



Commission for
Communications Regulation

Market Review

Wholesale Fixed Voice Call Origination and Transit Markets

Response to Consultation and Decision

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Redacted Information

Please note that this is a non-confidential version of the Response to Consultation and Decision. Certain information within the Response to Consultation and Decision has been redacted from the public version for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂ and highlighted in BLACK. In some cases, ComReg has presented information in an aggregated form in order to strike a balance between preserving the confidentiality of operator-specific information whilst enabling interested parties to understand, in a meaningful, the conclusions set out in the Response to Consultation and Decision.

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Glossary of Frequently Used Terms

Acronym	Full Title
3CT	Three Criteria Test
ADSL	Asymmetric Digital Subscriber Line
BEREC	Body of European Regulators for Electronic Communications
CA	Carrier Access
CATI	Computer Aided Telephone Interview
CATV	Cable Television Network
CBP	Countervailing Buyer Power
CDR	Customer Data Records
CG FACO	Current Generation Fixed Access and Call Origination
CLT	Critical Loss Test
CPE	Customer Premises Equipment
CPP	Calling Party Pays
CPS	Carrier Pre Select
CS	Carrier Select
CSH	Customer-Sited Handover
DOCSIS	Data Over Cable Service Interface Specification
EC	European Commission
EEO	Equally Efficient Operator
EoI	Equivalence of Inputs
EoO	Equivalence of Outputs

ERG	European Regulators Group
EU	European Union
FA	Fixed Access
FACO	Fixed Access and Call Origination
FL LRAIC+	Forward-Looking Long Run Average Incremental Cost plus
FSP	Fixed Service Provider
FTS	Fixed Telephony Services
FTTC	Fibre to the Cabinet
FTTH	Fibre to the Home
FVCO	Fixed Voice Call Origination
FVCT	Fixed Voice Call Termination
FWA	Fixed Wireless Access
GAP	Geographically Averaged Pricing
HCA	Historical Cost Accounts
HL-FA	Higher Level Fixed Access
HL-FACO	High Level Fixed Access and Call Origination
HL-RFVA	High Level Retail Fixed Voice Access
HM	Hypothetical Monopolist
HMT	Hypothetical Monopolist Test
IBH	In Building Handover
IN	Intelligent Network
IP	Internet Protocol

ISDN	Integrated Services Digital Network
ISDN BRA	ISDN Basic Rate Access
ISDN FRA	ISDN Fractional Rate Access
ISDN PRA	ISDN Primary Rate Access
ISH	In-Span Handover
KPI	Key Performance Indicator(s)
LEA	Large Exchange Area(s)
LL-FA	Lower Level Fixed Access
LL-FACO	Low Level Fixed Access and Call Origination
LL-RFVA	Low Level Retail Fixed Voice Access
LLU	Local Loop Unbundling
LS	Line Share
LV-CPER	Low-Value Customer Premises Equipment Rental
MNP	Mobile Number Portability
MSP	Mobile Service Provider(s)
MTS	Mobile Telephony Service(s)
MVCT	Mobile Voice Call Termination
NDA	Non-Disclosure Agreement
NEH	Near-End Handover
NGA	Next Generation Access
NRA	National Regulatory Authority
NRT	Net Revenue Test

NTC	Number Translation Code(s)
OAD	Other Authorised Operator
OSS	Operational Support Systems
OTT	Over the Top
PABX	Private Automated Branch Exchange
PAC	Payphone Access Charge
POI	Point of Interconnection
PRA	Primary Rate Access
PRS	Premium Rate Service(s)
PSTN	Public Switched Telephone Network
RFTS	Retail Fixed Telephony Service(s)
RFVA	Retail Fixed Voice Access
RFVC	Retail Fixed Voice Call(s)
RIA	Regulatory Impact Assessment
RIO	Reference Interconnect Offer
RNA	Retail Narrowband Access
RPP	Receiving Party Pays
RSU	Remote Subscriber Unit
SAB	Standalone Bitstream
SB-WLR	Single Billing-Wholesale Line Rental
SDSL	Symmetric Digital Subscriber Line
SEO	Similarly Efficient Operator

SIP	Session Initiation Protocol
SIP	Session Internet Protocol
SLA	Service Level Agreement
SLU	Sub-Loop Unbundling
SME	Small to Medium Enterprise
SMP	Significant Market Power
SoC	Statement of Compliance
SSNIP	Small but Significant and Non-transitory Increase in Price
STRPL	Switched Transit and Routing Price List
SV	Switchless Voice
TD LRAIC+	Top-Down Long Run Average Incremental Cost plus
TDM	Time-Division Multiplexing
TFEU	Treaty on the Functioning of the European Union
UG	Universal Gateway
ULMP	Unbundled Local Metallic Path
USO	Universal Service Obligations
VDSL	Very-high-bit-rate Digital Subscriber Line
VOB	Voice over Broadband
VOIP	Voice over Internet Protocol
VUA	Virtual Unbundled Access
WACC	Weighted Average Cost of Capital
WBA	Wholesale Broadband Access

WEIL	Wholesale Ethernet Interconnection Links
WLA	White Label Access
WLR	Wholesale Line Rental
WPNIA	Wholesale (physical) network infrastructure access
xDSL	Digital Subscriber Line broadband technology

1 Executive Summary

Overview

- 1.1 This Response to Consultation and Decision (**‘Decision’**) sets out ComReg’s final position regarding its review of competition within the wholesale market for fixed voice call origination provided on individual public telephone networks at a fixed location (**‘FVCO’**) and the wholesale market for call transit (**‘Transit’**). The Decision also sets out the role that regulation will play in promoting effective competition within these markets and in related downstream markets for the coming review period.
- 1.2 The wholesale services provided within these two markets ultimately enable Fixed Service Providers (**‘FSPs’**¹) to offer retail fixed line and call services to their customers (together referred to as **‘Retail Fixed Telephony Services’** or **‘RFTS’**).
- 1.3 FVCO is a wholesale call service that allows an operator to provide telephone calls over an end-user’s² telephone connection up to a designated network handover point. FVCO is typically sold and purchased alongside a fixed access (**‘FA’**) or wholesale line rental (**‘WLR’**) service, which is the rental by an operator of a physical connection from an end-user’s premises to the public telephone network. FAWLR thereby allows a FSP to sell a retail line rental service to a retail end-user which, when combined with FVCO, allows the FSP to provide a RFTS.
- 1.4 Transit is another wholesale service involving call conveyance between the FVCO stage of a call and the point at which the call is handed over for termination/completion by the network of the called party. Transit therefore allows call traffic to be conveyed between two or more networks where they are not directly interconnected, or indeed to a deeper point within a network.

