ComReg's approach, as well as, alternative approaches to FVA market definition put forward in the responses to the FVA Consultation. ComReg draws on Oxera's findings throughout this Decision.

Consultation responses and ComReg analysis

4.15 ComReg's analysis started in a 'modified Greenfield' situation. This means that ComReg assumes the FVA market to be unregulated (both at the retail and wholesale level), yet it assumes that LLU and WBA are regulated.[114] In this respect, SMP regulation present in other markets or regulation in place through the general regulatory framework is considered.[115]

[114] This is because ComReg has already established SMP in the LLU and WBA market leading to competition problem in the retail broadband markets.

[115] In line with the "Modified Greenfield Approach" set out in the Explanatory Note to the 2007 Recommendation (European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (the 'Explanatory Note to the 2007 Recommendation'), (C(2007) 5406), page 13), ComReg's assessment starts from the assumption that SMP regulation is not present in the market(s) under consideration. However, regulation present in other related markets or through the general regulatory framework is considered. This is to avoid drawing conclusions regarding the competitive structure of a particular market which may be influenced by, or indeed premised on, existing regulation on that market. Considering how these markets may function absent regulation helps to ensure that SMP based regulation is only applied (or withdrawn) in those circumstances where it is truly justified.

4.16 In fixed telephony, market services are increasingly sold as part of a bundle with other services, primarily broadband (i.e. dual play). In light of an increasing proportion of households and businesses bundling FVA with fixed voice calls and, in particular, broadband internet access, ComReg considered whether in the context of the current national circumstance in Ireland, a ‘standalone’ FVA service (as listed in the 2007 Recommendation) remained a relevant starting point for an ultimate assessment of competition in the provision of FVA to end-users. Regarding the appropriate starting point (focal product) for the market definition analysis, ComReg must take the utmost account of the 2007 Recommendation.[116] It is therefore obliged to examine markets that are on the list of recommended markets, these markets being susceptible to ex-ante regulation.[117] Market 1/2007 is defined as “*the provision of a connection or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving telephone calls and related services*” (typically referred to as narrowband telephony services).[118]

4.17 ComReg’s preliminary view on market definition was based on an approach that went beyond a potentially narrow application of the traditional SSNIP test. ComReg in addition to qualitative and quantitative factors also took into account the criteria suggested by BEREC[119] in its assessment of bundles for market definition purposes:

- economies of scale and scope, for example:[120]
- transaction costs faced by end-users;
- differing competitive conditions; and
- end-user behaviour.

4.18 ComReg used the above features to assess access/calls and prevalent types of bundles (FVA, calls and broadband) in the context of the Irish market.

4.19 Having chosen standalone FVA as the focal product in the context of the current market review, ComReg (consistent with competition law principles) applied the accepted standard SSNIP and other criteria, including in the presence of bundles, to analyse whether the market was any broader or narrower than standalone FVA.

[116] ComReg acknowledges that the 2007 Recommendation is currently under review by the European Commission and a revised Recommendation is expected later this year. Notwithstanding, until the revised Recommendation takes effect, ComReg is obliged under European Regulatory Framework to have due regard to the 2007 Recommendation.
[117] In accordance with Regulations 26 and 27 of the European Communities (Electronic Communications, Networks and Services (Framework) Regulation 2011, S.I. No.333 of 2011.
[118] Explanatory Note to the Recommendation p.21.
[119] BoR (10) 64, Report on the Impact of Bundled Offers in Retail and Wholesale Market Definition, December 2010 (page 16).
[120] As evidenced throughout the Decision, ComReg also considered in its analysis of bundles, issues of access of alternative operators to all relevant wholesale inputs.

4.20 In considering the approach to market definition for the FVA market, ComReg has taken account of the accepted and standard approach to market definition under the European regulatory framework[121] (consistent with competition law), alongside the FVA-specific issues that are present in the Irish market (having considered the updated retail trends set out in Chapter 3 and Appendix 4 of this Decision as well as operator submissions in particular in this regard), namely:

- the considerable growth of bundles in the market;
- the potential for fixed–mobile substitution;
- the potential for differences in competitive conditions across Ireland to drive the definition of separate geographic markets.

4.21 These aspects are the key issues, as identified below in the industry responses to ComReg's Consultations.

4.22 ComReg acknowledged that the issues under consideration in the FVA Consultation are of a complex and dynamic nature. However, ComReg has also highlighted that it should be borne in mind that market definition is not a mechanical or abstract process. ComReg's approach is based on its overall understanding of the FVA relevant market(s), taking account of available evidence of past behaviour as well as a prospective analysis, reflecting the characteristics of the FVA relevant market(s) and associated wholesale markets and the factors likely to influence their competitive development.

4.23 In addition, ComReg takes into account emergent localised competitive pressures, particularly insofar as FVA is sold in a bundle, through relevant and proportionate regulatory remedies.[122]

4.24 A number of key questions had to be addressed in arriving at what ComReg considers to be the correct market definition in the context of this market review, each of which is addressed in turn below:

1. What is the appropriate focal point for FVA market definition?
2. What is the appropriate FVA product market definition?
3. What is the appropriate FVA geographic market definition?

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[121] European Commission (2007), '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/EEA, recital 3.

[122] ComReg maintains its approach towards the NRT outside and within what is defined as Larger Exchange Areas ('LEA'), with a more flexible approach for the latter.

B. The appropriate focal product

4.25 The first step in ComReg's analysis is to identify the appropriate focal product(s) and its analysis of the scope of the relevant market(s) flows from this. In this sub section ComReg considers whether the focal product should be standalone FVA, or a bundle (e.g., of voice and broadband), or whether each should be a focal product. In light of ComReg's analysis and feedback from the FVA and Supplementary Consultations, ComReg considers that standalone FVA is the appropriate focal product for the purposes of this market review, as proposed in the FVA Consultation.

4.26 ComReg's preliminary view was that the appropriate focal product for the purposes of this market review is the standalone narrowband FVA (i.e. FVA delivered over PSTN), which was the focus of ComReg's 2007 market review, this in ComReg's view remained the appropriate starting point for the 2012 market review and for assessing product substitutes rather than a product bundle incorporating FVA.[123] In this regard, as mentioned ComReg took into particular account the criteria suggested by BEREC[124] in its assessment of bundles for market definition purposes:

- economies of scale and scope;
- transaction costs faced by end-users;
- differing competitive conditions; and
- end-user behaviour.[125]

[123] FVA Consultation paragraphs 4.14 and 4.15.
[124] BoR (10) 64, Report on the Impact of Bundled Offers in Retail and Wholesale Market Definition, December 2010 (page 16).
[125] ComReg has also demonstrated it considered the European Commission's views on bundling generally (in its discussion of market definition) see section 3.2 of the Explanatory Note to the 2007 Recommendation.

4.27 The trend towards increased consumption of bundle offers as well as increasing broadband penetration implied that a bundle (e.g. FVA and calls with broadband) could form the relevant starting point for ComReg's assessment of FVA product market substitutability.[126] As set out in the FVA Consultation, where consumers have a preference for both FVA and broadband, for transactional efficiency, they increasingly tend to buy these from the same supplier. However, ComReg also recognised that a significant number of households and business users still choose to purchase FVA as a standalone product; and a significant proportion of households and businesses do not require a fixed broadband service.[127] Similarly, there are other consumers who will purchase other parts of a bundle (excluding FVA) separately and those who will not purchase FVA at all. On this basis, ComReg's preliminary view was that the fixed voice connection component, irrespective of whether it is sold standalone or as part of a bundle, constitutes a relevant market in its own right and is the correct starting point for the market definition analysis.

4.28 In light of respondents' views ComReg further considered the question of the focal product. As set out at paragraph 4.12 to 4.13, Oxera having identified a number of criteria to answer this question applied these to the Irish market. Consistent with ComReg's approach, Oxera concluded that there are strong reasons to use standalone FVA as the focal product, given that the regulator's competition concerns pertain predominantly to standalone access to deliver voice services—specifically, the risk of Eircom charging retail prices that are too high, or leveraging a strong position in retail and wholesale FVA markets to adjacent markets through bundling. This is consistent with FVA being the only remaining retail product market in the European Commission's list of markets susceptible to ex ante regulation.[128] Although the European Commission is reviewing its recommendation on relevant markets in light of developments since 2007, it is still the case that most NRAs consider that FVA is not entirely or effectively competitive and remains susceptible to ex ante regulation.[129]

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[127] FVA Consultation, paragraph 4.58, Figure 19.

[128] European Commission (2007), 'Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services', C(2007) 5406 rev 1.

[129] So far, there has been limited withdrawal of the existing SMP designations in the relevant FVA markets: see http://www.cullen-international.com/product/applications/MarketAnalysis/intro.htm#Intro_table

Consultation Responses and ComReg Analysis

4.29 Regarding whether the focal product should be standalone FVA, or a bundle (e.g., of voice and broadband), or whether there should be two focal products, overall, respondents' views were mixed. On the one hand, with the exception of Eircom, respondents to the FVA Consultation broadly agreed that standalone FVA is the appropriate focal product and the correct starting point of the market definition exercise for the purposes of this market review. However, many OAO responses to the Supplementary Consultation suggested that where the majority of consumers take a bundle of services, both standalone FVA as well as FVA in bundles should be used as focal products. Although Eircom via its advisors Frontier Economics ('Frontier') agree the with three-criteria framework laid out by Oxera to select a focal product for market definition,[130] they consider that a correct application of the Oxera framework, criterion 1 and criterion 2 respectively, would result in the need to use both standalone FVA as well as FVA in bundles as focal products.

4.30 Eircom via its advisors Frontier suggest[131] that because one of ComReg's key regulatory concerns is leverage of market power when FVA is sold as part of a bundle, and by definition, such leverage can only happen in the presence of bundles, criterion 1[132] of Oxera's framework (where is the competition concern) naturally leads to the conclusion that bundles should also be used as a focal product in the market definition exercise. ComReg is of the view that, even in the presence of bundles, applying Oxera's criterion 1 actually reinforces the conclusion that it is necessary and appropriate to start from standalone FVA as the focal product for market definition. In the context of the FVA market review, the competition concern of leveraging market power from the FVA market into adjacent markets through the sale of bundles has its source in any SMP position that Eircom may have in FVA, as well as Eircom's SMP position in the underlying wholesale inputs required to sell such bundles, such as, SB-WLR line-share and WBA. That is, the leverage of market power when selling bundles does not have its source in the sale of bundles per se, as Eircom (Frontier) seems to suggest, but in the existence of SMP in the FVA value chain (either at retail or wholesale level).[133]

[130] See Section 2 of the Oxera report, p6-19.
[131] See section 2.2 of the Frontier report.
[132] Recall that this criterion requires identifying the competition concern the regulator is trying to solve as well as understanding the source of such concern.
[133] However, one cannot rule out the possibility that, in the future, retail bundled products could be the source of competition concerns for regulators—this could be the case, in particular, for triple-play bundles that could require wholesale remedies on the pay-tv element in order to ensure that OAOs can technically replicate them.

4.31 Absent ex ante wholesale regulation to underline retail competition, in particular the obligation to supply SB-WLR and the supporting wholesale remedies, as well as having an ex ante NRT (margin squeeze test) to ensure the replicability of FVA whether sold inside or outside bundles—Eircom's current SMP status would persist, regardless of how the FVA market is defined. Thus, concerning criterion 2[134] of Oxera's framework (what are the remedy implications) and contrary to Eircom's (Frontier's) view, ComReg does not consider it necessary to use bundles as the focal product (in addition to standalone narrowband FVA). In this respect, ComReg notes the European Commission's reasoning not to identify a separate retail market for bundles in the recently published Draft Recommendation on relevant markets. As noted in the Explanatory Note:[135]

> "*This Recommendation does not propose to define a separate retail market for bundles because evidence to date has not indicated that there is a need for ex ante regulation of bundles, which may contain a previously regulated input. Furthermore, even if an NRA would define a retail market for triple play, for example, the wholesale inputs needed to compose this bundle would remain separate and non-substitutable, such as for example local access, higher-level access and termination. What is important in this respect is that NRAs are able to ensure that the vertically integrated SMP operator's regulated elements of the bundle can be effectively replicated (in terms of both technical and economic replicability) at the retail level, without an implicit extension of regulation to other components which are available under competitive conditions*".

[134] Recall that this criterion looks into the remedy implications of market definition. In particular, it considers whether it is necessary to undertake a separate analysis of a product if there are reasons to believe that by not doing so, differences in competitive conditions might be overlooked and not adequately captured in the regulatory framework.

[135] Explanatory Note to the Draft Recommendation on relevant markets, 2013 p 18/19.

4.32 Furthermore, the BEREC Report on Bundled Offers notes that even if there were a separate market for the wider bundle of services, this of itself does not necessarily indicate that there is no competition problem with the individual components of the bundle, for example, the FVA component. In this respect, FVA is the source of the main competition concerns that ComReg wishes to test in the context of this market review, such as, leverage of market power and/or exploitation of 'captive customers'.[136] The FVA market review is being conducted with the specific context of captive customers in mind, thus standalone FVA is of most relevance from a regulatory perspective. This has been the key rationale to date for ComReg, as well as other NRAs, to use standalone FVA as the focal product when reviewing Market 1 (i.e. FVA). So far no NRA has notified to the European Commission a fixed access market based on bundled products. On the other hand, most NRAs still consider that FVA is not entirely or effectively competitive and remains susceptible to ex ante regulation.[137] It is notable that there seems to be an overall acceptance by respondents to the FVA and Supplementary Consultations that there is still some form of relevant market susceptible to ex ante regulation, either for standalone FVA or for FVA whether sold inside or outside a bundle.

4.33 ComReg notes that BT suggests that the choice of focal product cannot solely be dictated by the competition concern which risks bias and that other factors should be taken into account at this stage including evidence of consumer preferences for purchasing services. However, drawing on Oxera's overall framework for FVA market definition (inter alia Figure 4 which considered a variety of factors including those criteria set out at paragraphs 4.12) and having regard to updated trends and developments (Chapter 3 and Appendix 4), bundling of itself does not necessarily justify defining a relevant market for bundles. In this regard, ComReg also notes the European Commission and BEREC's views with respect to bundling and market definition – if a sufficient number of customers would "unpick" a bundle then it can be concluded that the service elements constitute the relevant markets in their own right – and not the bundle.[138]

[136] 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).
[137] See Cullen International's Market Analysis Database (as at 30 May 2014) at http://www.cullen-international.com/product/applications/MarketAnalysis/intro.htm
[138] See section 3.2 of the Explanatory Note to the 2007 Recommendation.

4.34 Further, as noted in the FVA Consultation regarding the prevalence of access for the purposes of providing voice services, the majority of FVA connections standalone or bundled are still by way of twisted copper pair connections. In Q4 2013 there were over 1.6 million PSTN and ISDN lines compared to 329,608 managed VOIP subscriptions. Although Eircom launched naked DSL in July 2013, it continues to maintain the purchase of retail narrowband access as a precondition for the supply of its own retail broadband, WBA and shared LLU or Line Share. Essentially, as the latter wholesale inputs can only be used to provide broadband services, at least over the period of the review, the narrowband access PSTN/SB-WLR connection is maintained to deliver the voice service. Therefore, ComReg concurs with Vodafone that narrowband standalone FVA serves as a suitable starting point for assessing the FVA market.

4.35 To date with a few exceptions as ComReg notes in the FACO Consultation[139] there have not been any significant developments of managed VOIP services by FSPs over wholesale broadband products purchased by them from Eircom. While Eircom is currently rolling out an NGA network, it is also likely largely to continue to provide FVA (and SB-WLR) over its copper narrowband network over the period of this review particularly for FVA customers who do not purchase broadband services. Consequently, FVA whether sold separately or in a bundle, is primarily offered over Eircom's fixed narrowband network (either through Eircom's retail arm, or indirectly through other FSPs using a suite of wholesale narrowband products provided by Eircom pursuant to SMP based regulatory requirements). Prospectively, however, a scenario may arise where an FSP, in light of migrating the majority of their customer base to standalone broadband or NGA broadband access products, may start offering managed voice service (i.e. managed VOIP), at least to a subset of their customers, though this is unlikely over the period of this review.

4.36 Finally, multiple plausible and shifting markets are likely to quickly become unmanageable from a practical (regulatory) perspective. If ComReg were to use a bundle as a focal product (in addition to FVA), there is a question as to which of the many bundles sold in the market should be the focal product: broadband bundle; triple-play bundle, quadruple-play (fixed and mobile voice, broadband and TV), etc. The choice of relevant bundle may influence the outcome. For example, a triple-play bundle may be more likely to be unpicked than a broadband bundle. ComReg considers that bundling is dynamic with changing supply and demand side developments leading to bundling and unbundling over time.

[139] Paragraph 3.40, ComReg documents 14/26.

Conclusion

4.37 On the basis of the analysis set out in the FVA and Supplementary Consultations, as well as the Oxera report and, having taken into account the respondents' views and the national circumstances, ComReg has decided that, consistent with the European Commissions' 2007 Recommendation, other European Commission guidance, the BEREC report, best practice analysis consistent with competition law and the practice of other NRA's, standalone FVA remains the correct focal product and the starting point for it to carry out the FVA market definition and SMP analysis according to circumstances in Ireland.

C. Product Market

4.38 In light of ComReg's analysis and feedback from the FVA and Supplementary Consultations, ComReg considers that standalone FVA is the appropriate focal product for the purposes of this market review. From this starting point, ComReg, drawing on expert economic input, then considers the scope of the market.

4.39 The European Commission's Notice on Market Definition defines a relevant market as follows:

- a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
- a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

4.40 In considering the scope of the market, ComReg generally considered whether the focal product is a market of its own or should a broader market be defined to take into account supply-side or demand-side substitutes, having regard to best practice standards (including the European Commission Notice on Market Definition for example).[140] In general ComReg's approach has been to consider qualitative factors and SSNIP analysis while being cognizant of potential limitations with any single method. Market definition is not an end in itself, but is undertaken to provide the context for the subsequent competition/SMP analysis.[141] It is useful in that it allows ComReg to consider the competitive constraints imposed by demand and supply side substitutes (and consequently the buyers and suppliers of those substitute products/services), on a forward-looking basis, that is, taking into account expected or foreseeable technological or economic developments over a reasonable time horizon linked to this market review, but this is noted that it is not an end in itself.

4.41 This section is organised in accordance with the key relevant issues identified by ComReg in this regard as a result of its analysis.

1. Is there a single relevant market for FVA combined with fixed voice calls?

2. Are residential and non-residential FVA customers in the same relevant market?

3. Are all forms of fixed narrowband access in the same relevant market as the candidate FVA product?

4. Broadband and the treatment of bundles: (i) is fixed broadband access an effective substitute for fixed narrowband access? (ii) Is there a single market for FVA whether sold inside or outside bundles, or are there separate FVA markets (a) Stand-alone FVA; and (b) Bundled FVA?

5. Are FVA and mobile access services in the same relevant market?

4.42 ComReg considers each of these issues in turn.

[140] ComReg also considered relevant provisions of the SMP Guidelines with respect to its assessment of product market definition; (The relevant product/service market comprises all products and/or services that are sufficiently interchangeable or substitutable with its products, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question (SMP Guidelines, paragraph 44).). In addition ComReg's assessment starts from the assumption that regulation in not present (i.e. in line with the modified Greenfield approach).

[141] See recital 27 of the Framework Directive, which is transposed into Irish law by the Framework Regulations.

1. FVA and fixed calls

4.43 This subsection considers whether fixed access and calls should be included within the same relevant market. In ComReg's view while there is evidence in both directions for FVA and fixed calls being in the same and different relevant markets, it is more appropriate and reasonable on balance that FVA and calls remain in separate markets for the purposes of the FVA market review.

4.44 ComReg must take the utmost account of the 2007 Recommendation[142] which defined Market 1/2007 as "*the provision of a connection or access (at a fixed location or address) to the public telephone network for the purpose of making and/or receiving telephone calls and related services*" (typically referred to as narrowband telephony services).[143] The FVA Market has been deemed susceptible to ex ante regulation by the European Commission.[144]

4.45 In the FVA Consultation, ComReg prospectively considered whether there is a distinct market for FVA (e.g., line rental only) or a single FVAC market.[145] It found it likely that there are economies of scope associated with the joint supply of FVA and calls.[146] It also found a high degree of demand for voice plans, which implied that there were some transactional complementarities for users.[147] ComReg accepted that there was a link between choice of FVA supplier and choice of making calls. However, it also accepted that there is an increasing range of alternative options for making calls. ComReg's view was that end-users typically use the same FVA provider for FVA as for calls, but that there are more recurring opportunities to switch away from the FVA provider to obtain calls from an alternative calls provider.[148]

[142] ComReg acknowledges that the 2007 Recommendation is currently under review by the European Commission and a revised Recommendation is expected later this year. Notwithstanding, until the revised Recommendation takes effect, ComReg is obliged under European Regulatory Framework to have due regard to the 2007 Recommendation. Ultimately however and notwithstanding the draft European Commission Recommendation and the current European Commission Recommendation, ComReg conducted its market analysis with an open mind with respect to Irish circumstances while at the same time taking the utmost account of European Commission guidance.

[143] Explanatory Note to the Recommendation p.21.

[144] The retail calls markets in Ireland are no longer listed as markets susceptible to ex ante regulation, see Market Analysis, Retail Fixed Calls Market Review, Assessment of the Three Criteria for ex ante Regulation and Withdrawal of SMP Obligations, ComReg Document 07/111, Decision 07/07, December 2007 (the '2007 Retail Calls Market Review').

[145] FVA Consultation paragraphs 4.21 to 4.56.

[146] FVA Consultation, paragraphs 4.25 to 4.29.

[147] FVA Consultation, paragraphs 4.30 to 4.39.

[148] FVA Consultation, paragraphs 4.44 to 4.51.

4.46 ComReg's preliminary view was that on balance, FVA and calls are in separate markets. Therefore, the FVA market definition analysis should not include fixed calls, primarily on the basis that there is scope for competitive constraints to emerge differently for FVA and calls. ComReg noted that regardless of whether access and calls belong in the same relevant market as FVA, or otherwise, the assessment of SMP was unlikely to differ.[149]

4.47 In light of the feedback in response to the FVA Consultation ComReg considered further in the Supplementary Consultation whether FVA and calls should be considered as part of the same market. In particular, Oxera conducted a SSNIP test on a hypothetical focal product of FVAC.[150] Oxera's additional analysis of the SSNIP evidence suggests that most consumers would not purchase access and calls separately in response to a SSNIP on standalone FVAC and therefore that they may belong within the same market (and that a wider bundle is not part of this market).[151] However, consistent with ComReg's observation in the FVA Consultation, Oxera also noted that the precise definition has limited implications for remedies for the FVA market since it is unlikely to alter a finding of SMP.[152]

Consultation Responses and ComReg Analysis

4.48 The majority of respondents agreed that FVA and fixed calls are in separate relevant markets, whereas Eircom disagreed.

4.49 Magnet was uncertain stating that there are arguments for and against having FVA and fixed calls in separate markets. It highlighted that FVA is required to provide a broadband connection although fixed voice calls may not actually be provided (i.e. place call barring on the line which would still allow the provision of VOIP calls as only the narrowband element of the line would be restricted). As such, in this respondents' view you can't have fixed voice calls without having FVA but you can have FVA without having fixed voice calls. According to Magnet, this leads to differing competitive constraints as different people see value in the two elements but more value is placed on the FVA on its own as the starting point to either acquire broadband or acquire fixed voice or both in a bundle.

[149] FVA Consultation paragraph 4.56.
[150] Oxera report, section 3.2.2 to section 3.2.4, p 22 to 26.
[151] Oxera gave a caveat that this calculation should be considered indicative only, owing to the limitations noted in Box 3.1 of the Oxera Report.
[152] Oxera report, p 26.

4.50 Eircom (Frontier) considers FVA and calls to be complementary and, hence, should be considered as part of the same market. Their conclusion is based on the almost entire elimination of the stand-alone CPS customer base, as well as, in their view, the 99% of consumers who source their FVA and fixed calls service from the same supplier under a single bill. Eircom notes an exception to this are those consumers who purchase a managed VOIP service. In that instance, however, the broadband access service is effectively a substitute for the FVA service. Eircom via its advisors Frontier argue:

- The majority of consumers purchase FVA and calls from the same FSP. Only 1% of consumers purchase calls separately from FVA.[153] This trend is reflected at the wholesale level where FSPs now favour the purchase of Eircom's SB-WLR or similar wholesale products available from BT,[154] over CPS access;[155]
- Only 15% of consumers think about calls and access separately;[156] and
- Economies of scale and scope.

4.51 ComReg agrees with Eircom that FVA and fixed calls can complement each other–purchasing fixed calls (as well as related telephony services, such as internet access) inherently requires some form of fixed access. FVA and fixed calls are not, however, substitutes. They are distinct products that can be purchased separately.

4.52 The key question, in ComReg's view, is whether consumers would unpick the FVAC bundle by substituting the calls part of the bundle with some other type of call (mobile, Skype, etc.); and whether they may switch away to other products, such as, a broadband bundle, or dropping voice altogether.

[153] FVA Consultation, paragraph 4.47.
[154] In some cases BT re-sells Eircom's SB-WLR Service and/or combines Eircom's WLR with its own wholesale voice service.
[155] According to ComReg Quarterly Report data, at Q3 2013, there were 375,351 SB-WLR access paths having risen from 352,052 in Q3 2011.
[156] The 2012 Market Research, Slide 28.

4.53 Vodafone's view is that there is a price sensitivity which causes changes in end-user purchasing decisions from purchasing disaggregated services to bundled services. This is supported by the 2012 Market Research which indicates that FVAC is now typically purchased as part of a broader 'bundle of services' most commonly alongside broadband.[157] Consistent also with Vodafone's view that there is nothing to indicate that a similar price sensitivity would not operate in the opposite direction as bundle pricing rise, ComReg observes that bundled offers are constantly evolving in light of technological change and changing consumer preferences leading to bundling and unbundling over time; in particular, regarding fixed retail subscriptions by type, narrow single play (e.g., FVAC) has fallen from 54% to 37% in the period since Q1 2010 whereas FVA within wider bundles, double play and more recently triple play bundles has increased from 46% to 63% over the same period.[158] While these developments are likely to reflect the complementarity at the retail level between FVA and calls and, on the other hand, between FVAC and other services, it also indicates the potential for different prospective substitution possibilities for consumers including the calls element.

4.54 One example of this would be where certain individuals who purchase FVA and calls ultimately do not use any of the calls and instead use an alternative method for communication. This might arise where consumers purchase fixed connection solely to access broadband, such as, product offers by Vodafone and Magnet.[159] Technically there is a one way dependency between calls and access. Having purchased FVA or FVAC, the ability to make calls on a pay-as-you-use basis, in many cases a consumer remains free to make calls via other networks, devices and technologies, such as, calling cards, VOIP enabled devices (PCs, personal tablets etc.) or mobile phones. Essentially consumers have more options /alternatives when making calls. In this way there may be partial unpicking of the FVAC bundle. For some consumers it may be preferable to unpick the bundle and hence drop the fixed line and use mobile only. This indicates that the decision to purchase access is discrete, whereas the decision to purchase calls is continuous. Accordingly, Vodafone believes there are potentially choices available to end customers as regards their provider for calls which are quite distinct for their choices as regards their provider for FVA.

[157] The 2012 Market Research, slides 19 (residential respondents) and 92 (business respondents).
[158] ComReg Quarterly Report, December 2013.
[159] For example, Magnet's Simply Broadband and Vodafone's One Net Express.

4.55 This would be consistent with the argument that the availability of making calls through other means (e.g., mobile, Skype) has a relatively limited impact on the decision to purchase a FVA line in the first place. This is especially the case where people purchase FVA, as opposed to other forms of access, in order to avail themselves primarily of ADSL broadband rather than to access a voice service, particularly in a world where there is little naked DSL product (as discussed below consumer preference continue to evolve and with the increased take up of bundles possibly the voice element of the bundle may become relatively less significant over time). This implies that individual elements, such as, FVA, calls and broadband are not so intrinsically linked as to justify the definition of a single FVAC market. ALTO and BT also believe that customers choose what access to use for certain types of call (international versus national, etc.) and thus FVA and voice calls markets may develop at difference paces.

4.56 While ComReg agrees that FVA and calls can often complement each other– purchasing fixed calls (as well as related telephony services, such as internet access) inherently requires some form of fixed access –ComReg’s reasoning that there is scope for competitive conditions in FVA and calls to evolve separately over the review period remains valid.

4.57 ComReg notes that the European Commission's Explanatory Note to the 2007 Recommendation made a distinction between access (a network connection) and usage (actually making calls) components of a retail telephone service. The majority of NRAs also make this distinction. Notably, the Netherlands is, to date, the only Member State in which voice calls are included as part of a broader voice access market.[160] ComReg furthermore notes that whether the market is identified as FVA or FVAC the assessment of SMP and/or the regulatory outcome is unlikely to significantly differ, as in each case the bottleneck is fixed access.[161] For example, FSPs currently use supporting wholesale remedies in the retail FVA markets which require Eircom to provide “a wholesale equivalent for retail offerings offered by Eircom in markets” on a non discriminatory basis[162] to supply these services in the retail market. For example, FSPs can use SB-WLR, currently regulated on retail minus basis, to compete for voice only subscriptions, and CPS to compete on just calls rather than access and calls.

[160] See Commission decision concerning Case NL/2012/1306: Fixed Telephony Markets in the Netherlands.
[161] It is noted that referring to national circumstances, the Dutch NRA defined the relevant market as including both fixed telephony access and voice calls services. The European Commission was not convinced by the NRA’s arguments regarding market definition, but concluded that the exact scope of the market definition did not affect the regulatory outcome (see further Case NL/2008/0821).
[162] Paragraph 5.5(i), ComReg 07/61, Retail Fixed Narrowband Access Markets, 2007 (notified as IE/2007/0632: Retail Fixed Narrowband Access Markets).

Conclusion

4.58 ComReg finds that FVA and fixed calls are in separate markets primarily on the basis that competitive conditions in access and calls have the potential to evolve separately during the market review period. As ComReg explains above, the competitive pressures for access and calls are likely somewhat different as consumers may partially unpick calls where as this is not the case for access which is a discrete decision. Further, ComReg is of the view that, regardless of whether calls are included in the same relevant market as FVA, or otherwise, as set out in detail below, the assessment of SMP is unlikely to significantly differ and, hence, the precise definition has limited implications for relevant remedies to be imposed in the market if any as in both cases the bottleneck' is fixed access.

2. Residential versus non-residential

4.59 In this subsection, ComReg considers whether FVA sold to residential and business customers are in separate markets. ComReg remains of the view that there is a single market for all user types whether residential or business, as it proposed in the FVA Consultation.

4.60 In the FVA Consultation, ComReg proposed that SME businesses and residential customers are in a single FVA market. This preliminary view was based on the specifications of connections for SME businesses and residential customers being similar and there being a chain of substitution[163] between business and residential FVA products. In addition, there was a high degree of supply side substitutability.[164]

[163] See paragraph 57 of the Commission Notice on Market Definition which notes that, in certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. A chain of substitution may exist, for example, where a customer would not substitute from product A to product C to avoid a SSNIP, but would substitute to an adjacent product B. This may suggest that products A and B are in the same market but that products A and C are in separate markets. However, if there are customers who would substitute from product B to product C to avoid a SSNIP then this may also suggest that products B and C are in the same market. Because of a chain of substitution between products A and B and products B and C, products A and C would be defined as in the same market.

[164] FVA Consultation, paragraphs 4.82 to 4.111.

4.61 On the demand side, each customer type is primarily buying relatively homogeneous FVA products (i.e. the same infrastructure is being used to supply their voice and related services). Pricing of the standard FVA service (i.e. PSTN and ISDN BRA) is identical for both residential and business users. However, it was noted that there may be some differences between business FVA products and residential products in terms of the calling and customer support services attached to the package. For example, the 2012 Market Research also revealed that businesses make a greater proportion of their outgoing calls using the FVA connection compared to households. Many businesses require a fixed phone line as their primary point of contact for customers and therefore they may be less sensitive to the price of FVA than residential consumers.[165]

4.62 Despite these variances, ComReg, consistent with BEREC's viewpoint, considered, based on corroborative evidence consistent with the European Commission's SMP Guidelines and Notice on Market Definition, that there was sufficient overlap between end-users with slightly different demand profiles such that a chain of substitution linking all categories of end-user can be identified:[166]

- There is a significant cross-over between the ways that business customers use FVA compared with the way that residential customers use the service;[167]
- The 2012 Market Research showed that 60% of businesses surveyed are on standard and not customised contracts in relation to their fixed telephony services, only 20% of businesses reported customising their contracts while a further 12% of business customers actually purchased a residential fixed telephony contract being content with a residential product;
- The overlap in the products consumed was likely attributable to the predominantly SME profile of businesses in Ireland;[168]
- Since there are generally no restrictions on residential customers taking out a business product or *vice versa*, products aimed at each customer type, particularly at the margins, will place some degree of pricing constraint on each other; and

165 FVA Consultation, paragraph 4.92.
166 BEREC Report on relevant market definition for business services – http://www.erg.eu.int/doc/berec/bor_10_46rev1a.pdf
167 FVA Consultation, paragraph 4.93.
168 FVA Consultation, paragraphs 4.90 and 4.94.

- Although the price range varies between products offered to business and residential customers, ComReg highlighted the significant cross-over between the standard products available to business and residential customers online.[169]

4.63 On the supply side, many FSPs currently supply both residential and business products indicating the ability of FSPs to engage in sufficient supply-side substitution. FVA suppliers not currently active in both segments could find it commercially viable to broaden their offerings to serve adjacent customer groups. FSPs can compete in both segments nationally primarily through resale of wholesale SB-WLR.

Consultation Responses and ComReg Analysis

4.64 ComReg's proposed decision that there was no residential/non-residential split and that instead it was appropriate to split the market between the products of LLVA and HLVA was not, in general, disputed by the industry.

4.65 Magnet, ALTO, BT and Eircom all consider that because the same underlying network is physically used to deliver the products, while there are some differences in the product characteristics, there is sufficient substitutability between the different products – businesses and consumers do switch between business and residential products. In addition, Vodafone noted that on the demand side the interface between residential demand profile and the business demand profile has a significant overlap with packages targeted at higher end residential customers overlapping with lower end business offerings. The scope for both demand and supply substitutability would in Vodafone's view indicate that at least for LLVA these two pools of end-user demand are in the same retail market.

4.66 Further, Eircom noted that the market for HLVA is characterised exclusively by business customers and therefore, it is unnecessary to make a distinction between business and residential customers in this market. ComReg agrees with Eircom that there is scope for breaks in the chain of substitutability, and varying competitive conditions for high-end business connectivity and related products. ComReg below considers whether it is appropriate to have separate markets for higher and lower level fixed voice access by reference to market national conditions.[170]

[169] FVA Consultation, paragraphs 4.96 to 4.106.
[170] In accordance with the European Commission guidance as set out in its Notice on Market Definition.

Conclusion

4.67 ComReg considers, in particular, for the reasons set out out in the FVA Consultation[171] and above and in light of the broad support among respondents for ComReg's analysis and view that there is a single FVA market for business and residential customers, that it is unnecessary at this time to make a distinction between business and residential customers in the FVA market (consistent with the 2007 Recommendation).

3. Lower and higher level narrowband access

4.68 In this subsection ComReg considers whether all forms of narrowband access are in the same relevant market. ComReg remains of the view that there are separate markets for lower-level voice access ('LLVA') and higher-level voice access ('HLVA') markets as was the case in the 2007 market review and as proposed in the FVA Consultation. In addition, regarding HLVA, ComReg finds that it is more appropriate to narrowly define this FVA market and exclude leased lines as well as SIP trunking.[172]

4.69 ComReg evaluated a possible distinction between various narrowband FVA products,[173] and examined whether it is more appropriate to define the FVA market in terms of product type, rather than user type as set out above. ComReg found distinctions between narrowband markets for lower level (PSTN, ISDN BRA and FWA) and higher level (ISDN FRA and PRA) narrowband access, the latter access products being demanded by non residential users.

[171] FVA Consultation, paragraphs 4.82 to 4.111.
[172] This is sometimes referred to as IP Business Trunks or IP Trunks –an exchange line service that uses IP for voice and data transmission and Session Initiation Protocol ('SIP') for the telephony control signalling. SIP Trunking services are generally multi-line services that are used to provide exchange line services to modern IP PBXs that support this type of interface.
[173] FVA consultation, paragraphs 4.112 to 4.131.

4.70 Concerning lower level access, services over PSTN, FWA[174] and ISDN BRA are interchangeable to a sufficient degree. The latter products offered the same functionality, for the same end use and operate under similar price constraints. For these reasons, FVA consisting of PSTN, FWA and ISDN BRA were considered as being in the same relevant FVA market (i.e. LLVA). However, higher level FVA via ISDN FRA and ISDN PRA were considered as being in a separate relevant FVA market (i.e. HLVA). ComReg based this conclusion on the fact that these two levels of FVA are distinct due to breaks in the chain of functional and pricing substitutability. ComReg considered in terms of pricing substitutability that LLVA is unlikely to be a demand side substitute for HLVA given the retail price differences that exist between the two FVA categories. A distinct break in the chain of substitution appears to arise at the 16 channel level.[175] In addition, ComReg considered that there was limited scope for effective supply-side substitution from higher rate ISDN FRA and PRA to basic PSTN access.

4.71 Concerning the distinct HLVA market identified, ComReg considered whether there is a broader HLVA market inclusive of alternative fixed access technologies such as, fibre based SIP trunking (i.e. broadly an exchange line service that uses IP for voice and data transmission and Session Initiation Protocol ('SIP') for the telephony control signalling) or NGA bitstream type access.[176] ComReg was of the preliminary view that over the period of this FVA review it was more appropriate that the HLVA market be narrowly defined to include ISDN FRA and PRA access products only. Leased lines provide only transmission capacity and thus in ComReg's view do not act as a constraint on HLVA services which typically provided switched voice and data access services.[177] This was supported by the 2012 Market Research –no business reported using leased lines as the platform to access their fixed voice call services. It was unlikely that there would be supply side substitution from leased lines into retail ISDN FRA and PRA for higher level FVA supply. The sunk cost of converting a leased line ISDN FRA or PRA is significant as well as the fact that HLVA are mature products subject to potential future decline.

[174] These services operate over a fixed network except for the final link to a premise which is provided by a wireless signal (and hence is a fixed line wireless connection).
[175] FVA Consultation paragraphs 4.113 to 4.123.
[176] FVA consultation paragraphs 4.129 to 4.131.
[177] See paragraphs 4.129.

4.72 Equally, substitutability of HLVA by SIP trunking was unlikely to be sufficiently prompt or immediate. As set out at paragraphs 4.130 to 4.131 of the FVA Consultation, while SIP trunks were available to some business users that these services are not yet well established in the market and there was likely no strong impetus to switch away from ISDN FRA and PRA to these services primarily because of uncertainty regarding the robustness of SIP standards, replacement cost of the PABX and other customer premise equipment upgrade likely to be subject to the timing of a business procurement process and contracts renewal.

Consultation Responses and ComReg Analysis

4.73 In broad terms all respondents agreed with ComReg's preliminary conclusions that there are distinct markets for LLVA and for HLVA. According to ALTO and BT, LLVA and HLVA products are distinct as the former primarily address singleton or small groups of end users whereas the latter can support larger numbers of end users, with additional features (e.g. DDI services) on potentially larger or private PABX platforms with multiple channels. Although Eircom agreed that LLVA and HLVA are distinct markets, nevertheless, it again emphasized that, in its view, fixed access and calls are part of the same market and that the relevant markets should be defined accordingly.

4.74 Concerning the specific scope of the HLVA market, most respondents agreed (Vodafone, ALTO, Telefonica, and BT) with a narrowly defined HLVA market including ISDN FRA and PRA only; however, two respondents Eircom and Magnet disagreed.

4.75 Eircom submitted that currently the access market is in a state of transition and that there is less demand for high level traditional voice access in the business base generally. In addition, Eircom believes prospectively that it is appropriate to include SIP trunking in the HLVA market definition, and that the impact of SIP trunking on HLVA over the next 2 years will be significant, with a continued levelling off and decline in demand for traditional HLVA services. Magnet similarly believes that IP voice should be included in the HLVA market or at a minimum closely monitored, particularly, hosted PBX's that do not require new purchase. Magnet considers that this product will be established as a popular product within the lifetime of the review due to the speed and adoption of new technology and telecommunications products.

4.76 In response to these points, ComReg has kept under close review the demand for traditional HLVA services and developments regarding SIP trunking which generally is targeted at SMEs. So far, ComReg observes that demand for high level traditional voice access in the business base has remained broadly stable–there were (59,344) fractional and (183,083) primary ISDN access paths in the Irish market in Q4 2013 (See Figure D, Appendix 4). In addition, ComReg considers that the impact of SIP trunking on HLVA over the next 2 years is not yet clear and so ComReg will monitor this. The 2012 Market research indicated that DSL was the technology of choice for businesses needing internet connectivity and not SIP trunking. Based on available data SIP trunking services have yet to emerge on any significant scale which suggests that SIP is not a direct replacement for higher level ISDN at least over the period of this review. From a supply side perspective, substitution of ISDN FRA and PRA by these emerging substitutes is not sufficiently prompt or immediate to justify a broader market definition in relation to HLVA at this time. Furthermore, ComReg consistent with the European Commission guidance concludes that access services provided over leased lines fall outside the boundary of the relevant HLVA market.[178]

4.77 Overall having considered a variety of factors (qualitative and quantitative), ComReg considers that there is currently no evidence indicating that SIP trunking services provided in conjunction with leased lines or possibly NGA bitstream are likely, within the short term, to pose an effective competitive constraint on the provision of high level ISDN. On this basis, ComReg concludes that IP solutions, including SIP trunks, fall outside the boundary of the relevant HLVA market at this time. However, ComReg will consider SIP trunking and other possible emerging substitutes in the SMP assessment.

Conclusion

4.78 ComReg's proposed decision that it was appropriate to split the market between the products of LLVA and HLVA was not, in general, disputed by the industry. Therefore, having regard to respondents' views and the analysis set out in the FVA Consultation, notably demand-side considerations including functional/pricing differences, ComReg has decided that FVA provided over ISDN FRA and ISDN PRA fall within the same HLVA market, with this being distinct from the LLVA market (PSTN, FWA and ISDN BRA). ComReg notes that a number of other NRAs such as the UK and the Czech Republic have adopted similar market delineation.

[178] European Commission Explanatory Note to the draft Recommendation (2014), Page 25.

4.79 Having regard to respondents' views and the update of the evidence set out in the FVA Consultation, ComReg has furthermore decided that HLVA should be narrowly defined consisting of access via ISDN FRA and PRA. However, ComReg acknowledges that the potential exists for SIP trunking to become more prevalent as Eircom transitions to its NGA network which ComReg will continue to keep under close review.

4. Broadband and Bundles

4.80 Having considered at paragraphs 4.25 to 4.37 that the appropriate starting point is standalone FVA, ComReg further considers how to treat broadband and bundles at the market definition stage by reference to the following key questions:

(i) Is fixed broadband access an effective substitute for fixed narrowband access?

(ii) Is there a single market for FVA whether sold inside or outside bundles, or are there separate FVA markets (i) Standalone FVA; and (ii) Bundled FVA?

4.81 ComReg considers each of these issues in turn.

(i) Is fixed broadband access an effective substitute for fixed narrowband access?

4.82 Starting with standalone FVA as the focal product, ComReg considers whether broadband is an effective substitute for a fixed narrowband connection in the delivery of voice services.[179] ComReg finds that broadband connections with managed VOIP are included in the relevant FVA market, but that unmanaged VOIP is excluded, as proposed in the FVA Consultation.

[179] FVA Consultation paragraphs 4.132 to 4.168.

4.83 In response to notifications made by NRAs under the European Regulatory Framework, the European Commission has underlined that access to the public telephone network for the purposes of fixed telephony services may be supplied by a variety of technical means, including over broadband internet connections.[180] The European Commission has furthermore underlined that in order to justify the inclusion of IP-based products in the retail access market, such products must have the same functionalities as PSTN/ISDN access (in terms of numbering, access to emergency services, ability to receive faxes, ease of use, ability to use standard end-user equipment, etc.), should be priced in a comparable range, and perceived by end users as substitutes. ComReg was cognisant, inter alia, the principle of technological neutrality, and the European Commission comments letters[181] in its analysis, which was further evaluated in the Supplementary Consultation. ComReg has from a forward looking perspective considered whether alternative broadband-based voice access services are sufficiently substitutable with retail narrowband FVA to the extent that they constrain a HM in the provision of narrowband FVA.

4.84 Regarding functional substitutability, ComReg's preliminary view[182] was that broadband connections that offer FVA functionality, that is, by means of a managed VOIP service, are functionally similar to a narrowband FVA service for a significant segment of end users. ComReg considered that broadband connections are increasingly facilitating the delivery of managed VOIP and may increasingly act as a constraint on narrowband PSTN/ISDN voice and, ultimately, the PSTN/ISDN connection. These included managed VOIP provided over broadband connections (CATV, the various families of Digital Subscriber Line broadband technology ('xDSL'), FWA and alternative fibre networks). Nevertheless, as noted in the FVA Consultation a significant proportion of broadband products did not include managed VOIP and were unlikely at least in the period of the review to be an effective substitute for narrowband FVA. This was, in part, because a large number of retail broadband connections were provided over a DSL connection, which in Ireland can only be purchased coupled with a narrowband connection to deliver FVA. At the time of the FVA Consultation naked DSL was not offered on any significant scale by FSPs including Eircom. As set out at paragraph 4.35 above, although Eircom launched naked DSL in July 2013, there have not been any significant developments of managed VOIP services by FSPs over wholesale broadband products purchased by them from Eircom.

[180] See also the Explanatory Note to the Recommendation (2007), p22.
[181] See, for example, Cases SE/2009/0965 and DE/2009/0897 and Cases IT/2009/0890, HU/2010/1095 and AT/2010/1117-1118 which discussed equivalence in functionalities.
[182] FVA Consultation, paragraphs 4.137 to 4.146.

4.85 In addition, unmanaged VOIP over a broadband connection (e.g., Skype, Viber) is unlikely to be considered a suitable substitute for a narrowband FVA service for the majority of end users in light of not yet meeting the functional characteristics similar to traditional narrowband FVA in relation to telephony.[183] This type of substitution would only be likely to occur at the margins, at least during the review period and, therefore, in ComReg's view would not be sufficient to constrain narrowband FVA.

4.86 ComReg compared pricing and marketing for a selection of potential substitutes for narrowband FVA – basic narrowband product variants (a standalone narrowband FVA service and one that includes a broadband service) and the entry level offerings from four managed VOIP suppliers.[184] ComReg highlighted that in line with its functional capacity, narrowband FVA is priced significantly lower than the potential managed VOIP-based substitutes. However, ComReg further highlighted that the prevalence of bundling of fixed telephony with broadband and/or Pay TV leads to varying levels of product differentiation in the purchase of fixed telephony. This, in turn, adds complexity to purchasing decisions made by end-users with respect to fixed telephony (within the bundle or otherwise), as well as complexities associated with understanding responsiveness to relative price changes.

4.87 Given the practical difficulties involved in applying a hypothetical SSNIP test between differentiated products, ComReg assessed market trends for evidence of actual substitution between narrowband FVA and broadband managed VOIP access. In this respect, the general trend in Ireland was that consumers and businesses increasingly purchase broadband whether standalone or as part of a bundle with other services,[185] and there was evidence of narrowband FVA customers switching to broadband with managed VOIP (primarily those of UPC),[186] which, in ComReg's view, suggested that a substantial proportion of end users (having made a decision to purchase broadband) consider broadband with managed VOIP to be a suitable substitute for narrowband PSTN/ISDN voice services despite only being available in a bundle with broadband and/or TV. ComReg noted that the growth in UPC's managed VOIP customer base had corresponded with a fall in the number of total narrowband subscriptions since 2007. However, there was still a significant segment of consumers which do not currently have a fixed broadband connection and which do not value it sufficiently to switch to a bundle incorporating FVA with broadband (or TV) in response to a SSNIP in their narrowband FVA service.

[183] FVA Consultation, Chapter 3 and paragraphs 4.137 to 4.139.
[184] FVA Consultation paragraph 4.147 to 4.160.
[185] FVA Consultation, paragraphs 4.80 and 4.81 and 4.142.
[186] FVA consultation, paragraphs 4.157 to 4.160 and slide 40 of the 2012 Market Research.

4.88 From a supply-side perspective, broadband connections currently supplied without managed VOIP could also be included in the market if the provider could or would be likely to switch to supplying a managed VOIP product in response to a SSNIP in the price of retail narrowband FVA. However, ComReg considered that there are likely to be additional costs, and time, involved in the launch of a managed VOIP service over a hypothetical wholesale naked bitstream connection (at the time of the FVA Consultation naked DSL was not offered on any significant scale by FSPs including Eircom). ComReg considered that given the uncertainty around the timing and effectiveness of these potential supply side constraints, this form of constraint was be better addressed in the SMP assessment.

4.89 ComReg was of the preliminary view that, looking at the FVA market as encompassing standalone and sold in a bundle, as one single market, on a forward-looking basis, broadband connections used to deliver managed VOIP are likely to fall just within the boundary of the same market as narrowband FVA over the timeframe of the market review. ComReg noted that inclusion of managed VOIP broadband connections in the relevant FVA market ensured that the competitive impact of UPC in particular on a forward-looking basis was fully accounted for in the analysis of existing competition under the SMP assessment.[187] Broadband subscriptions that do not include a managed VOIP service do not fall within the relevant FVA market.

Consultation Responses and ComReg Analysis

4.90 The majority of respondents including Eircom agreed that it is appropriate to define the FVA market more broadly to include PSTN and ISDN BRA over copper as well as broadband connections used to deliver managed VOIP which may include cable, fibre, FWA and DSL.

[187] It is noted that the European Commission accepts the inclusion of broadband access services with the relevant market, see for example, Case AT/2008/0832; Case DE/2009/0897; Case IT/2009/0890, Case SE/2009/0965 and more recently CZ/2014/1582.

End users are gradually switching from standalone FVA to broadband and bundles

4.91 As set out at paragraph 4.84 some end users have switched from PSTN based services to broadband with managed VOIP (mainly over UPC's cable network) indicating that the latter services are considered an effective (functional) substitute for narrowband FVA. For example, the growing uptake of UPC's FVA services amongst households (Figure F Appendix 4) indicates that its FVA product is seen as a credible substitute for end users of broadband which also value a FVA service. This is further supported by evidence from ComReg's 2012 Market Research revealing that UPC has gained a significant percentage of FVA 'switching customers' over the last three years.[188] At Q4 2013, UPC had 293,500 FVA subscribers, representing approximately 19% of overall FVA subscriptions, up from 205,800 FVA subscribers (or 16%) in Q2 2012. Overall, ComReg estimates that there were over 329,608 managed VOIP subscribers in Ireland as of Q4 2013 which represents over 22% of total FVA subscriptions.[189]

4.92 The growth in broadband with managed VOIP corresponds with a levelling off and decline in PSTN and ISDN subscriptions (albeit demand for narrowband FVA has remained broadly stable more recently). This migration is consistent with managed VOIP over broadband generally being a competitive constraint on narrowband FVA for a substantial proportion of end users. Consistent with Ecory's findings,[190] therefore, it is clear that in Ireland broadband with managed VOIP is gaining market share from Eircom's PSTN/ISDN lines. ComReg notes that eight Member States include fixed broadband access enabling managed VOIP over broadband to M1/2007 as they consider that substitution becomes substantial in their territories.[191]

4.93 This migration is consistent with managed VOIP over broadband generally being a competitive constraint on narrowband FVA for a substantial proportion of end users. However, as noted earlier, while Eircom's current limited supply of VOIP may change for customers subscribing to NGA broadband, for its remaining customers, Eircom will continue to deliver traditional PSTN FVA over its copper network for the next few years. Further, ComReg recognises that there remains a significant segment of end-users that do not currently have/utilise a fixed broadband connection and, for that cohort of end-users; broadband with managed VOIP is unlikely to provide an effective substitute for standalone narrowband FVA. It is noted that 37% of end users purchase standalone FVA or FVA not bundled with broadband. It is furthermore noted that almost one third of households do not so far have a fixed broadband connection.

[188] The 2012 Market Research, slide 40.
[189] ComReg Quarterly Key Data Report, Q4 2013 (page 22).
[190] Ecory's report 2013, p79 to 80.
[191] Ecory's report 2013, p78.

Pricing seems indicative of a price 'gap' for certain end users

4.94 ComReg has updated its comparison of pricing and marketing for a selection of potential substitutes for narrowband FVA (see Table 2).

Table 2 Selection of alternative FVA products

Platform	Product name	Price in 2012	Price in 2014
Narrowband[1]	Telephone access (narrowband)	€25	€25
Narrowband and DSL[2]	Telephone access (narrowband), Broadband	€40	€30 first six months, €45 thereafter
Narrowband and VDSL[3]	Telephone access (narrowband), Broadband	-	€30 first six months, €45 thereafter
Cable (UPC)[4]	Broadband/telephone access (managed VOIP)	€44	€12 first six months for new customers, €30 thereafter
	TV/telephone access (managed VOIP)	€33	€19.50 first six months for new customers, €49 thereafter
FWA[5]	Broadband/telephone access (managed VOIP)	€30 (Digiweb and Imagine)	€29.95 (Digiweb)
	Broadband/telephone access (managed VOIP)	-	€19.00 for new customers only (Imagine)
Fibre[6]	Broadband/telephone access (managed VOIP)	€39.95 (Magnet)	€43.98 (Magnet)

[1] Prices as of May 2014. Available on the Eircom website: https://secure.eircom.net/talktime/talktime-evolution-flow?execution=e3s1
[2] https://www.eircom.net/broadband/ngbProductDetails
[3] https://www.eircom.net/broadband/productDetails?id=bu_23
[4] http://www.upc.ie/bundles/broadband-phone/ and http://www.upc.ie/bundles/tv-phone/
[5] http://www.digiweb.ie/home/bundles/metro-bundle and http://www.imagine.ie/wimax_bundles.html
[6] http://www.magnet.ie/

4.95 As noted in the FVA Consultation broadband with managed VOIP may not, depending on its retail price relative to the price of narrowband FVA, be an effective substitute (any decision to purchase FVA over broadband would entail a consideration of a broader range of price/quality trade-offs and valuations beyond simply the price of FVA). As noted in the FVA Consultation for consumers without broadband or who have a preference for standalone voice services, the requirement to purchase broadband service and associated VOIP mediation hardware is likely to be a constraint on consumers switching away from standalone FVA.[192] As broadband suppliers such as UPC, Magnet Digiweb and Imagine do not supply standalone voice over their own broadband network, the relevant price comparison appears to be between Eircom's narrowband FVA charge of €25 and cable or others cheapest package at €45 (after a promotional period of 6 months). On the one hand, there is recent evidence of switching by customers from standalone purchases to broadband bundles; on the other hand, there is evidence of some standalone FVA customers (particularly those who do not currently purchase broadband from any provider) who would be less likely to switch to a bundle in response to a SSNIP on FVA –the price 'gap' based on their valuation possibly being too large to move away from narrowband FVA.

4.96 Regarding the inclusion of broadband services in the relevant FVA market, the European Commission has pointed out that to underpin increased substitution between broadband and narrowband access, NRAs must demonstrate that as a result of a SSNIP customers would switch from a narrowband connection to a broadband connection only.[193] On the basis of the additional SSNIP and critical loss analysis[194] carried out by Oxera in the context of the Supplemental Consultation, Oxera is of the view that the evidence on whether FVA sold in a bundle belong to the same relevant market as stand-alone FVA is mixed. The SSNIP tests conducted based on survey evidence suggest that these products are not part of the same market. However, as noted at paragraphs 4.91 to 4.96, switching evidence indicates that for a substantial portion of end users broadband with managed VOIP services are considered an effective substitute for narrowband FVA.

[192] The FVA Consultation paragraph 4.69.
[193] European Commission staff working document on market reviews under the EU Regulatory Framework (3rd report), COM (2010) 271 final.
[194] Oxera Report, section 3.3. These results need to be treated with caution owing to limitations with the survey data (e.g., small sample sizes, ambiguity in responses). In this regard, ComReg was mindful to consider all relevant available information from a range of sources.