¹ Fixed (voice) Service Providers (**‘FSPs’**) offer retail customers the ability to make and receive calls at a fixed location. Note that the reference to ‘fixed’ does not necessarily imply that the underlying or supporting network is necessarily a wired network.

² End-user(s) refer to both residential and business retail customers.

- 1.5 Consistent with ComReg's regulatory role to review certain electronic communications markets, the objective of this review is to examine the extent of competition within the above wholesale markets (together referred to as the '**Relevant Markets**'). For these Relevant Markets, this involves application of the Three Criteria Test ('**3CT**').³ If the 3CT is met in a market, ComReg will assess the market to determine whether any operator has Significant Market Power ('**SMP**') in that market. In circumstances where such markets are not found to be effectively competitive due to one or more FSPs being identified as having **SMP**, the imposition of appropriate *ex ante* regulatory obligations on such FSP(s) might be necessary in order to address identified competition problems that could arise in the Relevant Markets or related markets, absent regulatory intervention. Similarly, if effective competition is found to exist within either or both of the Relevant Markets, then regulatory intervention in such Relevant Market(s) would not be warranted.
- 1.6 In April 2014 ComReg issued a Consultation⁴ that set out its then preliminary views based on an analysis of the Relevant Markets.
- 1.7 In the Consultation, for each of the Relevant Markets, ComReg set out proposals on market definition and its associated SMP assessment, as well as proposed obligations or remedies (as appropriate) that were to be imposed on any operators identified as having SMP, with a view to addressing potential competition problems to the ultimate benefit of end-users.
- 1.8 Seven responses ('**Submission(s)**') to the Consultation were received from a range of industry stakeholders (together referred to as the '**Respondent(s)**')⁵, namely:
- Alternative Operators in the Communications Market ('**ALTO**');
 - BT Communications Ireland Limited ('**BT**');
 - Eircom Limited ('**Eircom**');
 - Magnet Networks Limited ('**Magnet**');
 - Sky Ireland ('**Sky**');

³ The 3CT test ensures that markets not identified in the EC's recommended list can only be regulated on an *ex ante* basis where it can be shown that (1) entry barriers are high and non-transitory (2) that the market is not likely to tend towards effective competition and (3) that *ex post* competition law remedies on their own are unsuitable for resolving the identified competition concerns. If any one of these criteria is not met, then *ex ante* regulation is not justified.

⁴ "Market Review - Wholesale Fixed Voice Call Origination and Transit Markets, Consultation, [ComReg Document 14/26](#), 4 April 2014" (the '**Consultation**').

⁵ Respondents Submissions (non-confidential) have been published. See "Market Review: Fixed access & call origination and Transit - Non-confidential submissions, [ComReg Document 14/99](#), September 2014" ('**Respondents' Submissions**').

- Telefonica O2 Ireland (**‘Telefonica’**⁶); and
 - Vodafone Ireland (**‘Vodafone’**).
- 1.9 ComReg has taken account of the Respondents’ Submissions in arriving at the positions set out in this Decision.
- 1.10 In parallel with the consultation process ComReg also sought additional quantitative and factual information from relevant service providers, largely related to traffic/subscription volumes and network interconnection arrangements. This information supplements other quantitative information available to ComReg.
- 1.11 ComReg has decided to maintain its preliminary position as set out in the Consultation and has concluded that the 3CT is met in the Fixed Access and Call Origination (**‘FACO’**) Markets⁷, and that Eircom has SMP in these markets. ComReg considers that regulation of these markets is warranted given potential competition problems that could arise, absent such regulation.
- 1.12 Despite the growth of retail mobile telephony services (**‘MTS’**) and the emergence, in some cases, of RFTS provided via voice-over-broadband (**‘VOB’**), there nonetheless remains strong demand from residential and business end-users for more traditional based RFTS. Retail competition for the provision of RFTS remains heavily dependent on the availability to service providers of wholesale products provided by Eircom such as Single Billing through Wholesale Line Rental (**‘SB-WLR’**), which is a product that combines WLR and FVCO.
- 1.13 In this Decision, ComReg specifies how it is going to promote the development of retail competition by imposing wholesale regulatory obligations on Eircom in the FACO Markets. This is intended to address potential competition problems arising from Eircom’s SMP in those markets, along with its ability and incentive to behave in an anti-competitive manner.
- 1.14 With respect to the Transit market, ComReg has decided to maintain its preliminary position as set out in the Consultation. ComReg has concluded that regulation of that market is no longer warranted given that barriers to entry have been overcome, and that the market is tending towards effective competition. In particular, there is evidence of existing competition within the Transit market, and that a number of service providers have increased the degree to which they interconnect directly with each other (thereby avoiding or reducing the need to purchase Transit from a third-party).
- 1.15 In arriving at the above conclusions for the Relevant Markets, in accordance with relevant statutory requirements, ComReg has also:

⁶ Since the publication of the Consultation, Three Ireland has acquired Telefonica. However, throughout this Decision we refer to Telefonica as the relevant Respondent.

⁷ See paragraph 1.24 below.

- consulted with the Competition and Consumer Protection Commission (**CCPC**) regarding its analysis, with the CCPC effectively indicating⁸ that it is in agreement with ComReg's analysis.
 - notified the European Commission (**EC**), BEREC⁹, and other National Regulatory Authorities (**NRAs**) regarding its draft measures. On 14 July 2015 the EC commented¹⁰ on two procedural issues arising from ComReg's analysis of the FACO Markets (no substantive comments were received from the EC on ComReg's market definition or SMP analysis for each of the Relevant Markets and no comments at all were received from BEREC or the NRAs in other Member States). Firstly, the EC noted ComReg's intended transfer of SB-WLR and associated price control and other obligations currently imposed in retail access markets into the upstream FACO Markets, noted that further important work was required to replace price control obligations currently imposed in the retail access markets, and invited ComReg to proceed with a review of retail access markets without undue delay. Secondly, the EC noted that ComReg plans to conduct further specific consultations on price control remedies imposed in the FACO Markets (and other markets), and called upon ComReg to take the opportunity in such consultations to streamline existing pricing remedies with a view to enhancing transparency and legal certainty for market players.
- 1.16 In arriving at the positions set out in this Decision, ComReg has taken utmost account of the EC's comments, with ComReg's consideration of such comments set out in Appendix D and elsewhere throughout this Decision.
- 1.17 Below, ComReg provides an overview of the main conclusions set out in this Decision.

Summary of Overall Conclusions

- 1.18 The following is a summary of ComReg's main conclusions arising from its review of the Relevant Markets.
- 1.19 ComReg notes that this summary should be read in the context of this Decision (and the Consultation) where a detailed explanation of the reasons behind these conclusions is set out.

⁸ A copy of the CCPC's correspondence is set out in Appendix B of this Decision.

⁹ 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.

¹⁰ A copy of the European Commission's correspondence of 14 July 2015 is set out in Appendix C of this Decision (**European Commission's Response**).

Summary of Retail Market Assessment

1.20 In Section 3 of this Decision, ComReg considers the main retail trends and developments and assesses the retail market insofar as it informs ComReg's subsequent assessment of the Relevant Markets. In this respect ComReg has decided as follows:

(a) the scope of the RFTS product market includes:

- RFTS provided to a fixed location over a narrowband copper network;
- Managed VOB based RFTS provided to a fixed location over a wide area fibre network, whether Fibre-to-the-Cabinet ('**FTTC**') (using VDSL) or Fibre-to-the-Home ('**FTTH**'); and
- Managed VOB based RFTS provided to a fixed location over a Cable Access Television ('**CATV**') network;

(b) MTS do not fall within the RFTS product market as such services appear to be more complementary products;

(c) ComReg leaves open the question as to whether Managed VOB provided over ADSL technologies are likely be an effective substitute for a RFTS offered over a narrowband network (or managed VOB on a CATV or VDSL network) and intends to monitor the situation on an ongoing basis;

(d) the question as to whether separate product markets exist for the supply of standalone RFTS and RFTS within a wider (broadband) bundle is left open as it does not have a material impact on the analysis of the wholesale markets which are the subject of this review; and

(e) the RFTS market is national in terms of its geographic scope.

1.21 ComReg notes that apart from UPC's Managed VOB based RFTS, there are currently no other service providers offering mass market Managed VOB based RFTS. ComReg intends to closely monitor developments over the period covered by this analysis and will review its position if there are material retail market developments that might affect the impact of the RFTS market on the FVCO and Transit markets.

Summary of FVCO Market Assessment

1.22 The EC's recommended markets list no longer identifies the FVCO market as being susceptible to *ex ante* regulation. As noted above, this means that ComReg is first required to undertake a 3CT in its assessment of the market.

Market Definition, Competition Assessment and SMP Designation

1.23 In Sections 4 and 5 of this Decision, ComReg has defined the FVCO markets from both product and geographic perspectives and has assessed the level of competition within such markets. Such analysis has had regard to the assessment of the main retail trends and developments set out in Section 3 of this Decision, which are likely to be of most relevance to ComReg's assessment of wholesale markets.

1.24 ComReg's main conclusions are as follows:

- (a) The relevant wholesale product market comprises both FVCO and FA/WLR components (hereby referred to as '**Fixed Access and Call Origination**' or '**FACO**'). This approach reflects not only the nature of retail demand for RFTS services, where line rental and calls are predominantly purchased by consumers together from single suppliers (which feeds into upstream wholesale demand), but also the fact that it is not technically possible for a wholesale customer to purchase FA/WLR from one wholesale supplier and FVCO from another¹¹. In this respect, since 2007 we have seen a significant decline in wholesale customers' demand for Eircom's standalone FVCO based wholesale Carrier-Pre Select ('**CPS**') product (where CPS is provided to a wholesale customer by Eircom, Eircom's retail arm continues to provide the underlying retail line rental service to the retail customer). SB-WLR now accounts for over 95% of wholesale customers' demand. It is ComReg's position that irrespective of whether or not FA/WLR components are included alongside FVCO within a broader FACO 'market', it does not materially alter the regulatory outcome as, even in circumstances where the market were defined to solely encompass FVCO (and SMP was found to exist in such a market), such an approach to market definition could nevertheless result in the imposition of regulatory obligations to provide FA/WLR
- (b) There are distinct markets for High Level FACO ('**HL-FACO**') and Low Level FACO ('**LL-FACO**') (together the '**FACO Markets**'), both of which are national in their geographic scope. This distinction between HL-FACO and LL-FACO arises given the underlying differences in demand-side and supply-side conditions associated with the FA/WLR component of FACO. In this respect a distinction can be drawn between the two markets as follows:
- (i) The LL-FACO market is comprised of:
- wholesale fixed access to the public telephone network for the provision of voice telephony services by means of (i) Public Switched Telephone Network ('**PSTN**'), or (ii) Integrated Services Digital Network ('**ISDN**') Basic Rate Access ('**ISDN BRA**'), which supports 2 voice channels; and
 - FVCO, being calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange level within Eircom's network. FVCO does not distinguish between the types of telephone numbers being called.
- (ii) The HL-FACO market is comprised of:

¹¹ WLR and CPS purchases from Eircom are inextricably linked. Where 'CPS only' was purchased, Eircom would sell the retail line rental services (self-supply of WLR) to the retail customer.