Future developments

4.97 Regarding FVA delivered over broadband networks using managed VOIP, as noted in the FVA Consultation, Eircom at the end of 2012 did not provide managed VOIP commercially on any significant scale. Eircom (and its wholesale customers through their purchase of SB-WLR) used its existing narrowband copper networks to deliver FVA. ComReg has monitored developments in relation to managed VOIP over xDSL including potential and actual entry by alternative FSPs. As noted earlier at paragraph 4.35 to date there have not been any significant deployments of managed VOIP by access seekers over wholesale broadband products purchased by them from Eircom (either using WBA or WPNIA products). Instead, where Line Share has been used by FSPs to provide broadband (at 64,397 lines take-up is currently very low), it has also involved FSPs purchasing SB-WLR to provide FVA. This means that a customer cannot usually substitute a narrowband service for DSL broadband with managed VOIP. Regarding any prospective constraint on narrowband FVA, the evidence with respect to managed VOIP over xDSL is less certain at this stage.

4.98 Although Eircom is currently rolling out an NGA network (as at 30 April 2014 it had passed ✄ premises), its copper based narrowband network is likely to be predominantly used for the foreseeable future, at least over the period of this review, to provide FVA to customers (and its SB-WLR service) located outside its NGA footprint, or to customers within the NGA footprint who are not purchasing NGA broadband. Eircom intends to ✄

4.99 Within at least the NGA area, ComReg would expect that an Eircom managed VOIP service would ultimately replace the traditional circuit switched voice over Eircom's copper based narrowband network.[195] However, recent evidence indicates that VDSL broadband subscriptions (either Eircom retail or Access Seekers providing retail services using wholesale VDSL purchased from Eircom) stood at ✄ as at December 2013. Although Eircom provides VDSL broadband it still provides FVA over its narrowband copper network. Upon the roll-out of Eircom's managed VOIP platform, ComReg considers that asymmetric switching is likely to occur away from narrowband FVA in particular for end users that value broadband, though given the relevant timeline such a development will not sufficiently constrain narrowband FVA over the period of the review.

4.100 In the future possibly an FSP, in light of migrating the majority of their customer base to standalone broadband or NGA broadband access products, may gradually start offering managed VOIP, at least to a subset of their customers, although this is unlikely, however, to happen on any significant scale during the lifetime of the review period. In addition, a scenario may prospectively arise where an operator delivers a standalone managed voice service equivalent to a standalone narrowband PSTN voice service. From a technical standpoint, it is possible that an operator could use a broadband access path to provide a standalone managed voice over IP/broadband as a product, but without also providing internet access. However, while this type of voice product is somewhat notional at this stage, to be technology neutral and noting the potential for this to emerge to one degree or another within the lifetime of this market review, ComReg includes them (consistent with for example the European Commission Notice on Market Definition) within the relevant market so that any future competitive constraints from such could be assessed. However, their inclusion at this point does not affect the SMP assessment later. The latter developments are consistent with BEREC's recent view that transition to IP networks will likely take more time than anticipated.[196] On that basis, ComReg agrees with Ecory's that, consistent with the current general trend, broadband with managed VOIP will likely become more widespread over time and that there is the potential for an increased shift towards FSPs employing these services instead of traditional voice access means.

[195] Eircom has indicated to ComReg in a presentation dated November 2013 that ✄ thus suggesting that its PSTN infrastructure will continue beyond the period covered by this market analysis.

[196] See BoR(14) 85.

Conclusion

4.101 Having regard to the initial analysis set out in the FVA Consultation, the updated general trend that consumers and businesses increasingly purchase broadband whether standalone or as part of a bundle with other services, as well as the updated actual evidence of narrowband FVA customers switching to broadband with managed VOIP, ComReg considers that on a forward looking basis broadband with managed VOIP falls within the boundary of the same relevant market as narrowband FVA over the timeframe of the current market review. As noted above, ComReg considers unmanaged VOIP connections do not fall within the relevant FVA market primarily because they are yet not functionally similar to PSTN/ISDN telephony. In the future possibly an FSP may start offering access with managed VOIP, at least to a subset of their customers, though this will not, however, happen on any significant scale during the lifetime of the review period. In addition, a scenario may prospectively arise where an operator delivers a standalone managed voice service equivalent to a standalone narrowband PSTN voice service.

(ii) Is there a single market for FVA whether sold inside and outside bundles, or are there separate FVA markets (i) Standalone FVA and (ii) Bundled FVA

4.102 In this subsection, ComReg considers whether it is most appropriate to Irish national circumstances to have a single FVA market (FVA whether sold inside or outside bundles) or, alternatively, separate FVA markets: standalone FVA and bundled FVA.

4.103 ComReg in the initial FVA Consultation proposed a broader LLVA market comprising narrowband access (PSTN and ISDN BRA), as well as, broadband access (cable, fibre, FWA and DSL) with managed VOIP (i.e. FVA whether sold inside or outside bundles). However, Eircom was of the view that the FVA market should be reconfigured to include two separate product markets: FVA and calls on a standalone basis and FVA and calls supplied within a wider bundle. The objective of the Supplementary Consultation was to inform where possible the scenario most appropriate to Irish national circumstances and consistent with the principles for market definition and competition law.

Consultation Responses and ComReg Analysis

4.104 Regarding whether to have a single FVA market inside and outside bundles or, alternatively, separate standalone FVA and bundled FVA markets, respondents' views overall were mixed.

- ALTO, BT and Telefónica considered that standalone FVA was a separate market to a bundle of FVA with other services;

- Magnet did not agree that FVA was in a separate market to bundles FVA, but did agree that consumers like to buy FVA and broadband from a single supplier; and

- Vodafone agrees with ComReg's view that the fixed voice connection component, irrespective of whether it is sold standalone or as part of a bundle, constitutes a relevant market in its own right. Furthermore, Vodafone did not agree that stand-alone FVA was a separate market, but agreed that FVA, whether sold as stand-alone or part of a bundle, was a separate market.

4.105 Eircom's view is that the FVA market should be reconfigured to include two separate markets, notably, Voice Only and Bundled Voice on the basis it believes that:

- Customers do not switch from FVA bundled with another service to standalone FVA (nor do they piece together various elements of a bundle), or vice versa;

- There are significant economies of scope between the provision of FVA and other elements of the bundle which implies a preference on the part of suppliers to provide both together; and

- There are different competitive conditions operating in these two markets.

4.106 In light of the feedback received in response to the FVA Consultation ComReg considered further in the Supplementary Consultation whether (i) a single wide LLVA market or (ii) two separate LLVA markets for standalone services and services sold in a bundle was more appropriate to national circumstances. In this respect, the FVA Consultation note possible fragmentation of the customer base with the take up of bundles:

- End-users wishing to avail primarily of broadband internet access combined in a bundle of higher value services, including voice as an add-on service (i.e. relatively more broadband centric where the perceived value of the fixed service has potentially moved from voice to internet access for multiple services) have additional choice in relation to their supplier of FVA.

- End-users wishing to avail of FVA only or primarily voice services based on PSTN and ISDN networks (and hence who are voice centric where the perceived value of the fixed service is voice) possibly have less choice of FSP.

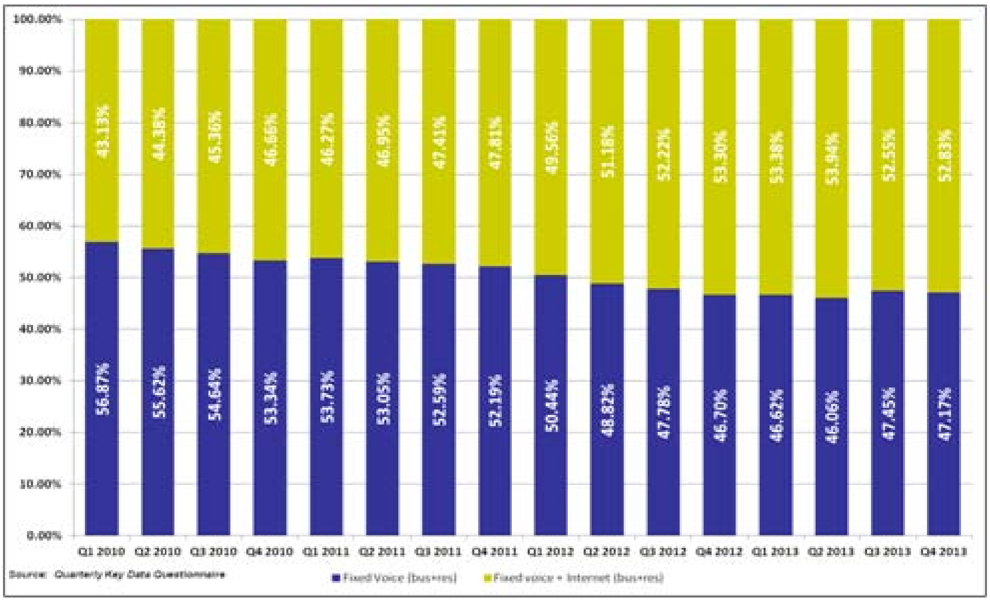
4.107 ComReg, as noted earlier at paragraphs 4.91 to 4.96 (and in the FVA Consultation), agrees in principle with Eircom that two cohorts of FVA can be identified. Only those customers that wish to have internet access will switch to broadband services – such switching, however, is not in general related to the willingness to avoid an increase in the price of narrowband FVA (i.e. a SSNIP) but to have access to additional services. In its Explanatory Memorandum to the 2007 Recommendation, the European Commission stated that while broadband connections are also capable of facilitating delivery of narrowband services, generally consumers will not upgrade to a broadband service solely for the purposes of accessing voice services. The European Commission acknowledges a certain degree of substitution exists between narrowband and broadband access. However, it is also of the view that while households with a broadband connection may be prepared to switch away from their narrowband connection, those without a broadband connection are not likely to switch given the focus of their demand.[197] ComReg has considered this view and its applicability to Irish National circumstances.

4.108 Decisions in general about which bundles of services to take are driven primarily by the character of the value-added components, and not necessarily by narrowband FVA in the bundle. As set out at paragraphs 4.94 to 4.101, customers' differing requirements, and the overall value for money that these bundles may offer, likely determine their choices, rather than the 'price' of the FVA component of the bundle. Some customers may get their FVA service from the supplier that provides the best content over TV networks, others still may get their FVA from the supplier that offers the cheapest broadband.

[197] The Explanatory note to the 2007 Recommendation p 22.

4.109 Regarding end-user behaviour, ComReg in the FVA Consultation examined a breakdown of subscription types which showed on the one hand a high proportion of end-users taking up bundles (tailored according to their preferences and valuation of the wider bundle of services).[198] However, ComReg in the FVA Consultation also observed that nearly half of FVA connections are purchased independently of broadband or other services.[199] Figure 5 updates the breakdown of subscription types since the FVA Consultation. It highlights that there is still a significant proportion of businesses and residential customers that purchase standalone FVA separate from broadband, thus a significant independent demand for FVA remains.[200] On the other hand, Figure 5 also highlights that end users are increasingly purchasing FVA bundled in particular with broadband. As noted in the FVA Consultation from a demand perspective it is arguable that the introduction of bundles has effectively fractured the customer base.

Figure 5 Percentage of FVA connections purchased with broadband and FVA on a standalone basis



[198] The 2012 Market Research, slide 19 and 92.
[199] FVA Consultation, paragraph 4.75 and Figure 19.
[200] FVA Consultation, paragraph 4.76, 4.77 and Figure 19.

4.110 For the reasons set out in the FVA Consultation, and based on a variety of factors set out at paragraphs 4.82 to 4.101 of this Decision, ComReg remains of the view that in theory a single broader LLVA market (i.e. FVA sold standalone and in a bundle) essentially including narrowband as well as broadband connections with managed VOIP (which may include cable, fibre, FWA and DSL) can on the one hand be defined. Magnet agreed with defining a single wide LLVA market, as proposed in the FVA Consultation. According to Magnet, this approach allows ComReg to adequately address potential competition concerns and design and apply remedies. Similarly, Vodafone agrees that FVA, whether sold as stand-alone or part of a bundle, is a relevant FVA market. This is consistent with Ecory's conclusion that "*the relevant retail market includes both narrowband (PSTN) and broadband (VOIP)*". In their view, because VOIP and PSTN are respectively tied to the broadband and narrowband access networks, broadband access may be considered a substitute for narrowband access.

4.111 In this respect, ComReg acknowledges that when looking at access level substitution it is relevant that suppliers are increasingly providing bundles that include telephony, broadband and very recently pay TV. There is evidence that the prevalence of broadband bundles in Ireland is now strong. In Ireland, take up of bundles of voice with another non voice product grew from 46% in Q1 2010 to 63% in Q4 2013.[201] This is currently dominated by the dual play (fixed telephony and broadband) bundles (Appendix 4, Figure I). Triple play bundles (with TV and more recently mobile), though growing, is relatively nascent. In view of the increasing propensity to purchase broadband, including, as part of a bundle with other services, end-users are switching away from narrowband to broadband with managed VOIP. As of Q4 2013, broadband with managed VOIP represented approximately 22% of total FVA subscriptions. In particular, Eircom accepts that there are customers who switch to a managed VOIP service and in that instance the broadband access service is generally an effective substitute for the narrowband connection used to deliver FVA service.

[201] ComReg Key Quarterly Report data, December 2013.

4.112 However, Eircom considers that to the extent that broadband with managed VOIP tends to be part of wider bundles, this constraint will mainly operate on Bundled Voice offerings – a consumer of Voice Only services would be unlikely to switch to a managed VOIP service. Further, Eircom via its advisors Frontier are of the view that there is insufficient switching from standalone FVA to bundles to find that they are in the same market. Eircom (Frontier's) core argument is that despite the strong evidence of recent switching from stand-alone FVA customers towards bundles, this does not necessarily imply that if a SSNIP test were to be applied on the remaining stand-alone FVA customers there would be sufficient switching towards bundles.[202]

4.113 Oxera's additional specific analyses considers what the results of a hypothetical SSNIP test on standalone FVA might be by analysing the distribution of stand-alone FVA subscribers between two separate types of FVA customers: those who buy broadband separately and those who do not purchase broadband from any supplier. As illustrated by Figure 3.4 of the Oxera report, the former group of consumers, which represents 34% of total standalone FVA subscribers, in Oxera's view, would very likely switch to a bundle as a consequence of a SSNIP on standalone FVA. Considering a critical loss level of 15-25%, Oxera finds that it would be necessary for around one-half to two-thirds of this group of consumers to switch to a bundle for the SSNIP to become unprofitable, which is in Oxera's view plausible. Moreover, Figure 3.3 in the Oxera report shows that there has also been switching towards bundles from standalone FVA consumers who do not purchase broadband. In other words, in response to a SSNIP, this group of customers may also in time choose to switch to a bundle. This reflects ComReg's preliminary proposal for a wide market for LLVA.

4.114 ComReg found it likely that there are economies of scope associated with bundles of FVA, calls and broadband. This is reflected in the marketing behaviour of many FSPs, which are increasingly focused on selling bundles to end users (e.g., using broadband infrastructure to deliver managed VOIP services additional to internet access). As was the case for FVA and calls there are also some transactional complementarities in purchasing FVA and calls with broadband. Therefore, ComReg considers that competitive constraints are likely tending in a similar direction in respect of the latter end users. However, in the case of standalone FVA customers, which do not currently have or, prospectively, wish to have a fixed broadband connection, ComReg is of the view that differing competitive conditions may arise in respect of this particular subset of consumers which might require separate consideration.

[202] Frontier report p15.

4.115 For example, a significant segment of end-users do not currently have/utilise a fixed broadband connection. Consistent with Ecory's finding, a potential set of captive customers exists in Ireland, as at Q4 2013 approximately 37% of FVA connections are purchased independent of broadband and/or other services in a bundle. According to the 2012 Market Research, approximately a third of households have no fixed broadband internet access. In addition, the research shows that lack of fixed line internet access is clearly linked to social grade and age. For consumers without a broadband connection, after not needing internet access, the most common reason for not having broadband is a wish to reduce household bills. These customers are not likely to immediately switch their FVA access to a broadband and voice bundle given the focus of their demand and/or likely transaction costs associated with the purchase of broadband including in a bundle.[203] As noted earlier at paragraphs 4.94 to 4.96 the price 'gap' based on their valuation is possibly too large to move away from narrowband FVA. Although the constraints from broadband (bundles) may increasingly constrain Eircom in relation to narrowband PSTN access, there is currently a group of captive customers that Eircom could find profitable to exploit through high prices for standalone FVA. As illustrated by Table 3, this is reflected in the evidence on the margins earned by Eircom on different products ✂

[203] The FVA Consultation paragraph 4.76.

Table 3 Margins on bundles and stand-alone products (€)

[✂

4.116 For the reasons set out above and drawing on qualitative and quantitative factors, ComReg is of the view that the competitive constraint from broadband with managed VOIP is not yet fully evidenced. Consistent with BEREC's view,[204] ComReg considers that the transition to managed VOIP will take place in phases and that narrowband FVA will remain necessary in the meantime and in particular for the potentially captive set of customers. As noted earlier, Eircom and FSPs using the Eircom network have yet to offer broadband with managed VOIP. Eircom continues to couple the narrowband voice service with broadband and naked DSL is negligible. In addition, Eircom has, absent regulation, also a strong position in relation to broadband access. Finally, VOIP in general is used on a relatively less significant scale.[205] On this basis, there remains a concern as to how effective substitution from broadband with managed VOIP will be for a significant proportion of potentially captive narrowband FVA customers over the period of the review. The overall extent to which potentially captive customers will benefit from the willingness of other customers types to switch to alternative FVA services including broadband based FVA in bundles is unclear from the SSNIP and critical loss analysis and generally. In the future however, possibly an FSP may start offering managed VOIP, at least to a subset of their customers, though this will not, however, happen on any significant scale during the lifetime of the review period. In addition, a scenario may prospectively arise where an operator delivers a standalone managed voice service equivalent to a standalone narrowband PSTN voice service, though this is only notional at this stage (see paragraph 4.97 to 4.101).

[204] See BoR (14) 85.

[205] The 2012 Market Research, slide 16; the 2013 ComReg Consumer ICT Survey slide 15 and the 2013 ComReg Business ICT Survey slides 25 and 26.

4.117 Eircom via its advisors Frontier considers that the choice of market definition materially affects the remedies that would be applied in the market. ComReg notes that BT and ALTO accept that it is possible to define a wider market than just standalone voice and both option 1 and 2 appear plausible, though they are, together with Magnet, broadly more supportive of option 2 (separate product markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband); however, in their view, the local competition issues must still be addressed in either case and what is pivotal is that remedies are proportionate and targeted.

Conclusion

4.118 From a theory of economics perspectives, it would be reasonable to define a single broad market for LLVA whether sold inside or outside a bundle or separate markets for each (i) standalone lower-level voice access and (ii) lower-level voice access sold inside a wider bundle of services. ComReg considers in light of the current evidence set out above and in the FVA and Supplementary Consultations that, on balance, referring to national circumstances,[206] it is most appropriate to define the FVA market for the purposes of this market review as being split at the lower level between two sub FVA markets:

i. Standalone FVA (which means a PSTN, ISDN BRA, or analogous (cable, fibre, FWA and DSL) broadband connection used to provide voice service (PSTN, ISDN or managed VOIP) to End-Users outside a bundle (not bundled for example with any of broadband, TV or mobile service). For the avoidance of doubt, FVA sold on a standalone basis includes FVA when offered or sold without voice calls or with voice calls including in a package (which could include for example discounted or free call minutes or another offer such as a handset). This would not be considered as a bundle; and

ii. FVA sold in a wider bundle of services (which means a PSTN, ISDN BRA, or analogous (cable, fibre, FWA and DSL) broadband connection used to provide voice service (PSTN, ISDN or managed VOIP) when offered or sold to End-Users inside a bundle for example with any of broadband, TV or mobile service. For the avoidance of doubt, FVA sold on a standalone basis which includes FVA when offered or sold without voice calls or with voice calls including in a package does not by itself count as a bundle but would be considered to be standalone.

4.119 Consistent with the Draft Explanatory note to the recommendation and the Ecory's report,[207] two cohorts of FVA can be identified. Prospectively, the general trend is towards the provisioning of broadband and bundles, though the captive set of standalone voice customers will likely persist and which in addition possibly have different competitive pressures and choices at least over the period of the review. In principle, barriers to switching to broadband with managed VOIP may be reduced over the longer term also for standalone LLVA customers in light of technological developments. It is possible that captive customers may also in time (over the medium to longer term) choose to switch to a bundle or the (notional) standalone managed voice service.

[206] It is noted that the European Commission has in the past accepted distinction between residential and non residential FVA customer. See the European Commission staff working paper on market reviews under the EU Regulatory Framework (3rd Report, COM (2010) 271 Final).
[207] See Ecory's report p 17/18 and the current draft European Commissions explanatory note (2014) at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=4968

4.120 ComReg recalls here that market definition is not an end in itself as set out in the Framework Regulations, and what ultimately matters is how the overall regulatory framework is designed to deal with the competition problems in the market. Irrespective of a wide or split FVA market definition, absent appropriate wholesale regulation (e.g. obligation to supply SB-WLR; ex ante margin squeeze test on bundles to ensure replicability of offers, etc), competition concerns would persist in relation to standalone FVA, notably, the risk of excessive pricing, as well as leverage. It is also the case that, absent appropriate wholesale regulation, competition concerns will likely persist in relation to bundled FVA, for example, replicability of Eircom's bundle. It is unlikely therefore that overall the regulatory approach under either of the alternative approaches to market definition would differ. Further, as noted above, if appropriate wholesale regulation including SB-WLR and margin squeeze is located in the FACO and WBA markets (although no decision has been made with respect to the FACO market review), which adequately supports the competitive constraint on Eircom posed by resellers, it will be appropriate for ComReg to revisit its market analysis relation to these FVA services. These issues are considered further by ComReg in Chapters 5 and 6 below.

5. FVA and mobile access

4.121 In this subsection ComReg considers whether the retail FVA market should be widened to included mobile access. Having taken account of respondents' submissions, ComReg finds that mobile access is not currently in the same market as FVA, as proposed in the FVA Consultation.

4.122 The 2007 Recommendation is based on separate relevant markets for FVA and mobile services. The European Commission considered in 2007 that, despite the move towards converged offerings, the general division between services provided at fixed locations and those at non fixed locations should remain.[208] The European Commission was of the view that there was insufficient evidence that the pricing of mobile services (to non fixed locations) systematically constrained the pricing of services to fixed locations. More recently, the European Commission in its Explanatory Note to the draft Recommendation[209] considers:

[208] Explanatory note the Recommendation, November 2007.
[209] Explanatory note the Recommendation 2014, page 19.

"Although mobile networks can, to a large extent, replicate the offers from fixed networks, providing end customers with offers which are similar to fixed networks,[210] *access via the mobile network is presently not considered in general by NRAs as substitutable with access to the public network at a fixed location. While the percentage of mobile-only households is continually increasing in the Union, a majority of customers still takes both fixed and mobile subscriptions. Further, the coverage and perceived quality of calls on the mobile networks still differ geographically and over time, also affected by the number of simultaneous users in the network. These elements would seem to indicate a greater degree of complementarity than of substitutability between these products in most Member States at the present time."*

4.123 According to the Ecory's report,[211] the relevant retail market in the representative Member State does not (and will not in the future) include mobile networks, though NRAs in specific member States may find justifications to conclude otherwise, In this respect, ComReg observes that almost all NRAs consider fixed and mobile access and services are separate retail markets.[212]

4.124 ComReg's preliminary view on fixed–mobile substitutability was that mobile access was not a sufficiently effective substitute for fixed access, and therefore FVA and mobile should be considered as separate relevant markets.[213] This preliminary view was based on an assessment of demand-side, as well as relevant supply-side factors.

4.125 Having both fixed and mobile telephone access (i.e. dual access) is still the most common scenario among Irish households,[214] though there is an increasing trend to mobile only households. End users tend to use fixed and mobile services in a complementary manner, for different purposes,[215] and perceive price differences between the two services (even though actual price differences have been declining).

[210] Such as 'home zone' telephony on the mobile phone at rates equivalent to fixed telephony.
[211] Ecory's Report (2013), p87.
[212] Only RTR (Austria) has defined two retail markets integrating fixed and mobile services, that is, national calls for residential users and broadband access for residential users. The Finnish regulator (in case FI/2010/1131-1132) also took into account competitive constraints from mobile access when de-regulating its retail FVA market. See various Article 7 notifications and BEREC, BoR (11) 54.
[213] FVA Consultation, paragraphs 4.169 to 4.208.
[214] FVA Consultation, paragraph 4.176.
[215] FVA Consultation, paragraph 4.181.

4.126 A significant majority of households and businesses still retain a fixed line, even though fixed call volumes have been declining at the same time as mobile call volumes have been increasing.[216] 64% of households still choose to retain a fixed line connection for access to voice and broadband services (and therefore to access the internet over the fixed line);[217] Business users, in turn, are typically reluctant to substitute from fixed to mobile because they assign high importance to fixed network characteristics, such as, access to the internet and a single contact phone number for the business. There is a general perception that a FVA connection is important to the day to day functioning of the business;[218]and to date Internet access over mobile connections has not been viewed as an effective substitute for fixed broadband access.[219]

4.127 Although ComReg recognised that mobile services could be a less costly option for lower-usage customers, it also recognised that fixed voice was, in general, still cheaper than mobile.[220]

4.128 On the supply side, ComReg was of the view that differences remain between fixed and mobile networks in the provision of FVA. ComReg was of the preliminary view that the time, costs and risks involved in investing in comparable access products for use at a fixed location using mobile network inputs renders such supply substitution not sufficiently immediate or effective to be considered as part of the FVA relevant market.[221]

4.129 Taking into account respondents' views, ComReg and its economic consultants, Oxera, reviewed again the evidence on FMS. In particular, Oxera conducted a SSNIP and critical loss analysis based on available data which indicates that the FVA market is separate to mobile.[222] Overall, taking into account qualitative factors and the SSNIP analysis it conducted, Oxera considered that, currently, mobile access exerts an insufficient competitive constraint on FVA or FVAC (or, what Eircom defines as Voice Only market).

Consultation Responses and ComReg Analysis

4.130 The majority of the respondents agreed that mobile access was an insufficient constraint on fixed access.

[216] FVA Consultation, paragraph 3.50.
[217] FVA Consultation, paragraph 4.175.
[218] FVA Consultation, paragraph 4.179 and 4.190.
[219] FVA Consultation, paragraph 4.183 – 4.188.
[220] FVA Consultation, paragraph 4.192 – 4.193.
[221] FVA Consultation, paragraph 4.203.
[222] Oxera Report, section 5.2, p45-48

4.131 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. Vodafone noted that a portion of the market is not choosing between fixed and mobile on the basis of substitution but rather this market segment increasingly views mobile service as baseline and FVA as incremental and discretionary.[223] BT and ALTO highlighted that if fixed mobile integration had occurred why then would mobile operators support both FVA and mobile access. BT and ALTO referred to the European Commission‘s view in relation to the 2007 Recommendation that there is insufficient evidence to prove that fixed and mobile access belong to the same market. Magnet broadly agreed with ComReg‘s conclusion, but clarified that with the falling fixed termination rates and mobile termination rates and higher broadband speeds across mobile networks, mobile phones will become more a substitute product as opposed to a complementary product.[224]

4.132 Conversely, Eircom submitted that mobile voice services impose a significant constraint on providers of fixed voice-only services, and thus that both services should be considered as part of the same relevant market. Eircom argued:

- The increasing proportion of mobile-only households was increasing, while Eircom’s FVA Voice Only customers was significantly decreasing; [225]
- The functionality of mobile is similar to, or even more advanced than, fixed-line telephony;[226]
- Marginal customers with a low level of consumption and high price sensitivity are likely to perceive mobile as a close substitute for fixed;[227]
- The expected reductions in the DSP subsidy[228] will increase the substitution towards mobile services by fixed customers;[229]

[223] Vodafone (2013), ‘Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers’, Response to ComReg’s Consultation 12/177, January 25th, p. 12.
[224] Magnet (2013), ‘Submission to Consultation 12/117’, January, p. 3.
[225] eircom (2013), ‘Response on behalf of eircom Group to ComReg Consultation 12/117’, January 25th, p. 22.
[226] Ibid., p. 23-25.
[227] Ibid., p. 36.
[228] Many consumers had received FVA for free or paid very little, due to the Telephone Rental Allowance from the DSP.
[229] Ibid.

- The introduction of naked broadband services will also increase the pressure that mobile voice services exert over fixed voice services for customers who also acquire fixed broadband services'.[230]

4.133 Eircom considers that market data presented in section II of its submission to the Supplementary Consultation supports its position regarding:[231]

- Continued migration of voice services from fixed to mobile networks which reduce the relevance of fixed voice-only lines;
- The existence of robust customer evidence of a perception that fixed and mobile voice connections are now substitutable; and
- Increased competition from mobile operators in the fixed space (e.g. targeted marketing by mobile operators of their services in an effort to incentivise customers to replace their standalone FVA service with mobile services, MNOs now provide geographic number portability of geographic numbers on to mobile services as part of their standard offering).

4.134 Eircom argue:

- There is increased take up of unlimited mobile tariffs;
- Similar to individual consumers, many small business owners having opted to use mobiles as their only means of contact; and
- There is a steady decline in MTRs and hence users and businesses no longer view mobile usage in place of fixed line usage as cost prohibitive.

4.135 ComReg considers that trends referred to by Eircom are not suggestive, of themselves, that there currently exists a sufficient level of substitution from fixed voice access services to mobile access services.

[230] Ibid., p. 34.
[231] Eircom submission to 13/95, p 33-36.

4.136 Overall fixed voice subscriptions are increasing quarter on quarter since Q1 2011. In Q4 2013 there were 1,529,070 fixed voice subscriptions (an increase of 1.4% on Q3 2013 and an increase of 4.4% on Q4 2012). Although the number of narrowband connections has declined from just over 2.1 million in Q1 2007 to approximately 1.6 million in Q4 2013, it is also evident that alternative fixed access technologies/platforms, with the exception of FWA, have experienced growth in the number of connections. In particular, ComReg observes a migration towards broadband connections bundled with a managed VOIP service. In that respect, ComReg estimates that there were over 329,000 managed VOIP subscribers in Ireland as of Q4 2013.[232] In total, managed VOIP minutes accounted for approximately 11.6%[233] of total fixed traffic in Q4 2013, having grown from 8.0% in Q4 2011.[234]

4.137 This overarching trend is reflected in the limited abandonment of the fixed connection –at 64% the household penetration rate for fixed line telephony in Ireland is high compared with other European countries.[235] This suggests that most households still prefer to have FVA for voice telephony.[236] While the proportion of mobile-only households is relatively high,[237] it has grown only 6 percentage points over the course of the last market review, from 30% to 36%. The more recent 2013 Consumer ICT Survey shows a greater number of households (69%) had a fixed line phone, suggesting up to 31% were mobile only households.[238] Another overarching trend since the 2007 market review has been a steady decline in fixed voice traffic and revenues. However, the same trend has not been observed for FVA subscriptions, whether bought on a standalone basis or as part of a bundle. As pointed out by ComReg at paragraphs 4.43 to 4.58, the market dynamics of call and line volumes show prospectively different competitive constraints for fixed calls and access.

[232] ComReg Quarterly Key Data Report, Q4 2013 (page 23); Note that these traffic and subscription figures refer to managed VOIP only and do not include unmanaged VOIP services, such as, Skype or Viber.
[233] ComReg Quarterly Key Data Report, Q4 2013; There were 149m managed VOIP minutes out of 1.287 billion retail minutes in total as at Q4 2013.
[234] See ComReg Quarterly Key Data Report, Quarter 4 2011; ComReg Document 12/20 (page 22). There were 130 million VOIP minutes out of 1.619 billion total retail minutes.
[235] E-communications Household Survey 2012: http://ec.europa.eu/public_opinion/archives/ebs/ebs_381_en.pdf
[236] FVA Consultation, Paragraph 4.176.
[237] FVA Consultation para 4.177 – 4.178. The 2012 Market Research, Slide 11
[238] 2013 Consumer ICT Survey, Slide 10.

4.138 It is clear from the trends set out in Chapter 3 that end users increasingly purchase broadband and bundles – fixed broadband is the service most commonly bundled with FVA and calls, mobile services are the services most often purchased outside a bundle with FVA (i.e. purchased separately). End-users are 'self bundling' or combining fixed and mobile access and services purchased from different suppliers, the option generally for end users to purchase (technically) integrated fixed and mobile services, to purchase bundled fixed and mobile services under one bill is not yet widely available. FVA is increasingly sold as an adjunct to fixed broadband thus entrenching the consumer need for a fixed line and would stem the tide of any substitution towards mobile services.[239]

4.139 Mobile services have lower Internet access speeds and capabilities than internet services provided via fixed access. To the extent that such quality differences remain (which is likely, even with the introduction of 4G mobile services), mobile access and FVA will be unlikely to be considered close substitutes at least for households that value broadband access. It is notable that Eircom and Frontier do not dispute this.

4.140 ComReg believes that the greater weight of evidence shows that consumers predominantly demand dual access and therefore consider access through mobile networks and FVA to be broadly complementary in use at home or in the office. Specifically, there was a clear preference amongst households for fixed to fixed and mobile to mobile communications. The 2012 Market Research shows that businesses preferred to use their fixed line telephone rather than their mobile phone for all categories of calls, including for calls to mobiles.[240] This indicates that FVA remains important for the significant majority of businesses.

4.141 According to Eircom, the functionality of mobile is similar to, or even more advanced than, fixed-line telephony. The 2012 Market Research[241] indicates that consumer perceptions appear to regard the fixed call quality and reliability as being close to but slightly better than mobile call quality. Having said that, poor mobile telephone network coverage in some locations can result in a poor call quality or an inability to make calls at all. This was also evident in responses to the 2012 Market Research, where 23% of residential respondents with a fixed line telephone noted poor mobile coverage in their home as a reason for retaining the fixed line telephone.[242]

[239] See further the 2013 ComReg ICT Consumer and Business surveys.
[240] The 2012 Market Research. slide 106.
[241] Slides 44 and 45.
[242] 2012 Market Research Slide 43.

4.142 Eircom considers that intensifying competition in the mobile market has led to an accelerated level FMS. Eircom suggests that, similar to individual consumers, many small business owners have opted to use mobiles as their only means of contact. However, ComReg's analysis of the survey results shows that business use of FVA is nearly universal at 95%.[243]

4.143 Eircom disagreed with ComReg's view that fixed voice services are generally cheaper than mobile voice services. Eircom based its argument on cross-country comparisons of the mobile voice premium, which it says illustrates that the 'premium' for mobile service[244] (over the price of fixed voice services) has been falling sharply and has been negative in Ireland since 2008, and that such a 'premium' will continue declining as the DSP subsidy reduces.[245] With the steady decline in MTRs, Eircom suggests that users and businesses no longer view mobile usage in place of fixed line usage as cost prohibitive.

4.144 ComReg recognises that some end-users would be likely to switch to mobile in response to a significant increase in the price of their FVA service. However, it is ComReg's view that the low awareness of prices generally is likely to diminish any response in demand to price changes. In this respect, the continued trend for households, and even more so businesses, to retain a fixed telephone line reflects a certain perception that mobile telephones are more expensive for making some types of calls. Having regard to the survey evidence, 68% of residential users[246] perceived the cost of making a call from a mobile telephone to be more expensive than the cost of a call from a landline when calling a local or national geographic number. Furthermore, the predominant reason cited by household respondents for retaining a fixed line telephone[247] was that it was cheaper to make some types of calls (cited by 73% of respondents with a fixed line telephone), followed by a preference for using their fixed line phone rather than mobile phone for making longer calls (cited by 64% of respondents with a fixed line telephone).

4.145 In ComReg's view, bundles of mobile access and mobile calls may, in certain cases, be cheaper than having a FVA package or bundle. However, this is negated by the fact that FVA packages are typically purchased on behalf of a household, and therefore often shared between multiple users, whereas a mobile package is normally used by an individual.

[243] The 2012 Market Research, Slide 84.
[244] The Mobile Voice Premium is defined as "the average retail revenue per mobile minute less the average retail revenue per fixed minute divided by the average retail revenue per fixed minute (see eircom submission to consultation 12/117: page 32, footnote 70).
[245] Ibid., p. 36.
[246] Market Research 2012, Slide 36.
[247] Market Research 2012, Slide 43.N=633.

4.146 Eircom also argues that FMS is stronger for marginal FVA end-users, which are typically voice-only with low usage, thus concluding that a price increase would be likely to lead to a significant switch of this type of mobile service user. Although ComReg recognises that switching to mobile services is most attractive for low-usage customers, that is, for some people a mobile on a low tariff is preferential to a landline, it considers that such switching to mobile is likely limited by the fact that Eircom offers low-cost access through its vulnerable-user scheme ('VUS')[248] or 'Talktime control'[249] package.[250] These products are targeted by Eircom at those who make very low volumes of fixed calls at low rates and the trend is such that there is a significant uptake in these offers.

4.147 Eircom expects the substitutability of mobile will become stronger with withdrawal of the DSP subsidy.[251] However, in spite of the Supplementary Consultation on this matter,[252] ComReg did not receive specific comments from any of the respondents, including Eircom, relating to the potential impact of the reduction and subsequent withdrawal in the DSP subsidy and whether this has actually increased the substitution towards mobile services by fixed customers. ComReg's analysis of recent data on the telephone allowance scheme indicates that the number of eligible customers reached ✂ in 2013, approximately three-quarters of those opted for a rebate in respect of their fixed connection and not mobile. Eircom has the majority share of DSP recipients (approximately ✂).

4.148 In the alternative to a mobile phone only, on withdrawal of the rebate, DSP consumers have the option of keeping the fixed line under Eircom's vulnerable user scheme or 'control' phone plans, which have characteristics more similar to pre-paid mobile offers and many do so. For example, the vast majority of Eircom's DSP recipients (approximately ✂) were on a discounted voice package ✂, Talktime Control ✂ and Eircom's vulnerable-user scheme ✂. Also, in this case, non-price factors could remain important in the consumer's decision on whether to keep the fixed line, as supported by the survey results,[253] thereby limiting the extent to which the pricing of mobile services constrains providers of FVA services.

[248] See Eircom Vulnerable User Scheme at http://www.eircom.ie/bveircom/pdf/Part2.3.3.pdf
[249] See Eircom Talktime control at http://www.eircom.ie/bveircom/pdf/Pt2.3.7.pdf
[250] FVA Consultation, paragraph 4.182.
[251] Many consumers had received FVA for free or paid very little, due to the Telephone Rental Allowance from the DSP in respect of either the fixed line or mobile but not both.
[252] Supplementary Consultation, p22.
[253] The 2012 Market Research p. 43.

4.149 ComReg's analysis of survey data shows that some customer types such as elderly people and businesses remain more attached to fixed access services.[254] Furthermore, DSP recipients are not entirely voice only; a significant and growing percentage of Eircom's DSP recipients ✄ reflect the general trend having a preference for bundle services (FVA as well as broadband and other services), compared to ✄ base rates (standard charges). Finally, where customers are required to give up a landline service in view of affordability and the impact of the recession, it is possible that FMS is limited with a reduced benefit to mobile in any event where such customers try to reduce costs overall and no longer avail of any telephony service.

4.150 Eircom (Frontier) considers that it is not appropriate to rely on the evidence Oxera points to regarding substitution of mobile uses because it has not restricted itself to data pertaining to standalone FVA customers. Eircom (Frontier) suggest that to verify Eircom's contention as to the substitutability of mobile, it is necessary to consider the potential for switching of standalone customers only. Consequently, Eircom (Frontier) consider that information as to difference in quality of fixed and mobile internet access does not seem to be relevant. Eircom (Frontier) also notes that Oxera did not seek to analyse why consumers who have standalone FVA only retain a fixed line. Eircom (Frontier) considers that, as naked broadband services have only recently been introduced by Eircom, then it seems likely that the retention of fixed lines may be largely due to a wish to retain fixed broadband services.

4.151 However, ComReg observes that the Frontier report did not argue that mobile access belongs to the same relevant market as FVA; rather, it focuses on the fact that that the evidence that Oxera relied on was not robust to reach such a definitive conclusion. ComReg disagrees with this assessment.

4.152 First, the Oxera report clearly set out that the sub-sample of stand-alone FVA customers who thought about line rental and calls separately was too small to be able to draw meaningful inferences, on its own, on the result of a SSNIP test. As set out in the FVA Consultation and subsequent Oxera report, in order to reach a conclusion in relation to FMS, the SSNIP analysis was complemented with the wider set of qualitative evidence. Specifically, ComReg's as well as Oxera's assessment of the evidence showed that a number of price and non-price factors (amongst others, as set out at paragraphs 4.173 to 4.197 of the FVA Consultation) suggested that consumers and businesses continued to view mobile access services as separate, and often complementary. Significantly, accessing a broadband line was not listed amongst the top 3 factors for retaining a fixed line. Again, the most important reasons mentioned were: it is cheaper to make calls; a preference for making longer fixed calls; and quality of the line.

[254] FVA Consultation, paragraph 4.178.

4.153 Furthermore, despite the increasing proportion of mobile only customers this has remained relatively stable and had only grown from 30% to 36% in over six years. Overall, this suggests that the remaining standalone FVA customers attach significant value to retaining a fixed line and, in the event of a SSNIP, may not substitute away to a mobile-only lifestyle. ComReg notes that Eircom (Frontier's) submission in the case of switching from standalone FVA to bundles (that those customers who remain with stand-alone FVA would be less likely to switch) would apply even more forcefully in the case of switching from standalone FVA to mobile access, for the reasons explained above. It is noticeable that Frontier decided not to articulate this argument in its section on fixed-mobile substitutability.

4.154 ComReg considers in paragraph 4.198 to 4.206 of the FVA Consultation that the entry of mobile service providers into the FVA market reflects recognition on their part that consumers place a distinct value on mobile voice telephony as compared to fixed voice telephony and indeed, vice versa, for the fixed incumbent. ComReg is of the view that the decision by Vodafone and Eircom to operate two separate access networks in parallel indicates that the mobile network delivers a different service proposition to a fixed telephone network. Consequently, mobile services satisfy a distinct customer need (otherwise diversification would lead to unnecessarily increase in costs associated with operating two networks, potential cannibalisation of existing sales, and ultimately would lead to a fall in profitability).This suggests a complementary relationship between FVA and mobile, rather than an effective degree of substitutability. In addition, the recent emergence of FVA and mobile being offered in bundles also suggests that end-users place a distinct complementary value on these services, rather than considering them to be substitutes.

Conclusion

4.155 For the reasons set out above, and those set out in the ComReg Consultations, including the Oxera report, at present, there is no strong evidence to suggest that fixed access and mobile access are sufficiently effective substitutes to merit inclusion in the same market. However, ComReg will continue monitoring closely market developments, such as, the take-up of naked DSL (i.e. DSL based broadband sold without FVAC) and 4G over the forthcoming regulatory period. In any case, ComReg assesses further the extent to which mobile access could still pose a potential source of competitive constraint over the timeframe of this market review in the final SMP assessment below.

D. Geographic Market

4.156 ComReg's preliminary view was that the relevant geographic market for both the wide LLVA (FVA sold standalone and in a bundle) and HLVA product markets as proposed in the FVA Consultation was national in scope.[255] ComReg noted that Eircom had the largest nationwide market share and supplied FVA nationwide over its ubiquitous PSTN network (whether sold inside or outside bundles).[256] And while ComReg acknowledged some localised competitive pressures, particularly insofar as FVA is sold as part of a bundle with other services, it considered the conditions of competition were not considered to be materially different and stable across different geographic areas to define FVA markets sub-nationally. ComReg's maintains that the geographic market is national in scope, but that the competitive conditions are sufficient for the purposes of the adoption of differentiated remedies. ComReg will monitor the situation with respect to the geographic conditions however.

4.157 Regarding competition from alternative infrastructure, UPC's network covers the most densely populated areas within the State with its coverage extending to some 746,100 households (approximately 45% of households in Ireland). ComReg's view was that in locations where, in particular, cable-based voice services are available, Eircom is facing increasing risk of its voice customers substituting away to cable broadband with managed VOIP. ComReg indicated[257] that broadly Eircom has a lower share of FVA subscriptions in areas where UPC is offering FVA, relative to areas where UPC is not, though this difference primarily related to the wider Dublin region. This suggested a degree of localised competitive pressure in relation to the provision of FVA. It was noted, however, that UPC's services were primarily targeted at households and it had a much smaller share of business subscriptions, providing only 3% of business FVA subscriptions in Ireland.[258]

4.158 In relation to competition based on Eircom's regulated wholesale inputs, ComReg was of the view that, prospectively, there was potential for LLU to expand beyond its current footprint, though observed that this development continued to be uncertain. The Irish market was characterised by a relatively low presence of operators relying on full LLU (that can support both voice and broadband services). Starting from the low base of fully unbundled lines, a stronger uptake of purchased WPNIA inputs[259] to deliver combined broadband

[255] FVA Consultation, paragraphs 4.209 to 4.241.
[256] FVA Consultation, paragraph 4.217.
[257] FVA Consultation, Figure 23 paragraphs 4.227 to 4.229.
[258] The 2012 Market Research, slide 95.
[259] WPNIA" means wholesale (physical) network infrastructure access (including shared (line share) or fully unbundled local loops) at a fixed location. It includes current generation WPNIA (over copper access network infrastructure and its Associated Facilities) and next generation WPNIA (over next generation fibre access network infrastructure and its associated facilities) and is synonymous with the Market as defined in ComReg Decision No. D05/10.

and FVA services was not, in ComReg's preliminary view, likely to reach critical mass capable of materially constraining Eircom's FVA pricing behaviour in local/regional areas over the lifetime of the FVA market review.[260]

4.159 In addition, ComReg found that the uncertainty of the timing and geographical area of the rollout of Eircom's NGA investment, as well as any NGA infrastructure investments by FSPs (e.g., ESB), which may not overlap with Eircom's NGA footprint, increased the potential for market boundaries to be variable over the period of the review. Eircom's planned NGA rollout was likely to change the competitive dynamic between Eircom (and Eircom network-based resellers) and UPC, as well as potentially impacting on the commercial strategy of WPNIA purchasers in respect of FVA services. On this basis, ComReg considered that the market boundaries would likely remain unstable, at least for the period of this review, and therefore market share projections for the future period based on structural trends were subject to uncertainty.

4.160 Furthermore, ComReg observed that there was no apparent evidence of any significant sub-national pricing or marketing in the supply of FVA. At the retail level, FSPs pursued a business policy of marketing and pricing uniformly on a national basis, which suggested that competitive conditions for FVA were homogenous nationwide. In urban areas where the competitive dynamic is relatively more enhanced by the existence of multiple suppliers of multi-bundled products, including UPC, there had been no change in the pricing or marketing of standalone FVA products. Equally, suppliers of FVA bundled services have not yet differentiated their pricing structure within the areas in which they were available.

4.161 At the wholesale level, Eircom at the time of the FVA Consultation in 2012 proposed to change the SB-WLR and bitstream pricing for FVA sold as part of a bundle in the NGA enabled exchanges. This implied some emergent pricing pressures driven predominantly by the alternative cable platform. However, ComReg's preliminary view was that the precise scope and sustainability of such pressures over the period of the review were uncertain.

4.162 ComReg concluded that there was no clearly identifiable break in conditions of competition across geographical areas to justify separate relevant geographical markets. The European Commission has emphasised in the past,[261] and recently reiterated its view (2014)[262] that differences in geographic conditions of

[260] FVA Consultation paragraphs 4.219 to 4.221.

[261] European Commission (2007), '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', p 12 (the "**European Commission's 2007 Explanatory Note"**).

[262] European Commission (2014), draft 'Commission Staff Working Document Explanatory Note: Accompanying document to the draft 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

competition can be captured at multiple stages in the framework (market definition, SMP or remedies). This is in line with the Common Position adopted by BEREC in 2008[263] regarding differentiating remedies when areas were not sufficiently stable to justify the definition of sub national markets and recently re-affirmed (2013).[264] Consistent with this approach, ComReg proposed to take such emergent competitive pressures into account when designing relevant and proportionate regulatory remedies.[265]

4.163 As regards geographic market definition, the application of the SSNIP test is not clear-cut**.**[266] Consequently, ComReg considered that it was appropriate to conduct an assessment of the homogeneity of competitive conditions (the concept of 'HCCs') on the FVA market across geographic areas.[267] In order to judge the homogeneity of competition on the FVA markets, consistent with guidance issued by the European Commission[268] and BEREC,[269] ComReg conducted a holistic assessment of both structural and behavioural factors (for example, geographic variation in entry conditions, the availability of services, the evolution of market shares, geographic variations in products and pricing).[270] ComReg's preliminary view on geographic market definition was, therefore, based on an approach that went beyond a potentially narrow application of the SSNIP framework.

4.164 In light of the responses to the FVA Consultation, ComReg instructed its expert economic consultants, Oxera, to examine further the case for sub-national markets.[271] Oxera concluded that ComReg's proposal to define a national market for the proposed LLVA market is reasonable from a theory of economics perspective and that it is appropriate to capture differences in competitive conditions in the design of remedies—most notably, in the NRT.[272] In the interests of providing interested parties with an additional opportunity to provide

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the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services', draft, p 15 (the "**European Commission's 2013 Draft Explanatory Note**").

[263] Common Position on geographic aspects of market analysis (definition and remedies), ERG (08) 20 final, October 2008.

[264] Draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies, BoR (13) 186, 5 December 2013 (the "BEREC 2013 Draft Common Position"), section 7.

[265] In October 2012 ComReg notified the European Commission of an amendment to the NRT (Case IE/2012/1381). ComReg maintains its approach towards the NRT outside and within the LEA, with a more flexible approach for the latter.

[266] FVA Consultation, paragraph 4.213.

[267] European Commission's 2013 Draft Explanatory Note, p13.

[268] European Commission (2010), "Commission staff working document, Accompanying document to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the regions on market reviews under the EU Regulatory Framework (3rd report), Further Steps towards the consolidation of the internal market for electronic communications", {COM(2010) 271 final}.

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

[270] European Commission's 2013 Draft Explanatory Note, p14.

[271] Section 4 of the Oxera report.

[272] Recall the NTR is to ensure replicability of bundled offers by potential competitors. It requires that the retail price of a bundle including FVA covers the sum of the costs of the inputs to the bundle and relevant retail costs net of any efficiency arising from bundling.

further views on the geographic scope of the market, ComReg, in the Supplementary Consultation, sought respondents' views on the geographic scope of a product market of FVA when sold in a bundle, if that were to be defined as a separate product market.

Consultation Responses and ComReg Analysis

4.165 Of the eight responses to the FVA Consultation, 7 commented specifically[273] on the geographic definition of the relevant markets. The majority of respondents did not challenge ComReg's approach and analysis set out in the FVA Consultation relating to geographic market definition to any significant extent. In view that there was no disagreement from any respondents regarding the product/geographic scope of the HLVA market (i.e. all respondents agreed it is national in scope), the remainder of this sub section considers the arguments around the geographic scope of the LLVA markets. In particular, Eircom disagreed and suggested that ComReg should define sub national retail markets for Bundled Voice customers. Eircom considers that that there are differences in competitive conditions in the areas where there is competing alternative infrastructure, compared to where there is no such infrastructure.

4.166 Eircom (Frontier) consider that defining separate product markets shows more clearly the different competitive conditions prevailing in the provision of bundled FVA in different areas. Eircom (Frontier) furthermore consider that ComReg should directly examine supply side substitution when assessing the geographic boundary of the FVA market. ComReg's approach does, however, take account (implicitly) of effective 'supply-side substitution'. Consistent with guidance provided by the European Commission,[274] it does this by examining the structural conditions (in particular, any variation in barriers to entry between geographic areas) and behaviour indicators present in the FVA market. Oxera (consistent with the European Commission guidance) has correctly highlighted that, contrary to Eircom's position, these factors need not be addressed at the market definition stage of a market review. Rather what is important is that competitive dynamics are reflected somewhere (be it at the market definition stage, SMP assessment or design of remedies). In any case, evidence of actual and potential supply side substitution is set out at paragraphs 4.217 to 4.232 of the FVA Consultation.

4.167 Below, ComReg further considers the extent of structural and behavioural geographic variance across Ireland that, if present, would possibly drive

[273] SKY Ireland did not comment on the market definition aspect as it had only just entered the Irish market.

[274] European Commission (2014), draft 'Commission Staff Working Document Explanatory Note: Accompanying document to the draft 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', draft, p 14 (the "**European Commission's 2013 Draft Explanatory Note**"). See also the European Commission's comments letters, in particular, Case UK/2007/0733 and UK/2010/1065.

definition of a sub national market for FVA inside a bundle within the LEA,[275] by reference to the following factors:

(a) geographic variation in entry conditions;

(b) the availability of services and the evolution of FSPs' market shares; and

(c) geographic variances in products and pricing.

(a) Geographic variation in entry conditions

4.168 Regarding the provision of standalone FVA, FSPs compete at the retail level primarily through the purchase of Eircom's SB-WLR service, which is available on a national basis. In addition, FSPs can offer FVA in a bundle through the combined purchase of wholesale inputs such as WLR, line-share and/or WBA products purchased either from Eircom or BT, which is purchased on a national basis. This means that FSPs without a network of their own gain national coverage by virtue of having wholesale access to Eircom's national network (and/or BT's resale of Eircom's wholesale access products).

4.169 Alternatively, entry through own network deployment tends to be centred, at least in the first instance, around relatively densely populated urban areas where FSPs can achieve greater economies of scale through the possibility of recovering their network investment costs from a greater number of customers within a given area. Most prominently, UPC launched a broadband service over its CATV network in 2007 and offers FVA using a managed VOIP service over that broadband network. This network covers the most densely populated areas within the State with its coverage extending to some 748,600 households.[276] Other FSPs have entered on a smaller scale by using own FWA or fibre networks to provide FVA (i.e. broadband with managed VOIP).

4.170 Eircom as well as other FSP's agree that the conditions of competition are sufficiently homogeneous across geographic areas to indicate the existence of a national Standalone FVA Market.[277] Eircom argues, however, that there are sub-national markets for FVA sold in a bundle. It considers that variations in competitive conditions are largely driven by the presence of UPC's alternative cable infrastructure and this is a natural boundary for defining the geographic market. According to guidance of the European Commission,[278] however, variations of competitive conditions are not determined solely by the presence

[275] For a definition of LEA see Price Regulation of Bundled Offers , Further specification of certain price control obligations in Market 1 and Market 4, Response to Consultation and Decision, ComReg Document 13/14, Decision 04/13, February 2013 (the "**2013 Bundles Decision**") available at http://www.ComReg.ie/_fileupload/publications/ComReg1314.pdf.

[276] http://www.libertyglobal.com/pdf/press-release/UPC-Holding-Press-Release-Q4-2013-FINAL.pdf

[277] Eircom (2013), 'Response on behalf of eircom Group to ComReg Consultation 12/117', January 25th, p. 37 and 38.

[278] Case PT/2008/0851.

of a particular network (e.g., in this context UPC's provision of FVA bundles over cable). ComReg considers it is appropriate to also prospectively examine any variation in competitive conditions taking into account the wholesale remedies on which the current and expected retail market outcomes are based. Eircom acknowledges this where it states that there is important additional competition from retail providers that rely on Eircom's network through resale of wholesale products (e.g., WLR, LLU and VUA products) as well as from other smaller infrastructure operators.

4.171 From a supply-side perspective, localised competition observed to date and anticipated on a forward-looking basis is increasingly targeted at the sale of wider bundles including FVA. For consumers who buy FVA in a bundle, competitive pressures from certain bundled FVA offers may prospectively vary from location to location in light of somewhat uneven entry of alternative competing networks. However, ComReg agrees with Vodafone's observation that there are some areas where cable is not available but other broadband access mechanisms are and in those areas the technical solution employed to meet FVA demand is predominately over twisted copper pairs. According to Vodafone the boundaries of these technical solutions are not determined by some objective geographic limitation but rather are determined by the internal business decisions of the relevant infrastructure operators as to the extent of their network deployment. As noted earlier, in both urban and rural areas, therefore, all FSPs (except UPC in urban areas) are currently dependent (and will remain dependent at least over the period of the review) on SB-WLR to provide retail voice services and shared LLU or Bitstream for the broadband component whether sold in a bundle or as a standalone service. Even where cable is available the majority of FVA connections are still by way of twisted copper pair connections.

4.172 Eircom is of the view that ComReg, by introducing the concept of LEA in its 2013 Bundles Decision,[279] has already recognized the differing nature of competitive conditions in different parts of Ireland. Some of the respondents to the Supplementary Consultation suggest that ComReg could define the scope of the geographic market by reference to inside/outside LEA. As set out in the 2013 Bundles Decision, the LEAs reflect those areas where prospectively uptake of unbundled services (whether LLU)[280] and/or virtual unbundling in NGA) should permit, in addition to other platforms such as cable, a greater degree of retail competition. Significantly the LEA criteria defined in the 2013

[279] Price Regulation of Bundled Offers , Further specification of certain price control obligations in Market 1 and Market 4, Response to Consultation and Decision, ComReg Document 13/14, Decision 04/13, February 2013 (the "**2013 Bundles Decision**") available at http://www.ComReg.ie/_fileupload/publications/ComReg1314.pdf.