- wholesale fixed access to the public telephone network for the provision of voice telephony services by means of (i) ISDN Fractional Rate Access ('**ISDN FRA**'), which supports between 14 to 30 voice channels or (ii) ISDN Network Primary Rate Access ('**ISDN PRA**'), which supports 30 voice channels; and
 - FVCO, being calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange level within Eircom's network. FVCO does not distinguish between the types of telephone numbers being called.
- (c) Eircom is the only FSP providing wholesale HL-FACO and LL-FACO products in Ireland. In addition to LL-FACO and HL-FACO products sold to wholesale customers, ComReg's position is that Eircom's self-supply, including its notional supply of FACO via Managed VOB¹², is also included in the FACO Markets (on the basis that Managed VOB is ultimately likely to replace Eircom's traditional circuit switched telephony services).
- (d) ComReg considers that the FVCO component of FACO includes calls to geographic, mobile or non-geographic numbers.
- (e) ComReg has also considered whether other services should fall within the FACO Markets, including having regard to the strength of indirect constraints from the retail market. ComReg's position is that RFTS products provided on alternative platforms, and MTS, do not provide a sufficiently effective indirect constraint on the FACO Markets such that it would justify their inclusion within the wholesale product market.
- (f) ComReg considers that the FACO Markets meet the EC's 3CT, which means that these markets are susceptible to *ex-ante* regulation.

¹² For the purposes of the Consultation and this Decision, 'Managed VOB' means VOIP provided by an FSP either directly using its own network, or indirectly by renting the access path from a third party.

- (g) In assessing competition within the FACO Markets, ComReg has considered a range of factors including existing competition, potential competition and countervailing buyer power ('**CBP**'). Eircom is the sole supplier in the FACO Markets having held a stable 100% market share over time. It therefore does not face existing competition within these markets. ComReg has, nevertheless, considered the hypothetical market share position, were the self-supply of vertically-integrated CATV, Fixed Wireless Access ('**FWA**') and alternative fibre based FSPs providing RFTS to be included in the FACO Markets. In these circumstances, Eircom would have a high hypothetical market share of over 80% in the LL-FACO Market. While this hypothetical market share has declined by approximately 20% since Q3 2009, largely accounted for by UPC's entry in the retail market, given the trend to date ComReg does not consider it likely that Eircom's (hypothetical) market share would fall close to or below 50%, within the lifetime of this review. In terms of the hypothetical market share position in the HL-FACO Market, Eircom would have a high and stable hypothetical market share of around 80%.
- (h) ComReg considers that Eircom has the ability to act, to an appreciable extent, independently of its competitors, customers and consumers in the FACO Markets. Eircom is, therefore, designated as having SMP in the FACO Markets.

Imposition of Remedies to Address Competition Problems

- 1.25 In Section 9 of this Decision ComReg considers and ultimately imposes a range of remedies on Eircom in the FACO Markets in order to address the potential competition problems that might arise absent regulation.¹³
- 1.26 ComReg is imposing a range of remedies upon Eircom. These include access, non-discrimination, transparency, price control/cost accounting and accounting separation obligations which apply to Eircom's supply of Current Generation ('**CG**') FACO¹⁴.
- 1.27 ComReg is not imposing obligations on Eircom with respect to access to its notional Next Generation ('**NG**') FACO.¹⁵ ComReg considers that limiting access obligations to CG FACO serves the dual-purpose of safeguarding competition in the short to medium term (through the various CG FACO remedies), while at the same encouraging service providers to develop their own VOB based capabilities over the longer term .

¹³ Such competition problems are discussed in Section 7 of this Decision where ComReg considers that Eircom has the potential ability and incentive to influence a range of competition parameters, including prices, innovation, output and the variety or quality of goods and services provided.

¹⁴ CG FACO is access to traditional circuit switched Time Division Multiplexing ('**TDM**') based FVCO and copper/fibre based FA/WLR.

¹⁵ NG FACO means IP based FVCO that would be delivered over an upstream regulated wholesale broadband access product or indeed through broadband enabled via local loop unbundling.

1.28 A brief summary of the CG FACO obligations being imposed upon Eircom is set out below. Note that in some cases, ComReg has, having considered Respondents' Submissions, implemented minor amendments/clarifications to the remedies that were proposed in the Consultation:

Access Obligations

1.29 To address potential competition problems associated with the actual or constructive denial of access to wholesale inputs Eircom is required to meet reasonable requests for access to CG FACO products, services and associated facilities including requirements:

- (a) to provide access to SB-WLR and ancillary services on SB-WLR, CG interconnection services, co-location facilities and payphone access charge services;
- (b) to negotiate in good faith with undertakings requesting access;
- (c) not to withdraw access to facilities already granted without the prior approval of ComReg;
- (d) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of products, services or facilities;
- (e) to provide access to co-location or other forms of associated facilities sharing insofar as it relates to interconnection services necessary to support access to FACO, products, services and facilities;
- (f) to provide access to services needed to ensure interoperability of end-to-end services to end-users, including facilities for intelligent network services;
- (g) to provide access to Operational Support Systems ('OSS') or similar software systems necessary to ensure fair competition in the provision of services;
- (h) to interconnect networks or network facilities; and
- (i) to provide access in accordance with a range of conditions governing fairness, reasonableness and timeliness.