[280] The local loop is the physical, mostly copper wire, connection between the customer premises and the local exchange, the facility which concentrates all local loops in a given area. In general, it is owned by the incumbent operator. Local loop unbundling is the regulatory process allowing alternative telecom operators to use the local loop.

Bundles Decision[281] highlighted that the boundaries between LEA and outside the LEA areas were unstable and evolving. For example, discussed below, more exchange areas may be included in LEAs depending on the impact of Sky's entry into retail broadband on LLU use; further expansion of BT's LLU footprint; and as highlighted at paragraph 3.13 above, the ESB intends to enter the retail broadband market. This factor, which ComReg anticipates will remain true during the lifetime of the review period, specifically militates against a finding of sub – national markets in the context of FVA market(s).

4.173 According to Eircom, having regard to the competitive constraints it faces primarily from UPC but also other FSPs, there are clear and stable boundaries determining which areas are more competitive. On the contrary, however, based on recent market developments as well as likely future trends, ComReg considers that the boundary between areas where prospectively there are different competitive pressures is variable and likely to change over the period of the review.

4.174 First, the absolute level of fully unbundled lines remains low throughout Ireland (see Figure C Appendix 4). It is unlikely that greater uptake of WPNIA inputs will reach critical mass to be able to constrain materially FVA pricing behaviour in local/regional areas over the period of this review. While the satellite TV provider Sky, similar to Vodafone, has entered the retail broadband market (by purchasing Bitstream from BT) as well as offering bundled voice (by purchasing WLR from BT, effectively reselling Eircom WLR and WBA products), the impact on LLU is still unknown. ✂. On this basis, ComReg finds no evidence that the deployment of networks by competitors of Eircom relying on full LLU (or unbundled local metallic path, ULMP) is more substantially advanced in densely populated areas.

4.175 Second, as noted earlier, FSPs can in principle use wholesale broadband access products supplied by Eircom to supply a retail broadband with managed VOIP service. Currently, neither Eircom nor FSPs use broadband access to provide a managed VOIP service. However, FSPs might start offering managed VOIP to a subset of customers in Ireland in view of the launch of 'naked DSL' (i.e. ADSL 2/ADSL2 plus service without voice access) in July 2013. Vodafone agreed that the prospect of additional supply of naked DSL (either NGA based or current generation based) allows wider deployment of managed VOIP based FVA access. However, it was of the view that the geographic boundaries of this deployment are not determined by any discernible geographically stable criteria

[281] In defining the appropriate LEA ComReg undertook detailed exchange by exchange analysis of the structural conditions in the market, and on this basis established a set of principles to apply to the LEA criteria. In particular in paragraphs 4.80 to 4.114 of the 2013 Bundles Decision set out analysis of the relevant structural and behavioural factors that justify the existing variation of competitive conditions that have lead ComReg to differentiate the remedies.

but rather by the scope of Eircom's broadband network deployment which continues to evolve.

4.176 Third, Eircom continues to rollout NGA and to expand outside the current LEA foot print. The LEA continues to evolve and is now comprised of 201 exchange areas. The growth from 126 exchange areas is solely based on Eircom's roll out of NGA. Its NGA coverage footprint is expected ultimately to cover 1.4 million premises by July 2016.[282] As such, while the criteria to determine the LEA is established the boundaries continues to evolve. BT's LLU footprint (based on Eircom's full LLU product offering) used by Vodafone and Sky will largely be congruent with the planned NGA footprint area which in turn largely overlaps LEAs. Concerning Eircom's NGA rollout, uptake of Eircom's VUA product remains nascent and it is currently too early to assess the impact that this may have on markets for broadband as well as retail bundled FVA. In addition, while the ESB intends to enter the Irish retail broadband market by leveraging from their access network, it remains to be seen what impact this development may prospectively have on the Bundled LLVA Market (and or other closely related markets).

4.177 Accordingly ComReg, while acknowledging the increased potential for market boundaries to vary over the period of the review, considers it remains too early to determine whether indications of increasing competition demonstrate that conditions in urban areas (or LEA) are sufficiently unique and stable to justify defining a separate geographic market for FVA sold in a bundle.

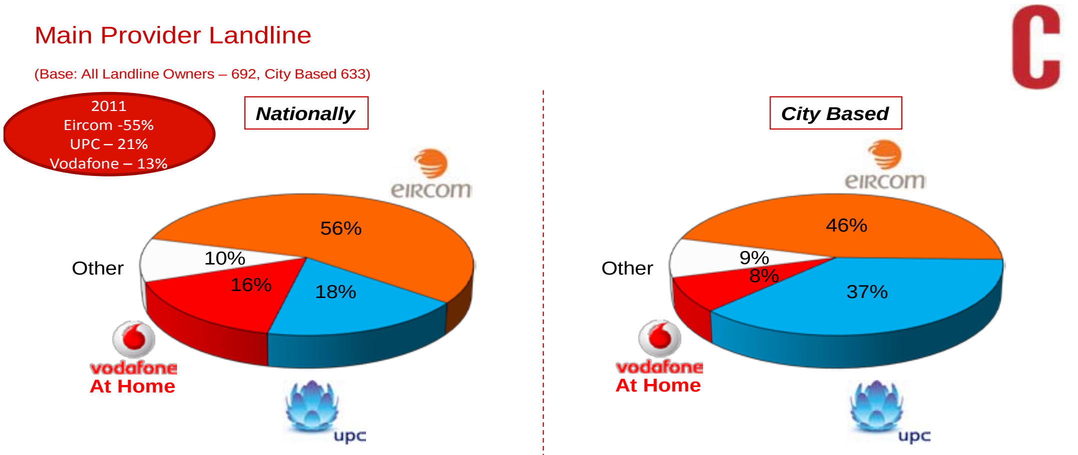
(b) Availability of services and market share

4.178 As set out at previously, Eircom along with other FSPs that use Eircom's twisted copper pairs network to provide FVA, whether standalone or in a bundle, offer services on a national basis. UPC, Eircom's largest competitor (when measured in subscription terms) is capable of providing FVA within broadband bundles to approximately 45% of households in Ireland, primarily in (sub) urban areas.

4.179 According to Eircom, competition is intense in urban areas where UPC is present, evidenced by the development of customer shares and churn which it considers is different in more densely populated urban areas. Figure 6, based on ComReg's 2013 ICT survey results, indicates broadly that UPC is attracting a significant number of subscribers to FVA sold in a bundle in cities where it has a cable network presence.

[282] This information is based on a November 2013 Eircom's press release available at http://pressroom.eircom.net/press_releases/article/eircom_announces_plans_to_extend_its_fibre_broadband_footprint_to_1.4_milli/.

Figure 6 2013 ICT Household Survey Snapshot of FVA market shares by Location[283]



	Urban	Rural	Landline Non Bundle	Broadband Bundle
Eircom	53	61	63	54
UPC	26	3	4	24
Vodafone	13	23	12	18

	Eircom	UPC	Vodafone
Dublin	44	42	6
Cork	55	14	25
Limerick	52	18	13
Galway	63	20	11

(Q 4a)

Significant difference exist in share by region nationally, and within cities around the country

Other = IFA Telecom, UTV, Pure, Telecom, Rapid Broadband

4.180 Figure 6 indicates that based on survey results, Eircom has a lower share of FVA in areas where UPC is offering voice and broadband services, compared to areas where UPC is not providing telephony services. This suggests a degree of localised competitive pressure in relation to the provision of FVA primarily in the wider Dublin region. The pattern suggests that UPC is able to attract churning subscribers from Eircom retail (and wholesale) FVA products, as well as new broadband bundle subscribers, while Eircom is losing subscribers when FVA is sold in a bundle. However, it is important to note that UPC's services are primarily targeted at households and it has a much smaller share of business subscriptions, providing approximately 3% of business FVA subscriptions in Ireland.[284] Regarding the product market definition, as set out in paragraphs 4.59 to 4.67, ComReg's analysis and view is that there is a single FVA market for business and residential customers.

4.181 Further, consistent with the European Commission's 2014 Draft Explanatory Note,[285] the fact that competitors do not supply on a national basis does not suffice to conclude that there are distinct geographic markets. Available evidence relating to demand-side and supply-side substitutability on the FVA market shows prospectively that FSPs providing broadband with managed

[283] This is based on survey evidence only and hence can be interpreted only as indicative evidence. it is also based on households and it should be recalled that ComReg has identified a product market that incorporates both residential and non residential services and UPC's share of the non residential segment is significantly lower than that of Eircom across all regions.

[284] The 2012 Market Research, slide 95.

[285] See pg. 15.

VOIP can increasingly exercise a national competitive pressure on Eircom's FVA whether standalone or in a bundle. As set out at paragraphs 4.82 to 4.120, for a substantial portion of end-users nationally broadband with managed VOIP services are considered an effective substitute for narrowband FVA, consistent with conclusions of the Ecory's report.

4.182 Regarding bundled FVA subscriptions, UPC as of Q4 2013 has almost a ✂% market share compared to Vodafone's ✂% share and other FSPs ✂% share. In the presence of regulation, Eircom has a ✂% share of bundled FVA subscriptions. Absent regulation, however, Eircom would likely have a greater market share, that is, ✂% bundled FVA subscriptions.[286] Eircom continues to be a major player and is likely to maintain a substantial retail presence for the foreseeable future in the FVA market for both standalone and bundled FVA subscriptions. Even where cable is available, the majority of FVA connections standalone or bundled are still by way of twisted copper pair connections.

4.183 Eircom (Frontier) suggests that for bundled FVA the competitive choices for customers purchasing bundles within the UPC footprint and outside the footprint are fundamentally different and that this is the relevant fact for deciding whether there should be a sub national market.[287]In contrast, Vodafone considers that where there is broadband availability there is a demand profile for FVA within bundles. It also considers that as the boundary of broadband availability has increased there does not seem to be any difference in the demand profile for bundled FVA in areas which formerly did not have broadband and those which historically did. Consequently, Vodafone is of the view that the demand profile for bundled FVA will be substantially homogeneous wherever there is broadband availability.

4.184 Notwithstanding that areas may differ by underlying structural conditions, the general trend of consumers (that value broadband at least) increasingly moving away from narrowband FVA to broadband with managed VOIP is taking place nationally. While it is apparent that consumers are responding to UPC's relatively attractive product bundles, variations of competitive conditions with respect to bundled FVA is not limited to the presence of UPC. Recent developments such as the entry of Sky into the broadband and telephony market, Vodafone's presence and the launch of IPTV over Eircom's NGA network suggest that service providers will increasingly compete for subscribers on the basis of popular bundled services on a national basis. Although UPC's market share of FVA continues to grow,[288] that rate of growth appears to have somewhat levelled off on entry of Sky, an FSP likely to be too large over time to ignore.

[286] ComReg Quarterly Report data.
[287] Eircom response to 12/117, Annex 1 (the Frontier Report), p. 18.
[288] ComReg Quarterly Report data , in addition, see UPC's press releases (http://www.libertyglobal.com/pdf/press-release/UPC-Holding-Press-Release-Q4-2013-FINAL.pdf

4.185 In this respect, ComReg notes that one of the developments which Eircom includes as having had significant impact on the market for retail FVA sold in bundles is "*the entry of Sky as a national player into the bundles market in February 2013 (supported by a major national media campaign) with the ability to leverage a substantial and well established base of existing TV customers with competitively priced broadband/home phone bundles.*"[289] In addition, ComReg notes that Eircom accepts that outside urban areas its provision of bundled FVA will be constrained by the existence of wholesale regulation and that additionally bundles outside urban areas will be indirectly constrained by the competitive forces that apply within urban areas.[290] Further, Vodafone observes that in terms of where there is broadband availability there is a demand profile for FVA within bundles. In this respondents view as the boundary of broadband availability has increased there does not seem to be any difference in the demand profile for bundled FVA in areas which formerly did not have broadband and those which historically did. Accordingly, if there is a geographic boundary then it has not been exposed by the expansion of broadband availability to date and lies beyond the current broadband foot print. Vodafone is also of the view that there is no identifiable reason why there should be any boundary and it seems reasonable that the demand profile for bundles FVA will be substantially homogeneous wherever there is broadband availability. On this basis, it would appear that Eircom is facing increased competitive pressure in the UPC network footprint as well as where bundles including broadband are sold such that a break in competitive conditions around UPC's cable network is less clear.

4.186 The Ecory's report notes that the general trend is switching towards broadband with managed VOIP. It is likely that bundles will increase in prevalence over the next few years, and correspondingly fewer consumers are likely to purchase FVA outside a bundle, which is consistent with a national FVA market whether standalone or in a bundle.

Geographic variation in products and pricing

4.187 In order to corroborate the structural evidence described above by reference to the actual behavior of the FSPs and their effect on the FVA market in terms of prices and market shares, ComReg has examined the pricing and commercial behavior of the current suppliers of FVA.

4.188 Eircom suggests that the product types and quality available to the market are different in UPC areas and rural areas and it responds differently depending on UPC's presence. However, if there are sufficiently differentiated conditions of demand and supply to justify the identification of sub-national markets for FVA and in particular bundled FVA, ComReg would expect more evidence of FSPs

[289] Eircom response to 12/117, p. 11.
[290] Eircom response to 12/117, p. 7.

engaging in geographically differentiated pricing strategies for FVA.[291] However, despite Eircom's contention, there is currently no apparent evidence of any significant sub-national pricing or marketing—irrespective of whether FVA is standalone or bundled, all operators have continued to price and market on a national basis at both the retail and wholesale level.[292]

4.189 In particular, the headline price of Eircom's standalone FVA remains constant over time. Although Eircom is subject to a RPC on its narrowband FVA, PSTN and ISDN access respectively, it is nevertheless free to reduce its standalone FVA prices, which ComReg would expect it to do if, it faced sufficient competitive pressure. On the other hand, given Eircom's 2014 USO designation, it is currently required to offer FVA (and calls) at geographically averaged prices.

4.190 In addition, the headline prices of Eircom's (non NGA) bundles including an FVA component have remained broadly constant over time for the same product categories (see for example, Table 2 at paragraph 4.94 above). Despite Eircom's declining market share, Eircom had not responded to UPC's offers by reducing its prices to the extent it could have within the boundaries of regulatory price controls (price floors in the wholesale broadband access market, in particular).[293] So far, Eircom's competitive response has manifested itself predominantly through increasing the value of certain broadband bundles with quality upgrades and time limited promotions, primarily in urban areas which may infer differences for certain high speed fibre based broadband services if prices are compared in quality-adjusted terms. There are differences in terms of availability of faster broadband speeds, Eircom has introduced upgrades in urban areas only and some products do not exist in rural areas.[294]

4.191 While there was some initial indications of sub-national pricing constraints, having regard to obligations imposed on it under the 2013 Bundles Decision (including various price ceilings and floors which are set to prevent Eircom imposing a margin/price squeeze in the WBA and WPNIA markets), Eircom in 2013 applied a discount on its SB-WLR product but only on a promotional basis when it is bundled with Line Share and bitstream within the LEA.[295] That

[291] ComReg notes the BEREC 2013 Draft Common Position which states that if prices (of the incumbent and alternative operators) are geographically uniform, this may be indicative of there being insufficient geographical variations in competitive conditions to justify the definition of local geographical markets (see para 114).

[292] According to prices advertised at www.eircom.ie www.upc.ie http://www.sky.com/products/broadband-talk/talk/features/index-roi.html and www.vodafone.ie as at 27 January 2014.

[293] Oxera (2013), 'Assessment of retail pricing constraints - Response to submissions on consultation 12/27: 'Next Generation Access ("NGA"): Proposed Remedies for NGA Markets', January.

[294] Not all exchanges have been upgraded to next generation broadband (NGB) capabilities. This connects an exchange to Eircom's next generation core network (NGN) and allows broadband connections to be delivered without congestion. All else being equal, lower congestion improves the quality, especially in times of peak demand. Furthermore, Oxera understands that not all of Eircom's exchanges are ADSL2Plus-enabled, which is required for the higher line speeds (> 12Mbps).

[295] Where the line is hosted on an Eircom exchange which is determined to be within the LEA — as published by ComReg from time to time or the exchange has been marked as Ready For Order as per the NGA Advanced PreQual File process. The broadband enabling wholesale products in scope are all variants of Current

development provides Eircom and/or other OAOs scope to reduced the headline or effective price of retail bundles that include FVA and NGB[296] broadband within the LEA. The FVA Consultation noted it was conceivable that in the future as Eircom's NGA roll out continues that the WLR discount for bundles in NGA enabled exchanges could possibly lead to further price/quality sub-national differentiation. However, ComReg observes at paragraph 3.13 that Eircom has recently announced the withdrawal of this wholesale promotion. ComReg furthermore observes an increase in the headline and/or effective price even regarding retail bundles that include FVA and NGB broadband within the LEA. At the moment, providers of broadband with managed VOIP offer a uniform price.[297] Although FSPs' marketing is focused almost entirely on bundled offers, the presence of these competing networks has not to date lead to the implementation of sub-national pricing or marketing strategies by nationwide providers of FVA standalone or in a bundle.

4.192 There is, overall, insufficient behavioural evidence at this point to suggest that Eircom faces appreciably different conditions to a degree that pricing of its FVA standalone or FVA in a bundle is constrained in some areas and not in others.

Conclusion

4.193 Accordingly, while ComReg observes some variations of competitive conditions, consistent with the guidance of the European Commission and BEREC, the evidence on differentiated conditions of demand and supply is not sufficient at this time so as to justify the definition of sub-national markets within the lifetime of this review. However, ComReg will keep this under review.

Generation Products (existing Bitstream and Line Share) and Next Generation (Bitstream Plus and Virtual Unbundled Access) Products.

[296] For example, Eircom's eFibre Advanced and eFibre Unlimited have a promotional monthly charge for the first 6 months that is available to new customers, with it reverting to a normal monthly charge thereafter.

[297] See http://www.digiweb.ie/home/phone or http://www.imagine.ie/offer/ for examples of FWA services with a single price irrespective of location (as at 27 January 2014).

4.194 Notwithstanding this, ComReg considers the differences in competitive conditions are sufficient for the purposes of the adoption of differentiated remedies. In this respect, the European Commission has emphasised that the EU framework does not preclude the imposition of different remedies in the same relevant market.[298] Consistent with European Commission guidance, differences in geographic conditions of competition can be captured at multiple stages in the framework (market definition, SMP or remedies). ComReg notes that remedies should be tailored and proportionate to the identified competition problem: accordingly, ComReg considers that it is appropriate in this case to impose remedies which take account of locally/regionally differentiated competitive conditions while retaining a national geographic market definition.

E. Overall Conclusion on Market Definition

4.195 The first step in ComReg's analysis is to identify the appropriate focal product(s) and its analysis of the scope of the relevant market(s) flows from this. In light of ComReg's analysis and feedback from the FVA Consultation and Supplementary Consultation, ComReg considers that standalone FVA is the appropriate focal product for the purposes of this market review. From this starting point, ComReg's analysis, drawing on expert economic input, concludes that the scope of the market by reference to standalone FVA as the focal product, should be delineated by:

(i) FVA and fixed calls are in separate markets;

(ii) there is a single market for all user types whether residential or business;

(iii) there are separate markets for lower-level voice access ('LLVA') and higher-level voice access ('HLVA') markets;

[298] Further, this approach was applied by the European Commission in its Decision concerning Case IE/2012/1381 and IE/2012/1382: modification of remedies related to the retail market for access to the public telephone network at a fixed location and the wholesale market for network infrastructure access.

(iv) while in theory there could be a single broad market for LLVA whether sold inside or outside a bundle[299] or separate markets for each of (i) standalone lower-level voice access and (ii) LLVA sold inside a wider bundle of services, ComReg considers in light of the current evidence set out above and in the FVA and Supplementary Consultations that, on balance, referring to national circumstances,[300] it is most appropriate to define the FVA market for the purposes of this market review as being split at the lower level between two sub FVA markets: standalone FVA (not bundled with for example broadband) and FVA sold in a wider bundle of services which includes broadband with managed VOIP; and

(v) ComReg finds that mobile access is not currently in the same market as FVA.

4.196 From this process, and having considered the views of respondents as well as the views of its expert economic consultant, Oxera, ComReg has decided that prospectively the most appropriate approach to FVA market definition is to determine three separate relevant retail FVA product markets as follows:

- **Market 1a Standalone lower level voice access** comprising access via a PSTN, ISDN BRA or analogous broadband[301] connection (cable, fibre, FWA or DSL), that is used to provide PSTN voice, ISDN voice or Managed VOIP service sold on a standalone basis or in a package with fixed voice calls ('Standalone LLVA');

- **Market 1b Bundled lower level voice access** comprising access via a PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA and DSL), that is used to provide PSTN voice, ISDN voice or Managed VOIP service sold in a product bundle which includes any of broadband, television or mobile services (and which product bundle may include fixed voice calls),('Bundled LLVA'); and

[299] The initial FVA Consultation proposed a broader LLVA market comprising narrowband access (PSTN and ISDN BRA), as well as, broadband access (cable, fibre, FWA and DSL) with managed VOIP (i.e. FVA whether sold inside or outside bundles).

[300] It is noted that the European Commission has in the past accepted distinction between residential and non residential FVA customer. See the European Commission staff working paper on market reviews under the EU Regulatory Framework (3rd Report, COM (2010) 271 Final).

[301] Prospectively, a scenario may arise where an operator, in light of evolving access technologies, delivers a standalone managed voice service (i.e. managed VOIP over an IP /broadband access path) equivalent to a standalone narrowband PSTN voice service. For example, from a technical standpoint, it is possible that an operator could use a broadband access path to provide a standalone managed voice over IP/broadband as a product, but without also providing internet access. However, while this type of voice product is somewhat notional at this stage, to be technology neutral and noting the potential for this to emerge to one degree or another within the lifetime of this market review, ComReg includes them within the relevant market so that any future competitive constraints from such could be assessed. However, their inclusion at this point does not affect the SMP assessment later.

- **Market 1c Higher level voice access** comprising access via ISDN FRA or ISDN PRA that is used to provide voice service sold either on a standalone basis or in a package with fixed voice calls, or in a product bundle which includes any of broadband, television, or mobile services (and which product bundle may also include fixed voice calls), ('HLVA').

4.197 ComReg has concludes that each of the FVA sub markets defined are national in scope.

Chapter 5

5 Competition Analysis and Assessment of Significant Market Power

Summary

5.1 As set out in Chapter 4 and the supplementary Oxera report, market definition is not an end in itself. The definition of the relevant economic market is carried out in order to identify the products and the geographic area over which an assessment can be made of operators' ability to act to an appreciable extent independently of competitors, customers and consumers (i.e. a position equivalent to dominance in competition law terms with reference to a particular market).

5.2 ComReg has analysed the Relevant FVA Markets defined in Chapter 4 to decide whether or not each is effectively competitive. As a result of its analysis, ComReg concludes that the evidence indicates that Eircom has SMP in each of the three markets identified in which it supplies FVA. This is supported by ComReg's detailed analysis of a number of key criteria. Those criteria and ComReg's summary conclusions in relation to them are as follows:

- **Market share:** Absent regulation (and taking a modified Greenfield approach[302] consistent with the European Commission's guidance, the market shares of FSPs reliant on the CPS/WLR remedy would be discounted), Eircom market share would be close to 100% of standalone LLVA, ✂ % of bundled LLVA and 80% of HLVA). In the presence of the SB-WLR and CPS remedy, Eircom continues to have a high market share (✂ % of standalone LLVA, ✂ % of bundled LLVA and 54% of HLVA). This is indicative, but it should be noted, not by itself, determinative of SMP;[303]

[302] Regarding a logical sequence when analysing markets, the European Commission mandates that a NRA's follow a modified Greenfield approach, which means that existing SMP remedies that apply to the market under consideration should be set aside/discounted (the 2007 Recommendation and Ecory's report, p381 refers).

[303] It should be noted that that the SMP Guidelines states that the existence of a high market share alone (though presumptive) is not sufficient to establish the existence of SMP; rather it means that the undertaking concerned might be in a dominant position and this needs to be considered alongside other potentially relevant criteria for assessing the existence of SMP.

- **Existing and potential competition:** In the presence of regulation, existing competition continues to evolve, though high and non transitory barriers to entry into the relevant FVA markets remain. Absent appropriate regulation in wholesale upstream markets, Eircom's ability to act to an appreciate extent, independently of competitors, customers and consumers in terms of FVA whether standalone or in a bundle will not be mitigated on a prospective basis over the period of the review; and

- **Countervailing buyer power ('CBP'):** There is insufficient CBP to prevent Eircom from behaving to an appreciable extent independently of its competitors and customers in setting its FVA prices.

5.3 Having regard to the above, ComReg has decided, in accordance with the Framework Regulations, to designate:

- Eircom as having SMP in the national Standalone LLVA Market;

- Eircom as having SMP in the national Bundled LLVA Market; and

- Eircom as having SMP in the national HLVA Market.

5.4 In light of the future trends and developments that ComReg has identified as potentially emerging in each of the relevant markets, amongst other things those set out in Chapter 3 (and updated in Appendix 4), ComReg intends to closely monitor the markets in terms of infrastructure and services competition both at the retail and wholesale level.

Structure of this section

5.5 ComReg briefly describes below the preliminary views set out in the FVA Consultation and then goes on to consider respondents' views before setting out its final reasoning and position. The remainder of this Chapter is structured as follows:

A. Overview of ComReg's approach

B. Assessment of SMP Market 1a: Standalone LLVA

C. Assessment of SMP Market 1b: Bundled LLVA

D. Assessment of SMP Market 1c: HLVA

E. Overall conclusion on Designation of undertakings with SMP

A. Overview of ComReg's approach

5.6 The FVA Consultation noted that Regulation 25(1) of the Framework Regulations equates SMP with:

> *"a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers".*

5.7 In the FVA Consultation, ComReg set out the approach that it took in producing its proposals on SMP.[304] ComReg has maintained the same approach in reaching its final conclusions. Namely, in assessing whether an undertaking has SMP on the three FVA sub markets defined in Chapter 4, ComReg has taken utmost account of the SMP Guidelines[305] which identify criteria for the assessment of SMP.[306] From these, and for the purposes of carrying out a forward looking analysis on the basis of existing and likely future market conditions,[307] ComReg identified the following criteria as being particularly relevant to its analysis of the FVA market:[308] market shares, barriers to entry and expansion, control of infrastructure not easily duplicated, economies of scale and scope, vertical integration, absence of potential competition and CBP.[309]

[304] FVA Consultation paragraphs 5.3 to 5.19.
[305] In accordance with Regulation 25(2) of the Framework Regulations ComReg is required to take utmost account of the SMP Guidelines.
[306] See paragraphs 75 and 78 of the SMP Guidelines.
[307] See paragraphs 20 of the SMP Guidelines.
[308] Other factors identified in the SMP Guidelines which could be used to indicate the potential market power of an undertaking were also examined in Appendix 2 of the FVA Consultation but, for the reasons set out therein, were considered of no or less relevance for the purposes of the SMP assessment in the relevant FVA Markets.
[309] FVA Consultation paragraphs 5.11 and 5.12.

5.8 As noted above ComReg adopts the modified Greenfield approach to the market analysis. Specifically, ComReg considered that in markets subject to ex ante SMP regulation, an authorised undertaking's behaviour may also be restricted by way of existing SMP regulatory controls. ComReg, in the FVA Consultation, noted that as part of the 2007 market review, wholesale measures were imposed on Eircom as a remedy: notably, SB-WLR and CPS access together with their supporting remedies obligations relating to access to and use of specific network facilities, transparency, non-discrimination, accounting separation, price control and cost accounting) in the retail FVA market. It is necessary therefore for ComReg to consider the potential ability of the undertaking to exert market power in the absence of ex ante SMP regulation in the FVA markets concerned. ComReg highlighted the risk of circularity[310] when taking into account market shares from FSPs which rely on the SB-WLR and CPS access remedy that was previously mandated for the FVA retail market which, if found to be effectively competitive, might subsequently be removed.

5.9 ComReg consulted on the principle to transfer the latter wholesale measures upstream to Market 2 (i.e. wholesale fixed voice access and call origination, the ('FACO' market) subject to consultation and contingent upon SMP still being identified in that market.[311] Therefore, because the SB-WLR and CPS access remedy would exist in the retail FVA markets for an interim period and pending a transition of wholesale measures upstream to the FACO market, it was necessary to undertake the competition assessment taking into account two scenarios i) the first considered the potential ability of Eircom to exert market power absent ex ante regulation in the relevant FVA markets but with resale-based (SB-WLR) access prospectively being mandated in the related wholesale FACO market, and ii) the second considered the potential ability of Eircom to exert market power in the absence of ex ante SMP regulation in the retail FVA markets as well as excluding SB-WLR access remedy in the related upstream FACO market (i.e. the modified Greenfield approach).[312]

5.10 ComReg's assessment of the relevant SMP criteria identified was conducted under the following three broad headings:

1) **Existing competition** – an assessment of factors such as market shares, relative strength of existing competitors and pricing behaviour.

[310] FVA Consultation, paragraphs 5.16 to 5.18.
[311] The FACO Consultation document is on the ComReg website at : http://www.comreg.ie/_fileupload/publications/ComReg1426.pdf
[312] As noted at paragraph 5.8, while discounting SMP regulation in the market concerned, other obligations (such as for example, relevant SMP remedies in other markets, notably LLU and WBA, or obligations relation to general consumer protection) are assumed to be in place.

2) **Potential competition** – an assessment of factors such as control of infrastructure not easily duplicated, barriers to entry, as well as considering the overall strength of potential competitors.

3) **Strength of any CBP** – an assessment of the impact posed by any strong buyers of FVA on the competitive behaviour of FVA suppliers.

FVA Consultation Proposals

5.11 ComReg analysed the two relevant FVA markets proposed in the FVA Consultation, notably, a broader LLVA market than that in 2007 market review (including narrowband as well as broadband with managed VOIP connections) and a HLVA market to determine whether they were effectively competitive and whether any FSPs operating within these markets should be designated as having SMP. On the basis of the analysis set out in Chapter 5 and Appendix 2 of the FVA Consultation, ComReg was of the preliminary view that Eircom should be designated as having SMP in the national market for LLVA and the national market for HLVA. Respondents' views regarding ComReg's preliminary conclusions on the status of SMP in the LLVA and HLVA markets as proposed in the FVA Consultation are set out below.

Assessment of SMP Lower Level Voice Access Markets

5.12 In the FVA Consultation, ComReg analysed the broad LLVA market (including narrowband as well as broadband with managed VOIP connections) proposed as part of the FVA Consultation to determine whether it was effectively competitive and whether any FSPs operating within this market should be designated as having SMP. On the basis of the analysis set out in the FVA Consultation, ComReg's preliminary view was that Eircom should be designated with SMP in the national market for LLVA. ComReg's proposals were supported by a detailed analysis of a number of criteria[313] and ComReg's preliminary conclusions were as follows:

[313] FVA Consultation, paragraphs 5.22 to 5.98.

- **Market shares:** Eircom's market share had been steadily declining in light of FSPs providing FVA using SB-WLR and FSPs supplying broadband with managed VOIP. In Q2 2012 Eircom's market share (in terms of retail FVA subscriptions) of the broader LLVA market was, in the presence of the existing SB-WLR/CPS remedy, approximately 58.3% compared to 69.2% in Q2 2010. ComReg considered that Eircom's market share of the broader market was at 58% high and was indicative though not determinative of SMP, even when market shares of FSPs that are reliant on the CPS/SB-WLR input are taken into account. When market shares of the FSPs reliant on regulation are excluded, Eircom's market share increased to above 80% of LLVA subscriptions.

- **Existing and potential competition:** In the presence of regulation (CPS/SB-WLR) in the market concerned, existing competition continued to evolve, though high and non-transitory barriers to entry into the LLVA market remained. In this regard, FSPs had not widely replicated the ubiquity of Eircom's network to supply FVA in the LLVA market. Absent regulation ComReg believed that existing competition would be virtually non-existent in the LLVA market. ComReg considered that, despite the presence of regulation,[314] the relative competitive strength of alternative FSPs was dampened, with the majority of FVA suppliers being SB-WLR re-sellers. In addition, the increased uptake of LLU (primarily by BT) has not played a significant role in the supply of FVA since BT which is the largest LLU operator is acting as an intermediary in the sale of SB-WLR at a wholesale level (i.e. a resale of Eircom's inputs).

  While competition was emerging in the form of voice services provided by other operators via broadband infrastructure using managed VOIP services, ComReg's preliminary view was that competition in the LLVA market was currently not effective. Because voice over broadband is not currently offered on a standalone basis to end-users in Ireland, alternative broadband platforms represent an additional choice of supply for only a subset of the population that place a higher value on broadband and the wider bundle of communication services. ComReg's preliminary view was that suppliers of managed voice over broadband did not act as a sufficient constraint on the PSTN/ISDN network nationally (though may have exerted a degree of competitive pressure for a subset of end users that primarily value broadband and bundles of broadband and add on voice services) in view of the significant proportion of the population that value voice as the primary fixed telephony service.

[314] The availability of SB-WLR combined with regulated wholesale prices and existing non-discrimination, and transparency remedies imposed under Decision D07/61.

Finally, ComReg acknowledged the potential for increased competitive constraint from mobile operators. In practice, however, these operators had yet to introduce tariff and service innovations, including flat rates and home zone products, which target FVA subscribers on a significant scale and which provide incentives to use the mobile phone rather than the fixed line for making calls at home or in the office. Entry by mobile operators into the FVA markets has in practice been through acquisition or based on resale of Eircom's wholesale inputs, which ComReg considers as recognition by mobile operators that consumers place a distinct value on mobile as compared to fixed voice telephony.

- **CBP:** It was ComReg's preliminary view that CBP was unlikely to be a sufficient constraint on Eircom's pricing behaviour in the LLVA market over the period of the market review.[315]

Consultation responses and ComReg analysis

5.13 The majority of respondents agreed with ComReg's preliminary conclusions on the status of SMP in the LLVA market as proposed in the FVA Consultation. However, Eircom, while not disagreeing with the preliminary assessment of SMP in relation to the wide LLVA, stated that the outcome of SMP assessment in the wide LLVA market would differ substantially if its alternative market definition (product and/or geographic) is used. As set out in Chapter 4, Eircom considered that ComReg should reconfigure the FVA market into separate FVA markets, Voice Only and Bundled Voice. On this basis, Eircom is of the view that SMP regulation at the retail level in relation to LLVA is no longer required in light of the substantial competitive constraints on the FVA sub-markets they consider are the relevant FVA markets as well as likely developments that will affect the market in the near term and the efficacy of wholesale remedies.

5.14 Subsequently, in response to the Supplementary Consultation, in which ComReg gave third parties an opportunity to comment on Eircom's proposal, amongst other things, many alternative FSPs considered that the supply of voice access is not yet competitive in Ireland with the majority of customers served by Eircom PSTN/WLR or ISDN/WLR irrespective of the precise geographical breakdown. Thus, from their perspective, the overall theme seems to be an acceptance that, whatever way the relevant FVA market is defined, it remains susceptible to ex ante regulation, whether for standalone FVA or for FVA sold inside or outside a bundle. Eircom maintains its view on the status of SMP in the LLVA market as set out in response to the FVA Consultation.

[315] FVA Consultation paragraph 5.88 to 5.97.

5.15 Regarding LLVA, having decided for the reasons set out in Chapter 4 to define separate FVA markets, notably standalone LLVA and bundled LLVA, ComReg is required to determine whether each of these LLVA markets are effectively competitive having regard to whether or not any of the FSPs operating within those defined markets have SMP.

B. Assessment of SMP Market 1a Standalone LLVA

5.16 Having updated the information of relevance to the SMP assessment, ComReg now examines the existing competition, barriers to entry and potential competition over the timeframe of the market review and the CBP in market 1a: Standalone LLVA taking into consideration the key issues raised by Respondents.

1. Existing competition

5.17 The overall size of the Standalone LLVA Market while decreasing[316] still accounts for a significant proportion of FVA purchasers. As at Q4 2013 there were approximately ✂ standalone LLVA subscriptions, representing 37%[317] of total FVA subscriptions.

[316] The number of standalone LLVA subscriptions decreased by almost 23% since 2010.
[317] Based on ComReg's Quarterly Report data.

5.18 Figure 7 illustrates the evolution of market share in terms of standalone LLVA subscriptions since 2010. Eircom's market share has fallen to ✂ % in Q4 2013 down from ✂ % in 2010 in light of the CPS/SB-WLR remedy. On this basis, Vodafone, Eircom's main competitor, has a market share of ✂ % of the Standalone LLVA Market, while other FSPs account for the remaining ✂ %. Absent regulation (taking a modified Greenfield approach consistent with the European Commission's guidance and therefore excluding the market shares of FSPs reliant on the CPS/SB-WLR remedy), Eircom would have close to a 100% market share of standalone LLVA. ComReg notes that Vodafone agrees with the modified Greenfield approach in considering market share.[318] In this respondents' view such an approach is an accurate model of actual market conditions. According to Vodafone any retail market share attributable to FSPs using WLR is a close proxy for Eircom directly providing FVA at a retail level. While in the presence of regulation Eircom is losing some market share to FSPs providing FVA using CPS and SB-WLR products, Figure 7 illustrates that it still retains a high and stable market share ✂% of standalone LLVA subscribers. As noted in the European Commission Guidelines,[319] *"According to established case law, very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position"*. Eircom's market share is strong evidence that it has in relation to standalone FVA end users the ability to behave, to an appreciable extent, independently of competitors and consumers (i.e. a position that is equivalent to dominance in competition law terms with reference to the Standalone LLVA Market).

[318] This approach is consistent with the Explanatory Memorandum to the Commission Recommendation of 17 December 2007 on relevant product and service markets.
[319] Commission Guidelines on Market Analysis (2002 C/ 165/03): paragraph 75.

✂Figure 7 Evolution of Market Shares in Standalone LLVA Market[320]

5.19 There are four main undertakings active in market 1a Standalone LLVA, notably, Eircom, Vodafone, Pure Telecom and Digiweb.[321] Regarding the effectiveness of the competitive constraint on Eircom's market position arising from existing competition, as noted in the FVA Consultation, with the exception of UPC's alternative cable network, most of Eircom's competitors in the supply of LLVA still compete by reselling Eircom's SB-WLR products with Vodafone the largest of these. This remains more valid when looking at standalone LLVA - direct build infrastructure by FSPs (excluding cable) given high barriers to entry is de minimus. ComReg, in the FVA Consultation, set out that barriers to entry into the LLVA since the 2007 market review are somewhat reduced. For example, the presence of SB-WLR has provided an avenue for entry into the supply of LLVA, and allowed competing suppliers to offer a competitive constraint to Eircom's FVA without the need to connect directly with end-users.

5.20 However, as noted above, Eircom's competitors in market 1a standalone LLVA continue to rely on the SB-WLR input and their business models are based on the prevailing SB-WLR price. Consequently, ComReg remains of the view, and Vodafone agrees, that the degree of constraint exercised on Eircom in the Standalone LLVA Market by what are effectively resellers of Eircom's SB-WLR product is limited. Eircom's competitors lack the ability to act entirely independently of Eircom, and have less flexibility in terms of product design, pricing, and ultimately the architecture and development of the underlying infrastructure. According to Vodafone, given the price structure of SB-WLR there is little or no scope for a prospective competitor to Eircom at the retail FVA level to undercut Eircom for standalone FVA.

[320] Standalone fixed voice subscriptions data includes subscribers purchasing ISDN FRA and PRA lines. However, as the number of these subscribers is relatively small and therefore it does not affect materially the analysis of market shares in the Standalone LLVA Market.
[321] For a list of providers of retail FVA see further Appendix 4.

5.21 ComReg is of the view that the degree of competitive constraint exercised is relatively less in the Standalone LLVA Market compared to bundled LLVA. Investment in alternative infrastructure for the provision of standalone LLVA is non-existent. LLU is not used to supply standalone LLVA in any region in Ireland, and this is likely to remain the case as it is usually not economical to use full LLU to provide only FVA services. Further, ComReg highlights in Chapter 4 that the general trend of consumers' preference for buying FVA as part of the broader 'bundle of services' most commonly alongside broadband as well as the decreasing size of the Standalone LLVA Market. Accordingly, ComReg considers the likely constraint on standalone LLVA generated by broadband with managed VOIP. However, for the reasons set out at paragraphs 4.90 to 4.101 broadband with managed VOIP currently constitutes a viable alternative source of supply of FVA only for end-users who have already decided to purchase broadband and who place value on the multi-product bundle. On the basis of the available switching evidence and the SSNIP analysis conducted by Oxera, ComReg's view is that the extent to which UPC and other managed VOIP over broadband suppliers pose a competitive constraint on standalone LLVA is over the period of this review mitigated by the factors considered at paragraphs 4.91 to 4.101 and paragraph 5.27 below. Notably, there are currently some differences between standalone LLVA and bundled LLVA in terms of the pricing, functionality and ultimately customer valuation of these products. Further, a significant portion of customers cannot switch to UPC's cable based FVA because its network extends to 45% of households. In Magnet's view, LLVA is not being constrained by VOIP over broadband and there are high barriers to entry in LLVA. Limited competition for the customers in market 1a Standalone LLVA is also supported by Eircom's increased market share in terms of subscriptions in the last three quarters.[322]

[322] Eircom's market share grew from ✂% in Q1 2013 to ✂% in Q4 2013. Source: ComReg Quarterly Questionnaire.

5.22 Regarding Eircom's ability to price independently, ComReg is of the view that existing competition does not exercise a sufficiently strong competitive constraint on Eircom's supply of standalone LLVA. As highlighted in the FVA Consultation, SB-WLR resellers' lack of freedom[323] to price entirely independently of Eircom indicates the limited strength of competition. The headline price of Eircom's standalone LLVA remains constant over time. This is despite reductions in the LLU and SB-WLR price and also in spite of a period of deflation in the broader economy. Although Eircom is subject to a retail price cap of CPI – 0 on its narrowband FVA prices, it is nevertheless free to reduce price, which ComReg would expect it to do if it faced sufficient competitive pressure including from mobile and any direct or indirect constraint from broadband with managed VOIP, and or bundled LLVA. For the reasons set out at paragraphs 4.91 to 4.120, ComReg is of the view that the competitive constraint from broadband with managed VOIP on a national basis is not yet fully evidenced. For example, Table 3 at paragraph 4.115 above illustrates that margins significantly differ for standalone LLVA and bundles including bundled LLVA.

5.23 In addition, ComReg notes that Vodafone and BT consider that Eircom retains the unilateral flexibility to increase its price of WLR. ComReg notes that although Eircom has offered a WLR discount for certain bundles (though more recently Eircom has indicated that plans to withdraw that wholesale promotion) it has yet to offer a similar such discount in respect of standalone LLVA/WLR connections. This is a clear demonstration, in Vodafone's view, that Eircom perceives that standalone FVA does not face any constraint from FVA sold in bundles and that Eircom can price it as it will. Vodafone also expressed the view that Eircom's undiscounted WLR price appears some €1.50 higher than the cost of delivering the service including the WACC, a clear indication that Eircom was free to price WLR (and by inference retail FVA) above the competitive level for a protracted period of time. In Vodafone's view whatever constraint eircom faces is on the broadband side.

5.24 For the above reasons, there is no firm behavioural evidence that Eircom is facing effective pricing constraints in the provision of standalone LLVA. The strength of competition in the Standalone LLVA Market does not represent and effective competitive constraint on Eircom's ability to act independently in market 1a Standalone LLVA in relation to pricing or commercial strategy at this stage. Below, ComReg considers other relevant factors which may have the effect of diminishing or undermining Eircom's market position in this relevant market.

[323] The price of SB-WLR wholesale input is set by ComReg based on Eircom's retail price minus the retail costs associated with the supply of FVA. The SB-WLR retail minus mechanism does not constrain Eircom in the level of the retail and wholesale prices that it sets, only the differential between those prices.

2. Barriers to entry and potential competition

5.25 Noting the absence of an effective competitive constraint posed by existing competition, ComReg assesses the likely effectiveness of any constraints likely to be posed by potential competition.

5.26 ComReg in the FVA Consultation considered the barriers to entry and expansion insofar as they may have impacted upon the effectiveness of the constraints posed by potential competitors. Then, ComReg assessed the strength of any such potential competition having regard to the barriers to entry and expansion that had been identified.[324] In this respect, factors considered and points made in the FVA Consultation regarding the extent of sunk costs, economies of scale, scope and density, control of infrastructure not easily replicated and vertical integration in LLVA remain valid (and hence the degree of competitive constraint arising from potential competition in the FVA markets through entry), even though ComReg has now determined to split the FVA market: market 1a standalone LLVA and market 1b bundled LLVA, respectively.

5.27 ComReg in the FVA Consultation highlighted that Eircom is the only ubiquitously networked provider. As such all FSPs with the exception of UPC, which provides the majority of its services over its cable network, rely upon wholesale inputs controlled by Eircom in order to provide FVA as well as broadband. Existing competition largely based on resale would indicate that the significant sunk costs associated with direct supply of FVA are prohibitive. ComReg furthermore highlighted that the upfront investment required in order to supply FVA in the LLVA market is considerable. ComReg's view is that over the period of this review Eircom is unlikely to be sufficiently constrained by a new entrant building a network to supply LLVA. This remains more valid when looking at standalone LLVA. In this regard, there are a number of factors that act as a barrier to this type of entry occurring in the Standalone LLVA Market:

- Eircom enjoys control of a ubiquitous copper/fibre access infrastructure which it is not feasible for any other operators to replicate, in particular where the Standalone LLVA Market in overall size is decreasing;[325]
- Eircom has a large customer base and diversified product range and therefore benefits from economies of scale, scope and density;[326]
- There are significant sunk costs that would be incurred when entering the Standalone LLVA Market; and

[324] FVA Consultation paragraphs 5.43 to 5.87.
[325] FVA Consultation paragraphs 5.58 to 5.64 sets out a discussion of the likely sunk costs associated with replicating the Eircom access network.
[326] FVA Consultation paragraphs 55.65 to 5.70 sets out a discussion of economies of scale, scope and density.

- Eircom benefits from being vertically integrated.[327]

5.28 Further, there are considerable barriers to entry into the Standalone LLVA Market associated with Full LLU or ULMP. The latter wholesale inputs are not used to supply FVA on a standalone basis, possibly because of the lengthy and costly process of rolling out FVA networks on that basis as well as the lack of commercial feasibility. As noted in the FVA Consultation the LLU process involves significant investment in infrastructure within (and between) exchanges. As a result, exchanges only tend to be unbundled in densely populated exchange areas where it is economical to do so. ComReg considers it unlikely that over the period of this market review FSPs relying on LLU inputs will offer sufficient potential competition and impose a sufficiently strong competitive constraint on Eircom in the Standalone LLVA Market.

5.29 Regarding voice services that may be provided over broadband networks using a managed VOIP service, as set out in Chapter 4, customers that wish to purchase standalone LLVA are unlikely to switch to alternative networks, since CATV, alternative FTTX, and FWA networks principally offer FVA only as part of a bundle (with broadband and/or pay TV). For the reasons, set out at paragraphs 4.91 to 4.120, ComReg considers that within the period of the review broadband with managed VOIP and or bundled LLVA will not exert a sufficient constraint to curb Eircom's market position in relation to the significant proportion of the population that nationally values standalone LLVA. Consistent with the Ecory's report,[328] ComReg recognises that in light of the increased take up of broadband as well as continued migration towards bundles, this continuing evolving dynamic may prospectively over the longer term sufficiently constrain standalone LLVA. This will not, however, happen, during the lifetime of the review period.

5.30 Eircom considers that mobile operators are exerting some constraint on providers of standalone LLVA. It furthermore considers that this constraint is likely to strengthen over the period of the market review. In Chapter 4 at paragraphs 4.121 to 4.155, however, ComReg finds that fixed access and mobile access are not strong substitutes and are in separate markets. Regarding potential competition posed by mobile networks, for the reasons, set out at paragraph 4.121 to 4.155, any competitive constraint arising from mobile access over the period covered by this market review will not effectively constrain Eircom's behaviour in the Standalone LLVA Market such that it would mitigate Eircom's strong position. However, ComReg will monitor prospective market developments over the forthcoming regulatory period.

[327] FVA Consultation paragraphs 5.71 to 5.75 gives an explanation of vertical integration as a barrier to entry.
[328] See Ecory's report p Chapter 5 and the current draft European Commissions explanatory note at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=4968

5.31 For these reasons, and consistent with views expressed by respondents, ComReg is of the view that though existing competition continues to evolve, high and non transitory barriers to entry into the Standalone LLVA Market remain. Hence, Eircom is not likely to be sufficiently constrained by a new entrant, in relation to its pricing or commercial behaviour, given the barriers associated with economies of scale, scope and density, with vertical integration and with control of infrastructure not easily replicated.

3. Countervailing Buyer Power

5.32 The FVA Consultation assessed CBP in relation to the wide LLVA market. See FVA Consultation paragraphs 5.88 to 5.97 as regards inter alia the assessment of the necessary conditions for effective CBP, the impact of regulation on CBP assessment, the profile of buyer and the analysis regarding alternative sources of supply. Having carefully reviewed again its preliminary analysis, ComReg considers that there is low CBP in the Standalone LLVA Market since customers are generally small and individually represent only a negligible proportion of Eircom‘s revenues in that market. As a result, CBP is unlikely to constrain Eircom‘s pricing behaviour in the Standalone LLVA Market over the period of the review.

Conclusion

5.33 It is ComReg’s view that Eircom’s position of market power is unlikely to materially change within the period of this review. In particular and in addition to Eircom’s high and stable market share, existing and potential competition is extremely limited in this market, as the majority of FVA suppliers are resellers and thus reliant on Eircom’s SB-WLR product to compete in this market; the strength of competition in the Standalone LLVA Market does not represent an effective competitive constraint on Eircom’s ability to act independently in market 1a standalone LLVA in relation to pricing or commercial strategy at this stage; investment in alternative infrastructure for the provision of standalone LLVA is non-existent; the increased uptake of LLU has not played a significant role in the supply of FVA, as BT (the largest LLU operator), acts only as an intermediary in the sale of SB-WLR at a wholesale level and LLU is not used to supply FVA on a standalone basis; and CBP does not constrain Eircom’s pricing behaviour in this market.

5.34 For these reasons, ComReg finds that Eircom has SMP in the Standalone LLVA Market.

C. Assessment of SMP Market 1b Bundled LLVA

5.35 Having updated the information of relevance to the SMP assessment, ComReg examines the existing competition, barriers to entry and potential competition over the timeframe of the market review and the CBP in the Bundled LLVA Market taking into consideration the key issues raised by Respondents.

1. Existing competition

5.36 The overall size of Bundled LLVA Market continues to grow rapidly and has increased by 53% since 2010. As of Q4 2013, there were ✂ bundled LLVA subscriptions representing 63% of total FVA subscriptions.

5.37 Figure 8 represents the evolution since 2010 of market shares in the Bundled LLVA Market – as between Eircom, resellers of SB-WLR, and alternative broadband FSPs supplying bundled managed VOIP services over the broadband network (including UPC‘s cable, fibre, FWA and DSL). It shows that Eircom’s market share in terms of FVA subscribers has been declining throughout this period. Figure 8 illustrates that Eircom has lost market share to alternative infrastructure, primarily to UPC’s managed VOIP services over the cable broadband network. As of Q4 2013, in the presence of wholesale regulation, Eircom has a ✂% market share of bundled LLVA down from ✂% in 2010. UPC’s market share has increased to ✂ % of the Bundled LLVA Market, up from ✂ % in 2010. Vodafone’s market share decreased to ✂ %, down from ✂% in 2010. While Sky has primarily offered standalone TV since February 2013, it is providing broadband and fixed voice in a wider bundle via the resale of line share and wholesale switchless voice products purchased from BT (with BT also re-selling Eircom’s line share product to Sky Ireland). Sky primarily competes in the Bundled LLVA Market where its share was ✂ % of this market at Q4 2013.

5.38 Although different resellers have gained and lost market share over the period, the overall market share of re-sellers has remained broadly constant in relation to bundled LLVA. Moreover, in order to avoid circularity and therefore taking a modified Greenfield approach (consistent with the European Commission’s guidance), excluding the market shares of FSPs reliant on the CPS/SB-WLR wholesale access remedy to compete in the Bundled LLVA Market would bring Eircom‘s market share to approximately ✂% of bundled LLVA subscriptions. This is indicative, but not by itself, determinative of SMP.

✂ Figure 8 Evolution of market shares in the Bundled LLVA Market[329]

5.39 In market 1b Bundled LLVA four main undertakings are active, notably, Eircom, Vodafone, UPC and Sky.[330] Regarding the effectiveness of the competitive constraint on Eircom's market position arising from existing competition, as noted in the FVA Consultation Eircom in the wide LLVA market is facing increasing competition in the supply of FVA from a number of different sources, including resellers of Eircom's SB-WLR product as well as from alternative broadband networks supplying managed VOIP in a bundle with broadband. This remains more valid when looking at bundled LLVA, as noted above, direct build infrastructure by FSPs is de minimus in relation to market 1a standalone LLVA.

5.40 Since the publication of the FVA Consultation, competition in the Bundled LLVA Market continues to evolve. In terms of re-sellers, Vodafone has recently started to offer loyalty discounts on its fixed voice and broadband services to its mobile voice subscribers, thus effectively lowering the price[331] for customers who are purchasing two or more services from Vodafone. In addition, Sky Ireland now provides fixed voice and fixed broadband services at a retail level and as of Q4 2013 has gained ✂% of subscriptions in the Bundled LLVA Market. Sky's growth is likely aided by its ability to cross sell to its extensive existing base of Pay TV customers.[332] However, all competitors (except UPC which provides voice services over its cable broadband network using a managed VOIP service) are relying on a range of Eircom's wholesale inputs primarily WLR and line share to supply bundled LLVA. In order to avoid circularity in the competition analysis, it is necessary to adopt a modified Greenfield approach and discount the reseller market share and the competitive constraint that they provide depending on the transition of the SB-WLR remedy to the wholesale FACO market. In any case, even taking re-sellers' market share into account, ComReg's view is that for the reasons set out above in relation to standalone LLVA, the degree of constraint that resellers (e.g., Sky and Vodafone) pose in the relevant Bundled LLVA Market is limited and is not strong enough to constrain Eircom's market position over the current review period.

[329] It should be noted that bundled fixed voice subscriptions data includes subscribers purchasing ISDN FRA and PRA lines. However, as the number of these subscribers is relatively small and therefore it does not affect materially the analysis of market shares in the Bundled LLVA Market.
[330] For a list of providers of retail FVA see further Appendix 4.
[331] Vodafone offers €3 and €10 discounts on the fixed services to its mobile subscribers. In order to avail of €10 discount, customer has to purchase certain tariffs.
[332] For example see ComReg Document 13/46, Consumer ICT Survey which indicated that 53% of respondents were purchasing TV services from Sky.

5.41 Consistent with the modified Greenfield approach ComReg takes into account the upstream regulation of LLU and WBA in the retail FVA competition assessment.

5.42 ComReg has monitored, amongst other things, developments since the FVA Consultation in relation to LLU and naked DSL. ComReg is in general agreement with Vodafone and considers that FVA provided by FSPs over full or shared LLU do not impose a sufficiently strong competitive constraint on Eircom in the Bundled LLVA Market. The total number of LLU lines has increased to 80,037 lines, however, shared LLU accounts for over 80% of all LLU lines at Q4 2013 (i.e. there is no FVA component; voice is provided using SB-WLR). FSPs continue to prefer shared access which allows broadband functionality only, with voice services still being provided over Eircom's PSTN/ISDN/WLR network. It is notable that LLU lines still account for less than 7% of all fixed broadband connections. Overall, Figure C Appendix 4 illustrates that the growth in the total number of LLU lines has been limited even in the context of broadband and the opportunity of economies of scope.

5.43 Moreover, although Eircom launched naked DSL in 2013, and while broadband is available on a standalone basis, in the context of providing FVA in a bundle, Eircom continues to couple the narrowband connection with the supply of its own retail broadband, WBA and shared LLU or Line Share. Essentially, as the latter wholesale inputs can only be used to provide broadband services, in the absence of an Eircom or reseller managed VOIP service the narrowband access SB-WLR connection needs to be maintained to deliver the voice service. Consequently, FVA whether sold separately or in a bundle, is primarily offered over Eircom's fixed narrowband network (either through Eircom's retail arm, or indirectly through other FSPs using a suite of wholesale narrowband products provided by Eircom pursuant to SMP based regulatory requirements).