1.30 ComReg has amended its position originally set out in the Consultation regarding the general requirement upon Eircom to negotiate Service Level Agreement ('SLA(s)') in good faith, such that Eircom is now required to conclude¹⁶ SLA negotiations within a six month period.

Non-Discrimination Obligations

1.31 ComReg has imposed a range of non-discrimination obligations upon Eircom. These obligations are designed to ensure that Eircom does not favour its downstream arm, or unduly favour any particular wholesale customer. Eircom is required:

¹⁶ This obligation relates to the timeframe for the completion of SLA negotiations and not the timing of any subsequent launch of the SLA which will depend on whether system developments are required in order to give effect the associated changes.

- (a) to provide services and information to other FSPs under the same conditions and of the same quality as Eircom provides for its own services or those of its subsidiaries or partners; and
 - (b) to apply equivalent conditions in equivalent circumstances to other undertakings to which it provides equivalent services.
- 1.32 Having considered Respondents' views, ComReg considers that in certain circumstances it is justified, proportionate and reasonable to require that Eircom is subject to an Equivalence of Input¹⁷ ('**EoI**') non-discrimination standard, in particular, for ordering processes for SB-WLR when SB-WLR is ordered in combination with Next Generation Access Wholesale Broadband Access ('**NGA WBA**') using a combined order type on Eircom's order management systems. Similarly, where a an SB-WLR service is in use with an NGA WBA service or which is provisioned together with an NGA WBA service, ComReg also considers that Eircom should be subject to an EoI standard for fault handling and fault repair services for the SB-WLR service element.
- 1.33 In circumstances other than those outlines above, Eircom must apply the non-discrimination obligations on at least an Equivalence of Outputs ('**EoO**') basis¹⁸.
- 1.34 Eircom is also required to provide ComReg, within specified timeframes, a 'Statement of Compliance' ('**SoC**') demonstrating its compliance with its non-discrimination obligations.

Transparency Obligations

- 1.35 ComReg has imposed a range of transparency obligations upon Eircom. The purpose of these obligations is to address potential competition problems associated with asymmetry of information and to support access, non-discrimination, price control and other obligations. Eircom is required:
- (a) to maintain and publish a reference interconnect offer ('**RIO**'), with this having to contain a minimum specified set of details, including prices and other requirements;
 - (b) to put in place a RIO change management and advance change notification process, including with respect to price changes;
 - (c) to publish key performance indicators ('**KPIs**'), performance metrics and SLAs;

¹⁷ Under this standard Eircom would be required to provide access to services and information in a manner which achieves the same standards in terms of functionality, price, terms and conditions, service and quality levels, systems and processes as Eircom provides to itself.

¹⁸ This standard recognises that Eircom would be required to provide access to services and information in a manner which achieves the same standards in terms of functionality, price, terms and conditions, service and quality levels as Eircom provides to itself, albeit potentially using different systems and processes.

- (d) to ensure that wholesale invoices are sufficiently disaggregated, detailed and clearly presented such that a wholesale customer can reconcile invoices to Eircom's RIO and RIO prices; and
- (e) to put in place non-disclosure agreement procedures governing the legitimate sharing of confidential and/or commercial information.

Price Control and Cost Accounting Obligations

- 1.36 ComReg has imposed a range of price control and cost accounting obligations upon Eircom. The purpose of these obligations is to address potential competition problems associated with price related behaviours including excessive pricing and margin squeeze. These include:
- (a) a price control obligation of cost orientation relating to (i) the FVCO component of SB-WLR and retention rates associated with the provision of FVCO for calls to Number Translation Codes ('**NTCs**'); (ii) interconnection services; (iii) order handling process costs associated with SB-WLR; (iv) co-location; and (v) ancillary SB-WLR services, including low value Customer Premises Equipment ('**CPE**') rental;
 - (b) a price control obligation of 'retail minus' relating to the WLR element of SB-WLR;
 - (c) an obligation not to cause a margin squeeze, including an obligation not to cause a margin squeeze with respect to Wholesale Switchless Voice ('**SV**'); and
 - (d) an obligation to maintain appropriate cost accounting systems to justify its prices/costs of FACO products, services and facilities.
- 1.37 In imposing the above obligations, ComReg has noted in this Decision that there are a number of related separate pricing consultations, some of which have been published and others to be conducted over the coming months, which may have a bearing on the price control obligations imposed in this Decision. Depending on the outcome of these separate pricing consultations it may, therefore, lead to amendments and/or the withdrawal of the price control obligations imposed in this Decision and in the downstream Retail Access Markets (as set out in ComReg's **2014 Retail Access Market Review Decision**¹⁹). In this context, on foot of the completion of the abovementioned workstreams, and as recommended by the EC (see Appendix D), ComReg intends to commence a review of the Retail Access Markets without undue delay.

¹⁹ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 14/89](#), Decision D12/14, August 2014 ('**2014 Retail Access Market Review Decision**').

Accounting Separation

1.38 ComReg is also imposing obligations upon Eircom to maintain separated accounts in respect of FACO products, services and facilities. This is to ensure transparency in its internal transfer pricing and partition of common and joint costs, and to support the other pricing, transparency, non-discrimination and other obligations set out in this Decision, ultimately minimising the scope for possible price-related leveraging competition problems to occur.

Withdrawal of FACO related Remedies in Retail Access Markets

1.39 A number of the above obligations have, up to now, been imposed in the Retail Access Markets (including the obligation to provide SB-WLR and associated obligations). As a consequence of this Decision, these obligations are being withdrawn from the Retail Access Markets, and are being moved upstream into the FACO Markets

1.40 In this Decision, ComReg has highlighted a number of other ongoing work streams that will consider in further detail the price control obligations to be applied in the FACO Markets. In particular, the margin squeeze obligations and an assessment of the price control methodology to be applied for WLR. These subsequent decisions may lead to the further withdrawal of remedies in the Retail Access Markets, including the removal of regulation altogether, where warranted. However, this will depend on the sufficiency of wholesale regulation in fostering effective competition in retail markets. In this context, on foot of the completion of the abovementioned workstreams, and as recommended by the EC (see Appendix D), ComReg intends to commence a review of the Retail Access Markets without undue delay.

1.41 ComReg has also decided to withdraw obligations imposed to date on Eircom with respect to the provision of standalone-CPS, Carrier Access ('CA') and Carrier Select ('CS'), subject to a 6-month sunset period. This is because these obligations no longer appear necessary to safeguard competition, since line rental and calls are predominantly purchased by consumers together from single suppliers.

Summary of Transit Market Assessment

1.42 The EC's recommended markets list no longer identifies Transit markets as being susceptible to *ex ante* regulation. While the Transit market has been regulated in Ireland to date, ComReg has now decided to de-regulate this market.

1.43 Details on the Transit market definition and assessment are set out in Sections 6, 7 and 10 of this Decision.

Transit Market Definition

1.44 ComReg's position is that the Transit market is a national market, and is comprised of Transit services provided at a fixed location, which include:

- all elements of call routing that take place between FVCO and Fixed Voice Call Termination ('FVCT'), including switching and conveyance;

- calls to geographic, non-geographic and mobile numbers;
- both trunk and pure Transit provided over copper and/or fibre networks (i.e. irrespective of the underlying infrastructure employed);
- Transit irrespective of the underlying technology used;
- Eircom's self-supply, as well as its supply in the wholesale market; and
- the self-supply and wholesale supply of other Transit service providers that are active in the provision of wholesale Transit services.

Competition and 3CT Assessment

1.45 ComReg has decided that regulation of that market is no longer warranted given that barriers to entry have been overcome, and that the market is tending towards effective competition. In particular, there is evidence of existing competition within the Transit market, and that a number of service providers have increased the degree to which they interconnect directly with each other (thereby avoiding or reducing the need to purchase Transit from a third-party).

Next Steps

1.46 ComReg intends to monitor developments in the RFTS market and to examine, whether in light of retail developments and the other ongoing pricing related regulatory work streams identified above, regulation within the Retail Access Markets and the FACO Markets remains appropriate. In this context, on foot of the completion of the pricing and related workstreams referred to throughout this Decision, and as recommended by the EC (see Appendix D), ComReg intends to commence a review of the Retail Access Markets without undue delay. ComReg will also continue to monitor the Transit Market, to ensure that effective competition is taking place in the absence of regulation.

2 Introduction

- 2.1 This Decision sets out ComReg's conclusions and position following its analysis of the wholesale market(s) for:
- the provision of FVCO; and
 - the provision of Transit.
- 2.2 These are wholesale components that are used by service providers in the supply of RFTS to end-users and, in some cases, also as inputs to other downstream wholesale services.
- 2.3 The objective of this review has been to examine the extent of competition within the above Relevant Markets, ultimately to ensure the development of effective competition in downstream markets to the benefit of end-users. In circumstances where such markets meet the 3CT, and are not found to be effectively competitive due to one or more FSPs having SMP, ComReg may impose regulatory obligations on such FSP(s) to address identified competition problems that could arise in the Relevant Markets or related markets, absent regulatory intervention. However, where the 3CT is not met, or where no operator has SMP, regulatory intervention would not be warranted.
- 2.4 This introductory section of the Decision describes the following:
- an overview of FVCO and Transit (discussed in paragraphs 2.6 to 2.13 below);
 - the legal basis and the regulatory framework according to which the review leading to this Decision has been undertaken (discussed in paragraphs 2.14 to 2.29 below);
 - background to the previous reviews of the Relevant Markets and why the current review has been undertaken (discussed in paragraphs 2.30 to 2.33 below);
 - an outline of the information sources relied upon for the analysis set out in the Decision (discussed in paragraphs 2.35 to 2.36 below);
 - the Consultation process that ComReg has undertaken which has led to this Decision being made (discussed in paragraph 2.37 to 2.37 below); and
 - an overview of the structure of the remaining sections of this Decision (discussed in paragraph 2.42).
- 2.5 Section 1 of the Decision contains an Executive Summary of the overall conclusions in this Decision. A glossary of frequently used terms has been included at the front of this Decision.

What are FVCO and Transit?