5.44 It is notable that similar to market 1a standalone LLVA many of Eircom's competitors in the supply of bundled LLVA also compete FSPs can offer FVA in a bundle through the combined purchase of wholesale inputs such as WLR, line-share and/or WBA products purchased either from Eircom or BT, which is purchased on a national basis with Vodafone the largest of these. This means that FSPs without a network of their own gain national coverage by virtue of having wholesale access to Eircom's national network (and/or BT's resale of Eircom's wholesale access products). However, as noted at in the FVA Consultation and above, the degree of constraint that resellers pose in the Bundled LLVA Market is limited. SB–WLR does not offer FSPs the same degree of commercial flexibility and independence as what could otherwise be leveraged through network investment.

5.45 In terms of alternative infrastructure competition, Eircom is of the view that it is subject to significant competitive constraints from alternative networks, primarily UPC but also other operators. Eircom presented the analysis of market shares within UPC's network area in terms of bundled subscriptions and indicated that prospectively competition is only likely to strengthen in more densely populated urban areas. Thus, in Eircom's view, it no longer holds SMP in a retail market for bundled FVA in more densely populated urban areas. Conversely, UPC is of the view that ComReg overstates the potential impact of UPC's network reach on competition for telecommunications services. According to UPC, its network reach has not translated into massive consumer uptake of telephony services as PSTN/ISDN accounted for 1.43 million lines in Q2 2012, compared to UPCs 205,800 voice customers in the same period (only 13% of all fixed telephony subscriptions in Ireland). In addition, Vodafone notes that there has been an evident slowing in the growth rate of cable based FVA. Its view is that the initial switching to cable was driven by broadband considerations and not FVA considerations. Looking forward, Vodafone believes that the prospective impact of cable based FVA over the period of the review cannot be directly inferred from past growth rates as it would appear that UPC coverage expansion has slowed considerably.

5.46 As of Q4 2013, however UPC is, according to its own published documentation, capable of providing broadband internet services to 748,600[333] households with the vast majority of these capable of receiving voice services. This amounts to approximately 44%[334] of households in Ireland. Moreover, as Figure F Appendix 4 illustrates, UPC continues to grow its market share in terms of subscriptions predominantly via triple play subscriptions. As of Q4 2013, UPC has 293,500[335] cable telephony subscriptions. ComReg considers that overall recent developments are indicating further strengthening of existing competition. Both managed VOIP providers (mainly UPC) and FSPs relying on Eircom's wholesale inputs are growing their market share in terms of subscriptions in the Bundled LLVA Market. However, as highlighted in the FVA Consultation, the availability of UPC's FVA service is limited to the coverage of its existing network. As a result, a significant proportion of customers cannot switch to UPC's cable based voice. The coverage of alternative fibre networks is also very limited and it has been noted that the FWA platform is in decline.

[333] UPC, ― UPC Holding Reports 2013 Results‖, press release available from: http://www.libertyglobal.com/pdf/press-release/UPC-Holding-Press-Release-Q4-2013-FINAL.pdf
[334] Based on the CSO QNHS estimate of 1,699,100 households as of Q3 2013.
[335] UPC, ― UPC Holding Reports 2013 Results‖, press release available from: http://www.libertyglobal.com/pdf/press-release/UPC-Holding-Press-Release-Q4-2013-FINAL.pdf

5.47 Regarding Eircom's ability to price independently, Eircom suggests that the product types and quality available to the market are different in UPC areas and rural areas and it responds differently depending on UPC's presence. Eircom's application of the SB-WLR discount only to bundles implies (according to Eircom) that the more intense competitive conditions relate specifically to the provision of retail bundles including FVA and that Eircom's ability to price independently in the relevant Bundled LLVA Market is more limited than in the relevant Standalone LLVA Market. However, Eircom has recently announced the withdrawal of this wholesale promotion. Further, as set out at paragraphs 4.94, Table 2 the headline prices of Eircom's (non NGA) bundles including an FVA component have remained broadly constant over time for the same product categories. Despite Eircom's declining market share, Eircom had not responded to UPC's offers by reducing its prices to the extent it could have within the boundaries of regulatory price controls. Indeed as noted at paragraph 4.191 Eircom has increased the headline and/or effective price for certain retail bundles that include FVA and NGB[336] broadband within the LEA. ComReg notes that Vodafone considers that Eircom's offer of a WLR discount is specifically designed to support the launch of a specific bundled broadband product and it is not a competitive response to the provision of FVA over cable. Otherwise, it is Vodafone's view the FVA discount would be made available on Eircom current bundles. According to Vodafone whatever constraint Eircom faces is on the broadband side.

5.48 In view of the above, ComReg has found that there is no firm behavioural evidence that Eircom is facing effective pricing constraints in the provision of bundled LLVA: given the lack of effective (existing) competition in the market it is ComReg's view that, absent regulation, Eircom has both the ability and incentive to increase prices (above the competitive level) offered/charged (e.g. Table 2 paragraph 4.94).

[336] For example, Eircom's eFibre Advanced and eFibre Unlimited have a promotional monthly charge for the first 6 months that is available to new customers, with it reverting to a normal monthly charge thereafter.

2. Barriers to entry and potential competition

5.49 In light of market and regulatory developments, ComReg also considers the likely effectiveness of any constraints likely to be posed by potential competition (i.e. noted the absence of effective competitive constraints posed by existing competition). As noted above in relation to market 1a standalone LLVA, factors considered and points made in the FVA Consultation regarding the extent of sunk costs, economies of scale, scope and density, control of infrastructure not easily replicated and vertical integration in LLVA remain valid (and hence the degree of competitive constraint arising from potential competition in the FVA markets through entry or expansion) in the context of market 1b bundled LLVA. Accordingly paragraphs 5.43 to 5.88 of the FVA Consultation should be read with this analysis. Note ComReg in considering constraints posed by potential competition first examines the barriers to entry and expansion insofar as they may impact upon the effectiveness of the constraints that may posed by potential competitors. Then, ComReg assesses the strength of any such potential competition having regard to the barriers to entry and expansion that have been identified.

5.50 Given the general trend of consumers' preference for buying FVA as part of the broader 'bundle of services' most commonly alongside broadband, ComReg considers the likely future constraint generated by managed VOIP over broadband. ComReg expects the general trend of increased penetration of broadband and prevalence of bundles to continue. However, ComReg in the FVA Consultation highlighted that the upfront investment required in order to supply FVA in the LLVA market is considerable even where supplied over broadband networks as part of a wider communications bundle including broadband. ComReg's view as set out in the FVA Consultation is that Eircom may not be sufficiently constrained by a new entrant building a network to supply bundled FVA as a number of factors act as a barrier to this type of entry occurring (see paragraphs 5.27 to 5.28).

5.51 For the reasons set out at paragraph 5.42 to 5.43 above, FVA over LLU inputs will also not offer a sufficiently strong competitive constraint on Eircom in the Bundled LLVA Market over the period of this review. As noted earlier, dependence on the SB-WLR input has yet to be decoupled which means that purchasers of WBA tend to use the SB-WLR input to provide the voice service rather than offering a managed VOIP service over the WBA (broadband) connection. For standalone LLVA as well as bundled LLVA customers Eircom will continue to deliver traditional PSTN voice services over its copper access network for the next few years. Regarding the prospective constraint from IP networks, BEREC considers it likely that the transition to VOIP will take place in phases and hence narrowband FVA will remain necessary in the mean time. In this respect, as of Q4 2013 there were ✂ naked bitstream connections and in addition there is no evidence as yet whether FSPs purchasing naked bitstream inputs are intending to provide managed VOIP services using these inputs. Even if FSPs were to launch managed VOIP services using Eircom‘s wholesale broadband inputs, ComReg does not expect these FSPs to pose an appreciable competitive constraint on Eircom in the Bundled LLVA Market over the period of this review.

5.52 While there is some indication[337] of the deployment of new fibre broadband platform within the timeframe of this market review (e.g., ESB), there is no available evidence to suggest that managed VOIP services will be provided over this platform. Even if these services were provided, an FSP providing these services is unlikely to benefit from the economies of scale enjoyed by Eircom. Moreover, such FSP is likely to face significant sunk costs in attempting to replicate (even to a lesser scale) FVA service offered by the incumbent FVA supplier. While the ESB has indicated it will enter the Irish retail broadband market by leveraging from their access network, it remains to be seen what impact this development may prospectively have on the Bundled LLVA Market (and closely related markets as relevant). In these circumstances, ComReg considers that Eircom is unlikely to be sufficiently constrained by a new entrant, at least during the period of the review period, in relation to its pricing or commercial behaviour.

5.53 Regarding potential competition posed by mobile networks, for the reasons, set out at paragraph 4.121 to 4.155 in Chapter 4, any competitive constraint arising from mobile access over the period covered by this market review will not effectively constrain Eircom's behaviour in the Bundled LLVA Market such that it would mitigate Eircom's strong position. The emergence of bundles containing fixed and mobile voice indicates that mobile operators acknowledge the complementary use of the two services by consumers. However, ComReg will monitor prospective market developments over the forthcoming regulatory period.

[337] See paragraph 3.13 above. See also FVA Consultation paragraphs 5.43 to 5.87.

5.54 Prospectively, over the period of this review Eircom will not be sufficiently constrained by a new entrant, in relation to its pricing or commercial behaviour, given the barriers associated with economies of scale, scope and density, with vertical integration and with control of infrastructure not easily replicated. For these reasons, ComReg is of the view that though existing competition continues to evolve, high and non transitory barriers to entry into the bundled LLVA market remain.

3. Countervailing Buyer Power

5.55 The FVA Consultation assessed CBP in relation to the wide LLVA market. For reasons similar to the initial analysis there is low CBP in the Bundled LLVA Market since customers are generally small and individually represent only a negligible proportion of Eircom's revenues in that market. See FVA Consultation paragraphs 5.88 to 5.97 as regards inter alia the assessment of the necessary conditions for effective CBP, the impact of regulation on CBP assessment, the profile of buyer and the analysis regarding alternative sources of supply. Having carefully reviewed again its preliminary analysis, ComReg remains of the view CBP is unlikely to constrain Eircom's pricing behaviour in the Bundled LLVA Markets over the period of the review or that would otherwise prevent it from behaving to an appreciable extent, interdependently of its competitors, customers or consumers.

Conclusion

5.56 It is ComReg's view that absent regulation Eircom's position of market power is unlikely to materially change within the period of this review. In particular and in addition to Eircom's relatively high market share (a modified Greenfield approach), both Vodafone and Sky are reliant on Eircom's SB-WLR product to be able to provide any FVA and broadband bundle on a national basis; LLU uptake remains limited in the context of providing bundled LLVA; there is no strong evidence of future entry or expansion of substantial national scale, either using alternative broadband platforms with manage VOIP (e.g., ESB) or Eircom's wholesale broadband products, at least over the period of the review; and CBP does not constrain Eircom's pricing behaviour in this Market. However, ComReg intends to revisit the position in 2015 at which time it will have revisited certain aspects of wholesale regulation – notably the regulation of the FACO market and the appropriate regime in respect of the regulation of retail/wholesale margins to be applied at the wholesale level.[338]

[338] See ComReg Document 14/90, "Replicability Test: Further specification of the price control obligations not to cause a margin squeeze: Market 2 and Market 5," published on the ComReg website: www.comreg.ie

5.57 As noted above, given the possible trends and developments that may emerge in this market going forward, ComReg intends to closely monitor this market. In particular, ComReg is in the process of conducting a FACO market review, in which context it is considering whether it is appropriate to mandate SB-WLR as well as an obligation of margin squeeze as a remedy on that wholesale market. ComReg is of the view that, prospectively, if appropriate wholesale regulation including WLR and margin squeeze in the FACO and WBA markets adequately supports the competitive constraint on Eircom posed by resellers, it will be appropriate for ComReg to revisit the Bundled LLVA Market to identify whether a finding of SMP continues to be appropriate. At that point ComReg may consult on a 3CT assessment in 2015 in respect of the Bundled LLVA Market (i.e. as noted at paragraph 1.12 above, the three criteria that must be cumulatively satisfied in order to determine whether a relevant market should be subject to *ex ante* regulation).

D. Assessment of SMP Higher Level Voice Access Market

5.58 As set out in Chapter 4, ComReg has decided that it is appropriate to maintain the position set out in the FVA Consultation that there is a distinct national HLVA Market. Having determined a HLVA Market, ComReg is required to also determine whether this relevant FVA sub market is effectively competitive having regard to whether any FSP has SMP in that market in which it provides FVA services. By way of context, ComReg first recaps the proposals regarding the HLVA competition and assessment of SMP as set out in the FVA Consultation. Having updated the information of relevance to this SMP assessment including market share and pricing trends and taking into consideration the key issues raised by respondents, ComReg further examines the status of SMP in the HLVA Market.

FVA consultation proposals

5.59 On the basis of an analysis of a broad range of criteria as set out in the FVA Consultation,[339] ComReg's preliminary view in the FVA Consultation was that Eircom should be designated with SMP in this relevant FVA sub market. Those criteria and ComReg's preliminary conclusion were as follows:

[339] FVA Consultation paragraphs 5.100 to 5.134.

- **Market share:** ComReg noted[340] an increasing number of ISDN FRA and ISDN PRA lines which appeared to be mainly driven by greater direct supply by FSPs of this type of access at the end of 2011. In the presence of the CPS/SB-WLR regulation, however, Eircom's market share in Q2 2012 (in terms of HLVA lines) was approximately 43% compared to 66% at the end of 2006. When market shares of FSPs relying on wholesale CPS and SB-WLR inputs are excluded, Eircom's market share in Q2 2012 rose to 62% of all HLVA lines, which is indicative but not determinative of SMP. This indicates that while competition is not yet effective in the relevant HLVA market, it is evolving at a faster pace than in the LLVA market.

- **Existing and potential competition:** Although high and non-transitory barriers to entry persist in the HLVA market, ComReg in the FVA Consultation considered that they may be less significant compared to the wide LLVA market. Evidence then indicated increasing supply of FVA by operators other than Eircom on the basis of own infrastructure which suggested that the competitive conditions on the LLVA and HLVA markets are not uniform with facilities-based competition less difficult to sustain compared to the LLVA market. However, ComReg believed that, absent regulation, Eircom's share of the HLVA market would likely have been closer to 62%. LLU did not play a role in the sole provision of voice services to end-users. The HLVA market was potentially addressable on a forward looking basis by alternative IP-based solutions/systems, such as, SIP Trunking.[341]

- **CBP:** It was ComReg's preliminary view that HLVA customers would not exert a sufficient constraint on the price-setting behaviour of Eircom, such that it would credibly offset its market power and ability to behave, to an appreciable extent, independently of competitors, customers and ultimately consumers in the HLVA market over the lifetime of this review.[342]

[340] FVA Consultation paragraphs 5.101 to 5.104.
[341] FVA consultation, paragraphs 5.116 to 5.129.
[342] FVA consultation, paragraphs 5.130 to 5.134.

Consultation Responses and ComReg Analysis

5.60 The majority of respondents broadly agreed with ComReg's preliminary view on the status of SMP in the HLVA Market. However, Eircom disagreed. It considered[343] that the relevant HLVA Market should include SIP trunking and that Eircom does not have SMP in a broader HLVA Market.[344] For the reasons set out in Chapter 4 at paragraphs 4.68 to 4.79, ComReg is of the view that the HLVA Market is, at this stage, no wider than ISDN FRA and ISDN PRA (and hence does not include IP based solutions, such as, SIP trunking or hosted VOIP). Having updated the information of relevance to the SMP assessment, ComReg examines the existing competition, barriers to entry and potential competition over the timeframe of the market review and the CBP in the HLVA Market taking into consideration the key issues raised by respondents.

5.61 ALTO, Magnet, BT Ireland and Vodafone presented their views on the proposal to remove retail remedies in the relevant HLVA Market. ALTO, Magnet and BT Ireland, while agreeing with ComReg's SMP assessment, expressed their concerns in relation to the removal of all retail remedies in the relevant HLVA Market given that Eircom has SMP in this market. BT Ireland noted Eircom's high market share in the absence of operators relying on CPS/SB-WLR inputs, and its perception about Eircom's strength in HLVA Market. Magnet highlighted high barriers to entry in LLVA and HLVA Markets and noted that competition is still not effective in HLVA Market. On the other hand, Vodafone noted that retail remedies in HLVA Market may no longer be necessary if appropriate wholesale remedies based on Equivalence of Inputs approach are present.

[343] See Eircom's response to question 8 of the FVA consultation.
[344] See Eircom's response to question 17 of the FVA consultation.

1. Existing competition

5.62 Since the FVA Consultation, ComReg has had to revise information on market share (the number of lines in the HLVA Market).[345] The updated trend in HLVA market share continues to support ComReg's preliminary view on the status of SMP in this market. Figure 9 illustrates that the size of the HLVA Market has been stable since the 2007 market review. There were approximately 9,810 HLVA access lines at Q4 2013.[346] While FSPs have gained market share[347] at the expense of Eircom since 2007, this gain is in the presence of wholesale regulation, more significantly through an increase in indirect access lines or re-sale of Eircom's WLR (and not through direct supply or own network build as first set out in the FVA Consultation). In the presence of the CPS/SB-WLR remedy, Eircom's market share though gradually declining remains high and relatively stable with Eircom having 53% of retail HLVA lines as of Q4 2013. As set out above, however, basing the SMP assessment on the presence of regulation in the retail FVA markets may give rise to a circular argument.[348] ComReg notes consistent with the modified Greenfield approach that if the current FSPs supplied SB-WLR is included in Eircom's retail market share then Eircom's percentage of market share would substantially increase to almost 80%. Eircom's market share is strong evidence that it has in relation to HLVA end users the ability to behave, to an appreciable extent, independently of competitors and consumers.[349]

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[345] After the publication of the FVA Consultation, a FSP informed ComReg that it was not providing HLVA supply using direct build and that historically it was providing incorrect data to ComReg. Hence, ComReg has revised the available information on the evolution of HLVA market size and market shares of FSPs operating in this market.

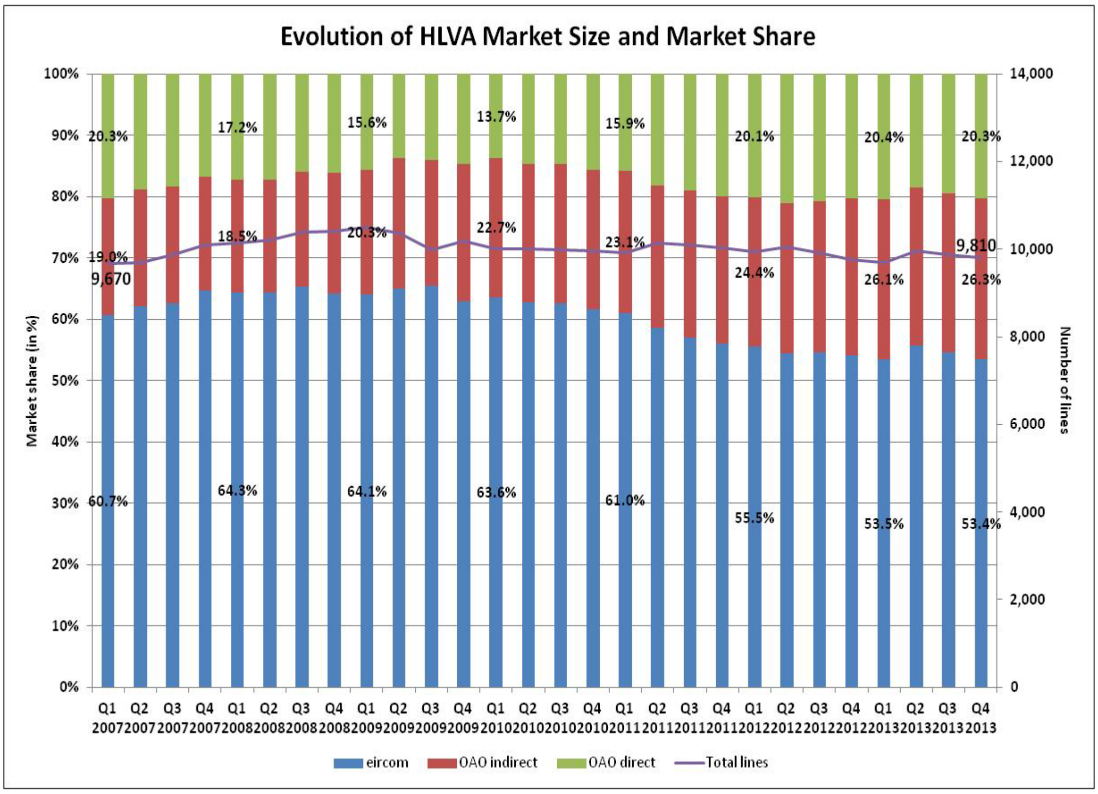
[346] The correction to market shares shows that the overall size of the HLVA market did not (as set out in the FVA Consultation) increase through greater direct supply of HLVA over FSPs' own independent networks.

[347] Market shares can have significant variations between adjacent quarters due to the relatively small size of the overall HLVA market.

[348] CPS and WLR are currently mandated in the HLVA and LLVA markets under review.

[349] Commission Guidelines on Market Analysis (2002 C/ 165/03): paragraph 75, *According to established case law, very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position*".

Figure 9 Size of HLVA Market and Evolution of Market shares



5.63 In market 1c HLVA there are five main undertakings active, notably, Eircom, Vodafone, BT, Telfonica and Imagine.[350] All of the latter four operators rely to a large degree on Eircom wholesale inputs to compete. Regarding the strength of existing competition, ComReg reviewed further the evidence on FSPs direct supply of HLVA over own infrastructure for sustainability and its impact on competition. FSPs continue to compete with each other on the HLVA Market through a mixture of indirect and direct connections, that is, in addition to direct supply some FSPs supply FVA also using SB-WLR. However, the number of ISDN FRA and PRA lines supplied via alternative FSPs' own networks (direct supply) has remained broadly stable since the 2007 market review indicating that also in this market that existing competition is heavily dependent also on the SB-WLR resellers.

5.64 According to Vodafone, ComReg overstates the impact of LLU in relation to the FVA markets. It argues that as well as the fact that there is limited uptake of LLU, the LLU purchased by BT is Line Share which requires the separate purchase of SB-WLR to provide voice service and as such has no bearing on the FVA market. Similar to standalone LLVA, ComReg considers that LLU does not play a role in the provision of voice services to HLVA end users. No operator supplies HLVA based on LLU inputs and, hence, all direct access over FSPs' networks is own build and this has remained relatively stable since 2007.

[350] For a list of providers of retail FVA see further Appendix 4.

5.65 ComReg notes Eircom’s view that it does not have SMP in the broader HLVA Market which includes SIP trunks. ComReg has concluded for the reasons set out in Chapter 4 that HLVA should be narrowly defined consisting of access via ISDN FRA and PRA. While very recently there is an increasing number of FSPs[351] providing SIP trunking services, Figure 9 highlights the stable size of the HLVA Market, indicating that SIP trunking has yet to have an impact on this Market. As set out at paragraphs 4.73 to 4.79, there is no evidence to suggest that SIP trunking services will be supplied or taken up on a sufficient scale, at least during the period of this review, which suggests that SIP is not currently a direct replacement for Eircom’s ISDN PRA and FRA access products.

5.66 As noted above for LLVA, ComReg agrees with Vodafone that as the majority of Eircom’s competitors in the supply of HLVA are resellers of Eircom’s CPS and SB-WLR products, they lack freedom[352] to price entirely independently of Eircom. Essentially, the degree of constraint posed in the HLVA Market by resellers is limited, though the constraint from direct suppliers should in principle be greater. Regarding ability to price independently, however, the updated FVA pricing information[353] supports ComReg’s view that competition has not significantly impacted HLVA prices. ISDN FRA and PRA line rental and connection prices have remained stable and Eircom continues to earn positive gross margins on ISDN PRA and FRA access products indicating the limited strength of competition in the HLVA Market. As noted for standalone LLVA at paragraphs 5.22 to 5.23, although Eircom has offered a WLR discount for certain NGA bundles on a promotional basis (however, it has indicated that it plans to withdraw this wholesale promotion) it has yet to offer a similar such discount in respect of SB-WLR supporting HLVA retail connections. This is indicative that Eircom does not consider that there is a significant competitive constraints in relation to these connections. In Vodafone’s view whatever constraint eircom faces is on the broadband side. In view of the above, ComReg finds no firm behavioural evidence that Eircom is facing effective pricing constraints in the provision of HLVA.

5.67 ComReg’s view is that Eircom’s persistent high market share, the strength of existing competition and Eircom’s historic ISDN PRA and FRA pricing behaviour are strongly suggestive that Eircom has SMP in the HLVA Market. However, ComReg further considers, taking into account Respondents’ views and updated information, other relevant factors which might diminish or undermine this presumptive SMP position.

[351] BT Ireland, Colt, Eircom, UPC as well as other FSPs are offering business connectivity services.
[352] The price of SB-WLR wholesale input is set by ComReg based on Eircom‘s retail price minus the retail costs associated with the supply of FVA. The SB-WLR retail minus mechanism does not constrain Eircom in the level of the retail and wholesale prices that it sets, only the differential between those prices.
[353] ComReg has updated the pricing information (‘Updated Pricing Structures’) which is presented in Appendix X.

1. Barriers to entry and potential competition

5.68 Although existing competition continues to evolve, high and non-transitory barriers to entry persist in the HLVA Market. As set out in the FVA Consultation, factors such as significant sunk costs associated with the construction of access network, prevalent economies of scale and scope and vertical integration mean that threat from existing wholesale competition or retail constraints from alternative platforms, such as, broadband or SIP trunks are not likely to pose an effective competitive constraint on Eircom's market power in the HLVA Market over the period of the review.

5.69 As with the Standalone LLVA and Bundled LLVA Markets the impact of LLU on competition in the supply of HLVA is likely to continue to be limited over the period of this review. FSPs have only deployed LLU on a very limited scale across both the business and residential markets. LLU to date has been predominantly used for broadband access. LLU therefore does not remove high and non-transitory barriers to enter the HLVA Market. While alternative broadband infrastructure will provide some degree of competition in relation to HLVA, it will not likely replicate Eircom's ubiquitous network and, hence, it will not act to effectively constrain Eircom in the supply of HLVA over ISDN PRA and FRA over the period of the review.

5.70 In this regard, ComReg acknowledges that within the timeframe of the market review SIP trunking will likely become more prevalent as Eircom transitions to its NGA network and other FSPs offer this type of alternative access product. However, it is yet unclear to what extent businesses migrating towards IP based products would lead to any significant increase in the competitive constraints on Eircom in the HLVA Market. ComReg notes that BT and ALTO, while acknowledging that SIP, trunking services are beginning to appear in the market, agree with ComReg that the significant cost associated with upgrade of existing equipment and infrastructure for SIP services will not happen in the period of the review. ComReg is of the view that these potential alternatives to ISDN do not currently and likely will not over the lifetime of this review impose an effective competitive constraint on the price-setting behaviour of Eircom, such that it would credibly offset its market power to behave, to an appreciable extent, independently of competitors, customers and ultimately consumers in the HLVA Market. However, ComReg will continue to monitor these developments and their potential emerging constraint on ISDN FRA and PRA products.

2. Countervailing buyer power

5.71 The FVA Consultation assessed CBP in relation to the HLVA market. See FVA Consultation paragraphs 5.130 to 5.134 as regards inter alia the assessment of the necessary conditions for effective CBP, the impact of regulation on CBP assessment, the profile of buyer and the analysis regarding alternative sources of supply. Having carefully reviewed again its preliminary analysis, ComReg considers that there is low CBP in the HLVA Market since even the largest SME firms would account for only a small proportion of Eircom's total revenues in the HLVA Market and hence the threat of losing an individual customer is unlikely to compel Eircom to negotiate with that customer regarding the terms of supply of FVA. As such, CBP is not a sufficient constraint on Eircom's pricing behaviour in the HLVA Market over the period of the market review.

Conclusion

5.72 It is ComReg's view that Eircom's position of market power, absent regulation, is unlikely to materially change within the period of this review. In particular and in addition to Eircom's high market share, competition is heavily dependent on SB-WLR resellers who lack the freedom to price entirely independently of Eircom; HLVA is not supplied based on LLU inputs and direct supply over own build networks has remained relatively stable since 2007; SIP trunking services have yet to have an impact on the HLVA Market and are unlikely to be taken up on a sufficient scale to do so during the period of this review; and there is low CBP in this market as even the largest SME firms would account for only a small proportion of Eircom's total revenues in the HLVA Market. However ComReg intends to revisit the position in 2015 at which time it will have revisited certain aspects of wholesale regulation – notably the regulation of the FACO market and the appropriate regime in respect of the regulation of retail/wholesale margins to be applied at the wholesale level.[354]

[354] See ComReg Document 14/90 entitled, "Replicability Test: Further specification of the price control obligations not to cause a margin squeeze: Market 2 and Market 5," published on the ComReg website: www.comreg.ie

5.73 As noted above, given the possible trends and developments that may emerge in this market going forward, ComReg intends to closely monitor this market. In particular, ComReg is in the process of conducting a FACO market review, in which context it is considering whether it is appropriate to mandate SB-WLR as well as an obligation of margin squeeze as a remedy on that wholesale market. ComReg is of the preliminary view, as set out in ComReg Document 14/26 "FACO Market Review" dated 4 April 2014 to include WLR and margin squeeze in the FACO market, and if it and WBA market can adequately support the competitive constraint on Eircom posed by resellers, it may be appropriate for ComReg to revisit the HLVA Market (and Bundled LLVA) to identify whether a finding of SMP continues to be appropriate. ComReg envisages a decision in respect of FACO and a further separate consultation has been issued in relation to bundles. At that point ComReg may consult in 2015 on a 3CT assessment in respect of the HLVA Market (i.e. as noted at paragraph 1.12 above, the three criteria that must be cumulatively satisfied in order to determine whether a relevant market should be subject to *ex ante* regulation).

E. ComReg's position on SMP assessments

5.74 ComReg has analysed the Relevant FVA Markets to decide whether or not each is effectively competitive. As a result of its analysis and taking into account respondents' views, ComReg concludes that the evidence shows that Eircom has SMP in each of the three sub markets identified in which it supplies FVA. This is supported by ComReg's detailed analysis of a number of key criteria. Those criteria and ComReg's summary conclusions in relation to them are as follows:

- **Market share:** In the presence of the SB-WLR and CPS remedy, Eircom continues to have a high market share (approximately ✂% of Standalone LLVA, ✂% of Bundled LLVA and 53% of HLVA). Absent regulation, Eircom market share would be close to a 100% of Standalone LLVA, ✂% of Bundled LLVA and 80% of HLVA). This is indicative, but it should be noted, not by itself, determinative of SMP;

- **Existing and potential competition:** In the presence of regulation, existing competition continues to evolve, though high and non transitory barriers to entry into each of the relevant FVA markets remain. Absent appropriate regulation in wholesale upstream markets, Eircom's ability to act to an appreciate extent, independently of competitors, customers and consumers in terms of FVA whether standalone or in a bundle as evidence above will not be mitigated on a prospective basis over the period of the review; and

- **CBP:** There is insufficient CBP to prevent Eircom from behaving to an appreciable extent independently of its customers and competitors in setting its FVA prices.

5.75 Having regard to Regulation 25 of the Framework Regulations, ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that each of the Relevant FVA Markets identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive.

5.76 In accordance with Regulation 27(4) of the Framework Regulations, ComReg hereby designates:

- Eircom as having SMP in the national Standalone LLVA Market;
- Eircom as having SMP in the national Bundled LLVA Market; and
- Eircom as having SMP in the national HLVA Market.

Chapter 6

6 Remedies

Summary

6.1 ComReg has defined separate Relevant FVA Markets. Having analysed the market characteristics ComReg finds that the Relevant FVA Markets are not yet effectively competitive and that Eircom holds SMP in each market. ComReg has considered the potential competition problems which may arise by virtue of Eircom having SMP in the Relevant FVA Markets. In light of the competition problems specific to each of the Relevant FVA Markets that persist and will continue to persist, ComReg has carefully examined a number of regulatory options for addressing those concerns.

6.2 In light of designating Eircom as having SMP ComReg is required by Regulation 27(4) of the Framework Regulations to impose on it such specific obligation(s) as it considers appropriate. Accordingly, ComReg has considered the appropriateness of imposing on Eircom obligations to address its position of SMP, notably, obligations relating to wholesale access: SB-WLR, CPS and a selection of remedies supporting these access obligations (obligations relating to access to and use of specific network facilities, transparency, non-discrimination, accounting separation, price control and cost accounting)[355] as provided for by Regulation 8(1) of the Access Regulations. In addition, ComReg considers such regulation at the wholesale level will not be sufficient to address the competition law concerns it has identified with respect to the FVA markets and consequently has considered the appropriateness of imposing on Eircom the following remedies at the retail level:

- A requirement not to charge excessive prices;
- A retail price cap measure;
- Obligation not to unreasonably bundle services;
- Transparency obligation; and
- Cost accounting obligation.

[355] Articles 9 to 13 of the Access Directive respectively. See ComReg Sections 5 and 6 of ComReg D07/61 which are being maintained potentially in interim (notified as IE/2007/0632: Retail Fixed Narrowband Access Markets).

Structure of this section

6.3 In the rest of this section ComReg summarises the proposals it made in the FVA Consultation as well as the proposals it made in the Supplementary Consultation. ComReg then sets out its response to respondents' views on its proposals and its final decisions. The discussion is divided into the following sections:

A. Overview to specifying and implementing remedies

B. Types of competition problems

C. Wholesale remedies

D. Retail remedies

E. Overall conclusion on appropriate and proportionate remedies in the Relevant FVA Markets

A. Overview to specifying and implementing remedies

6.4 ComReg in the FVA Consultation outlined its regulatory basis for imposing SMP obligations.[356] In accordance with Regulation 8(1) of the Access Regulations, ComReg is required to impose on an operator that is designated with SMP such of the obligations as provided for in Regulations 9 to 13 the Access Regulations as ComReg considers appropriate at the wholesale level. ComReg must impose at least one of the following obligations on an operator designated with SMP and may impose more than one.[357] In this regard, the wholesale obligations that may be imposed by ComReg on SMP undertakings are those relating to:

- Access;
- Transparency;
- Non-Discrimination;
- Price Control and Cost Accounting; and
- Accounting Separation.

[356] Paragraphs 1.7 to 1.18, Chapters 6 and 7.

[357] The SMP Guidelines also state at paragraph 17 that "NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP".

6.5 The legal basis for imposing retail remedies is Regulation 13 of the Universal Service Regulations (which transposes Article 17 of the Universal Service Directive).[358] ComReg must impose obligations pursuant to Regulation 13 in respect of a particular retail market where:

- ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that a particular retail market is not effectively competitive; and
- ComReg concludes that obligations imposed under Regulations 9 to 13 of the Access Regulations would not result in the achievement of the objectives set out in section 12 of the Act and Regulation 16 of the Framework Regulations.

6.6 Where these conditions are met, the Universal Service Regulations provides as appropriate for remedies to be imposed at the retail level. ComReg considers it appropriate in this regard to impose, pursuant to the Universal Service Regulations, the following retail obligations:

- Price control (via requirement not to charge excessive prices and/or a retail price cap measure);
- Obligation not to unreasonably bundle services;
- Transparency obligation;
- Cost accounting obligation;
- Obligation not to show undue preference to specific end-users.

6.7 In order to impose obligations provided for by the Universal Service Regulations, the Framework Regulations and the Access Regulations, Regulation 8(6) of the Access Regulations and Regulation 13(2) of the Universal Service Regulations provides that ComReg must be satisfied that any obligations imposed are:

- based on the nature of the problem identified;
- proportionate and justified in the light of the objectives laid down in Section 12[359] of the Communications Regulation Acts 2002 to 2011 and Regulation 16 of the Framework Regulations: and

[358] Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC (the "Universal Service Directive").

[359] (i) to promote competition; (ii) to contribute to the development of the internal market; and (iii) to promote the interests of users within the Community. These objectives have been supplemented by additional objectives under regulation 16 of the Framework Regulations, which ComReg has also taken into account.

- only imposed following public consultation and notification of the draft measures to the European Commission, BEREC and other NRAs.[360]

6.8 These considerations are taken into account throughout this section, as appropriate, when assessing whether and what form of remedy to impose, and are also discussed in further detail in Chapter 7 in the context of the final RIA. ComReg, in its consideration of obligations at the retail level, has concluded that obligations at the wholesale level would not result in the achievement of the objectives set out in the Communications Act and Regulation 16 of the Framework Regulations.

6.9 ComReg has also taken the following into account in considering the imposition of remedies on the SMP FSP:

- the European Regulators Group (ERG)[361] common position on the approach to appropriate remedies in the electronic communications networks and services regulatory framework;[362]
- the comments letters issued by the European Commission pursuant to Articles 7 and 7a of the Framework Directive in its review of regulatory measures notified by Member States under the EU consultation mechanism for electronic communications service; and
- the European Commission's 2005 Accounting Separation and Cost Accounting Recommendation.[363]

6.10 As noted in the FVA Consultation including the initial RIA, 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 Act of protecting the consumer and promoting competition by the least intrusive means, thus lightening any regulatory burden.

[360] In accordance with Regulation 12 of the Framework Regulations.
[361] Pursuant to Regulation (EC) No 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office ERG was replaced with the Body of European Regulators for Electronic Communications (BEREC) in 2010.
[362] Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06)33, May 2006, available at http://www.erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf.
[363] European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC) the '**2009 Termination Rates Recommendation'**).

6.11 As noted at paragraph 1.12 above, ComReg considers that if appropriate wholesale regulation including SB-WLR and margin squeeze in the FACO and WBA markets adequately supports the competitive constraint on Eircom posed by resellers, it will be appropriate for ComReg to revisit market 1b Bundled LLVA and market 1c HLVA to identify whether a finding of SMP (and hence retail obligations) continue to be appropriate in relation to these FVA services. In this respect, ComReg may consult on a 3CT in respect of the Bundled LLVA and the HLVA Markets, as previously explained.

B. Types of competition problems

6.12 As noted in the FVA Consultation[364] competition problems could potentially arise, absent regulation (consistent with the Modified Greenfield approach),[365] resulting from Eircom's position of SMP in the Relevant FVA Markets. ComReg's preliminary view was that absent regulation Eircom would have the ability and incentive to engage in the exploitation of end users and exclusionary practices including the restriction and distortion of competition in related markets through engaging in vertical and horizontal leveraging. ComReg further noted that the purpose of ex ante regulation is to prevent an undertaking with SMP from behaving in a manner which would inhibit the development of effective competition to the detriment of consumers.

6.13 This section summarises ComReg's preliminary view on competition problems in the FVA Markets, then reviews responses to ComReg's preliminary view and presents ComReg's final assessment of competition problems. In determining what form of ex ante regulatory remedies are warranted ComReg has carried out an assessment of potential competition problems that are likely to arise, assuming SMP regulation is absent and taking account of the structure and characteristics of the Markets (and adjacent markets). Although it is not necessary to set out actual instances of market dysfunctions which have actually occurred even in the presence of existing regulation, ComReg's analysis has been guided by experience in the market.

[364] Paragraphs 6.10 to 6.30.
[365] As outlined in the Recommendation 2007 and the independent report by Martin Cave, Ulrich Stumpf, Tommaso Valletti on behalf of the European Commission, July 2006 and, more recently, Ecory's report (2013).

Exploitative practices

6.14 ComReg's preliminary view in the FVA Consultation was that in the absence of regulation Eircom, as a result of its SMP, has the ability and incentives to exploit its wholesale and retail customers, by excessive pricing (for example) which would impact negatively on competition and consumers. Concerns about excessive pricing arise where, absent regulation, price levels are likely to be persistently high with no effective pressure (e.g. from new entry or innovation) to bring them down to competitive levels over the period of this review period, which ComReg has also discussed having regard to respondents' views in its final assessment of SMP.

6.15 Eircom, a vertically-integrated FSP with SMP in the Relevant FVA Markets and in wholesale markets (including WPNIA, WBA and (proposed) in the FACO market), has control of important wholesale inputs necessary for an existing or entrant FSP to offer FVA whether standalone or in a bundle. Many FSPs require effective ("fit for purpose") access to Eircom's wholesale inputs to enable them provide a competing source of supply of FVA, at either the wholesale or retail level. As noted in Chapter 5, given the economies of scale (and often economies of scope) identified in the Relevant FVA Markets, FSPs (other than Eircom) typically have not replicated the Eircom network.

6.16 Further, despite the introduction of wholesale measures (i.e. CPS, SB-WLR and supporting remedies) to promote competition in the Relevant FVA Markets, and the introduction of measures to facilitate customer switching (e.g. number portability), Eircom retained market power in the provision of FVA in the markets as proposed in the FVA Consultation, notably, LLVA and HLVA markets. As outlined in Chapter 5 of the FVA Consultation, there was insufficient competitive pressure from resellers of SB-WLR and CPS or from FSPs offering bundled broadband and voice at the retail level to prevent Eircom from behaving, to an appreciable extent, independently of its competitors and customers in the LLVA and HLVA markets. In this respect it was noted that the SB-WLR retail minus mechanism, as currently provided for in Section 6.11 of the Decision Instrument Decision D07/61 (and as subsequently amended by the direction referred to in ComReg Information Notice 08/19),[366] does not sufficiently constrain Eircom in the level of the retail and wholesale prices that it sets, only the differential between those prices.

[366] Single Billing Wholesale Line Rental – directions to Eircom regarding Retail Minus %: http://www.comreg.ie/_fileupload/publications/ComReg0819.pdf

6.17 ComReg considered that absent regulation, Eircom, as the SMP operator, would rationally have the incentive to maximise profits through raising prices and/or maintaining prices at a level higher than if competition were effective to the direct detriment of end users. At the wholesale level, there was a risk of excessive pricing where Eircom would have strong incentives to supply wholesale inputs at a level higher than if competition were effective (and hence raising input costs for rivals that purchase Eircom network inputs to compete in the downstream FVA markets) whenever FSPs are more efficient in the provision of FVA than Eircom itself on the LLVA and HLVA markets absent regulation. Regarding potential excessive pricing at the retail level, it was identified that this risk was most significant in relation to customers who do not yet have internet access or who purchase and value the FVA service as standalone. These end-users have relatively less choice of access providers compared with end-users who have decided to purchase broadband and/or voice in a bundle or large volume business users.

6.18 In addition, ComReg's preliminary view was that Eircom, because of ineffective competitive pressure in the FVA market,[367] could be insulated from the need to innovate and improve efficiency and quality of service to stay ahead of rivals. This may limit the development of new technology and/or lead to costlier and less efficient methods of supply and consequently higher prices for consumers than would otherwise exist under competitive market conditions (it was noted as part of the FVA Consultation that Eircom had yet to deploy itself and/or offer to alternative FSPs naked DSL or managed voice over broadband on any significant scale). This could involve withholding investment in related markets to delay or impede the development of competition in those markets, e.g. where the SMP firm has control over certain key inputs necessary for alternative FSPs to compete in related markets and delays upgrading those inputs or providing newer, potentially more cost effective inputs in line with technological developments. These inefficiencies would be passed on by Eircom, to its customers, through higher retail and wholesale prices, as noted above. For detail regarding issues of exploitative practices were discussed in the FVA Consultation and are referred to also in the discussion regarding specific remedies below.

[367] In addition to the FVA Consultation, ComReg also observed in the FACO Consultation that Eircom may face a degree of competitive constraint in certain parts of retail markets from independent FSPs (those not relying on Eircom's FACO inputs) such as UPC or from FSPs using wholesale inputs provided in upstream markets which might facilitate competition in the fixed access and voice calls markets. However, as noted in the FACO Consultation, ComReg considers that indirect constraints from the retail market or regulated access to wholesale products in other upstream markets are insufficient to effectively constrain Eircom's behaviour in the Relevant FACO Markets. Nevertheless, Eircom's decisions to invest and innovate may be somewhat influenced by the presence of independent retail competitors, whether in the fixed access and voice calls markets or related downstream markets.

Exclusionary practices and leveraging

6.19 ComReg's was also of the preliminary view that, absent regulation, Eircom would have the ability and incentive to engage in exclusionary practices, such as vertical leveraging[368] and horizontal leveraging.[369] ComReg's preliminary view was that Eircom had the ability, and the incentives to behave in such a way that would deter network investment and entry into the FVA markets. The behaviour could include foreclosing competition:

a) by imposing a margin squeeze between FVA and upstream, or adjacent services, which could discourage entry or investment by other FSPs in the supply of FVA;[370]

b) by refusing to supply access, applying unreasonable or discriminatory terms and conditions of access, and/or withholding information about new products and services; [371]

c) by engaging in predatory pricing of FVA (or SB-WLR) services to discourage entry of other potential FVA (or SB-WLR) suppliers;

d) by raising costs of those FSPs that rely on Eircom's SB-WLR input to provide FVA;[372] and

e) by making it difficult for customers to switch away to other FSPs.

6.20 ComReg was of the preliminary view that, as the vertically integrated undertaking with SMP in the Relevant FVA Markets (and currently with SMP in relevant upstream input markets), Eircom has ability and incentives to restrict or distort the development of competition in the Relevant FVA Markets (i.e. defensive leveraging).[373]

[368] Vertical leveraging arises where a vertically integrated undertaking is able to leverage its SMP position at one level in the production or distribution chain into vertically related markets in which it is also active.
[369] Horizontal leveraging arises where an undertaking with market power in one market is able to use it to exert undue influence into other markets that are at a similar level in the production or distribution chain. Examples of horizontal leveraging can include certain tying/bundling practices, cross subsidisation/predatory-type behaviour and/or where the SMP undertaking may seek to foreclose infrastructure-based competitors by way of an insufficient economic space 369 between the relative pricing of different upstream/intermediate inputs.
[370] FVA Consultation in particular paragraphs 6.20 to 6.24.
[371] FVA Consultation in particular paragraphs 6.25 to 6.29.
[372] FVA Consultation in particular paragraphs 6.18.
[373] FVA Consultation in particular paragraphs 6.24.

6.21 Overall, ComReg considered that, absent regulation, Eircom would have the ability and incentive to leverage market power into or from both horizontally and vertically related markets. By doing so, Eircom could strengthen its position in those related markets and potentially also reinforce its existing market power in the LLVA and HLVA markets. For example, Eircom could impose a margin squeeze on SB-WLR by offering discounted non-replicable retail product bundles, thereby undermining the effectiveness of those upstream inputs and impeding the ability of access seekers to effectively replicate the entire retail bundle. Vertical and horizontal leveraging could have the effect of (i) reinforcing its SMP in the LLVA and HLVA markets and / or (ii) leveraging that SMP into related markets since other FSPs (except UPC) are unable to replicate the access part of the bundle.

Consultation Responses and ComReg analysis

6.22 ComReg received responses from five parties in relation to ComReg's preliminary assessment of competition problems. All respondents, with the exception of Eircom, agreed with ComReg's assessment of the types of competition problems that might flow from Eircom's SMP in relevant FVA markets, as proposed in the FVA Consultation.

6.23 ALTO, Magnet, BT Ireland and Vodafone presented their views on the proposal to remove retail remedies in the HLVA market. ALTO, Magnet and BT Ireland, while agreeing with ComReg's SMP assessment, expressed their concerns in relation to the removal of all retail remedies in the relevant HLVA market given that Eircom has SMP in this market. BT Ireland noted Eircom's high market share in the absence of operators relying on CPS/SB-WLR inputs, and its perception about Eircom's strength in HLVA market. Magnet highlighted high barriers to entry in LLVA and HLVA markets and noted that competition is still not effective in HLVA market. On the other hand, Vodafone noted that retail remedies in HLVA market may no longer be necessary if appropriate wholesale remedies based on Equivalence of Inputs approach are present. Conversely Eircom argued:

- ComReg has not established why Eircom would face such incentives regarding anti-competitive practices;
- Eircom is prevented from engaging in anti-competitive behaviour (such as excessive pricing) in the FVA markets by USO obligations (including an obligation to offer nationally averaged line rental prices), competition for urban retail bundle customers, and by wholesale regulation;
- ComReg has not identified any significant real exploitative practices that have actually taken place in the FVA markets;

- Setting excessive prices for line rental would result in Eircom losing market share;
- Since the volume of Voice Only FVA customers is small, and the revenue that these customers generate is low, the extra profit from excessive pricing would be insufficient to justify the practice; and
- Eircom does not have SMP, and therefore it is not in a position to exploit end users.

6.24 ComReg now addresses these arguments.

6.25 Having regard to respondents' views to the FVA and Supplementary Consultations, ComReg considers the likelihood of Eircom engaging in anti-competitive behaviour such as excessive pricing, leveraging vertically or horizontally in the FVA markets.

6.26 According to Eircom, it is prevented from engaging in anti-competitive behaviour by existing regulation at the wholesale level. However in accordance with the modified Greenfield approach, when assessing competition in the Relevant FVA Markets, ComReg can assume the absence of SMP regulation. Without prejudice, however, ComReg has considered Eircom's existing obligations at the wholesale level including in relation to adjacent markets, and while it may be possible in the future to remove regulation at the retail level on the completion of the FACO decision (note that no decision has been made in this regard at this stage), ComReg remains of the view that Eircom, in particular by reference to the Standalone LLVA Market, is not currently sufficiently constrained at the retail level as a result of regulation upstream or otherwise. Unless and until effective and functional wholesale regulation is set out (notably the regulation of the FACO market and the appropriate regime in respect of the regulation of retail/wholesale margins to be applied at the wholesale level), ComReg does not consider Eircom is sufficiently constrained as it argues (this is also without prejudice to any Eircom obligations in respect of its status as USP).

6.27 ComReg has set out its preliminary proposals to transfer the SB-WLR remedy into the relevant upstream FACO market[374] as well as impose a margin squeeze test, should SMP be found in the FACO market and the latter remedies are considered to be appropriate in that regard. The presence of these remedies in the relevant upstream markets, notably FACO and WBA, may in the future obviate the need to regulate the downstream retail FVA market.

[374] Related to the proposal in the FVA Consultation to transfer upstream wholesale access remedies as relevant, the FACO Consultation published in April 2014 expressed a preliminary view that Eircom has SMP in the FACO

6.28 If, and at such time that, an SB-WLR and or a margin squeeze remedy are ultimately imposed in the FACO markets, these may address the competition problems identified in at least some of the Relevant FVA Markets. In that case, ComReg would review as relevant the competition problems in light of these remedies being available upstream (and may for example issue a consultation in respect of the "Three Criteria" as already suggested elsewhere above). For the time being, ComReg identifies what competition problems would be likely to prevail in the absence of wholesale regulation imposed under Decision D07/61 and Decision 01/14. In this regard it can be noted Magnet considers that, absent regulation, Eircom would not provide SB-WLR products to FSP's. This would further increase Eircom's market share, and would ultimately lead to an abuse of its dominant position. In Magnet's view, Eircom would then be likely to impose higher FVA prices. As noted in the FVA Consultation, paragraph 6.38, absent SB-WLR/CPS and supporting remedies, FSPs would not likely be able to procure the relevant wholesale access inputs to provide FVA the result of which would limit the effectiveness of competition and the risk that Eircom would exploit market power.

6.29 Further, BT in its submission to the Supplementary Consultation sets out that in either scenario of a standalone voice market or where it is supplied as part of a bundle, they see significant risk of upstream prices to third parties being set at excessive levels and/or margin squeeze relative to the downstream equivalents. It is clear other FSPs generally agree that Eircom absent regulation has both the ability and an incentive to implement an effective margin squeeze on the Relevant FVA Markets. As noted in the FVA Consultation, paragraph 6.23 to 6.24, absent regulation Eircom has ability and incentive to induce a margin squeeze vertically between the wholesale and related retail FVA markets and vice versa. For these reasons, and given the structure of the FVA markets, ComReg concludes that, at least over the period of the review, Eircom is not adequately constrained by wholesale regulation. ComReg remains of the preliminary view that SB-WLR/CPS, (proposed to be moved upstream to FACO/Market 2), is of importance in supporting competition at the retail level in FVA (and calls) on a national basis. The necessity or otherwise for retail regulation is fully or partly predicated on the effectiveness of these wholesale remedies.

markets, and proposed to impose obligations on Eircom to provide SB-WLR along with a range of supporting remedies.

6.30 Eircom is of the view that it does not have SMP, and therefore it is not in a position to exploit end users. Based on the SMP assessment however, ComReg concludes that, at least over the period of the review, Eircom is not adequately constrained by existing or potential competition or CBP in the Relevant FVA Markets. Price related exploitative behaviour is identified as a primary concern. Given its SMP in the Relevant FVA Markets, and in view that the retail minus SB-WLR price control alone does not provide a sufficient constraint on Eircom, it has an incentive and ability to price excessively. Concerns over exploitation of market power (specifically the risk of Eircom charging retail FVA prices that are too high) are most significant in relation to standalone LLVA as these customers do not currently value broadband to such an extent that they would switch to (more competitively priced) bundle services or to mobile only.

6.31 Moreover, ComReg disagrees with Eircom's assertion that the number of Standalone LLVA customers is small enough that it would underminene any incentive that Eircom might otherwise have had to price excessively. As noted in the market definition and competition assessment sections, demand for Standalone LLVA continues to be material and represents a significant proportion (37%) of overall FVA subscriptions. Eircom provides ✂ of Standalone LLVA subscriptions which could generate significant additional profits if Eircom were to increase the price per-subscription by even a small amount. In addition there is a risk of further exploitation of this cohort through a practice of tying i.e. refusing to sell FVA on a standalone basis.

6.32 ComReg, consistent with the modified Greenfield approach also considers any constraint on Eircom in view of its 2014 USO regarding affordable price levels. Essentially, irrespective of geographic location or type of end user, the 2014 USO requires the USP, Eircom, to offer end users uniform FVA prices. The obligation to offer nationally averaged line rental prices while potentially supporting affordability of FVA services (i.e. the same FVA price to all consumers nationally) does not ameliorate the risk of excessive FVA prices. ComReg's view is that the latter USO does not mitigate the concerns in relation to potential price and non price exploitative behaviour by Eircom in particular by reference to the Standalone FVA Market. Concerns about excessive pricing arise however where, absent regulation, the absolute level of the FVA price is likely to be persistently high. This concern remains in the presence of the USO and uniform FVA prices. In particular in relation to standalone LLVA end-users there is at present no effective pressure from SB-WLR resellers, from bundles or mobile to mitigate the risk of FVA prices rising over the period of the review. It is noted that ISDN access is outside the scope of the USO and therefore the USO is unsuitable to address competition concerns identified, notably amongst others, a risk of excessive pricing in respect of these end users. Additionally, ComReg considers there are competition problems that are not addressed through Eircom's USO.[375] Examples include the potential for Eircom to impose a margin squeeze, or to leverage SMP between the FVA markets and adjacent markets. For the above reasons, the USO purpose is to address in general wider social policy objectives and is not suitable to address all of the competition concerns identified pursuant to the FVA market review.[376] On this basis, ComReg considers that these concerns are most suitably addressed currently via the separate SMP obligation on Eircom, notably, the RPC (see paragraphs 6.91 to 6.102 below).

[375] ComReg plans to further consult in 2015 on the potential future scope of access at a fixed location under USO and its various components as relevant.

[376] BEREC furthermore considers that the proportion of captive users should not be underestimated (it goes far beyond elderly people as many business users are still structurally dependent on PSTN services) and social policy measures, even those included in the universal service obligations, are not likely to be suitable for addressing these issues: see Document number: BoR(14) 85.

6.33 Eircom submits that ComReg has only provided hypothetical examples of potential exploitative practices in which it could engage. However, ComReg provided some examples of cases where Eircom has engaged in behaviour that indicates the presence of SMP.[377] Indeed, OAOs consider that ComReg's analysis of competition problems is backed up by actual examples of Eircom non-compliance. ALTO and BT argue that Eircom has discriminated between wholesale inputs provided to Eircom's retail business, and those provided to Eircom's wholesale customers. ALTO and BT also pointed to the risk of Eircom imposing margin squeezes on relevant retail bundles. Other respondents also referred to other examples of where Eircom has not complied with existing regulatory obligations. For example, Sky referred to Eircom's consistent failure to meet non-discrimination obligations, and the fault repair targets agreed in its supply contracts with SB-WLR customers.[378] As noted in the FVA Consultation it is neither necessary for ComReg to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse.[379] Rather, ComReg notes that the purpose of ex ante regulation is to prevent the possibility of abuses.

6.34 More recently, ComReg has considered in the FACO Consultation related competition problems arising in the provision of SB-WLR and related wholesale products.[380] Until such time that appropriate and effective wholesale remedies are imposed upstream in the FACO Markets to address any SMP and competition concerns at that level, many of the competition problems identified in the FACO Consultation apply also at the retail level in the Relevant FVA Markets. As such, ComReg refers to the relevant competition problems as elaborated on further within the FACO Consultation.

Conclusion

6.35 Having regard to the analysis set out in the FVA and the Supplementary Consultations and the detailed consideration of respondents' views, ComReg's final position is now set out. Absent regulation, Eircom, as the SMP undertaking in the Relevant FVA Markets has the ability and incentive to engage in actions which could negatively impact on competition and customers in the FVA markets and in horizontally and vertically related retail and wholesale markets (e.g., calls and broadband). In view of the structure of the Relevant FVA Markets and their close relationship with the upstream FACO market in particular, it is ComReg's position that in view of having SMP Eircom has ability and incentive to engage in a range of exploitative and exclusionary behaviour absent regulation including:

FVA Consultation paragraphs 6.28 to 6.29.

[378] Information notice – Notification of non-compliance issued to Eircom Ltd for Fault Repair timescales for SB-WLR, ComReg Document No. 12/140, 21 December 2012.

[379] Such a requirement would be counterintuitive in markets where existing regulation is established to prevent these competition problems from occurring.

[380] In this regard, see section 8 of ComReg document 14/26 "Market Review: Wholesale Fixed Call Origination and Transit Markets", dated 4 April 2014.

- Exploiting customers, in particular standalone LLVA customers (e.g. through setting prices that are too high and/ or tying); and

- Using control over upstream inputs to engage in price and non price practices (e.g., leveraging a strong position in retail and wholesale FVA markets to adjacent markets through bundling) aimed at raising rivals costs in downstream FVA (and adjacent markets).

6.36 As has been made clear in Chapter 4, market definition is a means to an end, and not an end in itself. Specifically, it is ComReg's objective to ensure that regulatory remedies are targeted and designed to address competition problems that would prevail in the absence of regulation. ComReg as a result of its analysis in the FVA and Supplementary Consultations considers it necessary to impose, maintain, amend and withdraw appropriate remedies for the Relevant FVA Markets as now discussed.

C. Wholesale obligations

6.37 As noted at paragraph 6.5 ComReg must impose obligations pursuant to Regulation 13 in respect of a particular retail market where:

I. ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that a particular retail market is not effectively competitive; and

II. ComReg concludes that obligations imposed under Regulations 9 to 13 of the Access Regulations[381] would not result in the achievement of the objectives set out in section 12 of the Act and Regulation 16 of the Framework Regulations.

6.38 In respect of condition ii and as noted in the FVA Consultation because of the high and persistent barriers to entry (particularly, the fact that OAOs would need to build out a fixed network of their own), absent wholesale regulatory intervention via CPS/SB-WLR and LLU, competition would be restricted in the LLVA and HLVA markets. In addition, ComReg believed that the existing wholesale SB-WLR and CPS obligations and the various supporting obligations continue to be needed to facilitate competition in the FVA markets. As noted in the FVA and Supplementary Consultations, ComReg is consulting on certain amendments to remedies in regulated wholesale access markets (i.e. the preliminary proposals as outlined FACO Consultation as previously discussed), that may, in due course, permit the removal of some regulation in the retail FVA market, though this depends on the outcome of the FACO decision which cannot be pre-empted.

[381] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the "Access Regulations").

Maintenance of existing wholesale obligations SB-WLR and CPS

6.39 This subsection considers whether it is necessary and appropriate to continue to impose wholesale access SB-WLR and CPS on Eircom in the context of the current FVA market review. In view of the potential re-positioning of wholesale access obligations SB-WLR and CPS in Market 2 (i.e. the proposed shifting of wholesale access SB-WLR and CPS upstream to the FACO market), Eircom will as a result of this Decision (and depending on the outcome and decisions in ComReg's consultation on the FACO Market) continue to have obligations in relation to wholesale access namely SB-WLR and CPS (and a selection of remedies supporting these access obligations) as indicated may possibly occur in the FVA Consultation.

6.40 ComReg's preliminary view was that neither the LLVA (i.e. FVA whether sold on a standalone basis or in a bundle) nor the HLVA market was effectively competitive (or likely to become effectively competitive) within the timeframe covered by this review. ComReg identified a range of competition problems that were likely to arise in the relevant FVA markets, absent regulation.[382] On this basis, absent the imposition of any remedies within the LLVA and HLVA markets, it was ComReg's view that such markets would not likely function effectively. ComReg considered the option of regulatory forbearance or withdrawal of existing SB-WLR and CPS remedies was not appropriate at least for the period of this review for either of the wider LLVA market and HLVA market.

[382] FVA Consultation paragraphs 6.10 to 6.34.

6.41 It was noted that the wholesale regulated access to CPS and WLR as well as access to LLU and WBA support and will continue to support retail competition in FVA and adjacent retail markets. Without access to these wholesale services, FSPs that have entered the retail FVA markets and won market share would not have the 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. To date, in any region, FVA has not been supplied as a standalone product over purchased WPNIA[383] inputs. The latter option is generally not deemed economically viable[384] 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.[385] For these reasons, ComReg proposed[386] to maintain the wholesale remedies that were imposed on Eircom at the retail level[387] on an interim basis in the markets proposed in the FVA Consultation notably, LLVA and HLVA, pending the outcome of ComReg's separate review of the FACO Markets.[388]

Consultation responses and ComReg analysis

6.42 ComReg received responses from six parties in relation to the continued imposition on an interim basis the wholesale SB-WLR/CPS and associated remedies in the context of the current FVA market review. These respondents generally agreed with ComReg's proposal that there is a continued need for Eircom's SB-WLR and CPS/CS obligations (along with the various related supporting obligations) and that such obligations should remain in place in each of the FVA markets until such time that the obligations can be imposed upstream.

[383] Wholesale Physical Network Infrastructure Access.
[384] The last mile is still considered as a natural monopoly and thus involves high and non-transitory entry barriers.
[385] The FVA Consultation indicated that while LLU was currently somewhat limited it could possibly in the future provide an alternative means of delivering bundles of broadband and voice.
[386] FVA Consultation paragraphs 6.34 to 6.42.
[387] Specifically, that Sections 5 and 6 of the Decision Instrument in Decision D07/61 would remain in force until further notice.
[388] The European Commission in its comments letters has urged NRAs to impose WLR in order to render CS/CPS obligations more effective, see case EE/2010/1051.

6.43 ComReg remains of the view that SB-WLR, in particular, is an important driver of competition in the Relevant FVA Markets. Eircom is the only provider of SB-WLR and CPS and, as set out in the competition assessments, its competitors in each of the Relevant FVA Markets rely to a large extent on Eircom's SB-WLR and CPS products to compete in the market on a national basis.[389] Most FSPs believed that the FVA market would be significantly less competitive without SB-WLR being available, and that competition could be foreclosed due to the high barriers to entry that persist including the high costs associated with replicating Eircom's network. In this regard, BT and Vodafone argue that LLU has not had a discernible impact on Eircom's share in the FVA markets, which remains high. Today, in these respondents' view, with a couple of exceptions the industry still largely depends on Eircom's regulated wholesale fixed voice services to offer retail voice solutions. Therefore, BT and Vodafone consider that Eircom should be required to continue providing the relevant wholesale products.

6.44 Further, regarding the Bundled LLVA market, ComReg recognises the increasing prevalence of retail bundles, and that SB-WLR remains an important wholesale input for FSPs competing in the provision of retail bundles that includes FVA on a national basis. ComReg also notes Vodafone's view that SB-WLR is important in the adjacent market for retail broadband. This is because absent the availability of (a) SB-WLR, or (b) an effective naked DSL product, other FSPs would rely on Eircom to provide retail line rental to end users before WBA could be used to provide retail broadband. Vodafone submitted that the removal of the SB-WLR obligation would mean that competition in the retail broadband market would actually entrench Eircom's position of SMP in the FVA market. On that basis, Vodafone considers that, until Eircom's portfolio in Market 5 is sufficiently decoupled from dependence on a SB-WLR input, the SB-WLR product could be considered an associated facility within WBA/Market 5.

6.45 Although Eircom launched a DSL only wholesale product ('naked DSL') in July 2013, the narrowband access SB-WLR connection is still being used to deliver voice services. While Eircom is currently rolling out an NGA network, it is also likely largely to continue to provide FVA (and SB-WLR) over its copper narrowband network over the period of this review particularly for FVA customers who do not purchase broadband services. As ComReg notes in the FACO Consultation, with a few exceptions, there have not been any significant developments of managed VOIP services by access seekers over wholesale broadband products purchased by them from Eircom.

[389] See also the FVA Consultation Chapter 5, 6 and Chapter 7.

6.46 In light of Eircom having SMP in the Relevant FVA Markets (and additionally proposed to have SMP in the upstream FACO market), ComReg considers that absent regulation Eircom has the ability, and the incentive, to foreclose entry into the Relevant FVA Markets, for example, by setting excessive prices for SB-WLR or by refusing to supply the service. Indeed, as noted BT considers that there is a significant risk of upstream prices to third parties being set at excessive levels and/or margin squeeze relative to downstream equivalents. Ultimately that would result in direct detriment to consumers. ComReg considers that effective SB-WLR and CPS remedies are necessary to facilitate competition in the downstream Relevant FVA Markets. It is noted that BEREC is of the view that the lifting of regulatory obligations imposed under Market 1 and 2/2007 (WLR and CP/CPS) would leave the incumbent operator with significant market power in Market 1.[390]

6.47 ComReg recognizes the positive impact of SB-WLR (together with CPS) on competition in the Relevant FVA Markets. Only in the event of a market shift to a significantly higher proportion of FVA via direct access (i.e. FVA delivered over own or alternative infrastructures), could ComReg consider the removal of SB-WLR and CPS (and their supporting measures) as obligations for the Relevant FVA Markets. In these circumstances, ComReg's view is, based on the reasons more fully set out in the FVA Consultation[391] and the continued material demand for SB-WLR (Figure B Appendix 4), that the existing obligation to provide SB-WLR, along with the various supporting obligations imposed on Eircom under Decision D07/61 should be maintained. Doing so will facilitate competition for the benefit of end users in the Relevant FVA Markets.

[390] See http://berec.europa.eu/eng/document_register/subject_matter/berec/others/?doc=4444
[391] Paragraphs 6.34 to 6.42 and 7.18 to 7.23.

Sections 5 and 6 of Decision Instrument in Decision D07/61 remain in force pending FACO market review in 2014

6.48 As noted previously these obligations will be imposed on a potentially interim basis in the Relevant FVA Markets depending on the FACO Consultation and any SMP still being identified following the FACO market review. Eircom agrees that the SB-WLR, carrier select, and carrier pre-select obligations, if still required, should be continued as a wholesale remedy arising from the analysis of FACO/Market 2. Eircom noted that, by moving these remedies upstream, the FVA market analysis would be much simpler and clearer, and would only consider retail regulation where wholesale regulation is insufficient.[392] However, Telefonica, BT and ALTO considered that the text contained at Clause 6.42 of the FVA Consultation, relating to the continuation of wholesale regulation on an interim basis creates uncertainty (i.e. that the outcome of the FACO market review is not yet known). Similarly, Vodafone considered that to give regulatory certainty, remedies in the FVA market should be imposed on their own merits without caveat or conditional dependency on some economic market which by definition it believed does not curb Eircom's SMP in FVA.

6.49 ComReg's justification for the shifting of these remedies to the FACO markets is explained in Section 9 of the FACO consultation in particular.[393] That Consultation considers in detail whether it is appropriate to continue to impose SB-WLR and CPS obligations on Eircom and, subject to any proposed SMP finding, it also includes a Draft Decision Instrument containing the text of any proposed updated SB-WLR and CPS obligations (i.e. transfer of these obligations from the FVA Market to the FACO Market).[394] However, ComReg's analysis of FACO/Market 2 is not complete and no decision(s) have been made in this regard. In the meantime, ComReg, as noted in the FVA Consultation including the initial RIA, will on a potentially interim only basis and depending an outcome of the FACO market review in 2014 maintain the existing obligations in relation to SB-WLR and CPS and supporting obligations imposed on Eircom under section 5 and 6 of Decision D07/61. Regarding the existing obligation on Eircom to provide wholesale access SB-WLR/CPS the following are the detailed supporting obligations:

i. Access obligation

ii. Transparency obligation

[392] ComReg notes that the basis for imposing these remedies in the upstream wholesale market is being assessed in ComReg's FACO market review, and therefore will not be considered in this Decision paper.
[393] ComReg has also set out in the FACO Consultation a preliminary view that CPS on a standalone basis should not be included as a regulatory obligation in the FACO Market, on the basis that CPS has been nearly entirely superseded by SB-WLR as the wholesale input of choice for access seekers providing FVA. However ComReg is minded to maintain this obligation for the purposes of this Decision for the reasons set out.
[394] FACO Consultation paragraphs 9.62 to 9.77.

iii. Non discrimination

iv. Account separation

v. Price control

i. Access obligation

6.50 Regulation 12(1) of the Access Regulations provides that ComReg may impose[395] on an operator obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities where ComReg considers that the denial of such access, or the imposition by operators of unreasonable terms and conditions having a similar effect, would:

- hinder the emergence of a sustainable competitive retail market;
- not be in the interests of end-users; or
- otherwise hinder the objectives set out in Section 12 of the Communications Regulation Acts 2002 to 2011.
- Obligations must also be proportionate and justified in the light of the objectives laid down in Section and Regulation 16 of the Framework Regulations.

6.51 ComReg can impose, where appropriate, additional access obligations and may attach conditions covering fairness, reasonableness and timeliness to those access obligations.[396] Pursuant to Regulation 12(4) of the Access Regulations, when considering whether to impose obligations referred to in paragraphs (1) and (2) of Regulation 12 and, in particular, when assessing whether such access obligations would be proportionate to the objectives set out in Section 12 of the Act, ComReg must take the following factors into account:

a. the technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved;

b. the feasibility of providing the access proposed, in relation to the capacity available;

c. the initial investment by the facility owner, bearing in mind the risks involved in making the investment;

d. the need to safeguard competition in the long-term;

[395] In accordance with Regulation 8 of the Access Regulations.
[396] Provided for by Regulation 12(2)(a) to 12(2)(j) and Regulation 12(3) of the Access Regulations .

e. where appropriate, any relevant intellectual property rights; and

f. the provision of pan-European services.

6.52 These provisions have been discussed throughout this document and in the FVA Consultation (Chapter 6) in particular.

6.53 ComReg in evaluating the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial outlay of investment by the undertaking; and the need to safeguard competition in the long term has again concluded that continued access to SB-WLR as a wholesale input on fair and reasonable terms and conditions is an important focus of ComReg's regulatory policy and the promotion of competition. Accordingly, it remains appropriate to continue to impose these access obligations on Eircom. An assessment of these criteria is as follows:

a. Technical and economic viability of using or installing competing facilities:

6.54 Throughout this Decision ComReg has clearly explained why entry based on competing infrastructures is unlikely to mitigate the competitive harm arising from Eircom's dominance. This is because of, inter alia the presence of high barriers to entry and the presence of high levels of sunk cost. The evidence since the last review in 2007 is supportive of this view given the modest level of entry since then – notwithstanding the increased presence of UPC which is discussed above. ComReg will also encourage the correct build or buy pricing signals in its wholesale pricing methodologies. On a forward looking basis, ComReg notes that barriers to entry may reduce over time through alternative service providers deploying primarily managed VoIP based services; however, the timing of any such entry on that basis on any significant scale is as yet uncertain. In any event, ComReg does not consider it likely to materially alter the competitive position within the Markets within the period of this review. Eircom has also to date been providing SB-WLR and CPS services and it is, therefore, technically viable to do so.

b. Feasibility of providing access in relation to capacity available:

6.55 Access to SB-WLR and CPS are already provided by Eircom, albeit on foot of existing regulatory obligations. ComReg believes there are no material capacity constraints that would give rise to Eircom facing difficulties in meeting the proposed access obligations.

c. The initial investment of the facility owner:

6.56 Having regard to Regulation 12(4)(c) and Regulation 13(2) of the Access Regulations, ComReg's approach to imposing access remedies is based on principles that, inter alia, allow a reasonable rate of return on adequate capital employed, taking into account the risks involved. When proposing price control remedies: ComReg is mindful of facilitating the development of effective and sustainable competition to the benefit of consumers without compromising efficient entry and investment decisions of undertakings over time. ComReg is also mindful of the role of regulatory transparency and consistency in contributing to a more predictable environment conducive to long-run investment decisions being made.

d. The need to safeguard competition:

6.57 Throughout this Decision document ComReg has highlighted the impacts on competition and the impacts on consumers that could arise given Eircom's ability and incentives to potentially to engage in exploitative or exclusionary behaviours in the Markets (absent regulation). These include, inter alia, actual or constructive denial of access, excessive pricing and other behaviours which could damage the development of sustainable competition. ComReg considers that imposing access (and other obligations) in the Markets will ultimately promote the development of sustainable competition in retail markets, to the benefit of consumers.

e. Intellectual property rights:

6.58 ComReg's view is that intellectual property rights are not likely to be a significant concern in the context of the provision of access to SB-WLR or CPS.

f. Pan European Services:

6.59 Given the importance of SB-WLR as a means of providing competition to Eircom in Ireland and across the EU ComReg regards it as an essential tool for the encouragement of competition on a multinational basis across the EU. This is because a pan EU operator is very unlikely to invest in alternative infrastructure in a material way and no Irish based operator which offers a wholesale alternative would be able to offer a service covering all or most of the population without access to WLR.

6.60 Regarding the nature of the wholesale SB-WLR/CPS access currently imposed on Eircom, as provided for in D07/61, Eircom will continue to have regard to the following specific implementation issues:

6.61 Facilities already granted: More specifically in relation to the obligation not to withdraw access to facilities already granted ComReg considers this is necessary bearing in mind the continuing importance of SB-WLR and CPS for example, (and considering Eircom's ability and incentive to delay or refuse access either outright or constructively), however it may be possible to submit objectively justified circumstances for withdrawing access (such as the unjustified non-payment of wholesale charges), however, this would have to be considered on basis of the facts of the particular circumstances governing the proposed withdrawal of access. ComReg considers that the proposed remedy, requiring that Eircom seek ComReg's approval prior to any withdrawal of access, will promote regulatory certainty for all parties without unduly restricting investment incentives. More specifically, ComReg proposes that Eircom should notify ComReg, in writing, of any proposal to withdrawal access to facilities already granted, giving detailed reasons for the proposal. Including the impacts that the withdrawal of access is likely to have on existing purchasers. Where Eircom proposes to withdraw services, ComReg would retain the right to consult with relevant parties, prior to making a decision on whether to grant or to withhold its approval.

6.62 Technical interfaces: ComReg proposes to impose an obligation on Eircom to grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services. Having regard to the competition problems identified ComReg considers that this remedy is both justified and proportionate in order to ensure that, in the context of the provision of access to SB-WLR and CPS, interoperability of networks and services is ensured. In so doing, ComReg considers that this remedy will contribute to the development of sustainable downstream competition to the ultimate benefit of consumers.

6.63 OSS: Access to Eircom's OSS plays an important role in Eircom's the provisioning of wholesale services (such as SB-WLR) to Access Seekers and its downstream arm. This also includes access to OSS for the purpose of fault and in-service management. Access to OSS is, therefore, essential, to the effectiveness and efficiency of the operational aspects of the supply of such wholesale products. In the absence of Access Seekers being able to gain effective and efficient access to Eircom's OSS, they would likely be at a significant competitive disadvantage relative to Eircom's retail arm. Having regard to the competition problems discussed, ComReg considers that this remedy is needed to support Eircom's general access obligation because Eircom has the ability and the incentives to impede access to its OSS in order to leverage its market power into downstream and adjacent markets.

6.64 Regarding SLAs, these are intended to prevent Eircom from engaging in actual or constructive refusal to supply effective and efficient access to SBWLR and CPS. SLAs facilitate fair competition in the provision of services. SLAs encourage Eircom to achieve acceptable levels of service performance in the provision of services to Access Seekers and to ensure that a level playing field is created in terms of the access provided by Eircom to Access Seekers and that which is self-supplied.

ii. Transparency obligation

6.65 Regulation 9 of the Access Regulations provides that ComReg may, inter alia, specify obligations to ensure transparency in relation to access or interconnection requiring an SMP undertaking to make public specified information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any conditions limiting access to or use of services and applications where such conditions are permitted by law. In this regard and, in support of wholesale access obligations in respect of SB-WLR and CPS, ComReg has determined that a transparency obligation continues to be required to monitor and ensure the effectiveness of the other wholesale access obligations (such as access, non-discrimination, price control and accounting separation). In this regard ComReg considers it appropriate that ComReg Decision D05/11 regarding KPIs be maintained[397]. A transparency obligation should allow ComReg and market participants to monitor Eircom's compliance with its obligations, and address potential competition problems relating to discrimination for example. Absent the transparency obligations, Eircom has the ability and incentive to foreclose expansion/entry of potential downstream competitors by (for example), withholding information, the effect of which could be to create conditions of uncertainty thereby discouraging potential entry. The potential for leveraging of market power into related markets through informational asymmetries was also identified.

[397] Key Performance Indicators measure(s) of the standard(s) of products, services or facilities provided by Eircom to Access Seekers and by Eircom to itself. ('KPIs'). See "Introduction of Key Performance Indicators for Regulated Markets", Response to Consultation and Decision, ComReg Document No 11/45, DecisionD05/11, June 2011. This obligation is being maintained in respect of the Relevant FVA Markets generally.

iii. A non-discrimination obligation

6.66 ComReg identified that, absent regulation, Eircom has the ability and incentive to engage in behaviour that could adversely impact upon downstream competition and consumers. For example, Eircom could offer discriminatory prices, terms and conditions, and service/repair quality to different Access Seekers or between Access Seekers and its own retail arm. The application of an ex ante non-discrimination remedy seeks to prevent a dominant, vertically-integrated undertaking from engaging in discriminatory (price or non-price) behaviour that could hinder the development of sustainable and effective competition in downstream wholesale and retail markets.[398]

6.67 Regulation 10 of the Access Regulations provides that ComReg can impose non-discrimination remedies in relation to access or interconnection on an undertaking designated with SMP, in particular to ensure it behaves in such a way that it:

- applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and
- provides services and information to others under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or partners.

6.68 ComReg remains satisfied that a non discrimination obligation remains necessary to ensure the provision of effective and efficient non-discriminatory access (and pricing) regarding wholesale services. The aim of a non-discrimination obligation is to ensure there is no discrimination either between Eircom and operators and/or among other operators. The non-discrimination obligation therefore supports the objective of promoting the development of sustainable downstream competition which should ultimately be to the benefit of end-users and is therefore reflective of ComReg's regulatory objectives. Eircom as a vertically integrated operator would have complete control over wholesale inputs and therefore may have preferential access to customer information, which could afford it an advantage in relation to its position at the retail level (e.g. the availability of real time access to necessary information which is not available to downstream competitors or potentially reduced functionality). This obligation should also support the effective operation of other regulatory obligations such as access, transparency and price control.

[398] As noted in the Access Directive, the principle of non-discrimination is designed to ensure that undertakings with market power do not distort competition, in particular, where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.

iv. An accounting separation obligation

6.69 ComReg considers that an accounting separation obligation also remains an important requirement in respect of CPS and SBWLR. In accordance with Regulation 11 of the Access Regulations, ComReg can, inter alia, require an operator which is vertically integrated to make transparent its wholesale prices and its internal transfer prices, among other things, to ensure compliance with any non-discrimination obligation imposed or, where necessary, to prevent unfair cross-subsidy.

6.70 In general, the purpose of accounting separation obligations is to provide a higher level of detail of information than that which can be derived from the statutory financial statements of undertakings designated with SMP, with the objective of reflecting, as closely as possible, the performance of those parts of the undertaking's business were it to operate on a standalone basis.[399] In the case of vertically integrated undertakings, it can support non-discrimination obligations and prevent unfair cross-subsidies to other services. It can also assist ComReg in monitoring compliance with these obligations.

6.71 Allocating costs to the appropriate and relevant products and services of an SMP undertaking is an important factor to consider when regulating multiple products and services carried over the same network. This is particularly true for Eircom where its fixed narrowband access network is a common infrastructure that is used to provide a range of retail and wholesale services (some of which are subject to regulation) including FACO, WPNIA, WBA, retail fixed access and fixed voice calls, as well as other retail products including retail broadband. Therefore information is required about the costs associated with Eircom's provision of SBWLR and CPS, with such costs being distinct from the costs associated with other services provided over Eircom's network.

6.72 Eircom has the ability and incentive to engage in a range of price-related exploitative and leveraging behaviours ComReg therefore considers it necessary that a transparent and effective mechanism of accounting separation is established so that costs and their allocation to each customer (for example) can be transparently identified. It will enable ComReg to ensure that there is no price discrimination by providing transparency on the allocation of costs (for example). The detailed nature of these cost accounting obligations are those currently imposed upon Eircom and as specified in the 2010 Accounting Separation Decision.

[399] Article 1 of the 2005 Accounting Separation and Cost Accounting Recommendation.

v. A price control obligation[400]

6.73 In relation to price control and cost accounting supporting SB-WLR/CPS access, ComReg considers that as Eircom is a vertically integrated operator which has SMP at the wholesale level and which provides wholesale inputs relied upon to compete in a downstream market, it could as noted at paragraphs 6.14 to 6.18 price its upstream services (by applying discriminatory prices or pricing excessively) in such a way that may impede effective downstream competition. SB-WLR is currently regulated via a 'retail minus' obligations i.e. a 14% margin applies since 2009, though as noted in the FACO Consultation ComReg plans to examine this alongside various pricing aspects associated with the Eircom access network in 2014.[401] In the meantime, the SB-WLR obligation including amongst others the current 14% margin in that regard will be imposed on a potentially interim basis in the FVA markets depending on the FACO Consultation and any SMP still being identified following the FACO market review. ComReg, taking into account investment made by Eircom and in addition the allowable reasonable rate of return on adequate capital employed,[402] is satisfied that the price control obligation supported by cost accounting would serve to promote efficiency and sustainable competition and maximise consumer benefits.

6.74 In accordance with Regulation 8(6) of the Access Regulations, ComReg considers that the proposed obligations are based on the nature of the problem identified and are proportionate and justified in the light of the objectives laid down in Section 12 of the Act and Regulation 16 of the Framework Regulations.[403] Eircom will face minimal incremental burden from maintenance of such obligations at least over the period of this review given that CPS and SB-WLR access and their supporting remedies are existing obligations. These products are now well established and in common use by a large number of FSPs. Therefore, the continued provision of CPS and SB-WLR access does not impose substantial additional regulatory costs, and should be easily exceeded by the benefits of enhanced competition and wholesale revenues flowing to Eircom as well as direct benefit to end-users.

[400] Pursuant to Article 13 of the Access Directive.
[401] FACO Consultation paragraphs 9.239 to 9.257.
[402] Pursuant to Article 13 of the Access Directive.
[403] Pursuant to section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community. Regulation 16 of the Framework Regulations further specifies ComReg's obligations.

Conclusion

6.75 Having regard to the analysis in the FVA and Supplementary Consultations and having considered responses to the FVA and Supplementary Consultations, in view of the regulatory transition, ComReg considers it appropriate to continue to impose on Eircom on an interim basis the existing wholesale SB-WLR and CPS and associated remedies in the context of the current FVA market review depending the outcome and decisions in ComReg's consultation on the FACO market in 2014.

Margin squeeze

6.76 As indicated ComReg in the Supplementary Consultation considered further what remedies may be necessary and appropriate in the FVA market. Currently, ComReg is consulting on certain amendments to remedies in regulated wholesale access markets that may permit the removal of some regulation in the retail FVA market. In particular, ComReg is considering whether the introduction and specification of margin squeeze tests in the wholesale markets for FACO and for WBA, if effectively implemented upstream would permit the removal downstream of the current NRT in the retail FVA market. ComReg preliminary proposal was to suggest imposing in FACO/Market 2 a margin squeeze test, should SMP be found, and should this remedy is considered to be appropriate. If appropriate wholesale regulation including SB-WLR and margin squeeze in the FACO and WBA markets adequately supports the competitive constraint on Eircom posed by resellers, it may be appropriate for ComReg if a decision in respect of FACO/Market 2 has been made along the lines proposed in the consultation to revisit the Bundled LLVA and HLVA markets to assess whether the three criteria test is passed in the presence of upstream wholesale regulation. This proposal alongside respondents' initial views on the principle of switching the NRT upstream, is further considered in the context of the existing retail obligation on Eircom 'not to unreasonably bundle' below.

D. Retail obligations

6.77 In this section, we review the responses to ComReg's overall proposal to impose retail remedies, pursuant to Regulation 13 of the Universal Service Regulations and then consider the responses received relating to each specific retail remedy proposed by ComReg for the LLVA market. We then assess the responses and reach a final position on the retail remedies that ComReg will impose in the Relevant FVA Markets.

Overview of the sufficiency of wholesale measures

6.78 In the FVA consultation, ComReg considered that the proposed wholesale obligations would not, in themselves, achieve ComReg's regulatory objectives. In particular, it was ComReg's view that some of the competition problems identified in the Relevant FVA Markets persist and will persist in spite of regulatory measures at the wholesale level. LLU has not had an appreciable impact on the competitiveness of the FVA markets. In spite of the strong growth of SB-WLR, Eircom had retained market power in the provision of FVA to end users in each of the LLVA and HLVA markets. Furthermore, the SB-WLR retail minus mechanism, does not constrain Eircom in the level of the retail and wholesale prices that it sets, only the differential between those prices. Thus retail measures are required to complement those wholesale obligations and address the additional competition concerns arising at the retail level.

6.79 On that basis, ComReg proposed that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the Relevant FVA Markets.

Consultation responses and ComReg analysis

6.80 Most respondents saw a continued need for some form of SMP obligation(s) at the retail level. However, Eircom do not agree that any controls are required at the retail level.

6.81 Eircom's view is that retail regulation is a last resort and that ComReg needs to have regard to wholesale regulations, universal service and general authorisation obligations in place. Eircom does not believe that ComReg has shown why regulatory controls, in the presence of existing wholesale obligations, continue to be required in relation to LLVA. In particular, it does not believe that in light of Regulation 13(8) of the Universal Service Regulations, ComReg is entitled to impose any retail control obligations in relation to the geographic areas where it considers there to be intense competition, including in particular what is known as the LEAs. More specifically, Eircom suggests that ComReg does not need to intervene further in the retail market because:

- Prices for fixed voice access services have not increased since the last retail price cap was imposed. Eircom highlight that under the existing RPC a price increase of 5% would have been possible in 2008 and a further increase would be possible from October 2012. Competitive constraints are such that, Eircom contends, any such increase would be unprofitable. Eircom submits that the constraints imposed by the USO (national prices, and need to ensure affordability) would prevent any excessive pricing even if the competitive constraint did not do so. It is Eircom's view that ComReg has not taken any meaningful account of the impact of a USO in relation to the provision of access at a fixed location;

- Eircom submits that there is no evidence that the LLVA fixed voice access business is generating excessive returns, well above the weighted average cost of capital. Instead, in Eircom's view, returns will be lower than required to fund the WACC as Eircom shares decline in urban areas. In that regard, Eircom submits that when these unrecovered connection costs are included, then the return for the Wholesale PSTN product is close to the regulated rate of return; and

- The presence of price controls, cost accounting and accounting separation obligations, together with the potential application of competition law, significantly constrain any possibility by Eircom to engage in margin squeezes. Accordingly, Eircom does not agree that ComReg should intervene at the retail level and urges ComReg to take due account of existing wholesale obligations, the impact of Eircom's USO as well as generally applicable measures specifically designed to protect consumers.

6.82 According to Vodafone, ComReg is faced with a choice; it can try to construct a much more intrusive and robust set of wholesale remedies OR it can use a more nuanced and tailored combination of wholesale and retail remedies to address the competition issues that have been identified. Given that the market under consideration is a retail market and the degree of market power that exists, it is not clear that an intervention based solely on a set of wholesale remedies could be guaranteed to adequately address the retail level concerns. On this basis it appears to be a proportionate approach to use a combination of wholesale and retail remedies.

6.83 ALTO, Magnet and BT expressed concerns in relation to bundling –Eircom continues to have a large share of the FVA market and LLU has made no discernible impact. BT specified that Eircom should continue to be regulated to supply the various wholesale regulatory remedies including SB-WLR on retail minus basis. It is considered by the majority of respondents that there is both motive and opportunity for the creation of price/margin squeeze activity. In that regard, the obligation 'not to unreasonably bundle' is specifically highlighted as being required to prevent activities that in these respondents' view could easily circumvent wholesale regulation, such as, mixing subsidised non-regulated components with regulated components. According to BT, there is also a need to maintain retail regulation on Eircom to ensure end customers do not experience obstacles when attempting to switch provider. UPC generally believes that the balance between wholesale and retail remedies is appropriate and proportionate to the level of prospective competition in this market in Ireland.

Conclusion

6.84 In view of Eircom having SMP in the Relevant FVA Markets and because of the competition concerns identified by ComReg that currently persist despite wholesale intervention, for the reasons set out at paragraphs 6.36 to 6.73 ComReg considers that complete deregulation at the retail level at this stage is not appropriate, proportionate or justified.

Proposal to impose retail remedies in the LLVA market

6.85 In terms of the LLVA market, ComReg in the FVA Consultation considered that some form of retail SMP regulation continued to be needed to prevent Eircom from exploiting and/or leveraging its SMP. Because it is not likely that FSPs will exercise a sufficient competitive constraint on Eircom in the LLVA market over the review period, ComReg believed that, in addition to wholesale remedies, retail regulation of some, or all, of the available services in the LLVA market was appropriate, in particular given the predominance of residential users. In the longer term, in the absence of retail price control and other retail obligations ComReg's preliminary view was that Eircom may exploit market power by setting and/or maintaining prices for PSTN and ISDN BRA above a competitive level to the detriment of consumers. As noted in the FVA Consultation, there are a significant proportion of consumers who continue to primarily value only the standalone FVA product. These consumers are likely to need continued protection against the risk of potential price rises where competitive pressure alone in respect of the FVA services they purchase is too weak.

6.86 ComReg believed that forbearance from imposing retail SMP obligations on the LLVA market as not appropriate or justified. On that basis, ComReg proposed the following retail obligations, pursuant to Regulation 13 of the Universal Service Regulations:

- Price control via a retail price cap measure;
- Obligation not to unreasonably bundle services;
- Transparency obligation;
- Cost accounting obligation; and
- Obligation not to show undue preference to specific end-users.

Consultation responses and ComReg analysis

6.87 ComReg received responses from seven parties in relation to the imposition of retail remedies on the LLVA markets.

6.88 The majority of respondents (Vodafone, ALTO, Telefonica, Magnet, UPC and BT) agreed overall with ComReg's proposal to impose retail obligations on Eircom in the LLVA markets. The main concerns raised by respondents relate to:

- Eircom's ability to offer bundles and to cross-subsidise between FVA and other products;
- that a sufficient economic space be preserved between prices of retail products that include FVA, and the prices of the relevant wholesale inputs;
- to ensure there are not inappropriate barriers for users to switch provider;
- the strength of Eircom's market power, the nature of the potential competition problems already identified and the fact that Eircom has incentives and opportunities to leverage such power; and
- it is not clear that an intervention based solely on a set of wholesale remedies could be guaranteed to adequately address the retail level concerns. On this basis it appears to be a proportionate approach to use a combination of wholesale and retail remedies.

6.89 However, Eircom considered that it is not appropriate to impose an extensive range of retail obligations for the following reasons:

- ComReg has not, according to Eircom, provided convincing reasons to support the regulation of the retail market;

- it is subject to competitive pressure in provision of FVA products, particularly from mobile services and FVA bundles provided over cable;
- vulnerable users are protected by the Universal Service Regulations;
- these factors have prevented it from increasing prices, despite being permitted to do so under the existing retail price cap;
- there is no evidence that the LLVA fixed voice access business is generating excessive returns; and
- before imposing retail remedies, ComReg should take due account of existing wholesale obligations, the impact of the Universal Service Regulations, as well as generally applicable measures specifically designed to protect consumers.

6.90 In view of Eircom having SMP in the Relevant FVA Markets and because of the competition concerns identified by ComReg that currently persist despite wholesale intervention, for the reasons set out at paragraphs 6.36 to 6.73 ComReg considers that complete deregulation at the retail level at this stage is not appropriate, proportionate or justified. ComReg has addressed Eircom's arguments regarding the competitive conditions present in the Standalone LLVA market, within the SMP and Competition Problems sections of this Decision paper. On the basis of that analysis, ComReg considers that Eircom has the ability, and the incentive, to charge excessive prices, absent retail regulation. ComReg considers the appropriateness of retail remedies for each relevant FVA Market in turn[404].

1. Remedies Market 1a Standalone LLVA

6.91 ComReg considers that specific retail remedies are required, in addition to the general provisions of the Universal Service Regulations, to address the competition problems associated with SMP in the Standalone FVA Market as identified by ComReg at paragraphs 6.14 to 6.18.

[404] KPIs have already been discussed at paragraph 6.65.

(i) Price control

6.92 This sub section considers whether it is appropriate that Eircom, as the identified SMP operator, be subject to a retail price control obligation. ComReg finds that an obligation of price control via (a) a general requirement not to charge excessive prices and (b) a RPC remains appropriate and proportionate[405] in relation to the Standalone LLVA Market (the potential application or otherwise of a price control in relation to bundled LLVA is addressed below).

6.93 As noted in the FVA Consultation, Eircom is currently, amongst other things, subject to a retail price control via a price cap obligation under Decision 03/07[406] by virtue of its designation in 2007 with SMP in the higher and lower level retail fixed narrowband access markets as set out in Decision D07/61. ComReg proposed that a price control obligation be imposed on Eircom as a means to address its SMP in the wider LLVA market (FVA standalone and sold in a bundle), notably, a requirement not to charge excessive prices and a RPC. In the latter regard, ComReg proposed that it was appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom but only insofar as FVA provided via PSTN or ISDN BRA[407] was concerned and pending a further review of pricing aspects including the SB-WLR pricing methodology which ComReg plans to commence in 2014.

Consultation responses and ComReg analysis

6.94 ComReg received responses from three parties specifically in relation to the imposition of the RPC in the wide LLVA market, as proposed in the FVA Consultation. Vodafone and Magnet consider that the RPC should remain in place for Eircom's PSTN or ISDN BRA products to protect consumers against excessive pricing. In addition, Magnet proposed that such price cap should be implemented in conjunction with an obligation not to margin squeeze. However, Eircom argues that a RPC is no longer required on the basis that:

- Eircom's combined price of line rental and calls is close to the average for all EU for consumers, and among the cheapest in the EU for business users; despite higher structural costs;
- Eircom rejects the notion that its prices for connection and rental are higher than would apply in a competitive market;

[405] As set out at paragraphs 6.66 to 6.74 of the FVA Consultation in respect of the wider LLVA market.

[406] Decision Notice and Decision Instrument; SMP Obligation: Retail Price Cap Remedy – Fixed Narrowband Access Markets (ComReg Decision No. 03/07, Document No. 07/76, 1 October 2007). Through this Decision ComReg imposed on Eircom a retail price control in the form of a RPI-X cap, that is, CPI-0 (price caps are subject to an increase depending on the inflation rate). Separate price caps apply to a) PSTN and ISDN BRA services and b) ISDN FRA and PRA services.

[407] As part of the FVA Consultation ComReg did not propose to extend the application of the RPC to FVA provided via managed VOIP, though managed VOIP-based FVA formed part of the proposed wider LLVA market.

- ComReg's concerns regarding the potential for excessive pricing for LLVA are not justified;
- Competitive forces (constraints from mobile and FVA bundles provided over cable) and the USO prevent any increases in fixed line rental;
- Failure of ComReg to recognise, in its competition assessment, the regulatory constraints that curb Eircom's flexibility regarding FVA pricing; and
- Eircom undertook several initiatives on a voluntary basis to reduce connection fees via promotions.

6.95 ComReg has addressed Eircom's arguments regarding the competitive conditions present in the Standalone LLVA Market within Chapters 5 and 6 of this Decision. Eircom possesses market power with respect to consumers who avail themselves of standalone LLVA services. In the absence of remedies, it would have the incentive and ability to raise prices to the direct detriment of the consumers. This concern is particularly relevant in the context of those consumers who currently purchase their voice services on a standalone basis and do not value broadband to such an extent that they would switch to (more competitively priced) bundled services, or to mobile only. As previously noted, broadband with managed VOIP sold in a bundle (see further paragraphs 4.90 to 4.110) and mobile (see further paragraphs 4.121 to 4.155) do not currently exert a sufficient competitive constraint on Eircom in relation to standalone LLVA end users. Further, it is noted that BEREC considers that new services or technologies cannot at present be seen as direct constraints on operators of traditional public telephone services in all Member States especially as transition from PSTN to all-IP networks is slower and more gradual than initially envisaged and timing for phasing out of PSTN is uncertain.[408]

6.96 ComReg agrees with Eircom that the availability of SB-WLR provides a degree of competitive constraint on Eircom in the Standalone LLVA Market by reducing the cost of entering into the supply of standalone LLVA. However, as noted in Chapter 5 the competitive pressure for standalone LLVA is particularly weak and hence there is sound economic rationale to protect these consumers.[409] As set out at paragraphs 6.14 to 6.18 (and in Chapter 6 and 7 of the FVA Consultation), Eircom has, absent regulation, considerable scope and incentives to sustain FVA prices above competitive levels. Therefore, ComReg considers that a safeguard price control continues to be necessary and proportionate to protect this cohort.

[408] See Document number: BoR(14) 85.
[409] See further the European Commission's Draft Explanatory Note, p18/19 and the Ecory's report p17/18 and Chapter 5.

6.97 This is for two reasons. First, SB-WLR resellers are having a lesser impact on the Standalone LLVA Market.[410] As a result, Eircom has significantly higher market share in the Standalone LLVA Market, relative to the Bundled LLVA Market suggesting a relatively weak competitive constraint on Eircom in the Standalone LLVA Market. Second, a RPC is also required in part because of the relationship between retail and wholesale remedies.[411] In particular, ComReg has proposed to maintain an obligation on Eircom to provide SB-WLR, CPS, and the supporting remedies (should the transfer of these remedies from the FVA Markets to the upstream FACO Markets occur as a result of a decision regarding same when the FACO consultation is completed and a decision made) on the basis that these wholesale products are the main driver for competition, which delivers benefits to consumers in the Relevant FVA Markets. At the same time, the SB-WLR price is predicated on Eircom's retail FVA price. On this basis, ComReg is of the view that that wholesale only intervention is not sufficient of itself to adequately protect all consumers who face the risk of rising PSTN and ISDN BRA access prices.

6.98 ComReg is concerned that, absent a RPC, Eircom has the ability, and an incentive, to raise the retail FVA prices, and therefore also the SB-WLR price (Eircom had reduced the WLR price when purchased in conjunction with line-share or bitstream only, though it has recently announced the withdrawal of this wholesale promotion). As discussed at paragraphs 6.17 to 6.18, this would result in Eircom's SB-WLR based competitors facing an increase in their costs of providing retail FVA. In turn these FVA providers would be likely to increase their own retail FVA prices. This means that the competitive response to Eircom's retail price increase would be muted, and Eircom would not be constrained by FSP's selling services SB-WLR. It is noted that Vodafone agrees with a RPC given Eircom's relative market strength in the LLVA market and the fact that in its view the retail minus nature of the price control for SB-WLR means that Eircom can still leverage this market strength to price retail FVA above the competitive level. Vodafone believes that Eircom's retail price of FVA is above the competitive level required to recover the capital input costs. ComReg plans to commence in 2014 a review of pricing aspects including the SB-WLR pricing methodology. Within this review, ComReg will consider the appropriateness of cost-oriented methodologies for setting the price of SB-WLR. However, in the meantime, it is important to ensure that consumers are protected from those competition problems identified at paragraphs 6.14 to 6.33. As such, ComReg considers that a RPC remains necessary and proportionate, at least until such time that the SB-WLR price is set independently of Eircom's retail price for FVA products.

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[410] As discussed in paragraphs X to Y in the competition section of this Decision paper, SB-WLR resellers are primarily targeting retail bundle customers.

[411] The SB-WLR price is currently a retail-minus price, and therefore is pegged to the regulated retail price cap. This means that an increase in Eircom's retail FVA price would lead to an increase in the SB-WLR price.

6.99 Eircom has SMP with respect to those customers who would not readily switch to bundles in response to as SSNIP simply because they do not value broadband sufficiently. Accordingly, ComReg considers that in order to protect these consumers against any potential exploitative abuse by Eircom of its SMP in the Standalone LLVA Market a price control including a) a more general obligation not to charge excessive FVA prices and b) a RPC is a necessary, justified and proportionate remedy. ComReg considers, given the persistent risk of price-related competition problems deriving from Eircom's SMP position in the market, its ability, and the incentive, to charge excessive prices, absent retail regulation that it should be addressed and specifically that it be prohibited from charging excessive prices. In this regard, Eircom shall be obliged to refrain from charging excessive prices for the supply of services falling within the scope of Standalone LLVA Market. As noted also, the principle of a price cap is mentioned explicitly as a possible remedy in respect of retail competition issues under the Universal Service Directive.

6.100 Eircom suggest that the general provisions under the Universal Service Regulations would be sufficient to protect vulnerable customers. ComReg has carefully considered Eircom's comments regarding Regulation 8 of the USO Regulations (Affordability of Tariffs). In ComReg's view while Regulation 8(1) gives ComReg the power to (inter alia) monitor generally Eircom's retail prices (for example, as the designated USO provider in 2014) and Regulation 8(2) provides for obligations on the USP as relevant as regards certain vulnerable consumer groups (for example, geographically isolated end-users or elderly customers) for the basic fixed telephone services at a fixed location, these regulatory tools that would support in general social objectives, are not sufficient to address the specific competition problems highlighted by ComReg resulting from Eircom's SMP in the Relevant FVA Markets and in particular with respect to standalone LLVA end users.

6.101 For example, regarding the types of competition problems that persists and will continue to persist, as noted at paragraph 6.31 the current USO on Eircom in particular, GAP, seeks to ensure that the price for USO services including FVA and voice services are uniform across the country. The latter USO while potentially supporting affordability of FVA services is a complementary obligation to any SMP obligation and does not by itself address the competition concern, notably a risk of an unjustified price increase in the absolute FVA price to the detriment of consumers in the short term. As explained earlier, the USO, including GAP, is unsuitable to address adequately all of the competition concerns identified. In particular, it does not ameliorate the risk of excessive FVA prices, the potential for Eircom to impose a margin squeeze, or to leverage SMP between the FVA markets and adjacent markets. It is notable that BEREC considers that the proportion of captive users should not be underestimated (it goes far beyond elderly people as many business users are still structurally dependent on PSTN services) and social policy measures, even those included in the universal service obligations, are not likely to be suitable for addressing these issues.[412]

6.102 For the reasons set out above and in the FVA consultation, in order to address the risk of excessive FVA prices and other competition problems, ComReg considers that a complementary SMP obligation of price control is most appropriate, at least in relation to standalone LLVA end users. In ComReg's view it is appropriate to maintain the existing price control obligation and RPC decision (ComReg Decision 03/07) to safeguard those customers who would not readily switch to bundles in response to a SSNIP simply because they do not value broadband sufficiently. ComReg notes further that Regulation 13 (3)(b) of the Universal Service Regulations also specifically contemplates a RPC as an appropriate SMP remedy (notwithstanding any other obligations that may be owed by an undertaking, but which obligations ComReg has in any event carefully considered). ComReg for the reasons set out throughout this section considers the maintenance of the current RPC in relation to PSTN and ISDN BRA, as set out in Decision D03/07, is proportionate and justified, pursuant to Regulation 13 (3)(b).

[412] See Document number: BoR(14) 85.

Conclusion

6.103 Further to the designation of Eircom with SMP in the Standalone LLVA Market (as discussed in Chapter 5), the types of competition concerns identified in Chapter 6, in particular that Eircom has considerable scope and incentive to sustain FVA prices above competitive levels, ComReg has decided to impose on Eircom a retail price control obligation. In this respect, Eircom will be subject to the obligation not to charge excessive prices for the supply of services falling within the scope of the Standalone LLVA Market. This measure acts as a backstop to address the potential for Eircom to impose excessive prices for standalone LLVA. In addition, ComReg will continue to apply the existing RPC on Eircom (Decision 03/07) to the Standalone LLVA Market to mitigate the risk of price rises where competitive pressure for these customers is too weak. Specifically, Eircom as an SMP operator will, insofar as it relates to standalone LLVA, continue to be subject to the RPC with respect to PSTN and ISDN BRA services (although the RPC will no longer apply to the higher level market, notably ISDN PRA and FRA access services).

(ii) Obligation not to unreasonably bundle

6.104 This sub section considers whether it is appropriate that Eircom should be subject to a retail obligation not to unreasonably bundle FVA services. ComReg finds that an obligation on Eircom not to unreasonably which encompasses an obligation not to engage in tying practices in relation to the Standalone LLVA Market bundle remains appropriate.

6.105 As a means of addressing specific competition problems,[413] ComReg proposed for the wide LLVA market (i.e. FVA sold standalone or in a bundle) that it was appropriate, proportionate and justified that Eircom should be subject to an obligation not to unreasonably bundle FVA services within this market. Specifically, ComReg proposed in the FVA Consultation that Eircom should be subject to:

a) a general obligation not to unreasonably bundle services falling within the scope of the LLVA market with other services at the retail level;

b) an obligation not to unreasonably tie LLVA with other products (customers must be able to purchase LLVA on a standalone basis); and

c) an obligation to ensure that bundles containing FVA provided via PSTN or ISDN BRA (when bundled with other services) avoid a margin squeeze and comply with a net revenue test (maintenance of Decision 04/13, the Net Revenue Test).

[413] FVA Consultation paragraphs 6.75 to 6.88 and paragraphs 7.52 to 7.55; and covered briefly in paragraphs 51 to 57 of the Supplementary Consultation.

6.106 The first and second of these obligations (notably part (a) and part (b)) relate to the Standalone LLVA Market and are considered here. The potential application or otherwise of the obligation not to unreasonably bundle which encompasses a requirement to comply with the NRT established in Decision 04/13 (measure to avoid a margin squeeze i.e. part (c) above) is considered separately below in the context of the Bundled LLVA Market and the HLVA Market.

Consultation responses and ComReg analysis

6.107 ComReg only received one response relating to the proposed obligation requiring Eircom to sell LLVA on a standalone basis (i.e. not to engage in tying practices). That was from Eircom which stated that its USO will ensure that FVA cannot be tied. However, ComReg notes that while Eircom is required, given its designation in 2014 as the Universal Service Provider (USP), to provide access at a fixed location separately from the provision of telephone services as relevant under Regulation 3 of the Universal Service Regulations, this obligation only covers PSTN services and excludes ISDN access. Given that the scope of the Standalone LLVA Market in the context of this FVA market review extends also to certain ISDN products (i.e. BRA), ComReg considers that it is appropriate to ensure that there is also no unreasonable bundling by Eircom for ISDN BRA services (i.e. not to engage in tying practices). So that while ComReg has looked again at certain universal service obligations, ComReg is satisfied it remains more appropriate to maintain an obligation on Eircom pursuant to 13 (2)(d) of the Universal Service Regulations not to unreasonably bundle service.

6.108 For the reasons set out in paragraphs 6.77 to 6.88 of the FVA Consultation, further to the designation of Eircom with SMP in the Standalone LLVA Market (as discussed in Chapter 5), and in order to address the types of competition concerns identified in Chapter 6 which would not be adequately addressed by means of SMP obligations imposed at the wholesale level, for Standalone LLVA products, it is appropriate, proportionate and justified to impose on Eircom an obligation to prevent the practice of “tying” (i.e. refusing to supply FVA on a standalone basis).

6.109 Regarding those consumers who currently purchase their voice services on a standalone basis and do not value broadband to such an extent that they would switch to (more competitively priced) bundled services, or to mobile only, ComReg considers it to be proportionate and appropriate to impose an obligation on Eircom not to unreasonably bundle which encompasses an obligation not to engage in tying practices for Standalone LLVA as provided for by Regulation 13(2)(d) of the Universal Service Regulations.

6.110 As noted in the FVA Consultation[414] and Chapters 4 and 5 of this Decision the presence of wider bundles of communications products does not currently represent an effective competitive constraint on standalone LLVA. In these circumstances and where competition in relation to standalone LLVA is not yet effective such as to act as a constraint on Eircom's ability to exploit captive voice customers, as noted above in the RPC discussion, ComReg's view is that it is premature to remove the aspect of the existing 'not to unreasonably bundle' obligation that requires Eircom to offer FVA on a standalone basis. The obligation not to unreasonably bundle in the context of Standalone LLVA will require Eircom to offer these services as standalone products. This aims to ensure that consumer choice is not limited,[415] and to allow alternative FSPs to compete on single services (in addition to bundles) in the FVA and related markets.

Conclusion

6.111 Having regard to the analysis in the FVA and Supplementary Consultations and having considered responses to the FVA and Supplementary Consultations, ComReg has decided that Eircom should ensure that LLVA is available for purchase on a standalone basis, and end-users wishing to purchase Standalone LLVA should not be required to pay for services or facilities which are not essential to the Standalone LLVA product. In that regard, there is a general obligation not to unreasonably bundle services, falling within the Market, to End-Users by tying. In addition there are more detailed obligations which ensure that:

(i) End-Users are able to purchase, on a standalone basis, an individual service in the Market included in any bundle without being required by contractual or non-contractual means to purchase another service in a bundle or another service; and

(ii) End-Users should not be required to pay for services or facilities which are not necessary for the provision of the individual service in the Market requested.

[414] See paragraphs 5.26 to 5.99 and paragraph 6.24.

[415] This would be the case if Eircom were to stop providing a voice only retail service. Furthermore, consumer choice may be limited if customers could only purchase Eircom's FVA service if they are also required to purchase other services (e.g. broadband). This practice is known as tying (or pure bundling).

(iii) Transparency obligation

6.112 In this sub-section ComReg considers whether it is appropriate and proportionate that Eircom is subject to transparency obligations in the standalone LLVA market. As part of the FVA Consultation ComReg proposed that Eircom should be subject to the following transparency obligations in the wider LLVA market (FVA sold in and out of bundles):

(i) Eircom should be required to notify ComReg no later than five working days in advance of the implementation of proposed changes to the terms and conditions of supply (including prices) of services falling within the scope of the LLVA market.

(ii) Eircom should be required to publish all changes in relation to terms and conditions of supply (including prices) of services falling within the scope of the LLVA market, promptly, once such changes come into effect.

(iii) Eircom should be obliged, in respect of services within the scope of the LLVA market, to supply such services only at the relevant published price.

Consultation responses and ComReg analysis

6.113 ComReg received responses from six parties in relation to the transparency obligations it proposed in the wider LLVA market. Most respondents (ALTO, BT, Magnet, Vodafone and Telefonica) agreed with ComReg's proposal that a transparency obligation in relation to the LLVA market was appropriate, though Eircom disagreed.

6.114 Vodafone added that a lack of adequate supervision undermines the effectiveness of the other proposed measures, and on that basis that pre-notification of changes in conditions of supply is proportionate, reasonable and justified. Vodafone notes that the transparency remedy provides another means of supervising Eircom's compliance with the other remedies imposed. Vodafone argues that the obligation for Eircom to supply products only based on its published terms of supply is important because it ensures that retail competitors to the SMP operator are not faced with competing against a "secret" product supplied on an off-book basis by the SMP operator, and are therefore better placed to compete effectively with Eircom. Finally Vodafone also argues that ComReg should make explicit whether or not transparency measures are intended to also cover new services. ComReg considers that Vodafone's concerns regarding transparency are adequately addressed by the measures proposed.

6.115 Eircom's view is that Regulation 13 of the Universal Service Regulations does not provide for a transparency obligation to be imposed, and therefore that ComReg cannot impose such an obligation. In any case, Eircom considers a specific SMP transparency obligation is not necessary or justified, in its view other USO measures are available to achieve transparency in its view.