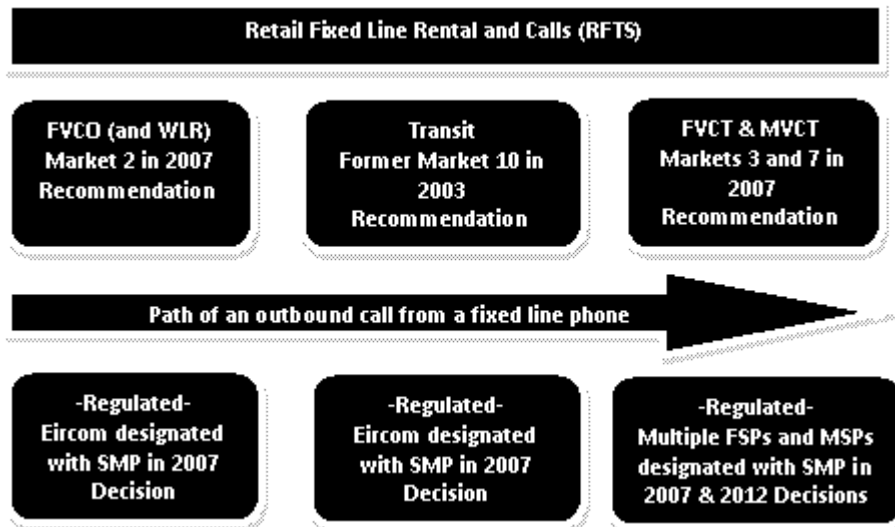
- 2.6 FVCO is a wholesale service that involves the supply of the switching, routing, and conveyance of a voice call up to a designated point of handover on a network, which is typically located at a switching point in a telephone exchange (or equivalent point in a network). FVCO services are often supplied with an access path (FA or WLR) over which FVCO is supplied. Together these FVCO and FA services are referred to in this Decision as Fixed Access and Call Origination (as noted in the Executive Summary, we have defined this combination of wholesale products as '**FACO**'). To date, Eircom has been the sole wholesale supplier of FACO through its SB-WLR product.
- 2.7 Transit is a wholesale service provided to FSPs and Mobile Service providers ('**MSP(s)**') (together referred to as '**Service Providers**') that involves the switching, routing and conveyance of calls between the point of handover of the FVCO stage of a call, up to, but not including the termination²⁰ stage of a call. The termination stage is typically from the nearest switching point to the called party onwards. There are currently several Service Providers providing Transit in Ireland, including Eircom, BT and UPC.
- 2.8 Together, the purchase of FACO and Transit (and Termination) enables FSPs to offer RFTS to end-users²¹ and, in some cases, as inputs to other downstream wholesale services. FACO and Transit inputs, in particular, allow an FSP to provide such services to customers that could not otherwise be capable of being served through the use of their own network. Transit services also offer a means for FSPs or MSPs to increase the connectivity within their own network, or indeed connectivity between two or more networks to facilitate the conveyance of call traffic between them in circumstances where they are not directly interconnected.
- 2.9 For example, an FSP may wish to provide retail access (line rental) and calls to a customer's premises but may not have a direct access connection to the customer's premises over which calls could be provided. That FSP can then, at the wholesale level, purchase FACO which it, in turn, uses to provide its RFTS. That FSP may also need to purchase Transit, which might, for example, involve the further conveyance/routing of the call from the Point of Interconnect ('**POI**') at which FVCO is handed over, up to the point at which the call is handed over for Termination on the called party's network Service Provider (or indeed, for further onward transit).

²⁰ The termination of a voice call to a mobile subscriber involves the supply by an MSP of a wholesale service known as Mobile Voice Call Termination ('**MVCT**'). The termination of a call to a fixed telephony subscriber involves the supply of Fixed Voice Call Termination ('**FVCT**'). To date, ComReg has found that all services Service Providers providing MVCT and FVCT (together referred to as '**Termination**') individually have SMP.

²¹ Residential and business retail customers.

- 2.10 The relationship between these wholesale inputs (and regulation prior to the adoption of this Decision) and the manner in which they are used in supplying Retail Fixed Voice Access ('RFVA')²² and Retail Fixed Voice Calls ('RFVC'), together referred to as RFTS, is illustrated in Figure 1 below.

Figure 1: Wholesale Inputs to a RFTS



- 2.11 As noted above, FVCO and Transit are often purchased alongside FA or WLR, which enables a FSP to 'rent' the access line and then, combined with FVCO, to offer a combined retail line rental and calls service to end-users. Eircom provides a WLR and FVCO product called SB-WLR. Some FSPs purchase SB-WLR services from Eircom to provide RFTS directly to retail customers, while other FSPs do so for the purpose of re-selling services as part of a broader suite of their own wholesale services which are made available to other FSPs.
- 2.12 Other FSPs choose not to purchase the combined SB-WLR products and instead purchase standalone CPS²³, being a standalone FVCO service which enables the FSP to provide an end-user with a calls only service, with the end-user continuing to purchase its line rental service separately from Eircom.
- 2.13 The FSP using a SB-WLR service will, at the wholesale level, pay Eircom a fixed monthly wholesale line rental charge, along with a FVCO charge and a Transit charge (if Transit is required) on a per call and/or per minute basis. An FSP using standalone CPS will pay Eircom the aforementioned FVCO charge only.

²² RFVA would be more commonly known as line rental.

²³ Standalone CPS is an FVCO service that does not include wholesale line rental. CPS is a wholesale service used to provide fixed calls when the end-user purchases retail line rental separately from a third party, most often the incumbent.

Legal Basis and Regulatory Framework

- 2.14 This market review is being undertaken by ComReg in accordance with the obligation under the **Framework Directive**²⁴ (transposed into Irish law as the **Framework Regulations**²⁵) that NRAs should analyse the relevant market(s) taking utmost account of the EC's 2014 Recommendation²⁶ and the SMP Guidelines²⁷.
- 2.15 Regulation 26 of the Framework Regulations requires that ComReg, taking the utmost account of the 2014 Recommendation and of the SMP Guidelines, defines relevant markets appropriate to national circumstances, in accordance with the principles of competition law.
- 2.16 Since the publication of the 2014 Recommendation in October 2014 (i.e. after the issue of the Consultation) the FVCO market is no longer identified at an EU level as being a market susceptible to *ex ante* regulation. It was previously identified in the prior 2007 Recommendation²⁸ as being a market susceptible to *ex ante* regulation and was described as follows:

*“Call origination on individual public telephone networks provided at a fixed location..... call origination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call transit and for call termination on the public telephone network provided at a fixed location.”*²⁹

²⁴ 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, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (the '**Framework Directive**'). Article 16 of the Framework Directive contains the obligation on NRAs to conduct market analyses.

²⁵ 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.

²⁶ European Commission – Commission Recommendation of 9.10.2014 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 (the '**2014 Recommendation**') available at <https://ec.europa.eu/digital-agenda/en/news/commission-recommendation-relevant-product-and-service-markets-within-electronic-communications>.

²⁷ European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3 (the '**SMP Guidelines**').

²⁸ 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**').

²⁹ Market 2 in the annex to the 2007 Recommendation.