6.116 Regulation 13(1) of the Universal Service Regulations provides for ComReg to impose such obligations as it considers appropriate where wholesale obligations are insufficient to address the competition law concerns identified, subject to such obligations being based on the nature of the problem identified and proportionate and justified. ComReg has examined again Eircom's existing pricing and transparency type obligations, but remains of the view that the obligations now proposed, pursuant to Regulation 13 (2) of the Universal Services Regulations, are necessary, proportionate and justified and the most suitable regulatory tool in the context of the FVA market review. For example, it is noted that the transparency provision provided by Regulation 8(4) of the Universal Service Regulations relates to particular mandated elements of the USO such a special tariff options and/or uniform charges. Although useful in protecting certain cohorts of customers (for example, geographically isolated end-users or elderly customers), ComReg considers that such provisions are not sufficient to address the broader competition problems highlighted by ComReg resulting from Eircom's SMP in the standalone LLVA and adjacent FVA markets, and for related reasons, considers that obligations pursuant to Regulation 14 or 15 of the Universal Service Regulations are similarly distinguishable.

6.117 In relation to the specific aspects of the transparency obligation proposed by ComReg Eircom raised the following points:

- An obligation to notify ComReg five days in advance of changes to LLVA services is not justified for the purpose of supporting an SMP margin squeeze obligation, since the terms of relevant price obligations would in any event trigger such an obligation. Specifically, Eircom suggests that the mechanism used under Decision 01/06 shows that a retail-minus / margin squeeze price control does not require retail obligations to operate;

- A transparency obligation is not warranted to monitor evolution of prices in order to ensure compliance with the USO. On the contrary, ComReg has wide ranging powers to seek this information from Eircom. If advance notice is required to ensure compliance with obligations of affordability or otherwise, this should be provided for by amending the USO designation;

- ComReg can only impose regulatory controls, including transparency remedies, to the LLVA product. Applying the remedy to any other products on the basis that they are bundled with LLVA would not be proportionate;

- Finally, the requirement to 'publish in its public offices' is obsolete. Publication on its website and to make material available upon request should suffice.

6.118 Overall, having regard to respondents' views, given the competition problems identified with respect to the Standalone LLVA and in order to ensure that the objectives of protecting end users while promoting competition are met, ComReg considers the following transparency obligations on Eircom in relation to standalone LLVA are necessary, proportionate and justified for the reasons set out below and throughout the Decision:

- For the reasons set out ComReg, having regard to the competition problems as discussed and Eircom's position of dominance in the Market, ComReg considers it is appropriate that Eircom continue to notify ComReg 5 (five) days in advance of changes to Standalone LLVA services, pursuant to Regulation 13 of the Universal Service Regulations. This is with a view to assisting ComReg with monitoring the prices, terms and conditions of Standalone LLVA in such a way that would support implementation of the retail price control and the retail-minus SB-WLR price control measure. This is necessary to support the implementation of the retail price control, and would facilitate the monitoring of compliance with the SB-WLR price control as appropriate (in the context of bundled LLVA, it is noted that the current NRT will continue to apply to that relevant Market and therefore also the notification requirements in relation to headline bundle prices and new bundle offers, though as explained ComReg has issued a separate consultation on the appropriate margin squeeze at the wholesale level which also amongst others re-examines these issues);

- Eircom is required to publish all changes in relation to terms and conditions of supply (including prices) of services falling within the scope of the LLVA market, promptly, once such changes come into effect. ComReg considers that publication of prices and other terms and conditions gives end-users greater visibility in relation to their purchase decision and thereby reduces informational asymmetries and search costs. For example, it was noted in Chapter 6 of the FVA Consultation that the 2012 Market research[416] indicated low levels of awareness and switching in the LLVA market among households and businesses. Maintaining the transparency requirement will not only support implementation of the Retail Price Control, and would facilitate the monitoring of compliance with the SB-WLR price control, it also directly benefits end-users and consumers by giving them greater confidence in their purchasing decisions. ComReg is satisfied, having looked again at the obligations as consulted on, that the transparency obligations as now set out in this Decision Instrument are the most appropriate means to deal with the competition and regulatory problems identified. However, ComReg is agreeable to remove the current obligation to make available certain information at Eircom's public office. ComReg agrees that it would be sufficient for Eircom to publish the relevant information on its website, and to make material available upon request. The Decision Instrument will reflect this: and

- Eircom is required to adhere to published prices. The objective of this aspect of the transparency obligation is to benefit end-users by again likely giving them greater confidence in their purchase decision and also giving at least certain end users (for example, those who currently purchase FVA and broadband but on a standalone basis) confidence to switch to bundles or alternative providers (and vice versa) should their preferences and product valuations evolve. Not to adhere to the published LLVA prices, terms and conditions would render ineffective the obligation of transparency and would potentially undermine other retail obligations –this obligation supports the implementation of the RPC, and would facilitate the monitoring of compliance with the SB-WLR price control.

6.119 Finally, ALTO and BT argued that ComReg should strengthen the transparency measure in this market by transposing the NGA transparency measures into this Decision. While ComReg is not minded in this market review to impose the level of obligations that were imposed in NGA as these were together at the wholesale level as OAOs suggest, it should be noted that Eircom is obliged to comply with any relevant requirements imposed by ComReg pursuant to Regulation 15 of the Universal Service Regulations.

[416] Attitudinal surveys of retail consumer and business users of fixed telephony services, entitled "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

Conclusion

6.120 On balance, and for the above reasons, ComReg considers the transparency remedies proposed in the FVA Consultation are necessary and proportionate to address the competition problems identified with respect to the Standalone LLVA market (set out in paragraphs 6.18 to 6.34). As provided for by Regulation 13 (1) of the USO Regulations, Eircom is subject to the following transparency obligations in the standalone LLVA market:

(iii) Eircom is required to notify ComReg no later than five working days in advance of the implementation of proposed changes to the terms and conditions of supply (including prices) of services within the standalone LLVA market;

(iv) Eircom is required to publish on its website all changes in relation to terms and conditions of supply (including prices) of services within the standalone LLVA market, once such changes come into effect; and

(v) Eircom is obliged, in respect of services within the standalone LLVA market, to supply such services only at the relevant published price.

6.121 Finally it can be noted that ComReg intends to remove the existing retail obligation not to show undue preference to end users in the relevant Standalone LLVA Market in the presence of the transparency obligation outlined.

(iv) Cost accounting obligation

6.122 Eircom is currently subject to a retail cost accounting obligation under the 2007 Decision (i.e. D07/61). Eircom is also currently required to provide separated accounts and maintain detailed cost accounting systems that are sufficiently granular to allow an assessment of cost allocations under the 2010 Accounting Separation Decision (‘ComReg Decision 08/10’).[417]

6.123 In order to support the retail price control obligations (including the RPC and the requirement not to unreasonably bundle) proposed to be imposed on Eircom in the wide LLVA market (FVA sold standalone and in a bundle), ComReg also considered on a preliminary basis that it was appropriate, proportionate and justified to maintain an obligation on Eircom to implement a cost accounting system. Specifically, ComReg proposed that Eircom should be subject to an obligation in the wide LLVA market to operate and maintain a cost accounting system that is:

[417] Accounting Separation and the Cost Accounting Review of Eircom Limited, ComReg Document 10/67, Decision D08/10, August 2010.

i. suitable for ensuring compliance by Eircom with obligations imposed on it under Regulation 13 of the Universal Service Regulations;

ii. capable of verification by ComReg; and

iii. operated and maintained in the manner and format specified under the 2010 Accounting Separation Decision.

Consultation responses and ComReg analysis

6.124 ComReg received responses from four parties in relation to the cost accounting obligations it proposed in the wide LLVA market. Respondents generally agreed that Eircom should be subject to an obligation to operate and maintain a cost accounting system and in the manner and format specified under ComReg Decision 08/10.

6.125 Further to the designation of Eircom with SMP in the Standalone LLVA Market and the competition concern that Eircom has considerable scope and incentive to sustain FVA prices above competitive levels (in light of which ComReg considers that imposition on Eircom of a price control obligation in the form of an obligation not to price excessively and a RPC for standalone LLVA continue to be necessary), ComReg is also of the view that for market 1a Standalone LLVA it is appropriate, proportionate and justified to maintain an obligation on Eircom to implement appropriate cost accounting systems in respect of standalone LLVA (in parallel to maintaining more generally a cost accounting system). This approach is specially provided for in the Universal Service Regulations, Regulation 13(4) as a potential SMP remedy. If specific price control obligations are to be meaningful, it is necessary to have a clear and comprehensive understanding of the costs associated with Eircom's provision of standalone LLVA. As noted in the FVA Consultation and in accordance with Regulation 13 (4) of the USO Regulations, obligations to maintain appropriate cost accounting systems generally support price control obligations.

6.126 It is noted that Eircom considers that the general accounting separation obligation D08/10 is sufficient and on that basis it is not necessary to impose additional retail obligations relating to cost accounting. ComReg also considers measures imposed under the 2010 Accounting Separation Decision are sufficient to address the competition problems identified in this relevant market. However, D08/10 applies to Eircom in the context of this relevant market where ComReg finds Eircom to have SMP and imposes an obligation of cost accounting as provided for Regulation 13 (4) of the USO Regulations.[418] Having regard to the need to support the effectiveness of the proposed price control obligations set out in paragraphs 6.91 to 6.102, ComReg considers that the continued imposition of cost accounting obligations upon Eircom in the Standalone LLVA Market is necessary and proportionate. In this respect, Eircom shall ensure that it continues to maintain appropriate cost accounting systems to justify its prices/costs of products, services and facilities in the Standalone LLVA Market.

6.127 The detailed nature of the cost accounting obligation is that currently imposed upon Eircom and as specified in the 2010 Accounting Separation Decision, D08/10. As such, ComReg is not imposing an additional cost accounting remedy, but rather is continuing to apply to the Standalone LLVA Market the existing 2010 Accounting Separation Decision. ALTO and BT consider that, in addition to the Historic Cost Accounts (‘HCA’) that Eircom provides under D08/10, Eircom should also provide Current Cost Accounts (‘CCA’) given the important of accounting accuracy and CCA provides a present day valuation. However, ComReg considers that the existing HCA measures imposed under the 2010 Accounting Separation Decision are sufficient to address the competition problems identified.[419] In terms of implementation of the cost accounting system, ComReg does not intend, at this time, to impose any further detailed cost accounting/accounting separation requirements on Eircom outside of those imposed under the 2010 Accounting Separation Decision.

[418] In accordance with paragraph 3.7 of the Decision Instrument in the 2010 Accounting Separation Decision (D08/10) which provides “*For the avoidance of doubt this Decision Instrument applies in all circumstances where ComReg has found Eircom to have SMP under the provisions of Regulations 25, 26 and 27 of the Framework Regulations (or such equivalent provision) and has imposed an obligation in relation to accounting separation pursuant to Regulation 12 of the Access Regulations and/or cost accounting pursuant to Regulation 14 of the Access Regulations and Regulation 14 of the Universal Service Regulations*.”

419 See http://www.comreg.ie/_fileupload/publications/ComReg1359.pdf

6.128 In addition, ComReg considers that the incremental costs of compliance associated with the cost accounting obligation will be minimal as Eircom already prepares and publishes separated accounts and has cost accounting systems in place to comply with this obligation and related obligations. According to Eircom an obligation of cost accounting for retail FVA is not onerous since it is already required to collect accounting cost and revenue data to comply with the general accounting separation obligation under D08/10. Ultimately the burden of proof will rest on Eircom to show that its prices/charges for Standalone LLVA products services and facilities are not excessive, having regard to the nature of the proposed price control obligations. This cost accounting obligation should assist Eircom in that regard.

Conclusion

6.129 In light of Eircom having been designated with SMP in the Standalone LLVA Market and that competition concerns persist and will persist in relation to standalone LLVA, ComReg considers it is appropriate to maintain the obligation on Eircom to operate a cost accounting system. ComReg is seeking to ensure effective compliance with any retail price control. Regarding implementation of the cost accounting system, ComReg does not consider it necessary to impose additional specific cost accounting obligations pursuant to the FVA market review as those under the 2010 Accounting Separation Decision are consider by ComReg sufficient to address the competition concerns arising in the Standalone LLVA Market. On that basis, ComReg also considers it is appropriate to continue to have Eircom observe the 2010 Accounting Separation Decision and the remedies set out therein to the Standalone LLVA Market.

(v) Non-imposition of obligation not to show undue preference to specific end-users

6.130 ComReg has considered the continued appropriateness of whether Eircom should be subject to an obligation not to show undue preference to specific end-users in the LLVA market, as proposed in the FVA Consultation. Although ComReg originally considered that such an obligation was necessary in order to address the competition problems identified,[420] having revised the FVA market definition for LLVA services (separate markets for standalone LLVA and bundled LLVA), it has since considered whether ComReg will remove the existing retail obligation not to show undue preference to end users in the Standalone LLVA Market in the presence of the transparency obligation outlined at paragraphs 6.111 to 6.118 (this aspect is separately discussed in relation to Bundled LLVA, paragraphs 6.158 to 6.162).

[420] FVA Consultation paragraphs 6. 13 to 6.30.

Consultation responses and ComReg analysis

6.131 ComReg received responses from six parties in relation to the obligation not to show undue preference to specific end-users that it proposed in the LLVA market. Eircom disagreed with ComReg analysis and conclusions drawn, though the majority of respondents agreed (Vodafone, ALTO, BT, Magnet and Telefonica).

6.132 Other FSPs noted that the obligation not to show undue preference to specific end users complemented the proposed transparency obligations, in ensuring that Eircom only supplies Standalone LLVA services at the published price. For example, Vodafone considers that this is important because it ensures that alternative FSPs are not competing against a superior product provided by the SMP operator over which they do not have visibility. Furthermore, Vodafone notes that such an obligation ensures the effectiveness of retail minus type pricing remedies by preventing the SMP operator from cherry-picking (whereby it extracts high margin from inert customers and lower margins in those market segments where it faces prospective competition). ALTO and BT also supported the proposed obligation not to show undue preference to specific end users, noting that this obligation should be supported by robust transparency obligations.

6.133 Eircom argues, inter alia, that its universal service obligations (USO) relating to geographically averaged pricing adequately provides adequate protection to those “consumers which continue to primarily value only the standalone FVA product”. This obligation was considered necessary and justified in view of the circumstances in the wider LLVA market. In the context of the wider LLVA market, there is a risk that an undertaking with SMP may exploit market power and show undue preference to specific end-users. An example of this might be to favour customers with lower prices simply on the basis that they are more likely to switch to another supplier or in response to a notification that they intend to switch. This could potentially have serious ramifications for competition. This would be particularly problematic if these offers were not adequately disclosed to the public at large – hence ComReg considered the need also for a retail transparency obligation.

6.134 As noted previously a significant segment of end-users do not currently have/utilise a fixed broadband connection and, for that cohort of end-users, broadband with managed VOIP is unlikely to provide an alternative for their basic fixed telephony service at least in the interim period. In this context, a potential set of "vulnerable" or “captive” customers exists. However, for the reasons set out at paragraphs 4.102 to 4.120 and having regard to respondents’ views, the market definition has been revised, notably, split at the lower level between two sub FVA markets: standalone FVA (not bundled with for example broadband) and FVA sold inside a wider bundle of services. That effectively delineates those potentially more inert customers from the non-captive customers. The revised market therefore exhibits a less varied set of competitive conditions, which, to an extent, mitigates the risk of Eircom showing undue preference to one group of end-users over another within this market.

6.135 ComReg considers that an obligation not to show undue preference to specific end-users is no longer necessary and justified in view of the circumstances in the Standalone LLVA Market and in this regard:

- Eircom is obliged under the transparency obligation which supports the price control remedy to supply Standalone LLVA only at the published price. This will prevent Eircom from privately offering different retail prices to different customers;
- in accordance with the 2014 universal services designation, currently, Eircom as USP must ensure affordability by way of GAP for USO services.[421] Currently the GAP ensures that basic telephone services provided by the USP are available at an affordable price, irrespective of geographical location in Ireland;[422] and
- the obligation on Eircom not to unreasonably tie (customers must be able to purchase Standalone LLVA on a standalone basis). This means that, for example, retail customers wishing to purchase Standalone LLVA will not be forced to also purchase a broadband bundle.

6.136 For these reasons, ComReg is satisfied that it is not necessary to impose an obligation on Eircom not to show undue preference to specific end-users in the Standalone LLVA market.

[421] In accordance with Article 8(3) of the Universal Service Regulations.
[422] It should be noted that ComReg plans to further consult on the future scope of access at a fixed location under USO and in that regard it will all consider the GAP element of USO.

Conclusion

6.137 Having regard to the respondents' views and on the basis of its analysis, ComReg intends to remove the existing retail obligation not to show undue preference to end users in the relevant standalone LLVA market in the presence of the transparency obligation outlined.

2. Market 1b Bundled LLVA

6.138 Regulation 13 of the Universal Service Regulations provides that ComReg must impose SMP obligations on a given retail market where it concludes that obligations imposed under Regulations 9 to 13 of the Access Regulations would not in themselves address the competition problems that have been identified. ComReg in the FVA Consultation considered that the proposed wholesale obligations would not achieve ComReg's regulatory objectives in the wider LLVA market (FVA standalone or in a bundle). ComReg considered insofar as LLVA services were concerned that, additional to wholesale access, a retail obligation on Eircom not to unreasonably bundle services, which encompassed an obligation to comply with the NRT (measure aimed at avoiding a margin squeeze), was required in order to address the competition problems identified (e.g., the risk of horizontal and/or vertical leveraging by Eircom).

6.139 In this section, ComReg reviews the responses to its specific proposal to impose an obligation not to unreasonably bundle services (or, more specifically, to maintain ComReg Decision D04/13). ComReg then assesses the responses and reaches a final position on the retail remedies that ComReg will impose in the Bundled LLVA Market.

(i) Obligation not to unreasonably bundle services

6.140 This sub section considers whether it is appropriate that Eircom should be subject to a retail obligation not to unreasonably bundle services notably that Eircom would avoid a margin squeeze and pass an NRT, as proposed in the FVA Consultation regarding the wider LLVA market (FVA standalone and in a bundle). ComReg insofar as bundled LLVA services are concerned considers it appropriate, proportionate and justified that Eircom continues to be subject to an obligation not to unreasonably bundle which encompasses an obligation to ensure that bundles containing FVA comply with the NRT (maintenance of Decision 04/13).[423] As set out at paragraphs 6.1031 to 6.110, the obligation not to unreasonably bundle pertaining to the Standalone LLVA Market encompasses an obligation on Eircom not to engage in tying practices, hence, the NRT will not apply with reference to that Market.

Summary of responses and ComReg analysis

6.141 ComReg received responses from seven parties in relation to the obligation not to unreasonably bundle, more particularly in relation to the proposal to maintain the NRT established in Decision 04/13. The majority of respondents agreed with ComReg's preliminary conclusions in respect of the need for an obligation not to unreasonably bundle encompassing the NRT, though Eircom disagreed. Specifically, Eircom considered in this regard that:

a. the obligation not to unreasonably bundle is only intended to allow ComReg to prohibit pure bundling of FVA, and does not entitle ComReg to require Eircom to meet an NRT. Eircom submitted that imposing an NRT is tantamount to regulating products and services for which the conditions for ex ante regulation simply are not met. Eircom therefore argues that imposing the NRT is contrary to the regulatory framework;

b. it is equally feasible to achieve the same regulatory objective by implementing the remedy from one of a number of upstream markets where ComReg has designated Eircom with market power. This can be done by constructing a margin squeeze test appropriate to the relationship between the essential input from the upstream market and the service combination sold into the downstream market for bundles;

c. ComReg is not entitled under Regulation 13(8) of the Universal Service Regulations to impose retail obligations in relation to the geographic areas where there is intense competition, including LEAs; and

[423] Notified to the European Commission as Case IE/2007/0632: Retail Fixed Narrowband Access Markets and notified as IE/2012/1381 and IE/2012/1382.

d. irrespective of the scope of the obligation 'not to unreasonably bundle' FVA, Eircom does not see a requirement for this obligation, in light of what it considers sufficient competitive pressures in the FVA market.

6.142 Other FSPs generally agreed that Eircom, absent regulation, has both the ability and incentive to implement an effective margin squeeze on LLVA, and that remedies should be in place that prevent Eircom from circumventing wholesale regulation by bundling subsidised non-regulated components with LLVA.

6.143 As noted the NRT obligation that is designed to prevent leveraging of SMP between adjacent markets (i.e. to avoid a margin squeeze) is imposed at the retail level under Decision 07/61 and Decision 04/13. The NRT is meant to ensure replicability of bundled offers by potential competitors and that margin squeeze is prevented ex ante. The NRT (i) addresses the risk of horizontal leverage of market power from the retail FVA market to prospectively competitive retail services and ii) ensures that the sale of bundles does not undermine wholesale 'retail minus' remedies currently imposed in standalone wholesale markets like FVA and broadband, which are in place to ensure that Eircom cannot leverage its market power vertically from wholesale to retail markets and foreclose competition via a margin squeeze.

6.144 As noted in the FVA Consultation, the bundling of end user services can be and usually is welfare enhancing. However, it was furthermore noted that bundling in certain circumstances can have certain negative consequences for competition and consumers.[424] For example, ComReg considers that bundling can be used to protect Eircom's SMP in the Bundled LLVA Markets (and adjacent markets such as the Standalone LLVA Market). As set out in Chapter 6 of the FVA Consultation and this Decision, ComReg considers absent regulation that Eircom has the ability and incentive to distort or foreclose competition in this market by creating a margin squeeze between its retail and wholesale services. More specifically, Eircom can engage in margin squeeze at the level of a bundle and foreclose entry through its pricing of one of the wholesale inputs with respect to which it has SMP (e.g., Eircom pending on the outcome of FACO continues to hold SMP in wholesale voice access (SB-WLR). These competition concerns illustrate that the NRT continues to be necessary to address the primary concern of vertical leverage (from wholesale to retail).

[424] FVA Consultation paragraphs 6.79 to 6.88.

6.145 Indeed, by definition, margin squeeze is a form of vertical leveraging, whereby a 'vertically integrated company attempts to exploit a position of dominance in an input market to restrict competition in a competitive downstream market'. In the context of Eircom's bundles, partly the same upstream network is used for the provision of different retail products, and anti-competitive effects can arise by virtue of a position of market power in one of the downstream markets and/or in the upstream markets. Consequently, there is a risk that Eircom's bundles become unreplicable because of its wholesale pricing. As a result, FSPs in the retail market may not be able to earn a sufficient margin between the access price they need to pay and the lower retail price they would receive to compete with the incumbent—including on a bundle-to-bundle basis, which in turn would distort the choice of bundles. This ability still exists notwithstanding that Eircom may include some unregulated services in a retail bundle such as retail broadband or mobile or TV services. ComReg is concerned that any obligation to comply with NRT and avoid a margin squeeze should not be undermined by including unregulated retail services below an appropriate measure of cost.

6.146 According to Vodafone, the potential scope of market harm from the unreasonably bundle of FVA services is very wide. In Vodafone's view the current structure of the Eircom product portfolio means that the vast majority of retail bundles which are based on Eircom supplied inputs (whether sold directly by Eircom or by OAOs using wholesale inputs purchased from Eircom) contain an FVA component. Vodafone added that demand for the nascent NGA service portfolio appears to be based around POTS,[425] which suggests that NGA retail bundles will contain an FVA component. Vodafone raised concerns that Eircom could close out competition in the NGA market by leveraging SMP from the FVA markets. Vodafone expressed a concern regarding a lack of clarity surrounding, and a potential lack of effectiveness of, the margin squeeze tests for NGA bundles that were established by ComReg in Decision 04/13. Vodafone considered that, under the Decision 04/13, Eircom would have flexibility to manipulate costs and cost recovery within bundles.

[425] Plain old telephone services.

6.147 ComReg's view is that it is premature to remove the current NRT aspect of the 'not to unreasonably bundle' obligation, notably, the current state of retail competition is partly based on this obligation. Contrary to Eircom's view that there is no requirement for the obligation not to unreasonably bundle and obligation to comply with NRT in light of what it considers sufficient competitive pressures in the FVA market, it is apparent that, from the OAOs' perspective, and based on ComReg's view of market conditions that it is essential that these obligations be retained. For the reasons set out in paragraphs 6.77 to 6.88 of the FVA Consultation, further to the lack of effective competition in the Bundled LLVA Market (as discussed in Chapter 5), and in order to address the competition concerns highlighted above and in Chapter 6 which would not be adequately addressed by means of SMP obligations currently imposed at the wholesale level, for Bundled LLVA products, it is appropriate, proportionate and justified to continue to impose on Eircom an obligation not to unreasonably bundle and comply with NRT. This will require Eircom to ensure that the retail price of a bundle including FVA will cover the sum of the costs of inputs to the bundle and relevant retail costs net of any efficiency arising from bundling.

6.148 However, ComReg in the Supplementary Consultation considered whether the introduction and specification of margin squeeze tests in the wholesale markets for FACO and for WBA, if effectively implemented upstream would likely permit the removal downstream of the current NRT in the retail FVA market, while not prejudging the outcome of that market review. With respect to Eircom's argument that the competition problems identified could be addressed through an appropriate margin squeeze obligation imposed in an upstream market, ComReg has proposed such a draft measure in the FACO markets, based on its preliminary view of the market, and is seeking submissions in relation to same. In addition, ComReg has issued a separate consultation in relation to bundles.[426] Until such time that a margin squeeze test is implemented upstream, and/or in the event that it is not deemed in fact appropriate at the wholesale level to impose such a test, there remains a need to have retail regulation in place that would address these competition concerns outside of the existing NRT. Accordingly, and pending the possible implementation of appropriate wholesale remedies in relation to margin squeeze in Market 2 and Market 5, ComReg considers that insofar as bundled LLVA is concerned, the NRT obligation imposed in Decision 04/13 remains appropriate to address Eircom's market position and the relevant competition problems identified in Chapter 6 of this Decision.[427]

[426] See ComReg Document 14/90, "Replicability Test: Further specification of the price control obligations not to cause a margin squeeze: Market 2 and Market 5," published on the ComReg website: www.comreg.ie
[427] FVA Consultation paragraphs 6.19 to 6.30 and paragraphs 6.79 to 6.88.

6.149 In addition, ALTO and BT suggested that ComReg has not adequately justified the geographically differentiated approach that it has proposed for the application of the NRT. Furthermore, Telefonica considered that it was inappropriate to impose geographically differentiated remedies without first defining sub-national markets. These respondents noted a lack of transparency around local market shares. As a result, they argue that there is insufficient information in the FVA Consultation to assess whether ComReg's bundles proposal is correct. However, ComReg has assessed the boundaries of the relevant geographic market at paragraphs 4.156 to 4.194. ComReg ultimately considers that the boundaries between areas in which different competitive conditions prevail are not sufficiently stable to justify the definition of sub-national markets at this time. Further, consistent with its analysis in Decision 04/13, which justifies the differentiation of remedies on a geographic basis between the LEA and non-LEA areas which remains relevant, ComReg considers that it is entirely appropriate to continue to apply the approach for geographically differentiating remedies set out in Decision 04/13 .

6.150 While UPC agreed with ComReg regarding the need to maintain the NRT, it considers that this obligation should extend to FVA provided by Eircom via managed VOIP. UPC submitted that not extending the NRT to managed VOIP opens opportunities for regulatory gaming by Eircom, and fails to provide the industry with clarity and certainty going forward. UPC considers that ComReg should assess the likely competition issues that could arise should a launch of managed VOIP service take place, and then impose appropriate remedies. In this respect, ComReg noted in the FACO Consultation that OAOs can reproduce a VOIP/broadband retail product bundle without access to a narrowband wholesale product.[428] As furthermore noted in the FACO Consultation, when providing retail VOIP/broadband bundle, Eircom would be required to demonstrate compliance with obligations imposed under wholesale broadband markets not to cause a margin/price squeeze. For example, a margin squeeze test was specified in Decision 04/13 which ensures that there is an appropriate relative margin between Eircom's Unbundled Local Metallic Path (i.e., ULMP)[429] product and: a) its SB-WLR product; and b) its Naked WBA product based on a Reasonable Efficient Operator cost standard based on the SMP and competition problems present in those markets. These measures ensure that such an Eircom's VOIP offer can be replicated by OAOs, which ComReg believes would address the competition concerned raised by UPC.

[428] ComReg has therefore assumed that, where Eircom offers the equivalent of an FVA bundle using VOIP, alternative FSPs are able to recreate that bundle using a wholesale broadband access ('WBA') service or local loop unbundling.
[429] ULMP is the implementation of Full Unbundled Access to the Local Loop.

Conclusion

6.151 For the above reasons, ComReg considers insofar as bundled LLVA is concerned it appropriate, proportionate and justified to maintain the existing obligation on Eircom not to unreasonably bundle and comply with the NRT. As provided for by Regulation 13 (2)(d) of the Universal Service Regulations, Eircom is obliged to ensure that it does not bundle FVA unreasonably with other services. In that regard, Eircom is required not to engage in a margin squeeze and bundles including FVA must pass the NRT as specified in Decision 04/13. ComReg considers that, in the absence of an effective upstream remedy, that this is the most effective means of addressing the relevant competition problems identified in the Bundled LLVA Market. However, the retail obligation on Eircom not to unreasonably bundle which encompasses the obligation to comply with the NRT will be reviewed, if, and when ComReg deems it appropriate to specify a functional and effective margin squeeze test in the FACO and/or WBA market(s), and may be lifted from the Bundled LLVA Market if the relevant competition problems are addressed adequately through that upstream regulation. ComReg is currently consulting on bundles and replicability tests: further specification of the obligation not to cause a margin squeeze proposed in Market 2 and existing in Market 5).

(ii) Cost accounting obligation

6.152 ComReg proposed in the FVA Consultation that insofar as the wide LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision 08/10.

Consultation responses and ComReg analysis

6.153 As noted previously, respondents including Eircom broadly agreed that Eircom should be subject to an obligation to operate and maintain a cost accounting system and in the manner and format specified under Decision 08/10.

6.154 Further to the assessment of competition and SMP in Chapter 5, ComReg finds that there is a lack of effective competition in the Bundled LLVA Market and that Eircom with SMP has, absent regulation, sufficient scope and incentives to implement a margin squeeze or unreasonably bundle services to the detriment of consumers and long term competition. Because ComReg considers that imposition on Eircom of an obligation not to unreasonably bundle services, notably compliance with the existing NRT on an interim basis, continues to be necessary, ComReg is also of the view that it is also appropriate, proportionate and justified to maintain an obligation on Eircom to continue to implement a cost accounting system. If the NRT test obligation is to be meaningful, it is necessary to have a clear and comprehensive understanding of the costs associated with Eircom's provision of bundled LLVA. Obligations to maintain appropriate cost accounting systems generally support price control obligations, including the obligation not to unreasonably bundle which encompasses the NRT.

6.155 Having regard to Eircom's integrated position across several upstream and downstream markets (in particular noting its SMP designations in a number of these markets), the scope for Eircom to leverage its position at the retail or wholesale levels, or both levels, and the associated need to ensure sufficient visibility of how costs are allocated across FVA and other horizontally and vertically-related input services, ComReg considers that the cost accounting system operated by Eircom should be such as to have sufficient information available to ensure the efficient monitoring of pricing related issues (i.e. margin squeeze) and to ensure effective compliance with any retail price control. In addition to the relevant points raised by respondents in relation to the application of a cost accounting obligation in the wide LLVA market, as proposed in the FVA Consultation, Vodafone was of the view that to conduct proper supervision of remedies (it noted the movement to bundles and the existence of price controls in other regulated market, in particular, Margin Squeeze), ComReg requires information regarding Eircom's costs and cost recovery. Accordingly, ComReg considers (and notes OAOs, such as, Vodafone, agree) that the required information is best obtained by way of separated accounts as specified under ComReg Decision 08/10 in the absence of functional or structural separation at this time.[430]

[430] Further detailed reasoning justifying the requirement originally for such an obligation is set out in detail in ComReg Decision D08/10.

6.156 Having regard to the need to support the effectiveness of the obligation not to unreasonably bundle obligation which encompasses the obligation to comply with the NRT, set out in paragraphs 6.139 to 6.150, ComReg is of the view that it is appropriate, proportionate and justified for market 1b to maintain an obligation on Eircom to implement appropriate cost accounting systems in respect of bundled LLVA. This approach is specially provided for in the Universal Service Regulations, Regulation 13(4) as a potential SMP remedy. In this respect, Eircom shall ensure that it maintains appropriate cost accounting systems to justify its prices/costs of Bundled LLVA products, services and facilities. The detailed nature of the cost accounting obligation is that currently imposed upon Eircom and as specified in the 2010 Accounting Separation Decision, D08/10. It is noted that Eircom considers that the general accounting separation obligation D08/10 is sufficient and on that basis it is not necessary to impose additional retail obligations relating to cost accounting. This has been discussed in detail above in the context of the Standalone LLVA Market at paragraphs 6.121 to 6.128 and the same rationale as expressed in respect of that market applies equally in the case of the Bundled LLVA Market.

6.157 ComReg considers that the incremental costs of compliance associated with the cost accounting obligation will be minimal as Eircom already prepares and publishes separated accounts and has cost accounting systems in place to comply with this obligation and related obligations. Ultimately the burden of proof will rest on Eircom to show that its prices/charges for the relevant retail and wholesale services do not amount to unreasonable bundling. This cost accounting obligation should assist Eircom in that regard.

Conclusion

6.158 In light of Eircom having been designated with SMP in the Bundled LLVA Market and that absent regulation competition concerns persist and will persist in relation to bundled LLVA, ComReg has decided to maintain the obligation on Eircom to operate appropriate cost accounting systems with a view to ensuring effective compliance with the NRT. In this respect, ComReg will also apply the 2010 Accounting Separation Decision and the remedies set out therein to the Bundled LLVA Market. On that basis ComReg's does not consider it necessary to impose additional specific cost accounting obligations pursuant to the FVA market review as those under the 2010 Accounting Separation Decision should be sufficient to address any concerns arising in the Bundled LLVA Market. However, this remedy will be reviewed at such time that ComReg specifies a functional and effective margin squeeze test in the FACO market, and may be lifted from the Bundled LLVA Market if the relevant competition problems have been addressed adequately through upstream regulation.

Non imposition of certain retail obligations

6.159 Similar to standalone LLVA, all competitors (except UPC) rely to a large extent on SB-WLR and other wholesale access products purchased from Eircom to provide FVA and other services. Thus the competitive constraint exercised by what are primarily resellers on Eircom's FVA is not yet evident nationally. ComReg considers that over the period of the review SB-WLR and retail minus does not obviate the need to have additional regulation at the retail level.

6.160 In view of Eircom having SMP in this relevant market, ComReg has considered the appropriateness of imposing a price control in respect of bundled LLVA. However, prospectively ComReg expects the general trend towards bundles to increase and hence the competitive pressures to increase from alternative providers of broadband with VOIP. Although competition is at present not sufficiently or completely effective, bundled LLVA users have a range of choice of alternative suppliers with FSPs (primarily UPC) building out alternative broadband infrastructure. Hence choice is less limited for the sub set of consumers that place greater value on broadband internet access or a bundle of broadband plus voice services compared to Standalone LLVA.

6.161 On the basis of its analysis, ComReg considers prospectively that imposition of specific retail obligations such as relating to price control (as a price cap safeguard), transparency or an obligation not to show undue preference would not seem necessary for this cohort of FVA users where the risk of exploitation of market power by Eircom (i.e. charging FVA prices that are too high or tying) is a relatively less significant concern compared to conditions in the Standalone LLVA Market. In any case, to the extent that bundled LLVA users become again voice centric or change their valuations or preferences in relation to bundles, it is possible to unpick the bundle and switch to standalone LLVA to meet their changed need and or services valuation, and in that scenario would also be protected by implementation of the RPC in respect of standalone LLVA. In addition, regarding a transparency obligation, as noted at paragraph 6.117 it is noted that the current NRT will continue to apply in respect of the Bundled LLVA Market and the notification requirements therein in relation to headline bundle prices and new bundle offers, though as explained ComReg has issued a separate consultation on the appropriate margin squeeze at the wholesale level which also amongst others re-examines these issues. Accordingly, ComReg is conscious of acting proportionately, and for this Market, considers that certain retail obligations (as mentioned above) are no longer appropriate or proportionate in today's circumstances.

6.162 Further, in the future to the extent that retail competition is underlined by effective and functional regulation upstream, notably, SB-WLR and margin squeeze in FACO and other wholesale markets, in these circumstances it is ComReg's view that it is appropriate to forbear from a retail price control insofar as bundled LLVA is concerned. Deregulation would allow Eircom greater freedom over its retail FVA access prices in a bundle. This may, in appropriate circumstances, be beneficial for competition as it could lead to more innovative pricing, such as, price bundles and increased competition where competing operators are able to identify commercial opportunities. ComReg believes that the main constraint on Eircom's prices in the relevant FVA markets in future should be provided by competition. Competition is increasing (but not yet effective) and ComReg believes it should be stimulated further by the continued availability of SB-WLR and increasing competition from managed voice over broadband for at least a proportion of end users who value broadband or wider bundles of communications services.

6.163 Despite Eircom's continued SMP in the Bundled LLVA Market, ComReg considers it appropriate, proportionate and justified not to impose on Eircom obligations of price control, transparency and not to show undue preference in relation to bundled LLVA. In the future it is expected that competitive pressure for bundled LLVA will increase, though specific concerns in this market pertain predominantly to margin squeeze. With a view to targeting regulation to the competition concern, ComReg considers it appropriate and proportionate after an interim period to rely on effective and functional SB-WLR and margin squeeze regulation upstream to underlie in part or in full competition on the bundled LLVA market and is consulting on such a proposal in the FACO consultation. However no decision in relation to the FACO/Market 2 has yet been made. ComReg will consult in the coming weeks on the further specification of a margin squeeze test as relevant for the purposes of Markets 2 and 5. In the meantime (and in the event ComReg does not deem it appropriate to have a margin squeeze obligation in the FACO markets), ComReg considers it appropriate to rely on retail obligations not to unreasonably bundle supported by a cost accounting obligation to regulate competition in this market.

3. Market 1c HLVA Market

6.164 Having determined the necessity of imposing relevant wholesale remedies with respect to the HVLA Market, ComReg then considered the necessity of imposing any retail remedies. In this regard, ComReg considered the possibility of retail de-regulation of the HLVA Market (i.e. forbearance from imposing any retail SMP obligations on the HLVA Market, but maintaining retail SMP obligations on the LLVA market).

Proposed removal of retail obligations on the HLVA market

6.165 In this sub section, ComReg considers responses to its proposal to remove retail obligations from Eircom in the HLVA market on the basis that the maintenance of existing wholesale obligations would be sufficient to address the competition problems identified in the HLVA market.

6.166 For the reasons set out in the FVA Consultation,[431] ComReg proposed initially that it seemed appropriate at this stage to rely on the wholesale obligations (e.g., SB-WLR, CPS and supporting remedies) only and, sought submissions in respect of its preliminary views. ComReg's preliminary view was that wholesale obligations combined with increased competition from alternative infrastructure and /or, prospectively, from emerging products such as hosted PBX telephony and SIP Trunks, were possibly sufficient to address Eircom's market position and any competition concerns in the HLVA Market. However it was also noted that Eircom would appear to be able to maintain HLVA prices at a higher level than would be if competition were effective. This suggested that competitive pressures alone had not yet constrained prices to a competitive level. On that basis the FVA Consultation noted that some form of retail remedies (e.g., a retail price cap) could, in principle, apply to HLVA services until there is further evidence as to the sustainability of increased competition based on supply of FVA directly over own networks and LLU.

Consultation responses and ComReg analysis

6.167 Respondents' views were somewhat mixed in relation to the potential removal of retail obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone.

6.168 Eircom agreed with ComReg's proposal in the FVA Consultation to remove retail obligations on HLVA. Eircom noted that it has not increased prices since the date of the Decision 07/61 on 28 August 2007, despite the fact that the retail price cap 07/76 would have allowed further price increases. Eircom considers that the price cap placed on its ISDN PRA and FRA products should be removed. On the other hand, a number of respondents considered that ex-ante retail regulation may still be required in the HLVA market.

6.169 ALTO and BT consider that the existing HLVA remedies (imposed under Decision 07/61) should remain in place, given that Eircom has not altered its prices for some years (though they noted that a price change has been initiated during the FVA Consultation process). BT noted that emerging products such as SIP trunks, which may ultimately replace ISTN PRA and FRA products, are only now being introduced into the market. BT considers that this transition will take considerable time, and will incur a high cost for customers.

[431] See paragraphs 6.55 to 6.59.

6.170 Although Vodafone agreed that there are sufficiently different conditions between HLVA and LLVA markets to justify consideration of a differentiated regulatory response, nevertheless, it believed that the total removal of retail controls was not justified and does not conform to ComReg's statutory objectives to safeguard competition. Vodafone noted that HVLA is likely to be sold to enterprise customers as part of a composite telecommunication service supply and therefore it is necessary in their view that a retail price control be maintained which prohibits the unfair bundling (particularly through margin squeeze) of Eircom's HVLA products. According to Vodafone, removal of retail controls means that it is almost impossible to monitor or detect discriminatory activities in the upstream wholesale supply. It suggests that removal of retail remedies should only be contemplated in the context of a move to an EoI approach as regards wholesale supply of HLVA products.

6.171 Magnet similarly believes that it is necessary that a retail price control be maintained which prohibits the unfair bundling of Eircom's HVLA products. It raises concerns that removal of HLVA retail obligations could provide Eircom retail with incentives to bundle products to make them more attractive to this category of end user (e.g., allow Eircom cross-subsidise with other products especially mobile and cloud storage solutions) which may foreclose this market. Finally, Telefonica suggested that reliance on wholesale remedies alone as a means of addressing the competition problems in that market is sufficient if retail competition can be protected against unreasonable bundling.

6.172 The respondents' views represent a mixed range of reactions, although the overall theme seems to be an acceptance that some form of ex ante retail regulation may still be required in the HLVA Market to protect against any risk of unreasonable bundling.

Conclusion

6.173 As noted above, ComReg considers that maintaining CPS/SB-WLR and the supporting remedies will enhance the level of competition in the HLVA Market through the encouragement of FSPs to compete directly with Eircom via these resale inputs and move up the ladder of investment as appropriate. However, ComReg finds that in light of Eircom having being designated with SMP and having regard in particular to respondents' views in relation to the types of competition concerns that absent regulation persist and are likely to persist in this market, it is necessary and appropriate to impose on Eircom an obligation not to unreasonably bundle services, notably compliance with the existing NRT, as well as a supporting cost accounting obligation depending on the outcome of the FACO Consultation, this may be on an interim basis. However, any retail regulation will be reviewed at such time that ComReg specifies a functional and effective margin squeeze test in the FACO market, and may be lifted from the HLVA market if the relevant competition problems have been addressed adequately through upstream regulation.

6.174 ComReg has considered BT's and ALTO's submissions, but agrees with Eircom, for the reasons more fully set out in the FVA Consultation, that a retail price cap is not required in the HLVA market. However, ComReg considers below the case that has been presented by respondents for imposing other retail remedies.

Imposition of specific retail obligations

6.175 Regulation 13 of the Universal Service Regulations provides that ComReg must impose SMP obligations on a given retail market where it concludes that obligations imposed under Regulations 9 to 13 of the Access Regulations would not in themselves address the competition problems that have been identified. Having regard to respondents' views ComReg has considered the appropriateness of imposing specific retail obligations on Eircom in the HLVA market where current wholesale regulation is not sufficiently effective.

(i) Obligation not to unreasonably bundle

6.176 ComReg in the FVA Consultation considered whether it would be appropriate to remove retail regulation on the HLVA Market, including, the existing obligation not to unreasonably bundle (which also currently applies to HLVA services) where possibly wholesale obligations combined with increased competition from alternative infrastructure and, prospectively, from SIP Trunks, are sufficient to address Eircom's market position and any competition concerns in the HLVA market. For the reasons discussed below, however, ComReg has determined that it is appropriate to maintain the existing obligation not to unreasonably bundle and comply with the NRT, which is effected by the Decision 04/13, as a price control obligation imposed on Eircom in the HLVA Market.

Consultation responses and ComReg analysis

6.177 ComReg received a number of responses in relation to its proposal not to impose an obligation not to unreasonably bundle which encompasses the NRT in the HLVA Market. Although Eircom supported the removal of this obligation, several other respondents considered that ex-ante retail regulation also remains necessary in the HLVA Market to protect against any risk of unreasonable bundling by Eircom in respect of HLVA services.

6.178 ComReg has reviewed its assessment of competition problems, and the need for regulatory remedies in the HLVA Market in light of responses received from FSPs, in light of which ComReg now considers it somewhat premature to remove the obligation not to unreasonably bundle and compliance with the NRT in the HLVA Market for the following reasons:

- High and persisting market share. The updated information[432] for the competition and SMP assessment indicates that Eircom has a higher share of the HLVA Market than estimated in the FVA Consultation.

[432] As noted in Chapter 5, after the publication of the FVA Consultation, a FSP informed ComReg that it was not providing HLVA supply using direct build and that historically it was providing incorrect data to ComReg. Hence, ComReg has revised the available information on the evolution of HLVA market size and market shares of FSPs operating in this market.

- Further analysis was undertaken in the FACO Consultation regarding the HL-FACO market: taking into account ComReg's recent FACO Consultation, where it has proposed draft remedies reflecting its preliminary view regarding (1) an obligation on Eircom to provide SB-WLR and (2) an obligation on Eircom not to margin squeeze in the provision of wholesale and retail bundles for which HL-FACO is an input.[433] The final decision on the FACO market review is expected in Q4 2014 and ComReg considers it further underlines the appropriateness of maintaining this remedy in the interim or potentially otherwise.

- Concerns expressed by alternative FSPs in response to FVA and Supplementary Consultations: based on the concerns expressed by alternative FSPs regarding the importance of ensuring the ability of SB-WLR resellers to replicate Eircom's retail bundles in the HLVA Market.

[433] Specifically, ComReg presented its preliminary view in Section 8 and 9 of the FACO Consultation that Eircom has the ability and incentive to engage in a margin squeeze through its relative pricing of the FVCO component of FACO (and other regulated services) and Wholesale SV services. This could potentially distort or restrict competition across the supply chain, including ultimately at retail levels to the detriment of end-users. This represents a risk of horizontal and vertical leveraging and margin squeeze.

6.179 In particular, in light of the updated data since the FVA Consultation, ComReg considers that, absent regulation, Eircom would have the ability and incentive to distort or foreclose competition in this market by creating a margin squeeze between its retail and wholesale. This was discussed in detail in the context of the Bundled LLVA Market above and the same rationale as expressed in respect of the Bundled LLVA Market applies equally in the case of the HLVA Market. ComReg acknowledges that, until such time that the margin squeeze test is implemented upstream, there is no regulation in place that would address these competition concerns outside of the existing NRT. To that extent, ComReg accepts the concerns raised by alternative operators around the need for measures that prevent Eircom from unreasonably bundling. For example, Vodafone, Magnet and other alternative FSPs raised concerns about the potential for Eircom to leverage its SMP by imposing a margin squeeze on the HLVA market through the provision of bundles. ComReg has previously addressed this potential competition problem through Decision 04/13, which applies to both the high level and low level FVA access markets. Accordingly, ComReg considers that insofar as HLVA is concerned, for the reasons noted earlier, the NRT obligation imposed in Decision 04/13 remains necessary to address the relevant competition problems identified in Chapter 6 of this Decision.[434] ComReg considers it necessary and proportionate to maintain the existing obligation not to unreasonably bundle encompassing and obligation to comply with NRT (specified in Decision 04/13) in the interim pending the possible implementation of appropriate wholesale remedies in relation to margin squeeze in the FACO market or otherwise.

6.180 According to Vodafone, the removal of retail controls would mean that it is almost impossible to monitor compliance or detect discriminatory activities. Vodafone suggests that removal of retail remedies should only be contemplated in the context of a move to an equivalence of inputs approach as regards wholesale remedies applied to HLVA products. ComReg considers that Vodafone's concerns around the ability to monitor Eircom's compliance with the obligation not to unreasonably bundle are addressed by ComReg's information gathering powers established through Decision 04/13 (in addition, the need for a cost accounting obligation applying to the HLVA market is considered below). These obligations require Eircom to provide information that enables ComReg to assess Eircom's compliance with the NRT.

[434] FVA Consultation paragraphs 6.19 to 6.30.

Conclusion

6.181 Having identified Eircom as having SMP in this market and having regard to respondents' views, ComReg considers insofar as HLVA is concerned it is appropriate, proportionate and justified to maintain the existing obligation on Eircom not to unreasonably bundle and comply with the NRT. As provided for by Regulation 13 (2)(d) of the Universal Service Regulations, Eircom is obliged to ensure that it does not bundle HLVA unreasonably with other services. In that regard, Eircom is required not to engage in a margin squeeze and must pass the NRT as specified in Decision 04/13. ComReg considers that, in the absence of an effective upstream remedy, that this is the most effective means of addressing the relevant competition problems identified in the HVLA Market. As noted in the context of bundled LLVA, this remedy will be reviewed if and to the extent that ComReg specifies a functional and effective margin squeeze test in the FACO market, and may be lifted from the HLVA market if the relevant competition problems identified in this market have been addressed adequately through upstream regulation. ComReg is consulting on bundles notably replicability tests and further specification of the obligation of margin squeeze (NRT) as contained in Decision 04/13.

(ii) Cost accounting obligation

6.182 As noted in paragraphs 6.164 to 6.165, insofar as HLVA was concerned it was proposed that it was likely appropriate at this stage to rely on the wholesale obligations (e.g., SB-WLR, CPS and supporting remedies) only. Having regard to the respondents' views and analysis set out in Chapter 5 and in relation to the competition concerns that rise, ComReg reconsiders this proposal.

Consultation responses and ComReg analysis

6.183 Further to the assessment of competition and SMP in Chapter 5, ComReg finds that there is a lack of effective competition in the Bundled LLVA Market and that Eircom with SMP has, absent regulation, sufficient scope and incentives to implement a margin squeeze or unreasonably bundle services to the detriment of consumers and long term competition. Because ComReg considers that imposition on Eircom of an obligation not to unreasonably bundle services, notably compliance with the existing NRT on an interim basis, continues to be necessary, ComReg is also of the view that it is also appropriate, proportionate and justified to maintain an obligation on Eircom to continue to implement a cost accounting system. In this respect, the same rational as expressed in respect of the Bundled LLVA Market equally applies in the context of the HLVA Market. Specifically, if the obligation not to unreasonably bundle is to be meaningful, it is necessary to have a clear and comprehensive understanding of the costs associated with Eircom’s provision of HLVA. As noted at earlier, OAOs considered that ex-ante retail regulation remains necessary in the HLVA market to protect against any risk of unreasonable bundling in relation to HLVA. In particular, Magnet submitted that a specific obligation of cost-accounting is also necessary in the HLVA market to monitor the risk of preferential treatment to customers of Eircom (e.g. higher speeds, mobile discounts, free minutes or generally how products are bundled).

6.184 Having regard to Eircom’s integrated position across several upstream and downstream markets (in particular noting its SMP designations in a number of these markets), the scope for Eircom to leverage its position at the retail or wholesale levels, or both levels, and the associated need to ensure sufficient visibility of how costs are allocated across FVA and other horizontally and vertically-related input services, ComReg considers that the cost accounting system operated by Eircom should be such as to have sufficient information available to ensure the efficient monitoring of pricing related issues (i.e. margin squeeze) and to ensure effective compliance with any retail price control.

6.185 Having regard to the need to support the effectiveness of the obligation not to unreasonably obligation including the obligation to comply with the NRT set out in paragraphs 6.175 to 6.180, ComReg considers that the continued imposition of cost accounting obligations upon Eircom in the HLVA Market is justified. In this respect, Eircom shall ensure that it maintains appropriate cost accounting systems to justify its prices/costs of HLVA products, services and facilities. The detailed nature of these cost accounting obligations are those currently imposed upon Eircom and as specified in the 2010 Accounting Separation Decision.[435] It is noted that Eircom considers that the general accounting separation obligation D08/10 is sufficient and on that basis it is not necessary to impose additional retail obligations relating to cost accounting. This has been discussed in detail above in the context of the Standalone LLVA and Bundled LLVA Markets and the same rationale as expressed in respect of those markets applies equally in the case of the HLVA Market.

6.186 ComReg considers that the incremental costs of compliance associated with the cost accounting obligation will be minimal as Eircom already prepares and publishes separated accounts and has cost accounting systems in place to comply with this obligation and related obligations. Ultimately the burden of proof will rest on Eircom to show that its prices/charges for the relevant retail and wholesale services do not amount to unreasonable bundling. This cost accounting obligation should assist Eircom in that regard.

Conclusion

6.187 In light of Eircom having been designated with SMP in the HLVA market and that absent regulation competition concerns persist and will persist in relation to HLVA, ComReg has decided to ComReg has decided to maintain the obligation on Eircom to operate appropriate cost accounting systems with a view to ensuring effective compliance with the NRT. In this respect, ComReg will also apply the 2010 Accounting Separation Decision and the remedies set out therein to the HLVA Market. On that basis ComReg's does not consider it necessary to impose additional specific cost accounting obligations pursuant to the FVA market review as those under the 2010 Accounting Separation Decision should be sufficient to address any concerns arising in the HLVA Market. However, this remedy will be reviewed at such time that ComReg specifies a functional and effective margin squeeze test in the FACO market, and may be lifted from the HLVA Market if the relevant competition problems have been addressed adequately through upstream regulation. However, no decision has been made in respect of the final obligations in the FACO market.

[435] Accounting Separation and the Cost Accounting Review of Eircom Limited, ComReg Document 10/67, Decision D08/10, August 2010.

E. Overall conclusion on remedies

6.188 Having considered the views of respondents, ComReg has decided that the following remedies are the most appropriate for addressing the competition concerns raised in the FVA markets and are necessary and proportionate for the promotion of competition and to ensure there is no distortion or restriction of competition in the relevant markets:

- To maintain the full suite of wholesale obligations (i.e. in respect of SB-WLR and CPS) that were previously imposed on Eircom in Decision D07/61 until such time that the competition problems identified in the Relevant FVA Markets can be adequately addressed in relevant wholesale markets. SB-WLR and CPS is maintained for the purposes of each of the Relevant FVA Markets.

- Regarding the Standalone LLVA Market, to impose on Eircom the following retail obligations: a requirement not to charge excessive prices, a RPC, an obligation not to unreasonably bundle (not to engage in tying practices), a transparency obligation, and a cost accounting obligation.

- To impose on Eircom in each of the Bundled LLVA and the HLVA Markets the following retail obligations: not to unreasonably bundle FVA with other services (maintenance of the NRT as specified in D04/13 until such time that these competition problems can be adequately addressed-in this regard ComReg has suggested through the FACO Market Review the proposed imposition of SB-WLR and margin squeeze remedies in the relevant upstream markets, should this be deemed necessary following the FACO market review) and, a cost accounting obligation.

Chapter 7

7 Regulatory Impact Assessment

7.1 ComReg as part of the FVA Consultation[436] set out its preliminary Regulatory Impact Assessment ('RIA'). In so doing, ComReg noted that the purpose of a RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. ComReg set out its approach to conducting the RIA and then conducted its RIA having regard to its proposed approach to imposing (or not) regulatory remedies in Chapter 6 of the FVA Consultation, along with a consideration of other options.[437]

7.2 Essentially, ComReg's approach to RIA follows the RIA Guidelines8438 published by ComReg in August 2007 and takes into account the "Better Regulation" programme439 and international best practice (for example, considering developments involving RIA published by the European Commission and the OECD). Section 13(1) of the Act requires ComReg to comply with Ministerial Policy Directions. In this regard, Ministerial Policy Direction 6 of February 2003440 requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the "Better Regulation" programme. ComReg has taken account, in acting in the pursuit of its objectives as set out in Section 12 of the Act and Regulation16 of the Framework Regulations, the importance of promoting efficiency, sustaining competition, promoting efficient investment and innovation whilst giving the maximum benefit to end-users, as more particularly set out at Regulation 6 of the Access Regulations.

[436] Paragraphs 7.1 to 7.67.
[437] FVA Consultation paragraph 7.58 and options Tables pages 246 to 250.
[438] ComReg Document 07/56a, ComReg, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", 10 August 2007 (the '**RIA Guidelines'**).
[439] Department of the Taoiseach, "Regulating Better", January 2004. See also "Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis", June 2009, ('**The Department of An Taoiseach's Revised RIA Guidelines**'), available from: http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf
[440] Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

7.3 It was noted that the RIA, in conjunction with the rest of the analysis and reasoning set out elsewhere in the FVA Consultation represented a RIA which set out its preliminary assessment of the potential impact of the imposition of the proposed regulatory obligations in the Relevant FVA Markets.[441] As part of the process in selecting an appropriate regulatory approach, ComReg set out the key policy issues and objectives, followed by an assessment of the relevant wholesale and retail regulatory options and their respective impacts for consumers, FSPs and competition. The European Commission established that the retail market for access to the public telephone network at a fixed location (i.e. FVA) is susceptible to ex ante regulation. In accordance with the European Framework, ComReg carried out its analysis of this listed market. On the basis of that analysis ComReg proposed to designate Eircom with SMP in relation to the proposed relevant FVA markets. It was noted that in order to address the identified competition problems, ComReg was required to impose on an operator with SMP one or more remedies as appropriate.

7.4 With specific regard to the analysis of competition within the relevant FVA markets and, having regard to the competition problems identified, it was noted that ComReg’s regulatory objectives are to mitigate any exercise of SMP and to ensure the development of effective competition within and across communications markets to the ultimate benefit of end users. In so doing, having regard to the competition problems identified in the FVA and Supplementary Consultations, ComReg was seeking to allow competitors enter the market with confidence (in the CPS and SB-WLR access that Eircom provides and the prices it sets in that regard), thereby promoting the development of effective competition. ComReg was also seeking to provide consumers with protection against any potential exploitative behaviour, such as, excessive pricing and/or restrictions or distortions in competition amongst FSPs via margin squeeze. As noted providing greater regulatory certainty to FSPs through the development of an effective and efficient forward looking regulatory regime serves to promote competition amongst FSPs.

[441] FVA Consultation paragraph 7.4.

7.5 In pursuing these objectives, ComReg recognised that regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. ComReg identified and considered the regulatory options open to it to address the competition problems in the relevant FVA markets. The question of regulatory forbearance and the incremental imposition of one or more of the obligations identified were considered. First, ComReg set out its preliminary view as to why regulatory forbearance was not appropriate, proportionate or justified.[442] ComReg then, following an incremental assessment (starting from the lightest of remedies to the most intrusive) of the appropriateness of other individual remedies, considered that the maintenance of wholesale access (SB-WLR, CPS and supporting remedies) was appropriate in the Relevant FVA markets.[443] In addition, ComReg proposed to remove retail obligations on the HLVA market, though it was considered that it was appropriate and justified to maintain retail regulation on the LLVA market where concerns over market power were most significant.

7.6 ComReg assessed on a preliminary basis the likely impact of its proposed regulatory approach on stakeholders and on competition.[444] The FVA Consultation identified six broad regulatory options in relation to the relevant FVA markets are as follows:

- Option 1 – Maintain existing access to CPS and SB-WLR and supporting obligations only;
- Option 2 – (a) Maintain wholesale remedies and (b) impose retail transparency obligation only on the LLVA market;
- Option 3 – (a) Maintain wholesale remedies and (b) impose retail transparency and an obligation not to show undue preference to specific end users on the LLVA market;
- Option 4 – (a) Maintain wholesale remedies and (b) impose retail transparency, an obligation not to show undue preference to specific end users, price control and cost accounting systems on the LLVA market;
- **Option 5 – (a) Maintain the existing wholesale remedies and (b) impose all existing retail remedies on the LLVA market only (withdraw retail remedies for the HLVA market);** and
- Option 6 – (a) Maintain the existing wholesale remedies and (b) impose all existing retail remedies on all FVA markets.

[442] FVA Consultation paragraphs 7.16 to 7.17.
[443] FVA Consultation paragraphs 7.18 to 7.23.
[444] FVA Consultation paragraphs 7.56 to 7.67.

7.7 It was ComReg's preliminary view that Option 5 represented the most justified, reasonable and proportionate of the approaches to regulation within the relevant FVA markets. ComReg invited comments from interested parties on the RIA and its underlying analysis, proposed in the FVA Consultation.

Consultation responses and ComReg analysis

7.8 The majority of respondents (Vodafone, ALTO, BT, Magnet and Telefonica) broadly agreed with ComReg's preliminary conclusions on the RIA assessment. However, Eircom disagreed with the RIA in principle and submitted that it was deficient in a number of respects and was therefore, in its view, not 'fit for purpose. ComReg has carefully considered the responses received to its FVA Consultation regarding its preliminary RIA. Having regard to respondents' views and comments from the European Commission, the following sections, in conjunction with the analysis and reasoning set out in the FVA and Supplementary Consultations and throughout this Decision represent the final RIA based on final decisions made in relation to this Decision document.

Principle of RIA

7.9 Eircom did not accept the RIA in principle because it disagreed with the substance of the market analysis as presented in the FVA Consultation. Regarding the substance of the market analysis, ComReg has addressed Eircom's arguments as to alternatives in market definition and the degree to which its market position has been dissipated. Having regard to the analysis set out in the FVA and the Supplementary Consultations and the detailed consideration of respondents' views, ComReg's concludes on the basis of the analysis set out in Chapters 4 and 5 of this Decision on market definition and the status of SMP in the Relevant FVA Markets. ComReg has defined separate Relevant FVA Markets, notably, Standalone LLVA, Bundled LLVA and HLVA. Having analysed the market characteristics ComReg finds that the Relevant FVA Markets are not yet effectively competitive and that Eircom holds SMP in each market. Furthermore, absent regulation, Eircom, as the SMP undertaking in the Relevant FVA Markets has the ability and incentive to engage in actions which could negatively impact on competition and customers in the FVA markets and in horizontally and vertically related retail and wholesale markets (e.g., calls and broadband). On that basis as set out in Chapter 6, obligations regarding SB-WLR/CPS and retail obligations as specified are both justified and proportionate.

A 'fit for purpose' RIA

7.10 Eircom considered the preliminary RIA was not 'fit for purpose and in that regard had the following specific issues:

i. No quantifiable assessment of the efficiency or cost of ComReg's proposals

ii. The RIA is limited and did not consider all of the available options. Eircom considered that ComReg did not when conducting its RIA take a prospective view of developments which in Eircom's view will significantly impact on the markets;

iii. ComReg started from the wrong premise when conducting the RIA –its view that "regulatory forbearance is unwarranted" is based on the assumption that SMP has already been found to exist in particular markets;

iv. The RIA focused exclusively on remedies and obligations and treated the definition and analysis of the markets as effectively "faits accompli". Alternative market definitions, such as the inclusion of calls and access in the same market, are simply ignored in the RIA;

7.11 ComReg disagrees with Eircom's view that the RIA is not fit for purpose.

7.12 First, Eircom is of the view that the preliminary RIA lacked a quantified assessment of the efficiency or cost of ComReg's proposals. As part of the FVA market review, ComReg did consider all of the available evidence to provide its assessment of the FVA market. More specifically, ComReg commissioned the 2012 Market Research[445] with a view to informing its understanding of consumer and business attitudes/behaviours in the FVA market. The 2012 Market Research set out in detail the insights derived from the survey analysis and key conclusions. In view of the responses received, ComReg commissioned additional specific analyses of ComReg's consumer survey results which were not included in the original 2012 Market findings but which it considered may nonetheless be usefully explored by interested parties for the purpose of the consultation process.[446] However, it was noted that the 2012 Market Research findings were only one element of the evidence considered by ComReg. In particular, in arriving at its final positions ComReg has taken into account including amongst others empirical evidence from a range of sources:

- ComReg's 2013 ICT Surveys;
- The Oxera Report (2013);
- Respondents submissions to the FVA and Supplementary Consultations;
- Irish Communications Quarterly Report;
- Trends and developments set out in Chapter 3 of this Decision including Appendix 4 (the updated retail trends analysis);

[445] Published separately as ComReg Document 12/117a.
[446] See ComReg Document 13/08: http://www.comreg.ie/_fileupload/publications/ComReg1308.pdf

- Guidance from the European Commission, BEREC and other relevant commentators; and
- The European Commission's comments letters in respect of market analyses.

7.13 Second, ComReg's approach to the FVA market review is in accordance with currently applicable legislation and regulatory framework.[447] In summary, ComReg is responsible for defining relevant service markets which apply in its national territory and to define the geographical scope of its analyses via relevant geographic markets. In defining the markets, ComReg must take the utmost account of the Commission's Recommendation. For each market defined, ComReg must establish whether or not there is a position of SMP and, if so, apply remedies in the form of obligations imposed on undertakings with SMP. These processes were followed in the context of the specific FVA market review as demonstrated throughout the FVA and Supplementary Consultations and this Decision.

7.14 Third, ComReg did not as Eircom suggests, treat the definition and analysis of the markets as effectively "faits accompli". With specific regard to alternative FVA market definitions and prospective market analysis, ComReg sought to define the relevant retail FVA market in a prospective manner by analysing the impact of future trends, such as, amongst others, described in the FVA Consultation, on how consumers regard different services to be substitutes. ComReg did consult on alternatives with regard to the definition of the Relevant FVA markets. In particular, ComReg set out the scope of the market definition[448] exercise (and which it has again fully re-evaluated) considered the following:

- Is the appropriate starting point for the market definition exercise a standalone FVA product or a bundle of FVA with other complementary services?
- Is there a single relevant market for FVA combined with fixed voice calls?
- Is standalone FVA a separate market to a bundle of FVA with other services?
- Are residential and non-residential FVA customers in the same relevant market?
- Are all forms of fixed narrowband access in the same relevant market as the candidate FVA product?

[447] As summarised in Appendix 1.
[448] FVA Consultation paragraph 4.13.

- Is fixed broadband access an effective substitute for fixed narrowband access?
- Are FVA and mobile access services in the same relevant market?
- What is the geographic scope of the relevant market(s)?

7.15 All respondents including Eircom broadly agreed with the proposed scope of the review of the FVA market. However, Eircom qualified its broad agreement as to the scope of the review of the FVA market – it considered that the FVA Consultation did not reflect the fact that there are in its view two distinct groups of customers who buy FVA with different demand side substitutes: fixed Voice Only customers; and Bundled Voice customers. Further, Eircom stated that ComReg needed to consider and consult on how the withdrawal of the DSP subsidy by the Government, in its view a material change to the market for FVA, would affect Eircom's market power as proposed in the FVA Consultation.

7.16 In view of the responses received to the FVA Consultation, the Supplementary Consultation including the Oxera report further considered the matter of market definition. More specifically, Oxera assessed ComReg's proposals in respect of market definition as set out in the FVA Consultation and evaluated them against alternatives particularly mindful of the need to be consistent with the approach to market definition under the European Commissions' 2007 Recommendation and SMP guidelines as well as with principles of competition law. The Oxera Report presents their assessment of ComReg's proposals in respect of market definition and evaluation of those against possible alternatives. On the basis of Oxera additional specific analyses, Table 1 of the Oxera report illustrates plausible FVA market definition scenarios and implications for remedies.

7.17 Having conducted the market definition assessment taking into account respondents' views on alternatives for market FVA market definition as well as drawing on the Oxera framework (see Figure 4) and additional analyses as relevant, ComReg concludes on the Relevant FVA Market definitions at paragraphs 4.195 to 4.197. In considering the approach to market definition for the FVA market, as has been demonstrated throughout the FVA and Supplementary Consultations and this Decision, ComReg has taken account of the standard approach to market definition under the European Regulatory Framework[449] (consistent with competition law), alongside the following issues:

[449] European Commission (2007), '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/EEA, recital 3.

- the considerable growth of bundles in the market;
- the potential for fixed–mobile substitution; and
- the potential for differences in competitive conditions across Ireland to drive the definition of separate geographic markets.

7.18 As noted in the FVA Consultation the purpose of market definition is to structure and inform ComReg's forward looking assessment of whether SMP exists in the supply of retail FVA. ComReg considers that market definition is not an end in itself, but carried out with the aim of understanding whether, during the course of the review period, FVA customers will be protected by effective competition, or whether ex ante regulation is required. ComReg's objective to ensure that regulatory remedies are targeted and designed to address the competition problems that prevail in the absence of regulation. The FVA and Supplementary Consultations and this Decision explore, in detail, having regard to FVA market definition and competition in the Relevant FVA Markets, the suitability of different regulatory approaches for the Relevant FVA Markets. As such, the overall analysis (and in particular Chapter 6 of the FVA Consultation and of this Decision) considers the likely and potential impacts of various regulatory options taking account of the specific characteristics of the Relevant FVA Markets. Therefore, this RIA forms part of a broader regulatory impact assessment which extends throughout a number of Chapters in the FVA and Supplementary Consultations and this Decision.

7.19 In particular, ComReg's assessment of Competition Problems and Impacts on Competition and Consumers (Chapter 6 of the FVA Consultation and of this Decision) considers the ability and incentives for exploitative behaviour and/or exclusionary strategies to arise as a consequence of having an SMP position in the Relevant FVA Markets. In particular, price-related competition problems have been identified as a primary concern. ComReg has demonstrated that, in the absence of appropriate ex ante regulation, Eircom with SMP has the ability and incentive to set and or maintain FVA prices above the competitive level. Chapter 6 of the FVA Consultation and this Decision demonstrates how such behaviour would potentially result in a structure of prices in retail and wholesale markets that would likely be less efficient, restrict or distort competition and distort customer choice. Furthermore, Eircom absent regulation has the ability and incentive to obstruct effective access with a view to extracting excessive retail or wholesale line rental prices and/or raising rivals' costs/impeding competition in downstream retail FVA and (closely related) markets.

7.20 In ComReg's remedies assessment, ComReg has further undertaken a detailed assessment of a range of possible regulatory options for addressing the competition problems identified. The FVA Consultation including the RIA[450] referred to the legislative basis upon which ComReg must consider the imposition of remedies, including under Regulation 8(6) of the Access Regulations, Regulation 13 of the USO Regulations and Section 12(1)(a) of the Act. ComReg's aim in conducting its RIA is to ensure that all measures are appropriate proportionate and justified.

7.21 ComReg recalls that the purpose of the RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. Consistent with the RIA Guidelines[451] and Section 13(1) of the Act,[452] having regard to its proposed approach to imposing (or not) regulatory remedies in Chapter 6 of the FVA Consultation and this Decision, ComReg's RIA considers the effect of proposed regulation or regulatory change.[453] Therefore, ComReg in conducting the RIA takes full account of its obligations under the latter Regulations.

7.22 In choosing remedies we have taken account of Regulation 8(6) of the Access Regulations, Section 12 of the Communications Regulation Act, Regulations 9 and 13 of the Access Regulations and Regulation 16 of the Framework Regulations.[454]

- Regulation 8(6) of the Access Regulations provides that:

7.23 Any obligations imposed in accordance with this Regulation shall –

- Be based on the nature of the problem identified,
- Be proportionate and justified in light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations'; and
- Only be imposed following consultation in accordance with Regulation 12 and 13 of the Framework Regulations.

[450] Paragraphs 1.7 to 1.18, paragraphs 6.2 to 6.6 and paragraphs 7.11 to 7.12.
[451] ComReg, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", ComReg Document 07/56a, 10 August 2007 (the '**RIA Guidelines'**).
[452] In this regard, Ministerial Policy Direction 6 of February 2003 requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the "Better Regulation" programme.
[453] FVA Consultation paragraph 7.58 and options Tables pages 246 to 250.
[454] ComReg has also considered international best practice (for example, considering developments involving RIA published by the European Commission and the OECD).

7.24 ComReg has clearly identified the competition problems associated with the market(s)-including excessive pricing, exclusionary / predatory behaviour and as well as concerns around leveraging. ComReg considers that there has been no unforeseen and material change to the preliminary conclusions reached in respect of the SMP designation or competition problems. ComReg considers that the remedies set out in Chapter 6 of this document should address the specific competition problems noted. ComReg considers that the remedies set out in this Decision Document is proportionate and justified and based on the problems identified, as more particularly discussed in Chapter 6 but also throughout this document. This Decision should also provide reasonable certainty and predictability to operators in the market(s) and that the benefit to other operators and ultimately end-users and consumers should outweigh any cost. We have considered responses to consultation and, based on those responses, we have amended some of our views from the consultation in this Decision Document.

7.25 Our objectives as set out in Section 12 of the Communications Regulations Act aim to:

i. Promote competition and in particular to encourage efficient investment in infrastructure and promoting innovation;

ii. Contribute to the development of the internal market;

iii. Promote the interests of users within the Community and in particular to encourage access to the internet at a reasonable cost to end-users.

7.26 The obligations proposed at the wholesale and retail level will allow Eircom to meet competition at the retail level and will also allow OAOs to compete in a better functioning market, and as discussed in the Remedies chapter certain flexibility is also being maintained. ComReg also considers that consistency of regulation across products is important to investment decisions. The remedies proposed should provide signals for efficient investment and promote innovation –see generally Chapter 6. The remedies as crafted should have positive implications for the price, choice and quality of services ultimately delivered to end-users and should promote the interests of users within the Community and encourage access to the market at a reasonable cost to end-users.

- Regulation 13 of the Access Regulations

7.27 Regulation 13 of the Access Regulations provides that ComReg may impose on an operator obligations relating to cost recovery and price controls where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end-users. The requirements in respect of the imposition of pricing remedies in particular have been already been addressed in Chapter 6 and throughout this document. ComReg has demonstrated that any price control imposed needs to strike a balance between different forms of efficiency and this for example, has been considered in the pricing obligations.

- Regulation 16 of the Framework Regulations

7.28 The main requirements and objectives of Regulation 16 of the Framework Regulations have already been addressed above and throughout this Decision. However for completeness it can be noted again that in terms of contributing to the development of the internal market that the draft measures were made accessible to the Commission, BEREC as well as NRAs in other EU Member States. The Commission letter and our considerations of its correspondence has also been taken the utmost account of in the decision.

7.29 The comments provided by the European Commission were provided pursuant to Article 7 (3) of the Framework Directive and that the proposed measure does not create a barrier to the single market nor is it incompatible with Community law. We have taken into account all European Commission and European Union guidelines and law. In terms of promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods our overall approach should ensure regulatory consistency and predictability over the period, but we also commit to monitoring developments. ComReg has further taken due account of the variety of conditions relating to competition and end-users that exist in the various geographic areas within the State: As set out we recognise that there may be varying competitive conditions (especially prospectively) in the market and this is reflected in the remedies.

7.30 Regulation 16(2) of the Framework Regulations requires that ComReg applies objective, transparent, non-discriminatory and proportionate regulatory principles. The obligations contained in the Decision Document are for example objectively justifiable (they are based on the problems identified) and are fair (the benefits outweigh the burden imposed). They are not unduly discriminatory, in that Eircom (and no other operator) has been found to have SMP in the relevant market(s); they are proportionate, in that it is targeted at addressing the market power that Eircom holds in the relevant market(s) and reflects pricing and other obligations that are not unduly burdensome. The obligations are also transparent, in that the obligations are clear in their intention to ensure that Eircom does not act in an abusive manner.

- Regulation 6 of the Access Regulations:

7.31 Regulation 6 of the Access Regulations requires that ComReg encourages and ensures access that meets criteria which are largely discussed above and throughout the document. In summary however ComReg considers the relevant remedies reflect and promote efficiency and competition (and will for example) prevent Eircom from passing any inefficiently incurred costs onwards through excessive prices. In terms of giving the maximum benefit to end users, it can be seen that market entry and competition is promoted at the wholesale level which enables OAOs to effectively compete at the retail level. ComReg considers that this is best approach to maximising the benefits to end users. The geographic dimension also protects end users in less competitive areas of the country from excessive pricing.

Assessment of options and impact

7.32 Of the six broad regulatory options identified in the FVA Consultation, it was ComReg's preliminary view that Option 5 (i.e. maintain the existing wholesale remedies and impose all existing retail remedies on the LLVA market only (withdraw retail remedies for the HLVA market) represented the most appropriate of the approaches to regulation within the relevant FVA markets. Vodafone was of the view that considering the overall regulatory approach and the strength of Eircom's market position, ComReg appeared to have acted in a proportionate and reasonable manner in weighing two opposing risks. According to Vodafone, if regulatory measures were lifted before Eircom's market power has sufficiently dissipated there would likely be direct and tangible effects on competition and consumers. On the other hand however, imposing regulation slightly higher than that actually required by the market impacts on Eircom rather than competition and consumers. However, Eircom considers that regulation of the FVA market is no longer necessary or appropriate in light of market developments.

7.33 As noted at the outset ComReg considers all regulatory options, including the option of de-regulation or regulatory forbearance at the retail level in order to ensure that regulation remains focused and responsive to the needs of a changing environment.

7.34 ComReg has considered whether the option of de-regulation or regulatory forbearance is appropriate in the Relevant FVA Markets. As noted in Chapter 6 and Appendix 1, the Regulations require ComReg to impose at least some level of regulation on undertakings designated as having SMP. In Chapter 5, ComReg concludes that the Relevant FVA Markets are not effectively competitive (and are not likely to become effectively competitive within the timeframe covered by this review). In Chapter 6, ComReg identifies a range of competition problems that persist and will persist in the Relevant FVA Markets, absent regulation. On the basis of this analysis, it is ComReg's view that the Relevant FVA Markets will not function effectively absent regulation. This is not in the interest of promoting sustainable retail competition and is to the direct detriment of consumers. It is ComReg's view that the option of regulatory forbearance in the Relevant FVA Markets is not, therefore, appropriate or justified. The relevant issue to be considered, therefore, relates to what form of regulation is appropriate.

7.35 ComReg sets out in Chapter 6 its views on the detail of the imposition of regulatory obligations on Eircom in the Relevant FVA Markets having regard to the particular circumstances of the each of the Relevant FVA Markets, the associated identified competition problems and taking account of the relevant statutory requirements to which ComReg must have regard when imposing remedies. In this regard, ComReg takes a balanced and incremental approach to its assessment of regulatory options by first considering the lightest potential form of remedial action and the likely resulting impacts on competition and consumers. Chapter 6 of this Decision identifies the appropriate mix of regulatory obligations to address the specific market failures and consequential competition and consumer impacts identified.

7.36 Having considered the impacts on stakeholders and competition, it is ComReg's position that regulatory forbearance is not appropriate and that the regulatory approach as set out in Chapter 6 of this Decision (i.e. maintain the existing SB-WLR/CPS and supporting wholesale remedies and impose relevant retail remedies on all FVA markets) represents the most justified, reasonable and proportionate of the available regulatory approaches. Thus, ComReg's reasoned final position is to impose on Eircom relevant wholesale and retail obligations as set out in Chapter 6 of this Decision. ComReg considers that this regulatory approach will best achieve the twin objectives of promoting effective competition while protecting the standalone FVA end-user.

7.37 Having regard to the defined FVA markets and that as yet there is insufficient effective competition in the Relevant FVA Markets, the final RIA updates the assessment of the impact of regulatory options on different stakeholders:

Updated Option 6:[455]Maintain the existing wholesale remedies on all FVA markets and (b) impose relevant retail remedies on all FVA markets		
Impact on Eircom	**Impact on Competition**	**Impact on Consumers**
Existing regulatory burden on Eircom (per the 2007 Decision) will be lifted as relevant. Existing wholesale SB-WLR/CPS remedies on Eircom continue pending a decision in relation to FACO/Market 2, or potentially staying in Market 1.	Allow efficient alternative FSPs to compete effectively in the FVA markets, in related markets and for bundle offers which include FVA and fixed voice services.	End users would benefit from increased choice of FSP.
Retail obligations are more targeted at specific concerns: Apply to markets 1b and 1c NRT (Decision 04/13) and accounting separation (Decision 08/10) pending FACO decision and consultation on replicability test. If in the future effective wholesale regulation obviates any need for these 2 retail obligations, possibly markets 1b and 1c could be deregulated; as competition develops, the obligation on Eircom not to unreasonably bundle is proportionate in view that the short term cost to Eircom is outweighed by the benefits to consumers in terms of price choice and quality of services. For market 1a Eircom is subject to the existing obligations of (safeguard) RPC, cost accounting and not to tie standalone FVA; the RPC does not unduly discriminate against Eircom in that, while it only applies to Eircom, the condition is imposed in order to address Eircom's ability to raise FVA prices above the competitive level in light of its SMP in markets to which the control applies. The approach to the RPC is proportionate in that it is the least burdensome means of achieving this	Allow efficient alternative FSPs to replicate FVA and fixed voice services spurring innovation.	End users would benefit from increased choice of FSP, increased choice, price, quality. End users protected against any risk of unjustified FVA price increases or a reduction in choice through tying practices. Transparency obligation facilitates empowering consumers with a view to enhancing switching and more informed choices by consumers.

[455] Reflecting a Market Definition of Standalone LLVA, Bundled LLVA and HLVA and the imposition (and withdrawal) of remedies as set out in Chapter 6 of this Decision.

aim. Incremental costs of compliance associated with cost accounting obligation will be minimal as Eircom already prepares and publishes regulatory financial statements and has cost accounting systems in place to comply with this obligation and related obligations. Incremental burden on Eircom from implementation of the transparency obligation is outweighed by the benefit to competition and end users. Obligation on Eircom not to show undue preference to end users is removed in each of the Relevant FVA Markets.		

7.38 The FVA and Supplementary Consultations and this Decision incorporate a full and objective assessment of the various regulatory options available for the Relevant FVA Markets in an Irish context. As part of this assessment, ComReg undertakes detailed analysis of the specific structure and characteristics of the Relevant FVA Markets and a graduated impact assessment of potential regulatory options for addressing each of the specific problems identified (however a formal cost benefit analysis is not necessary). This RIA should, therefore, be read in conjunction with the FVA and Supplementary Consultations and this Decision as a whole.

Conclusion

7.39 For the reasons set out above the RIA which is an integrated part of the overall analysis is in accordance with the guidelines and is fit for purpose. ComReg is of the view that the RIA is sufficient to justify the overall regulatory approach having identified Eircom with SMP in the Relevant FVA Markets. ComReg's view is that, absent regulation, there is the potential and incentive for Eircom to engage in exploitative and exclusionary behaviours which would negatively impact on competition and consumers. In Chapter 6 ComReg provided examples of potential competition problems and the impact of these on competition and consumers. ComReg objectives in regulating the relevant FVA markets are to prevent restrictions or distortions of competition in affected FVA markets (and related retail markets) and help to ensure that consumers can achieve maximum benefits in terms of price choice and quality of FVA and fixed telephony service.

Appendix: 1 Legal and regulatory background

A 1.1 The FVA market review was undertaken by ComReg in accordance with the obligation under the Framework Directive[456] that NRAs should analyse and define relevant markets taking the utmost account of the 2007 Recommendation[457] (including the Explanatory Note to the 2007 Recommendation)[458] and the SMP Guidelines

A 1.2 Regulation 26 of the Framework Regulations[459] requires that ComReg, taking the utmost account of the 2007 Recommendation and of the SMP Guidelines, defines relevant markets appropriate to national circumstances, in accordance with the principles of competition law.

A 1.3 The European Commission refers in the 2007 Recommendation to the FVA market as follows:

> "access to the public telephone network at a fixed location for residential and non-residential customers."[460]

A 1.4 Having regard to Regulation 25 of the Framework Regulations, where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged under Regulation 27(4) of the Framework Regulations to designate an undertaking(s) with SMP in that market and impose on such undertaking(s) such specific obligations as it considers appropriate, or maintain or amend such obligations where they already exist.

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[456] Articles 15 and 16 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC (the '**Framework Directive'.**

[457] 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**').

[458] European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (the '**Explanatory Note to the 2007 Recommendation**'), (C(2007) 5406).

[459] European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the '**Framework Regulations'**). The Framework Regulations transpose the Framework Directive.

[460] Appendix to the 2007 Recommendation, point 1.

A 1.5 In accordance with Regulation 27(4) of the Framework Regulations, where an undertaking is designated as having SMP in a relevant market, ComReg is obliged to impose on such an undertaking such of the obligations set out in Regulations 9 to 13 of the Access Regulations461 and/or Regulation 13 of the Universal Service Regulations[462] as it considers appropriate (or maintain or amend such obligations where they already exist). In accordance with Regulation 8(6) of the Access Regulations, obligations imposed under the Access Regulations must:

a) be based on the nature of the problem identified;

b) be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Acts 2002 to 2011,[463] and Regulation 16 of the Framework Regulations; and

c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.

A 1.6 Regulation 13(1) of the Universal Service Regulations states that where:

- ComReg determines, as a result of a market analysis carried out, in accordance with Regulation 27 of the Framework Regulations, that a given retail market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive; and
- ComReg concludes that obligations imposed under Regulations 9 to 13 of the Access Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Acts 2002 to 2011, and Regulation 16 of the Framework Regulations.

A 1.7 ComReg shall impose such obligations, as it considers appropriate to achieve those objectives, on undertakings identified by ComReg under Regulation 27(4) of the Framework Regulations as having SMP on a given retail market.

[461] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the '**Access Regulations'**). The SMP Guidelines also state at paragraph 17 that "NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP".

[462] European Communities (European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011).

[463] Communications Regulation Act 2002 (No. 20 of 2002), as amended by Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (the '**Communications Regulation Acts 2002 to 2011**').

A 1.8 Regulation 13(2) of the Universal Service Regulations states that any obligations imposed by ComReg under Regulation 13(1) of the Universal Service Regulations must be based on the nature of the problem identified under the market analysis and be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Acts 2002 to 2011, and Regulation 16 of the Framework Regulations.

A 1.9 Section 12(1)(a) of the Communications Regulation Acts 2002 to 2011 sets out the objectives of ComReg in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities, namely:

a) to promote competition;

b) to contribute to the development of the internal market; and

c) to promote the interests of users within the European Union.

A 1.10 It should further be noted that Regulation 16(1) of the Framework Regulations states that ComReg shall:

a) unless otherwise provided for in Regulation 17, take the utmost account of the desirability of technological neutrality in complying with the requirements of the Specific Regulations having particular regard to those designed to ensure effective competition,

b) in so far as the promotion of competition is concerned

   i. ensure that elderly users and users with special social needs derive maximum benefit in terms of choice, price and quality, and

   ii. ensure that, in the transmission of content, there is no distortion or restriction of competition in the electronic communications sector,

c) in so far as contributing to the development of the internal market is concerned, co-operate with BEREC in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of European Union law in the field of electronic communications, and

   i. in so far as promotion of the interests of users within the European Union is concerned

   ii. address the needs of specific social groups, in particular, elderly users and users with special social needs, and

   iii. promote the ability of end-users to access and distribute information or use applications and services of their choice.

A 1.11 Apart from conducting a public consultation in accordance with Regulation 12 of the Framework Regulations, ComReg is also obliged to make draft measures accessible to the European Commission, BEREC and the NRAs in other Member States pursuant to Regulation 13(3) of the Framework Regulations. Pursuant to Regulation 27(1) of the Framework Regulations, ComReg shall carry out an analysis of the relevant markets in accordance, where appropriate, with an agreement with the Competition Authority under section 34 or 47G of the Competition Act 2002.

A 1.12 Overall, in preparing this Consultation Paper, ComReg has taken account of its functions and objectives under the Communications Regulation Acts 2002 to 2011, in addition to requirements under the Framework Regulations, the Access Regulations and the Universal Service Regulations. ComReg has taken the utmost account of the 2007 Recommendation and the Explanatory Note to the 2007 Recommendation and the SMP Guidelines. ComReg has further taken account of the European Commission's Notice on Market Definition[464] and any relevant common positions adopted by BEREC.[465]

A 1.13 ComReg has also had regard to relevant European Commission comments made, pursuant to Article 7 and Article 7a of the Framework Directive, with respect to other National Regulatory Authorities' (NRAs') market analyses.

[464] Commission notice on the definition of relevant market for the purposes of Community competition law, (the 'Relevant Market Definition Notice'), Official Journal C 372, 09/12/1997 P. 0005 – 0013.
[465] Body of European Regulators for Electronic Communications (**BEREC**) as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

Appendix: 2 Consultation with the Competition Authority

A 2.1 The following is a copy of the opinion of the Irish Competition Authority setting out its agreement with ComReg's definition of the Relevant FVA Market(s) and the assessment of competition within such markets.

An tÚdarás Iomaíochta
The Competition Authority

Kevin O'Brien
Chairperson
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1

30th June 2014

Re: Commission for Communications Regulation ("ComReg") Market Review – Fixed Voice Access

Dear Kevin,

Pursuant to Regulation 27(1) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) ComReg has consulted the Competition Authority with respect to ComReg's proposed draft measures arising from its analysis of the Fixed Voice Access markets.

On the basis of the facts and analysis presented by ComReg, the Competition Authority is satisfied that there are no grounds for altering the market definitions proposed by ComReg.

On the basis of the facts and analysis presented by ComReg, the Competition Authority is satisfied that there are no grounds to disagree with ComReg's conclusion that Eircom should be designated as having significant market power in each of the identified relevant Fixed Voice Access markets.

Yours sincerely

Isolde

Isolde Goggin
Chairperson
Competition Authority

Tel: 01 804 5400
E-mail: ig@tca.ie

Teach Pharnell, 14 Cearnóg Pharnell, Baile Átha Cliath 1, Éire. Parnell House, 14 Parnell Square, Dublin 1, Ireland.
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Appendix: 3 European Commission comments

A 3.1 Attached below is a copy of correspondence from the European Commission setting out its comments pursuant to Article 7 of the Framework Directive.

A 3.2 In addition, attached below is a copy of the European Commission a CORRIGENDUM to this comments letter published at https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp

EUROPEAN COMMISSION

Brussels, 28.7.2014
C(2014) 5482 final

Commission for Communications
(COMREG)

Block DEF,
Abbey Court,
Irish Life Centre,
Lower Abbey St.,
Dublin 1
Ireland

For the attention of:
Mr Kevin O'Brien
Chairperson of the Commission

Fax: +35318788193

Dear Mr O'Brien,

Subject: Commission Decision concerning Case IE/2014/1629: Retail markets for access to the public telephone network at a fixed location in Ireland

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 2 July 2014, the Commission registered a notification from the Irish national regulatory authority, the Commission for Communications (ComReg),[1] concerning the third review of the retail markets for access to the public telephone network at a fixed location (Market 1)[2] in Ireland.

The national consultation[3] ran from 26 October 2012 to 25 January 2013. In addition, in view of the responses received, ComReg undertook a supplementary consultation in particular on the matter of market definition and treatment of bundled services, which ran from 17 October 2013 to 18 December 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and

[1] Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

[2] This market corresponds to market 1 in 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 Recommendation'), OJ L 344, 28.12.2007, p. 65.

[3] In accordance with Article 6 of the Framework Directive.

the Commission may make comments on notified draft measures to the NRA concerned.

II. Description of the draft measure

II.1. Background

The second review of Market 1 was previously notified to and assessed by the Commission under case IE/2007/0632[4].

At the time, ComReg designated Eircom with SMP on the markets for higher and lower level retail narrowband access at a fixed location and specified how Eircom could sell bundles of services.

ComReg imposed *inter alia* an obligation on Eircom not to unreasonably bundle services in order to avoid that retail fixed narrowband access is priced in such a way as to constrain Other Authorised Operators (OAOs). ComReg proposed to apply the so-called Net Revenue Test ("NRT").

In 2010, ComReg proposed to maintain the NRT supplemented by an assessment of the competitive context of the bundle in question. ComReg further specified the requirements with respect to bundles that include retail fixed narrowband access. This draft measure was notified to the Commission under case IE/2010/1054[5] and the Commission had no comments.

In October 2012 (IE/2012/1381[6]), ComReg notified an amendment to its NRT. At that time, ComReg considered that the developments in the Irish telecommunications sector, in particular the continued expansion of cable networks and strengthening of LLU-based competition, do not yet warrant a sub-national segmentation of the market. Therefore, according to ComReg, it was more appropriate to vary the relevant remedy on a geographic basis. ComReg identified the so-called Larger Exchange Areas ("LEAs") characterized by a higher degree of competition, either based on LLU or other platform (CaTV). For bundles sold/offered in the LEAs, ComReg proposed to: i) include LLU or NGA access services as a wholesale input cost and ii) implement a two part test, according to which the bundles are first assessed on an individual bundle basis[7] and secondly in an aggregated manner.[8] For bundles sold/offered outside the LEAs the net revenue test in the previous form would continue to apply.[9] The Commission commented on the geographical remedy variation and on the parallel application of a margin squeeze test and cost-orientation obligation.

4 SG-Greffe (2007) D/203441.

5 C (2010) 2050.

6 C (2012) 8836.

7 Each bundle must pass its own average total costs (ATC) with a Long Run Incremental Cost (LRIC) cost standard for retail fixed calls; when under the NRT applied outside the LEA each bundle must only cover its ATC.

8 The portfolio of bundles offered in the LEA must pass the ATC.

9 ComReg indicated that the applicable NRT is based on a product-by-product assessment of each bundle, where each bundle must cover its own ATC. This means that the current NRT uses the same wholesale inputs required by an OAO to replicate the Eircom retail fixed narrowband access (RFNA) bundle. Therefore, in order for a bundle to be considered reasonable it must cover the costs faced by an OAO seeking to replicate the RFNA bundle using the wholesale service from Eircom. ComReg stated that this has been reasonable to date as full LLU has had insignificant take-up.

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II.2. Market definition

On the basis of its analysis and the comments received during the public consultations, and differently to the market boundaries determined previously, ComReg proposes to define three separate retail markets:

> Market 1a – Standalone Lower Level Voice Access (LLVA) comprising PSTN, ISDN BRA or similar connection (cable, fibre, fix wireless access and DSL) that is used to provide voice service sold on a standalone basis or in a package with fixed voice calls[10];
>
> Market 1b - Bundled Lower Level Voice Access (LLVA) comprising PSTN, ISDN BRA or similar connection (cable, fibre, fix wireless access and DSL) that is used to provide voice service (including a managed VoIP service) sold in a product bundle that includes broadband, TV, or mobile (and may also include fixed voice calls); and
>
> Market 1c – High Level Voice Access (HLVA) comprising ISDN FRA[11] or ISDN PRA[12] connections that are used to provide a voice service sold on a standalone basis or as package with other services (fixed voice calls, broadband, TV or mobile).

ComReg considers that access at fixed location is a separate market from fixed calls, and that there is no distinction between user types (residential, business customers). Moreover, ComReg considers that while in theory there could be a single broader market for LLVA (whether sold on a standalone basis or within a bundle), it finds it more appropriate to define two separate LLVA markets for standalone services and services sold within a bundle. ComReg further concludes that access provided by mobile telephony is outside the scope of the market (mainly due to different quality, usage and pricing patterns).

Each of the markets is national in scope.

II.3. Finding of significant market power

ComReg has assessed the most relevant SMP criteria and grouped them into three categories: (i) existing competition (market shares, relative strength of competitors, pricing); (ii) potential competition (barriers to entry, control over infrastructure, strength of potential competitors); and (iii) countervailing buyer power.

ComReg proposes to designate Eircom as having SMP in each of the three markets identified above.

Market 1a (Standalone LLVA)

This market represents 37% of total subscriptions to the telephone network at a fixed location. In the absence of any wholesale regulation Eircom would have, according to ComReg, a 100% market share, however in the presence of WLR and CS/CPS, Eircom has […]%, while Vodafone has […]% and all other providers jointly have […]% of the market. Eircom's market share is slowly declining over time (from […]% in 2010), and the market is still characterised by high entry barriers (high sunk cost, Eircom's

10 ComReg considers this market as a "focal product" for the purpose of its market definition and SMP assessment.

11 ISDN FRA (Fractional Rate Access) provides up to 16 independent voice channels.

12 ISDN PRA (Primary Rate Access) provides up to 30 independent voice channels.

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ubiquitous copper/fibre infrastructure, benefits of vertical integration, economies of scale and scope). Finally, ComReg considers that countervailing buyer power would not constrain Eircom's behaviour in this market.

Market 1b (Bundled LLVA)

ComReg observes that this market is rapidly growing, and has increased by 53% since 2010. As of end 2013, it represents 63% of total subscriptions to the telephone network at fixed location.

In the absence of wholesale regulation Eircom's market share would amount to […]%. However, taking into account the market shares of service providers who rely on wholesale access, Eircom's market share declined from […]% in 2010 to […]%. At the same time UPC has increased its market share from […]% in 2010 to […]% in 2013[13]; other nearest competitor is Vodafone with approx. […]%, while other alternative operators have approx. […] of the market.

ComReg notes that in the bundled LLVA market Eircom is to some extent constrained by the presence of an alternative platform (CaTV), however, despite its declining market share, Eircom's prices have remained fairly stable, indicating it has not responded to its competitors' offers by reducing its prices. In addition, ComReg believes that the fixed voice access element of the bundles will remain necessary, and the likely transition towards (managed) VoIP would not pose an appreciable competitive constraint on Eircom in the bundled LLVA market within the period of this market review. Finally, countervailing buyer power is also unlikely to constrain Eircom over the review period.

Market 1c (HLVA)

Eircom enjoys a 53% market share (in the absence of wholesale regulation its market share would amount to 80%, according to ComReg). ComReg considers that although competition continues to emerge in this market, the high and non-transitory barriers to entry persist. Furthermore, at this stage, it remains unclear whether the IP-based products could sufficiently constrain Eircom's pricing behaviour. ComReg also considers that countervailing buyer power is not sufficient to mitigate Eircom's SMP over the review period.

II.4. Regulatory remedies

The remedies proposed by ComReg are summarised in the table below:

	Market 1a (Standalone LLVA)	Market 1b (Bundled LLVA)	Market 1c (HLVA)
Wholesale remedies			
WLR and CPS	Yes (interim pending review of market 2 in 2014)	Yes (interim pending review of market 2 in 2014)	Yes (interim pending review of market 2 in 2014)
Retail remedies			
No excessive charges	Yes	No	No

13 UPC is capable of providing broadband services (and thus also access to telephone network) to 44% of households in Ireland.

Price cap	Yes	No	No
Not to unreasonably bundle	Yes	Yes	Yes
Transparency	Yes	No	No
Cost accounting	Yes	Yes	Yes

For all three markets ComReg proposes to impose wholesale remedies in the form of an obligation to provide Wholesale Line Rental and CPS.

Nevertheless, ComReg considers that the imposition of wholesale remedies would not suffice to constrain Eircom's behaviour on the retail markets, as it would have the ability and incentives to increase its prices. In particular, this is relevant for Market 1a (standalone LLVA), as consumers who purchase standalone fixed access do currently not value broadband (or other bundles) to such an extent that they would be willing to switch to bundles. Furthermore, as the WLR prices are set on the basis of a retail-minus methodology, Eircom would have the ability and incentive to increase its retail standalone LLVA prices and therefore also the charges for WLR (hence, limiting the impact of its competitors at the retail level). Therefore, ComReg finds it appropriate to maintain the Retail Price Cap[14].

ComReg also proposes for all three markets to maintain the obligation not to unreasonably bundle, which encompasses the NRT (measure aimed at avoiding a margin squeeze).[15] While currently the NRT obligation is anchored in the remedies imposed at retail level, ComReg's intention is to impose this test in the market for wholesale call origination (for which the market review and the public consultations are ongoing). However, as long as the NRT would not be imposed at the wholesale level, ComReg believes it would be premature to remove it from the retail markets. In this respect, ComReg intends to revisit the proposed retail remedies once it completes the assessment of the (upstream) wholesale call origination market (Market 2), by the end of 2014. ComReg states that, once the remedies will be imposed in Market 2, it will assess whether markets 1b and 1c continue warranting *ex ante* regulation.

III. COMMENTS

The Commission has examined the notification and has the following comment:[16]

Imposition of remedies in the upstream (wholesale) market and assessment of the three criteria

The Commission notes that ComReg, on the one hand, intends to impose the WLR and CPS remedies in the (upstream) market for wholesale call origination, once its current market review of this market is finalised, and, on the other hand, subsequently assess whether market 1b (bundled LLVA) and market 1c (bundled or standalone HLVA) continue to meet the three criteria, with a view to potentially remove all retail regulation from those markets. Against the background that these latter markets jointly represent a significant proportion of

14 Price caps are subject to an increase depending on the inflation rate.

15 ComReg maintains its approach towards the net revenue test outside and within the Large Exchange Areas, with a more flexible price control for the latter.

16 In accordance with Article 7(3) of the Framework Directive.

5

> all retail fixed voice access connections in Ireland (63%) and on the basis of the decreasing market share of the SMP operator in particular in market 1b, the Commission urges ComReg (i) to complete the assessment of the (upstream) market for call origination as soon as possible, (ii) to notify the Commission, other NRAs and BEREC of it and (iii) to reassess whether the presently notified markets still warrant ex ante regulation without any undue delay.

Pursuant to Article 7(7) of the Framework Directive, ComReg shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[17] the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[18] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.[19] You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

17 Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of 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 301, 12.11.2008, p. 23.

18 Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

19 The Commission may inform the public of the result of its assessment before the end of this three-day period.

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EUROPEAN COMMISSION

Brussels, 4.8.2014
C(2014) 5705 final

Commission for Communications
(COMREG)

Block DEF,
Abbey Court,
Irish Life Centre,
Lower Abbey St.,
Dublin 1
Ireland

For the attention of:
Mr Kevin O'Brien
Chairperson of the Commission

Fax: +35318788193

Dear Mr O'Brien,

Subject: CORRIGENDUM to Commission Decision C(2014) 5482 final of 28.7.2014 concerning Case IE/2014/1629: Retail markets for access to the public telephone network at a fixed location in Ireland

Comments pursuant to Article 7(3) of Directive 2002/21/EC

Please note that the above decision is amended as follows:

In section II.4 ("Regulatory remedies") on page 5 the following sentence:

"*ComReg also proposes for all three markets to maintain the obligation not to unreasonably bundle, which encompasses the NRT (measure aimed at avoiding a margin squeeze)*[1]."

is replaced by:

[1] *ComReg maintains its approach towards the net revenue test outside and within the Large Exchange Areas, with a more flexible price control for the latter.*

"ComReg also proposes for all three markets to maintain the obligation not to unreasonably bundle, which encompasses an obligation not to engage in tying practices for market 1a, and for markets 1b and 1c, an obligation to comply with the NRT (measure aimed at avoiding a margin squeeze)[1]."

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

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Appendix: 4 Updated Retail Trends Analysis

A 4.1 This Appendix provides a current list of providers of retail FVA and an updated analysis, as of Q4 2013, of the retail FVA markets trends as discussed in the FVA Consultation and further considered in Chapter 3 of this Decision.

List of providers of retail FVA

A 4.2 The following is a list of providers of retail FVA:

- Airspeed Telecommunications Ltd.
- ATS Voice Ltd.
- Blue Face Ltd.
- British Sky Broadcasting Ltd.
- BT Ireland Ltd.
- Casey Cablevision Ltd.
- Centrecom Systems Ltd.
- Colt Technology Services Ltd.
- Digital Forge
- Digiweb group
- Edge Telecommunications Ltd.
- Eircom Ltd.
- Fastcom Broadband Ltd.
- Greencom Telecommunication Ltd.
- IFA Telecom Ltd.
- Imagine Telecommunications Business Ltd.
- Ker Broadband Comms Ltd.
- Magnet Networks Ltd.
- Nova Networks Ltd.
- O2 Ireland Ltd.
- Onwave Ltd.

- PermaNET ltd.
- Puretelecom Ltd.
- Rapid Broadband Ltd.
- Ripple Communications Ltd.
- Sky Ireland Ltd.
- UPC Communications Ireland Ltd.
- UTV Internet Ltd.
- Verizon Ireland Ltd.
- Vodafone Ireland Ltd

Developments in CPS, SB-WLR and LLU services

A 4.3 As shown in Figure A, the total number of cable access lines increased, representing 35% of all non-Eircom access lines in the fixed market as of the end of Q4 2013. There was migration from CPS-only to SB-WLR – the fall (86%) in CPS represents a decrease of 95,358 lines since Q1 2007. At the same time, however, SB-WLR and WLA lines have grown (49%), an increase of 146,900 lines. The migration of CPS customers to SB-WLR is driven by the convenience of receiving a single bill or "one stop shopping" for the end-user.

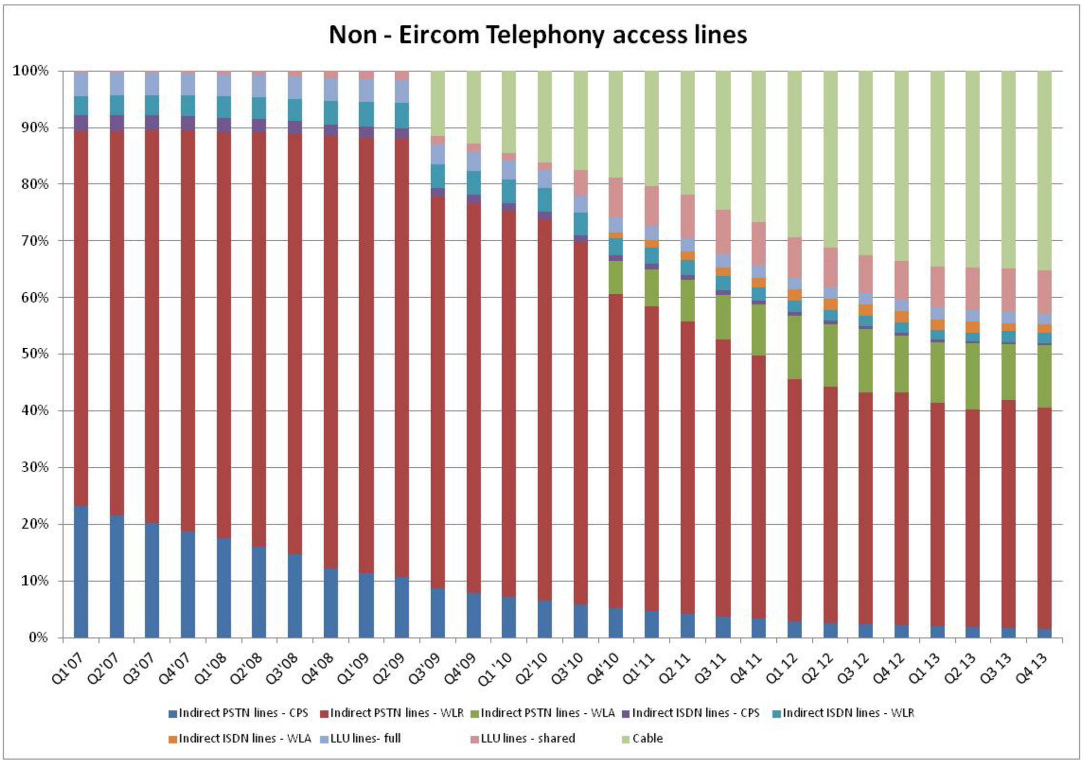

Figure A: Non-Eircom fixed telephony access lines, Q1'07 – Q3'13

A 4.4 As noted in Figure B, CPS, SB-WLR and WLA reached 460,963 lines in Q4 2013 compared to 409,421 lines in April 2007. This indicates an overall increase of 51,542 lines (or 12.6%). Combined CPS, SB-WLR and WLA reached a low of 376,211 lines in December 2010 but have been increasing since then.

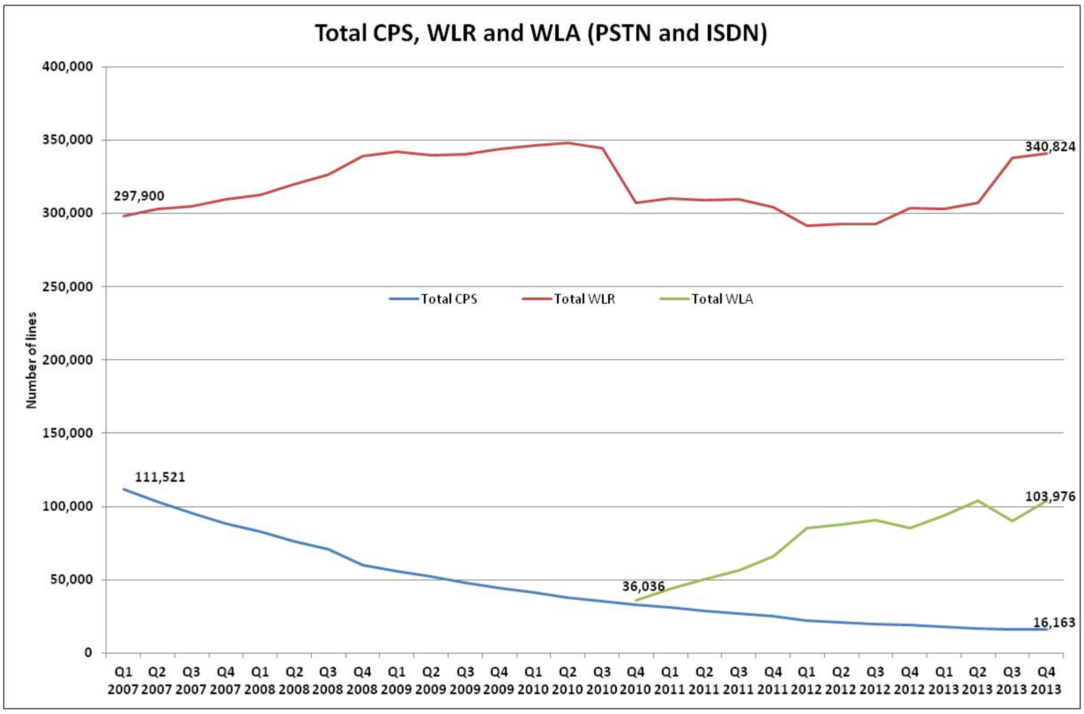

Figure B: Total CPS, SB-WLR and WLA (PSTN and ISDN), Q1'07 – Q4'13

A 4.5 Figure C illustrates the evolution of LLU lines. As of Q4 2013 there were 80,037 unbundled local loops, up from 19,337 in 2007. Shared LLU connections accounted for 80% of all LLU lines.

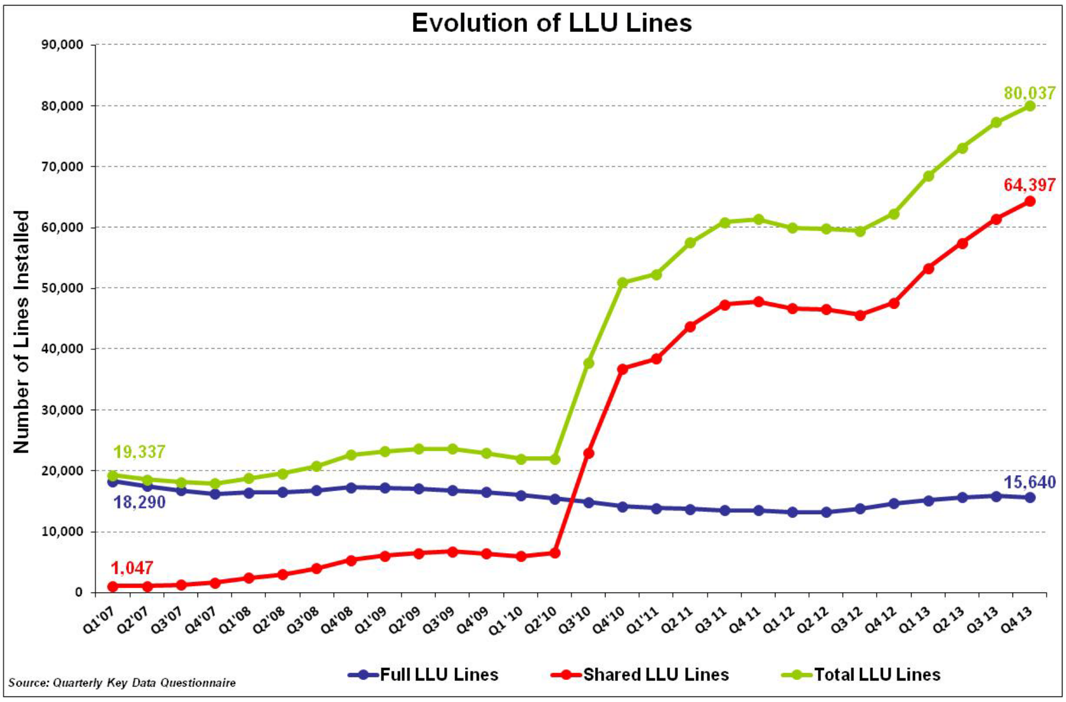

Figure C: Evolution of LLU lines, Q1'07 – Q4'13

Evolution of access infrastructure and technologies

A 4.6 Figure D illustrates the distribution of the different types of access infrastructure and technologies (which provision both voice and data services) at fixed locations since 2007.

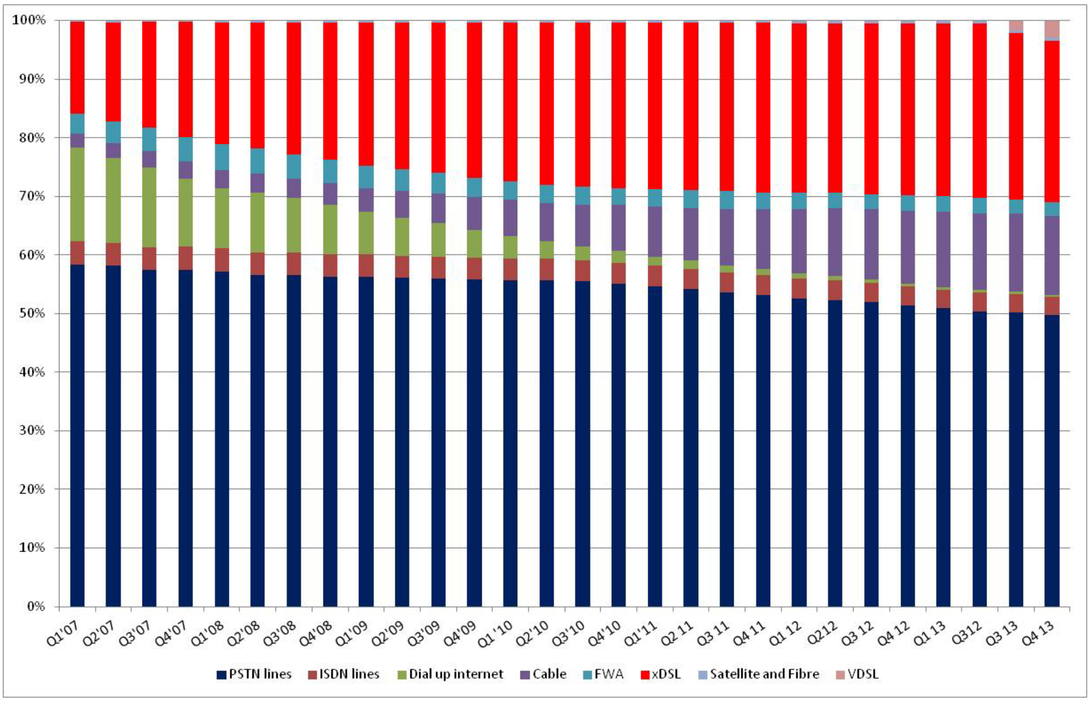

Figure D: Fixed Retail Connections by Technology, Q1'07 – Q4'13

Decline in PSTN and ISDN Landlines

A 4.7 The total number of retail connections has fallen marginally in Ireland, as is evident from Figure E. The overall number of FVA lines (PSTN, ISDN and managed VOIP over broadband) has declined, though the driver of this decline is the reduced take-up of FVA over the more traditional PSTN and ISDN landlines.[466] Combined PSTN/ISDN lines have been declining steadily in recent years, falling from 1.72 million in Q1 2007 to 1.33 million in Q2 2013. The number of combined PSTN/ISDN lines has increased since then, reaching 1.34 million as of Q4 2013.

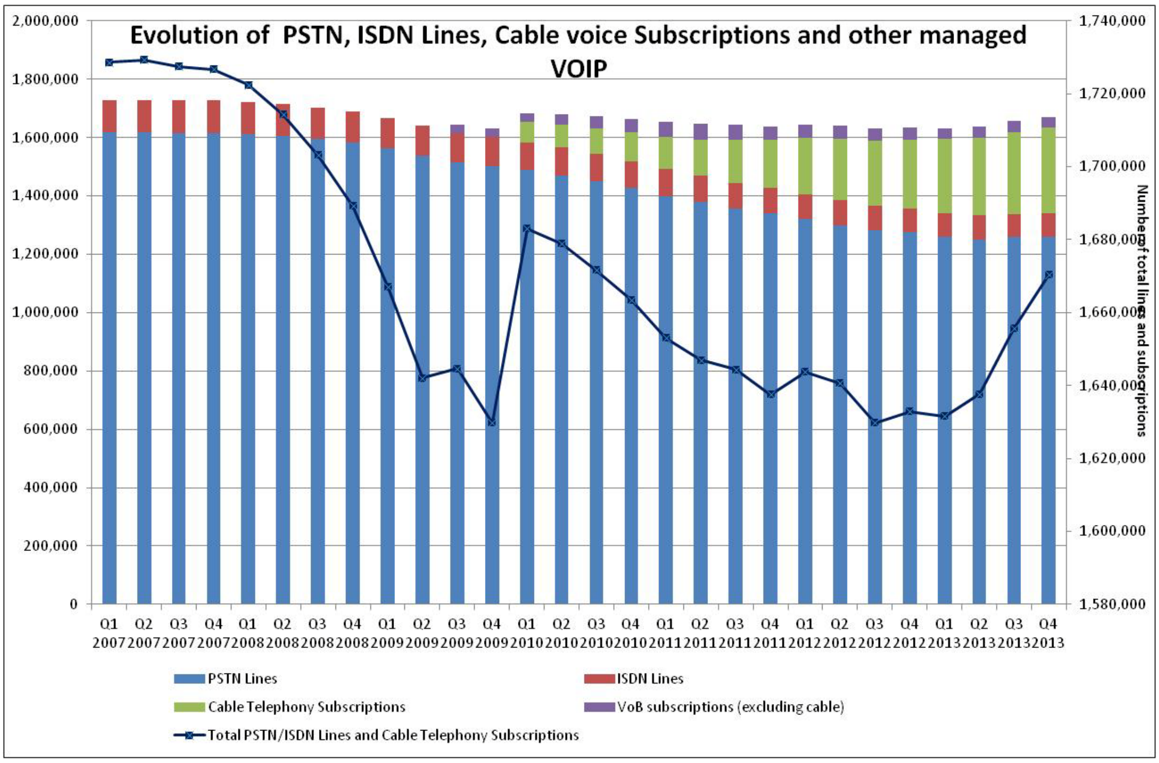

Figure E: Evolution of PSTN, ISDN Lines, Cable voice and other managed VOIP subscriptions, Q1'07 – Q4'13

Growth of Cable subscriptions

A 4.8 As illustrated in Figure F, the development of managed VOIP over cable broadband has spurred the growth in availability and subscription to UPC's cable telephone service. As of Q4 2013 UPC had a retail share of approximately 19% of all fixed telephony subscriptions.[467]

[466] Since 2007, fixed retail voice traffic (excluding VoB traffic) has also fallen, from 2.4 billion minutes in Q1 2007 to 1.1 billion minutes in Q4 2013, a decrease of 53%.

[467] ComReg's Quarterly Report data, March 2014.

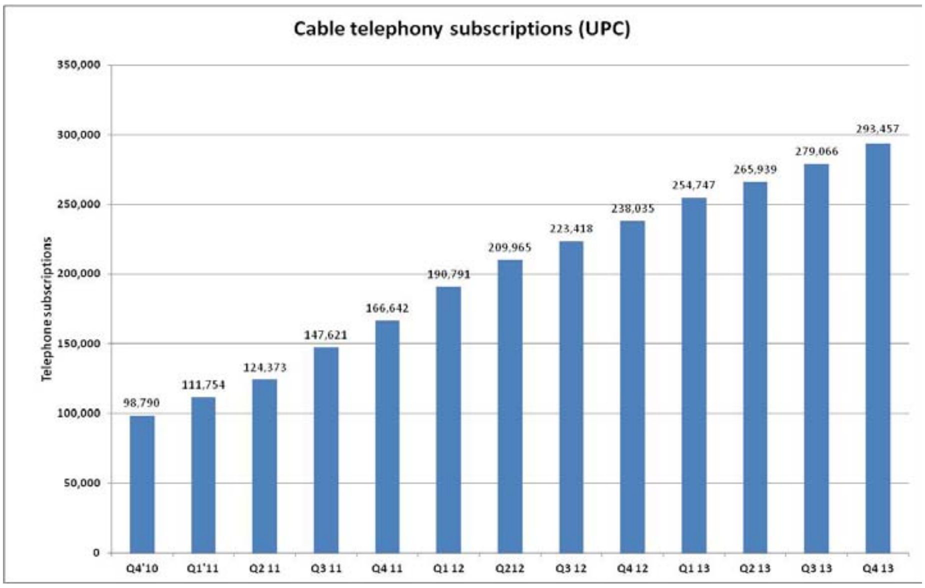

Figure F: UPC's cable telephony subscriptions, Q1 2010 - Q4 2013

Growth of broadband connections

A 4.9 Figure G illustrates the growth of broadband connections. As of Q4 2013 there were 1,689,052 broadband connections in Ireland (an increase of 1.3% since Q4 2012). Narrowband internet subscriptions continued to fall, declining by 25.1% since Q4 2012.

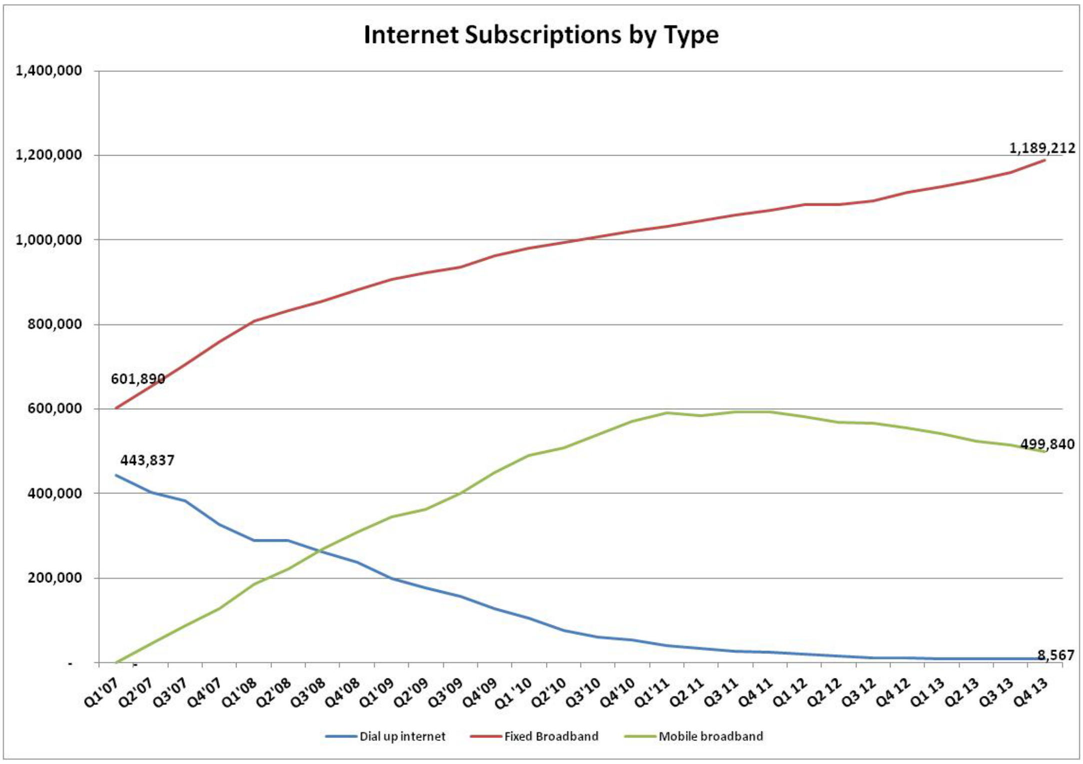

Figure G: Internet Subscriptions by Type, Q1 2007- Q4 2013

A 4.10 Figure H shows that in terms of choice of broadband internet access, most end-users are connecting using DSL technology/ modems (41.5%), with Eircom being the leading provider. The share of non-DSL fixed broadband lines has increased. Relative to other EU countries Ireland has a high proportion of mobile broadband subscriptions (29.6%).[468] Internet access using the cable network has also increased – reaching levels above 20% in Q4 2013. VDSL and FWA broadband accounted for 4.4% and 3.6% respectively while satellite and fibre (excluding cable) broadband subscriptions combined accounted for the remaining 0.7% of the market. ComReg notes that some or all of the recent reductions in the number of DSL broadband subscriptions are accounted for by a switch to VDSL service.

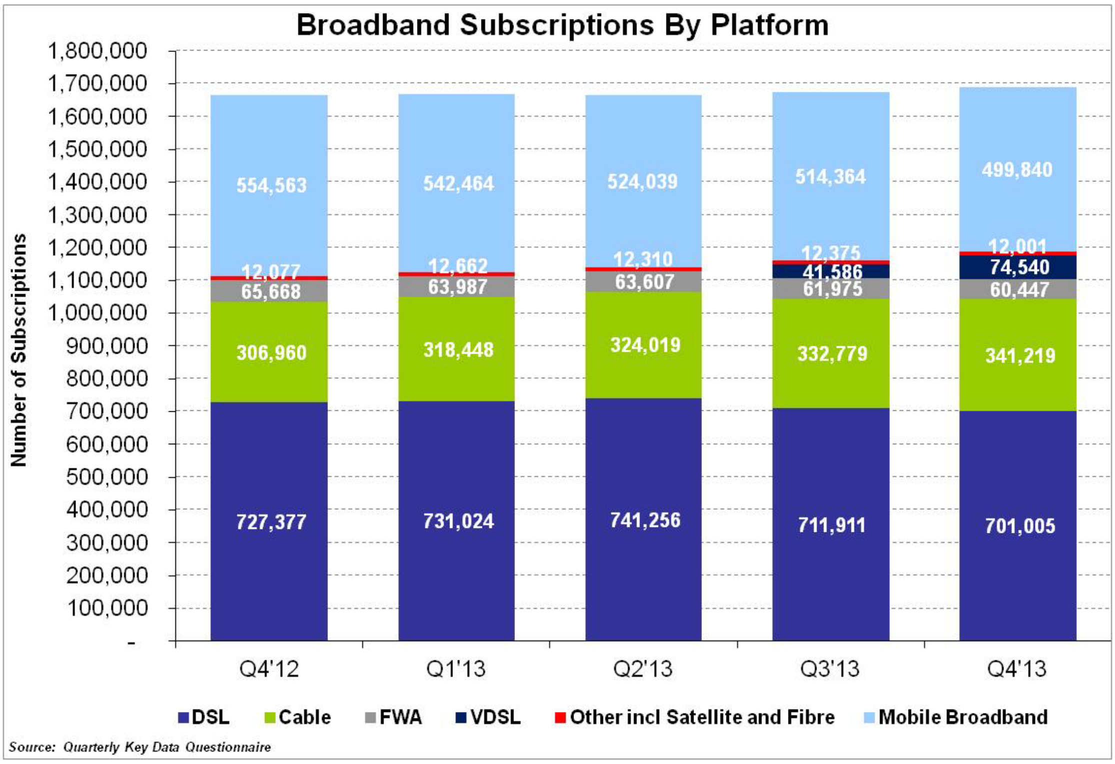

Figure H: Broadband Subscriptions by Platform, Q3 2012 – Q4 2013

Increasing uptake of bundled services

A 4.11 As evident from Figure I, bundles offering "double play" (in particular, the combination of FVA, fixed voice calls and fixed broadband internet access) are the most common. Demand for triple-play (e.g. fixed telephony, internet and TV) has grown significantly in 2013 with Eircom, Sky Ireland and Vodafone offering triple play services in addition to those offered by UPC.

[468] This includes mobile dongles/data cards only. Internet access over handsets is not included.

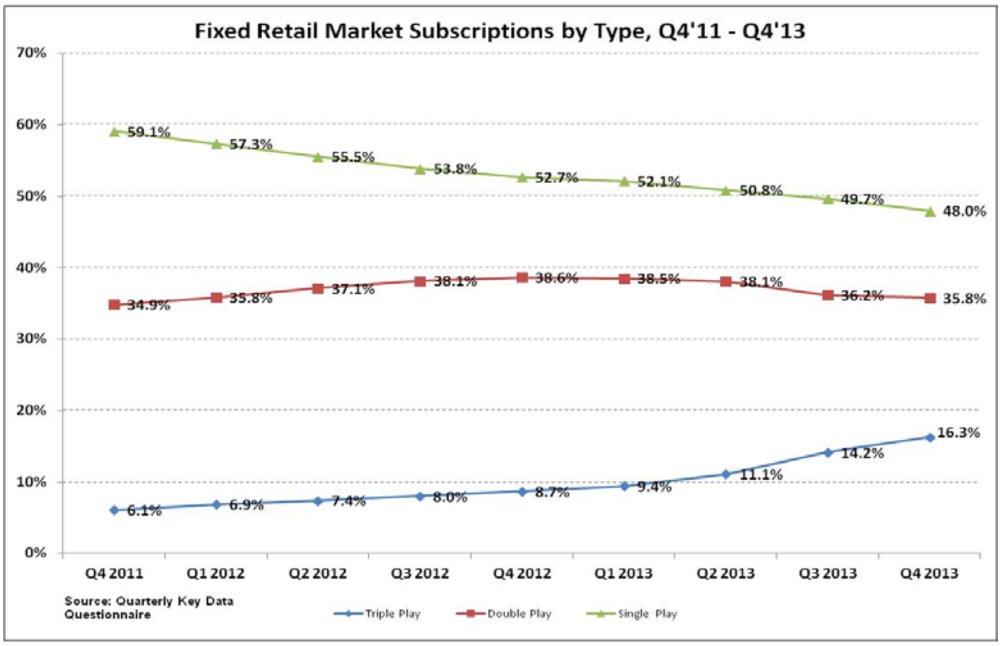

Figure I: Fixed Market Retail Subscriptions by Type, Q3 2011 – Q4 2013

Convergence and Fixed Mobile Substitution

A 4.12 Figure J highlights recent volumes of originating voice calls by call type on both fixed and mobile networks on a quarterly basis. Mobile originating voice minutes (up 6.3% on Q4 2012) accounted for 69.0% of all voice minutes in Q4 2013 (compared to 65.1% in Q4 2012) while traffic originating on a fixed line network (down 10.6% on Q4 2012) accounted for the remaining 31.0% of all voice minutes (compared to 34.9% in Q4 2012).

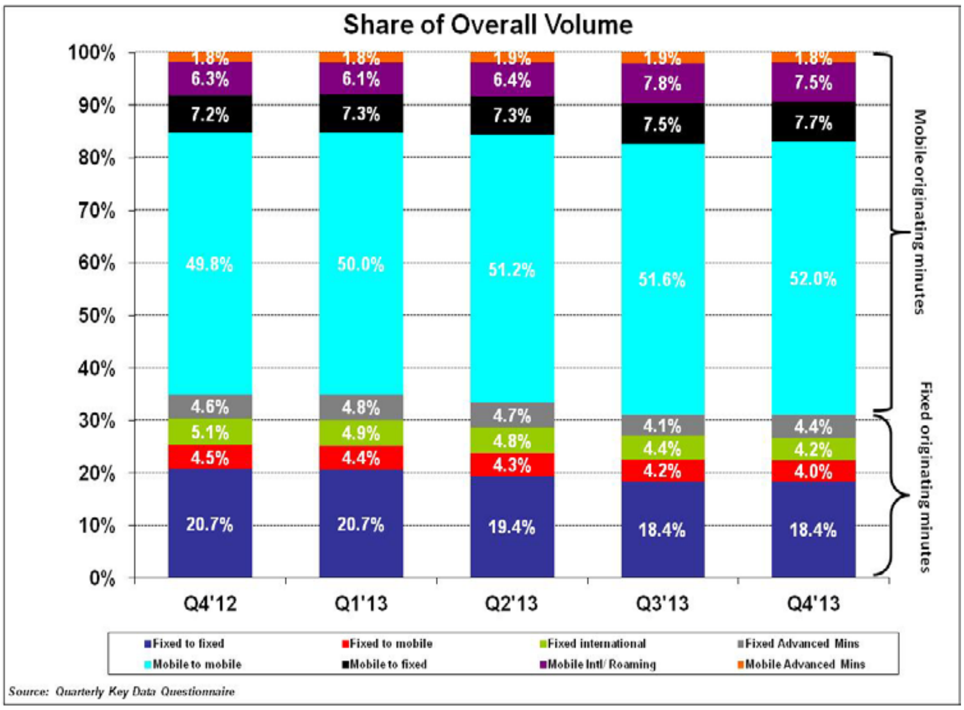

Figure J: Share of originating voice calls, Q4 2012 – Q4 2013

Appendix: 5 Updated pricing structures

Table 1: Price and non-price characteristics of standard residential and business products

Supplier	Product	Business	Residential
Eircom[469]	Line rental (entry level)	€20.96	€25
	Line rental plus broadband (range)	€30.00 up to €89.99[470]	€35 up to €50
Vodafone[471]	Line rental	€30.99	€30
	Line rental plus broadband	€39.99 up to €59.99	€40 up to €55
UPC[472]	fixed line phone with broadband (standalone FVA not available)	€45.50 up to €65.50	€37 up to €52
Digiweb[473]	Fixed line phone with broadband (FWA)	Prices not published on website	€29.95 up to €49.95
	Fixed line phone with broadband (DSL)	Prices not published on website	€30 up to €49.95
Sky[474]	Line rental	NA	€30
	Line rental plus broadband	NA	€30 up to €50

469 Prices as of February 2014. Available on the Eircom website here for residential products: https://secure.eircom.net/talktime/talktime-evolution-flow;jsessionid=BFBB3E7DC24FCC302FA3A92B61184C8E.jvm1?execution=e1s1 and here for business products: http://business.eircom.net/?view=Advanced

470 Includes mobile phone (emobile) service.

471 Prices as of February 2014. Available on http://www.vodafone.ie/home-phone-broadband/simply-talk/ and http://www.vodafone.ie/small-business/fixed/single-line/

472 Prices as of February 2014. Available on http://www.upc.ie/bundles/broadband-phone/ and http://business.upc.ie/products/

473 Prices as of February 2014. Available on the Digiweb website here: http://www.digiweb.ie/home/ and http://www.viatel.com/

474 Prices as of February 2014Available on http://www.sky.com/ireland.

Table 2: Eircom Retail Pricing – Narrowband Services[475]

Product	No. channels	Connection charge	Monthly rental
PSTN/FWA	1	€107.43	€20.96
ISDN BRA	2	€202.47	€32.51
ISDN BRA 'hi speed'	2	€99.16	€32.51
ISDN FRA	16	€3,299	€166.50
ISDN PRA	30	€3,299	€277.06

Table 3: Demand-side substitution[476] analysis

No. Channels	1	2	8	16	30
ISDN PSTN FWA	€358.95	€717.90	€2,871.60	€5743.20	€10,768.50
ISDN BRA	€592.59	€592.59	€2,370.36	€4,740.72	€8,888.85
ISDN BRA 'high speed'	€489.28	€489.28	€1,957.12	€3,914.24	€7,339.20
ISDN FRA	€5,297	€5,297	€5,297	€5,297	n/a[477]
ISDN PRA	€6,623.72	€6,623.72	€6,623.72	€6,623.72	€6,623.72

[475] For clarity, all prices are quoted exclusive of VAT. VAT is currently charged at 13.5% for standard PSTN connections only, Eircom Price List 2012, effective from 01/01/12. The VAT rate for all other services is charged at 23%. See monthly rental and connection for all products at www.eircom.ie, and also for charges in respect of ISDN; Eircom Price List, effective from 17/07/08 at www.eircom.ie.

[476] The total cost is calculated as follows: For example, in relation to demand for 8 channels, the initial connection charge and ongoing monthly rental are calculated for each access product i.e. 8 PSTN/FWA connections = 8*PSTN/FWA connection charge + 8*12*PSTN/FWA monthly rental, similarly the total cost is calculated for 4 ISDN BRA/BRA 'hi speed', 1 ISDN FRA and 1 ISDN PRA.

[477] Technically, ISDN FRA represents a variant of ISDN PRA and as such where a customer wished to avail of 30 lines they would opt for ISDN PRA.

Table 4: Evolution of PSTN and ISDN BRA line rental and connection prices

Product	No. Channels	Connection Charge 2007-2014	Monthly Rental 2007	Monthly Rental 2014	Percentage Increase
PSTN	1	€107.43	€19.98	€20.96	4.9%
ISDN BRA	2	€202.47	€30.99	€32.51	4.9%

Table 5: Evolution of ISDN FRA and PRA line rental and connection prices

Product	No. Channels	Connection Charge 2007-2014	Monthly Rental 2007	Monthly Rental 2014	Percentage Increase
ISDN FRA	16	€3,299	€158.72	€166.50	4.9%
ISDN PRA	30	€3,299	€264.11	€277.06	4.9%

Appendix: 6 Decision Instrument Market 1a Standalone Lower Level Voice Access ('Standalone LLVA')

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1. This Decision Instrument ("Decision Instrument") is made by the Commission for Communications Regulation ("ComReg") and relates to the retail market for access to the public telephone network at a fixed location for residential and non-residential customers, as identified by the European Commission 2007 Recommendation and as analysed by ComReg in the document entitled "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", ComReg Decision D12/14, ComReg Document 14/89.

1.2. This Decision Instrument is made:

i. Pursuant to and having regard to the functions and objectives of ComReg as set out in Sections 10 and 12 of the Communications Regulation Act 2002 as amended and in Regulation 16 of the Framework Regulations; and

ii. Having taken account of the functions of ComReg under Regulation 6(1) of the Access Regulations; and

iii. Having taken the utmost account of the European Commission 2007 Recommendation and the SMP Guidelines; and

iv. Having, where appropriate, pursuant to Section 13 of the Communications Regulation Act 2002 as amended complied with the policy directions made by the Minister for Communications, Marine and Natural Resources;[478] and

v. Having had regard, as appropriate, to the market definition, market analysis and reasoning set out in ComReg Document 12/117, and ComReg Document 13/95, and to the market definition, market analysis and reasoning set out in ComReg Decision D12/14; and

vi. Having taken account of the submissions received from interested parties in relation to ComReg Document 12/117 and ComReg Document 13/95 following a public consultation pursuant to Regulation 12 of the Framework Regulations; and

vii. Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations; and

viii. Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulations 13 and 14 of the Framework Regulations and having taken the utmost account pursuant to Regulation 13(6) of the Framework Regulations of

[478] Policy Directions made the Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004.

any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State in accordance with Article 7(3) of the Framework Directive; and

ix. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations, Regulation 13 of the Universal Service Regulations and Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations.

1.3. The provisions of ComReg Document 12/117, ComReg Document 13/95 and ComReg Decision D12/14 shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2. DEFINITIONS AND INTERPRETATION

2.1. In this Decision Instrument:

"Access Regulations" means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

"Authorisation Regulations" means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

"Authorised Undertaking(s)" shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

"BEREC" means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

"Communications Regulation Act 2002 as amended" means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) ("Communications Regulation Act 2002 as amended");

"ComReg" means the Commission for Communications Regulation, established under the Communications Regulation Act 2002 as amended;

"ComReg Decision D07/61" means ComReg Document 07/61, Decision D07/61 entitled "Decision Notice and Decision Instrument – Designation of SMP and SMP Obligations – Market Analysis: Retail Fixed Narrowband Access Markets" dated 24 August 2007;

"ComReg Decision 03/07" means ComReg Document 07/76, Decision 03/07 entitled "Decision Notice and Decision Instrument – SMP Obligation: Retail Price Cap Remedy – Fixed Narrowband Access Markets" dated 1 October 2007;

"ComReg Document 08/19 and associated Directions" means ComReg Document 08/19 entitled "Single Billing Wholesale Line Rental and Directions to Eircom regarding retail minus %", dated 22 February 2008;

"ComReg Decision D08/10" means ComReg Document 10/67 entitled "Response to Consultation Document 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited", dated 31 August 2010;

"ComReg Decision D05/11" means ComReg Document 11/45 entitled "Response to Consultation and Decision on the introduction of Key Performance Indicators for Regulated Markets" dated 29 June 2011;

"ComReg Document 12/117" means ComReg Document 12/117 entitled "Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", dated 26 October 2012;

"ComReg Document 13/95" means ComReg Document 13/95 entitled "Supplementary Consultation to ComReg Document 12/117, Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", dated 17 October 2013;

"ComReg Decision D12/14" means ComReg Document 14/89, ComReg Decision D12/14, entitled "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers" dated 28 August 2014;

"DSL" means digital subscriber line;

"Effective Date" means the date set out in Section 15 of this Decision Instrument;

"Eircom" means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

"End-User" shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Authorised Undertaking;

"European Commission 2007 Recommendation" means the 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, 28.12.2007);

“European Commission Explanatory Note” means the European Commission Explanatory Note accompanying the 2007 Recommendation, SEC(2007) 1483/2, C(2007) 5406;

“Framework Directive” 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“FWA” means fixed wireless access;

“ISDN” means integrated services digital network;

“ISDN BRA” means ISDN basic rate access;

“Managed Voice Over Internet Protocol (VOIP)” means a managed voice over internet protocol service, including but not limited to managed VOIP provided over cable, DSL, fibre optic, cable and fixed wireless access (FWA), which is provided to a similar quality as the voice service currently provided by Eircom over PSTN;

“Market” means the market as defined in Section 4 below;

“PSTN” means public switched telephone network(s);

“Significant Market Power (SMP) Obligations” are those obligations as more particularly described in Part II below;

“SMP Guidelines” means the European Commission Guidelines of 11 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C165/03) (OJ C 165/6);

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Universal Service Regulations” means the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011); and

“Working Day” means a day which is not a Saturday, Sunday or public holiday in Ireland.

3. SCOPE AND APPLICATION

3.1. This Decision Instrument applies to Eircom in respect of activities falling within the scope of the Market as defined in Section 4 of this Decision Instrument.

3.2. This Decision Instrument is binding upon Eircom in the manner now set out below and Eircom shall comply with this Decision Instrument in all respects.

4. MARKET DEFINITION

4.1. This Decision Instrument relates to the retail market for access to the public telephone network at a fixed location for residential and non-residential customers, as identified in the 2007 European Commission Recommendation and as analysed by ComReg in ComReg Decision D12/14.

4.2. Pursuant to Regulation 26 of the Framework Regulations and in accordance with the European Commission 2007 Recommendation and the European Commission Explanatory Note, taking the utmost account of the SMP Guidelines and in accordance with the principles of competition law, the Market is defined in this Decision Instrument as the retail market for access to the public telephone network at a fixed location in Ireland for the provision of voice telephony services by means of:

> Standalone lower level voice access comprising access via a PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA or DSL), that is used to provide a PSTN voice, ISDN voice or Managed VOIP service that is offered or sold on a standalone basis to End-Users or when offered or sold in a package with fixed voice calls to End-Users (the "Market").

4.3. The Market is more particularly described in Chapter 4 of ComReg Document 14/89, ComReg Decision D12/14.

5. DESIGNATION OF UNDERTAKING WITH SIGNIFICANT MARKET POWER ('SMP')

5.1. Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and taking the utmost account of the SMP Guidelines, having determined that the Market is not effectively competitive, Eircom is designated as having SMP in the Market.

<u>PART II - SMP OBLIGATIONS (SECTIONS 6 TO 11 OF THE DECISION INSTRUMENT)</u>

6. SMP OBLIGATIONS

6.1. In accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, ComReg is continuing to maintain in force certain SMP Obligations on Eircom as detailed in Section 7 of this Decision Instrument.

6.2. In accordance with and pursuant to Regulation 13 of the Universal Service Regulations, having determined that the Market is not effectively competitive and that obligations imposed by ComReg under Regulations 9 to 13 of the Access Regulations would not result in the achievement of the objectives set out in Section 12 of the Communications Regulation Act 2002 as amended and Regulation 16 of the Framework Regulations, ComReg is imposing and/or continuing certain SMP Obligations on Eircom in respect of the Market, as detailed further in Section 7 to 11 of this Decision Instrument.

7. CONTINUATION IN FORCE OF CERTAIN OBLIGATIONS

7.1. In accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, Section 5 “Wholesale Obligations (1) Carrier Selection and Pre-Selection” and Section 6 “Wholesale Obligations (2) Single Billing Wholesale Line Rental” both contained in the Decision Instrument set out in the Annex to ComReg Decision D07/61, shall continue in force and apply to Eircom until further notice by ComReg.

7.2. For the avoidance of doubt, ComReg Document 08/19 and associated Directions, shall continue in force and apply to Eircom until further notice by ComReg.

7.3. For the avoidance of doubt, ComReg Decision D05/11 shall continue in force and apply to Eircom until further notice by ComReg.

8. OBLIGATION OF TRANSPARENCY

8.1. Pursuant to Regulations 13(1) of the Universal Service Regulations, Eircom shall notify ComReg no later than five (5) Working Days in advance of the implementation of proposed changes to the terms and conditions of supply (including prices) of services within the Market.

8.2. Pursuant to Regulations 13(1) of the Universal Service Regulations Eircom shall publish on its website in a manner which is reasonably accessible to End-Users all changes in relation to the terms and conditions of supply (including prices) of services within the Market as soon as such changes come into effect.

8.3. Pursuant to Regulations 13(1) of the Universal Service Regulations Eircom shall, in respect of services within the Market, supply such services in accordance with the published price.

9. OBLIGATION RELATING TO PRICE CONTROL

9.1. Pursuant to Regulation 13(2)(a) of the Universal Service Regulations, Eircom shall not charge excessive prices for the supply of services falling within the scope of the Market.

9.2. Pursuant to Regulation 13(3) of the Universal Service Regulations, the obligations relating to lower level services contained in the Decision Instrument set out in Annex 1 of ComReg Decision 03/07 shall continue in force and apply to Eircom in the Market until further notice by ComReg.

10. OBLIGATION NOT TO UNREASONABLY BUNDLE SERVICES

10.1. Pursuant to Regulation 13(2)(d) of the Universal Service Regulations, Eircom shall not unreasonably bundle services falling within the Market to End-Users by tying.

10.2. Without prejudice to the generality of the obligation in Section 10.1, Eircom shall ensure, in offering or selling services falling within the Market, that:

(i) End-Users are able to purchase, on a standalone basis, an individual service in the Market included in any bundle without being required by contractual or non-contractual means to purchase another service in a bundle or another service; and

(ii) End-Users should not be required to pay for services or facilities which are not necessary for the provision of the individual service requested in the Market.

11. OBLIGATION RELATING TO COST ACCOUNTING

11.1. Pursuant to Regulation 13(4) of the Universal Service Regulations, Eircom shall operate and maintain a cost accounting system in respect of the Market that is:

(i) based on generally accepted accounting practices;
(ii) suitable for demonstrating compliance with the relevant obligations imposed under this Decision Instrument; and
(iii) capable of verification by ComReg or a qualified independent party.

11.2. Without prejudice to the generality of the obligation in Section 11.1, pursuant to Regulation 13 and Regulation 30 of the Universal Service Regulations Eircom shall comply with all of the obligations in relation to cost accounting set out in ComReg Decision D08/10 and in any other decisions or directions which may be issued by ComReg from time to time.

PART III - OBLIGATIONS AND EFFECTIVE DATE (SECTIONS 12 TO 15 OF THE DECISION INSTRUMENT)

12. STATUTORY POWERS NOT AFFECTED

12.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it from time to time under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument).

13. WITHDRAWAL OF OBLIGATIONS

13.1. Save as provided for in Section 6 and Section 7 above, the Decision set out in ComReg Decision D07/61 is hereby withdrawn only when this Decision Instrument contained in Appendix 6 Market 1a: Standalone LLVA; the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA; and the Decision Instrument contained in Appendix 8 Market 1c: HLVA (all of ComReg Decision D12/14) shall together have full force and effect.

14. MAINTENANCE OF OBLIGATIONS

14.1. Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.

14.2. If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

14.3. For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

15. EFFECTIVE DATE

15.1. The Effective Date of this Decision Instrument shall be the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 28 DAY OF AUGUST 2014

Appendix: 7 Decision Instrument Market 1b: Bundled Lower Level Voice Access ('Bundled LLVA')

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1. This Decision Instrument ("Decision Instrument") is made by the Commission for Communications Regulation ("ComReg") and relates to the retail market for access to the public telephone network at a fixed location for residential and non-residential customers, as identified by the European Commission 2007 Recommendation and as analysed by ComReg in the document entitled "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", ComReg Decision D12/14 ComReg Document 14/89.

1.2. This Decision Instrument is made:

i. Pursuant to and having regard to the functions and objectives of ComReg as set out in Sections 10 and 12 of the Communications Regulation Act 2002 as amended and in Regulation 16 of the Framework Regulations; and

ii. Having taken account of the functions of ComReg under Regulation 6(1) of the Access Regulations; and

iii. Having taken the utmost account of the European Commission 2007 Recommendation and the SMP Guidelines; and

iv. Having, where appropriate, pursuant to Section 13 of the Communications Regulation Act 2002 as amended complied with the policy directions made by the Minister for Communications, Marine and Natural Resources;[479] and

v. Having had regard, as appropriate, to the market definition, market analysis and reasoning set out in ComReg Document 12/117, and ComReg Document 13/95, and to the market definition, market analysis and reasoning set out in ComReg Decision D12/14; and

vi. Having taken account of the submissions received from interested parties in relation to ComReg Document 12/117 and ComReg Document 13/95 following a public consultation pursuant to Regulation 12 of the Framework Regulations; and

vii. Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations; and

viii. Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulations 13 and 14 of the Framework Regulations and having taken the utmost account pursuant to Regulation 13(6) of the Framework Regulations of

479 Policy Directions made the Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004.

any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State in accordance with Article 7(3) of the Framework Directive; and

ix. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations, Regulation 13 of the Universal Service Regulations and Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations.

1.3. The provisions of ComReg Document 12/117, ComReg Document 13/95 and ComReg Decision D12/14 shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2. DEFINITIONS AND INTERPRETATION

2.1. In this Decision Instrument:

"Access Regulations" means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

"Authorisation Regulations" means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

"Authorised Undertaking(s)" shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

"BEREC" means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

"Communications Regulation Act 2002 as amended" means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) ("Communications Regulation Act 2002 as amended");

"ComReg" means the Commission for Communications Regulation, established under the Communications Regulation Act 2002 as amended;

"ComReg Decision D07/61" means ComReg Document 07/61, Decision D07/61 entitled "Decision Notice and Decision Instrument – Designation of

SMP and SMP Obligations – Market Analysis: Retail Fixed Narrowband Access Markets" dated 24 August 2007;

"ComReg Document 08/19 and associated Directions" means ComReg Document 08/19 entitled "Single Billing Wholesale Line Rental and Directions to Eircom regarding retail minus %", dated 22 February 2008;

"ComReg Decision D08/10" means ComReg Document 10/67 entitled "Response to Consultation Document 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited", dated 31 August 2010;

"ComReg Decision D05/11" means ComReg Document 11/45 entitled "Response to Consultation and Decision on the introduction of Key Performance Indicators for Regulated Markets", dated 29 June 2011;

"ComReg Document 12/117" means ComReg Document 12/117 entitled "Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", dated 26 October 2012;

"ComReg Document 13/95" means ComReg Document 13/95 entitled "Supplementary Consultation to ComReg Document 12/117, Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", 17 October 2013;

"ComReg Decision 04/13" means ComReg Document 13/14 entitled "Price Regulation of Bundled Offers", dated 8 February 2013;

"ComReg Decision D12/14" means ComReg Document 14/89, ComReg Decision D12/14 entitled "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers" dated 28 August 2014;

"DSL" means digital subscriber line;

"Effective Date" means the date set out in Section 13 of this Decision Instrument;

"Eircom" means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

"End-User" shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Authorised Undertaking;

"European Commission 2007 Recommendation" means the 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, 28.12.2007);

"European Commission Explanatory Note" means the European Commission Explanatory Note accompanying the 2007 Recommendation, SEC(2007) 1483/2, C(2007) 5406;

"Framework Directive" 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009;

"Framework Regulations" means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

"FWA" means fixed wireless access;

"ISDN" means integrated services digital network;

"ISDN BRA" means ISDN basic rate access;

"Managed Voice Over Internet Protocol (VOIP)" means a managed voice over internet protocol service, including but not limited to managed VOIP provided over cable, digital subscriber line (DSL), fibre optic cable and fixed wireless access (FWA), which is provided to a similar quality as the voice service currently provided by Eircom over PSTN;

"Market" means the market as defined in Section 4 below;

"PSTN" means public switched telephone network(s);

"Significant Market Power (SMP) Obligations" are those obligations as more particularly described in Part II below;

"SMP Guidelines" means the European Commission Guidelines of 11 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C165/03) (OJ C 165/6);

"Undertaking" shall have the same meaning as under Regulation 2 of the Framework Regulations;

"Universal Service Regulations" means the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011); and

"Working Day" means a day which is not a Saturday, Sunday or public holiday in Ireland.

3. SCOPE AND APPLICATION

3.1. This Decision Instrument applies to Eircom in respect of activities falling within the scope of the Market as defined in Section 4 of this Decision Instrument.

3.2. This Decision Instrument is binding upon Eircom in the manner now set out below and Eircom shall comply with this Decision Instrument in all respects.

4. MARKET DEFINITION

4.1. This Decision Instrument relates to the retail market for access to the public telephone network at a fixed location for residential and non-residential customers, as identified in the 2007 European Commission Recommendation and as analysed by ComReg in ComReg Decision D12/14.

4.2. Pursuant to Regulation 26 of the Framework Regulations and in accordance with the European Commission 2007 Recommendation and the European Commission Explanatory Note taking the utmost account of the SMP Guidelines and in accordance with the principles of competition law, the Market is defined in this Decision Instrument as the retail market for access to the public telephone network at a fixed location in Ireland for the provision of voice telephony services by means of:

> Bundled lower level voice access comprising access via a PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA or DSL) that is used to provide a PSTN voice, ISDN voice or Managed VOIP service that is offered or sold to End-Users in a product bundle which includes any of broadband, television or mobile services (and which product bundle may include fixed voice calls) ("the Market").

4.3. The Market is more particularly described in Chapter 4 of ComReg Document 14/89, ComReg Decision D12/14.

5. DESIGNATION OF UNDERTAKING WITH SIGNIFICANT MARKET POWER ('SMP')

5.1. Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and taking the utmost account of the SMP Guidelines, having determined that the Market is not effectively competitive, Eircom is designated as having SMP in the Market.

PART II - SMP OBLIGATIONS (SECTIONS 6 TO 9 OF THE DECISION INSTRUMENT)

6. SMP OBLIGATIONS

6.1. In accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, ComReg is continuing to maintain in force certain SMP Obligations on Eircom as detailed further in Section 7 of this Decision Instrument.

6.2. In accordance with and pursuant to Regulation 13 of the Universal Service Regulations, having determined that the Market is not effectively competitive and that obligations imposed by ComReg under Regulations 9 to 13 of the Access Regulations would not result in the achievement of the objectives set out in Section 12 of the Communications Regulation Act 2002 as amended and Regulation 16 of the Framework Regulations, ComReg is imposing and/or continuing certain SMP Obligations on Eircom in respect of the Market, as detailed further in Sections 7 to 9 of this Decision Instrument.

7. CONTINUATION IN FORCE OF CERTAIN OBLIGATIONS

7.1. In accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, Section 5 “Wholesale Obligations (1) Carrier Selection and Pre-Selection” and Section 6 “Wholesale Obligations (2) Single Billing Wholesale Line Rental” both contained in the Decision Instrument set out in the Annex to ComReg Decision D07/61, shall continue in force and apply to Eircom until further notice by ComReg.

7.2. For the avoidance of doubt, ComReg Document 08/19 and associated Directions, shall continue in force and apply to Eircom until further notice by ComReg.

7.3. For the avoidance of doubt, ComReg Decision D05/11 shall continue in force and apply to Eircom until further notice by ComReg.

8. OBLIGATION NOT TO UNREASONABLY BUNDLE SERVICES

8.1. Pursuant to Regulation 13(2)(d) of the Universal Service Regulations, Eircom shall not unreasonably bundle services falling within the Market with other services to End-Users.

8.2. Without prejudice to the generality of the obligation in Section 8.1, Eircom shall with respect to the Market and, pursuant to Regulation 13(2)(d) of the Universal Service Regulations, ensure that a bundle avoids a margin squeeze and complies with a net revenue test.

8.3. Pursuant to Regulation 13(2)(d) of the Universal Service Regulations and without prejudice to Sections 8.1 and 8.2, Eircom shall continue to comply with the obligations contained in the Decision Instrument set out in Annex 3 of ComReg Decision D04/13 which shall continue in force with respect to the Market, until further notice by ComReg.

9. OBLIGATION RELATING TO COST ACCOUNTING

9.1. Pursuant to Regulation 13(4) of the Universal Service Regulations, Eircom shall operate and maintain a cost accounting system in respect of the Market that is:

(i) based on generally accepted accounting practices;
(ii) suitable for demonstrating compliance with the relevant obligations imposed under this Decision Instrument; and
(iii) capable of verification by ComReg or a qualified independent party.

9.2. Without prejudice to the generality of the obligation in Section 9.1, pursuant to Regulation 13 and Regulation 30 of the Universal Service Regulations, Eircom shall comply with all of the obligations in relation to cost accounting set out in ComReg Decision D08/10 and in any other decisions or directions which may be issued by ComReg from time to time.

PART III - OBLIGATIONS AND EFFECTIVE DATE (SECTIONS 10 TO 13 OF THE DECISION INSTRUMENT)

10. STATUTORY POWERS NOT AFFECTED

10.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it from time to time under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

11. WITHDRAWAL OF OBLIGATIONS

11.1. Save as provided for in Section 6 and Section 7 above, the Decision set out in ComReg Decision D07/61 is hereby withdrawn only when this Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA; the Decision Instrument contained in Appendix 6 Market 1a: Standalone LLVA; and the Decision Instrument contained in Appendix 8 Market 1c: HLVA (all of ComReg Decision D12/14) shall together have full force and effect.

12. MAINTENANCE OF OBLIGATIONS

12.1. Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.

12.2. If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

12.3. For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

13. EFFECTIVE DATE

13.1. The Effective Date of this Decision Instrument shall be the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 28 DAY OF AUGUST 2014

Appendix: 8 Decision Instrument Market 1c: Higher Level Voice Access ('HLVA')

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1. This Decision Instrument ("Decision Instrument") is made by the Commission for Communications Regulation ("ComReg") and relates to the retail market for access to the public telephone network at a fixed location for residential and non-residential customers, as identified by the European Commission 2007 Recommendation and as analysed by ComReg in the document entitled "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", ComReg Document 14/89, ComReg Decision D12/14.

1.2. This Decision Instrument is made:

i. Pursuant to and having regard to the functions and objectives of ComReg as set out in Sections 10 and 12 of the Communications Regulation Act 2002 as amended and in Regulation 16 of the Framework Regulations; and

ii. Having taken account of the functions of ComReg under Regulation 6(1) of the Access Regulations; and

iii. Having taken the utmost account of the European Commission 2007 Recommendation and the SMP Guidelines; and

iv. Having, where appropriate, pursuant to Section 13 of the Communications Regulation Act 2002 as amended complied with the policy directions made by the Minister for Communications, Marine and Natural Resources[480]; and

v. Having had regard, as appropriate, to the market definition, market analysis and reasoning set out in ComReg Document 12/117, and ComReg Document 13/95, and to the market definition, market analysis and reasoning set out in ComReg Decision D12/14; and

vi. Having taken account of the submissions received from interested parties in relation to ComReg Document 12/117 and ComReg Document 13/95 following a public consultation pursuant to Regulation 12 of the Framework Regulations; and

vii. Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations; and

viii. Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulations 13 and 14 of the Framework Regulations and having taken the utmost account pursuant to Regulation 13(6) of the Framework Regulations of

480 Policy Directions made the Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004.

any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State in accordance with Article 7(3) of the Framework Directive; and

ix. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations, Regulation 13 of the Universal Service Regulations and Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations.

1.3. The provisions of ComReg Document 12/117, ComReg Document 13/95 and ComReg Decision D12/14 shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2. DEFINITIONS AND INTERPRETATION

2.1. In this Decision Instrument:

"Access Regulations" means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

"Authorisation Regulations" means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

"Authorised Undertaking(s)" shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

"BEREC" means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

"Communications Regulation Act 2002 as amended" means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) ("Communications Regulation Act 2002 as amended");

"ComReg" means the Commission for Communications Regulation, established under the Communications Regulation Act 2002 as amended;

"ComReg Decision D07/61" means ComReg Document 07/61, Decision D07/61 entitled "Decision Notice and Decision Instrument – Designation of SMP and SMP

Obligations – Market Analysis: Retail Fixed Narrowband Access Markets" dated 24 August 2007;

"ComReg Document 08/19 and associated Directions" means ComReg Document 08/19 entitled "Single Billing Wholesale Line Rental and Directions to Eircom regarding retail minus %", dated 22 February 2008;

"ComReg Decision D08/10" means ComReg Document 10/67 entitled "Response to Consultation Document 09/75 and Final Direction and Decision, entitled "Accounting Separation and Cost Accounting Review of Eircom Limited", dated 31 August 2010;

"ComReg Decision D05/11" means ComReg Document 11/45 entitled "Response to Consultation and Decision on the introduction of Key Performance Indicators for Regulated Markets", dated 29 June 2011;

"ComReg Document 12/117" means ComReg Document 12/117 entitled "Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", dated 26 October 2012;

"ComReg Document 13/95" means ComReg Document 13/95 entitled "Supplementary Consultation to ComReg Document 12/117, Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers", dated 17 October 2013;

"ComReg Decision D04/13" means ComReg Document 13/14 entitled "Price Regulation of Bundled Offers", dated 8 February 2013;

"ComReg Decision D12/14" means ComReg Document 14/89, ComReg Decision D12/14 entitled "Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers" dated 28 August 2014;

"Effective Date" means the date set out in Section 13 of this Decision Instrument;

"Eircom" means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

"End-User" shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Authorised Undertaking;

"European Commission 2007 Recommendation" means 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, 28.12.2007);

"European Commission Explanatory Note" means the European Commission Explanatory Note accompanying the 2007 Recommendation, SEC(2007) 1483/2, C(2007) 5406;

"Framework Directive" 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009;

"Framework Regulations" means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

"ISDN" means integrated services digital network;

"ISDN FRA" means ISDN fractional primary rate access;

"ISDN PRA" means ISDN primary rate access;

"Market" means the market as defined in Section 4 below;

"SMP Guidelines" means the European Commission Guidelines of 11 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C165/03) (OJ C 165/6);

"Significant Market Power (SMP) Obligations" are those obligations as more particularly described in Part II below;

"Undertaking" shall have the same meaning as under Regulation 2 of the Framework Regulations;

"Universal Service Regulations" means the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011); and

"Working Day" means a day which is not a Saturday, Sunday or public holiday in Ireland.

3. SCOPE AND APPLICATION

3.1 This Decision Instrument applies to Eircom in respect of activities falling within the scope of the Market as defined in Section 4 of this Decision Instrument.

3.2 This Decision Instrument is binding upon Eircom in the manner now set out below and Eircom shall comply with this Decision Instrument in all respects.

4. MARKET DEFINITION

4.1 This Decision Instrument relates to the retail market for access to the public telephone network at a fixed location for residential and non-residential customers, as identified in the 2007 European Commission Recommendation and as analysed by ComReg in ComReg Decision D12/14.

4.2 Pursuant to Regulation 26 of the Framework Regulations and in accordance with the European Commission 2007 Recommendation and the European Commission Explanatory Note, taking the utmost account of the SMP Guidelines and in accordance with the principles of competition law, the Market is defined in this Decision Instrument as the retail market for access to the public telephone network at a fixed location in Ireland for the provision of voice telephony services by means of:

> Higher level voice access comprising access via ISDN FRA or ISDN PRA that is used to provide a voice service offered or sold to End-Users either on a standalone basis or in a package with fixed voice calls, or in a product bundle which includes any of broadband, television, or mobile services (and which product bundle may also include fixed voice calls) ('the Market').

4.3 The Market is more particularly described in Chapter 4 of ComReg Decision D12/14*.*

5 DESIGNATION OF UNDERTAKING WITH SIGNIFICANT MARKET POWER ('SMP')

5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and taking the utmost account of the SMP Guidelines, having determined that the Market is not effectively competitive, Eircom is designated as having SMP in the Market.

<u>PART II - SMP OBLIGATIONS (SECTIONS 6 TO 9 OF THE DECISION INSTRUMENT)</u>

6 SMP OBLIGATIONS

6.1 In accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, ComReg is continuing to maintain in force certain SMP Obligations on Eircom, as detailed further in Section 7 of this Decision Instrument.

6.2 In accordance with and pursuant to Regulation 13 of the Universal Service Regulations, having determined that the Market is not effectively competitive and that obligations imposed by ComReg under Regulations 9 to 13 of the Access Regulations would not result in the achievement of the objectives set out in Section 12 of the Communications Regulation Act 2002 as amended and Regulation 16 of the Framework Regulations, ComReg is imposing and/or continuing certain SMP Obligations on Eircom in respect of the Market, as detailed further in Sections 7 to 9 of this Decision Instrument.

7 CONTINUATION IN FORCE OF CERTAIN OBLIGATIONS

7.1 In accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, Section 5 “Wholesale Obligations (1) Carrier Selection and Pre-Selection” and Section 6 “Wholesale Obligations (2) Single Billing Wholesale Line Rental” both contained in the Decision Instrument set out in the Annex to ComReg Decision D07/61, shall continue in force and apply to Eircom until further notice by ComReg.

7.2 For the avoidance of doubt, ComReg Document 08/19 and associated Directions, shall continue in force and apply to Eircom until further notice by ComReg.

7.3 For the avoidance of doubt, ComReg Decision D05/11 shall continue in force and apply to Eircom until further notice by ComReg.

8 OBLIGATION NOT TO UNREASONABLY BUNDLE SERVICES

8.1 Pursuant to Regulation 13(2)(d) of the Universal Service Regulations, Eircom shall not unreasonably bundle services falling within the Market with other services to End-Users.

8.2 Without prejudice to the generality of the obligation in Section 8.1, Eircom shall with respect to the Market and, pursuant to Regulation 13(2)(d) of the Universal Service Regulations, ensure that a bundles avoids a margin squeeze and complies with a net revenue test.

8.3 Pursuant to Regulation 13(2)(d) of the Universal Service Regulations and without prejudice to Sections 8.1 and 8.2, Eircom shall continue to comply with the obligations contained in the Decision Instrument set out in Annex 3 of ComReg Decision D04/13 which shall continue in force with respect to the Market, until further notice by ComReg.

9 OBLIGATION RELATING TO COST ACCOUNTING

9.1 Pursuant to Regulation 13(4) of the Universal Service Regulations, Eircom shall operate and maintain a cost accounting system in respect of the Market that is:

(i) based on generally accepted accounting practices;
(ii) suitable for demonstrating compliance with the relevant obligations imposed under this Decision Instrument; and
(iii) capable of verification by ComReg or a qualified independent party.

9.2 Without prejudice to the generality of the obligation in Section 9.1, pursuant to Regulation 13 and Regulation 30 of the Universal Service Regulations, Eircom shall comply with all of the obligations in relation to cost accounting set out in ComReg Decision D08/10 and in any other decisions or directions which may be issued by ComReg from time to time.

PART III - OBLIGATIONS AND EFFECTIVE DATE (SECTIONS 10 TO 13 OF THE DECISION INSTRUMENT)

10 STATUTORY POWERS NOT AFFECTED

10.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it from time to time under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

11 WITHDRAWAL OF OBLIGATIONS

11.1 Save as provided for in Section 6 and Section 7 above, the Decision set out in ComReg Decision D07/61 is hereby withdrawn only when this Decision Instrument contained in Appendix 8 Market 1c: HLVA; the Decision Instrument contained in Appendix 6 Market 1a: Standalone LLVA; and the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA; (all of ComReg Decision D12/14) shall together have full force and effect.

12 MAINTENANCE OF OBLIGATIONS

12.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.

12.2 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

12.3 For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

13 EFFECTIVE DATE

13.1 The Effective Date of this Decision Instrument shall be the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE 28 DAY OF AUGUST 2014

Appendix: 9 Glossary of Terms

Acronym	Full Title
BEREC	Body of European Regulators for Electronic Communications
CBP	Countervailing Buyer Power
CPS	Carrier Pre-Select
DSL	Digital Subscriber Line
ERG	European Regulators Group (replaced by BEREC)
EU	European Union
F2F	Fixed-to-Fixed call
F2M	Fixed-to-Mobile call
FSP	Fixed Service Provider
FTRs	Fixed Termination Rates
FWA	Fixed Wireless Access
HM	Hypothetical Monopolist
IP	Internet Protocol
ISDN	Integrated Services Digital Network
LLU	Local Loop Unbundling
M2F	Mobile-to-Fixed call
M2M	Mobile-to-Mobile call
MTRs	Mobile Termination Rates
NGA	Next Generation Access
NRA	National Regulatory Authority
NTP	Network Termination Point
PSTN	Public Switched Telephone Network
SB-WLR	Single-Billing *via* Wholesale Line Rental
SLA	Service Level Agreement
SME	Small-to-Medium size Enterprise
SMP	Significant Market Power
SSNIP	Small but Significant Non-transitory Increase in Price
VoIP	Voice over Internet Protocol
WBA	Wholesale Broadband Access

WPNIA	Wholesale Physical Network Infrastructure Access