- 2.17 Since the publication of the 2007 Recommendation in December 2007 (the Transit market is no longer identified at an EU level as being a market susceptible to *ex ante* regulation but was previously identified in the **2003 Recommendation**³⁰ as being a market susceptible to *ex ante* regulation and was described as follows:
- “For the purposes of this Recommendation, transit services are taken as being delineated in such a way as to be consistent with the delineated boundaries for the markets for call origination and for call termination on the public telephone network provided at a fixed location.”*³¹
- 2.18 ComReg has used these previously-listed markets as the starting point for its market analysis exercise.³² However, given neither of such markets fall within those identified in the current 2014 Recommendation, ComReg has applied the 3CT test in its analysis to determine whether they are susceptible to *ex ante* regulation at a national level (as is permitted under the EU regulatory framework).
- 2.19 In line with the “Modified Greenfield Approach” (**‘MGA’**) explained in the Explanatory Note to the 2014 Recommendation³³, ComReg has assessed whether the Relevant Markets are effectively competitive from a forward-looking perspective and in the absence of regulation.³⁴ 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 and proportionate.

³⁰ European Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, C(2003) 497 (the **‘2003 Recommendation’**).

³¹ Market 10 identified in the annex to the 2003 Recommendation.

³² Though, as discussed in Section 4 of this Decision, ComReg ultimately defines FACO Markets that include both FVCO and FA components.

³³ Explanatory Note accompanying the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, dated 9.10.2014 (the **‘Explanatory Note to the 2014 Recommendation’**), at page 8. The Explanatory Note to the 2014 Recommendation is available at <https://ec.europa.eu/digital-agenda/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>.

³⁴ However, regulation present in other related markets or through the general regulatory framework is considered.

- 2.20 Where an undertaking is ultimately designated as having SMP in a relevant market, ComReg is obliged, under Regulation 8(1) of the **Access Regulations**³⁵, to impose on such an undertaking (or maintain where they already exist) such of the obligations set out in Regulations 9 to 13 of the Access Regulations as it considers appropriate. Obligations imposed must:
- be based on the nature of the problem identified;
 - be proportionate and justified in the light of the objectives laid down in section 12 of the **Communications Regulation Act 2002 (as amended)**³⁶, and Regulation 16 of the Framework Regulations; and
 - only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.
- 2.21 Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) sets out ComReg's objectives in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities, namely:
- to promote competition;
 - to contribute to the development of the internal market; and
 - to promote the interests of users within the European Union.
- 2.22 ComReg has conducted a public consultation in accordance with Regulation 12 of the Framework Regulations.
- 2.23 Pursuant to Regulation 27(1) of the Framework Regulations, ComReg has carried out an analysis of the Relevant Markets in accordance, where appropriate, with an agreement with the CCPC under section 34 or 47G of the Competition Act 2002. In this respect, on 2 June 2015 ComReg consulted with the CCPC, with the CCPC providing its response to ComReg ('**CCPC Response**') on 15 June 2015, a copy of which is set out in Appendix B.
- 2.24 The CCPC Response indicates that the CCPC is satisfied that there are no grounds for altering the market definitions proposed by ComReg and that the CCPC 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 FACO Markets identified.

³⁵ 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".

³⁶ Communications Regulation Act 2002 (No. 20 of 2002), as amended (the '**Communications Regulation Act 2002 (as amended)**').

- 2.25 On 16 June 2015³⁷ ComReg also made its draft measures accessible to the EC, BEREC and NRAs in other Member States pursuant to Regulation 13(3) of the Framework Regulations. The EC provided its response to ComReg (**'European Commission's Response'**) on 14 July 2015, a copy of which is set out in Appendix C. Neither BEREC nor the NRAs in other Member States provided any comments on ComReg's notified draft measures.
- 2.26 As noted in paragraphs 1.15 and 1.16 above, the EC commented on two procedural issues related to ComReg's notified draft measures. In arriving at the positions set out in this Decision, ComReg has taken utmost account of the EC's comments, with ComReg's consideration of such comments set out in Appendix D and elsewhere throughout this Decision.
- 2.27 Overall, in preparing this Decision, ComReg has also taken account of its functions and objectives under the Communications Regulation Act 2002 (as amended), in addition to requirements under the Framework Regulations and the Access Regulations.
- 2.28 The analysis undertaken in this Decision, and throughout the preceding Consultation, also takes the utmost account of the following documents:
- the 2014 Recommendation and the Explanatory Note to the 2014 Recommendation;
 - the SMP Guidelines; and
 - the 2005 Accounting Separation and Cost Accounting Recommendation³⁸.
- 2.29 ComReg has also taken account of:
- the Notice on Market Definition³⁹ for the purposes of Community competition law;
 - any relevant common positions adopted by BEREC; and
 - any relevant EC comments made, pursuant to the procedure set out in Articles 7 and 7a of the Framework Directive, with respect to NRAs' market analyses.

³⁷ The EC registered ComReg's notification of its draft measures as being complete on 17 June 2015.

³⁸ 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 **'2005 Accounting Separation and Cost Accounting Recommendation'**).

³⁹ Commission notice on the definition of relevant market for the purposes of Community competition law, (the **'Notice on Market Definition'**), Official Journal C 372, 09/12/1997 P. 0005 – 0013.

Previous Review

- 2.30 ComReg previously analysed the FVCO and Transit markets in the 2007 Decision⁴⁰, defining separate national FVCO and Transit markets and designating Eircom as having SMP in each of these markets. ComReg also imposed obligations upon Eircom which, amongst other things, required it to offer these FVCO and Transit services to **Access Seekers**⁴¹ at regulated prices.
- 2.31 ComReg separately analysed the Retail Access Markets in the 2014 Retail Access Market Review Decision⁴². Arising from this, Eircom was designated with SMP in these markets, and was required, amongst other things, to provide FA/WLR to Access Seekers at a regulated price (these markets are referred to throughout this document as the **Retail Access Markets**).

Current Review

- 2.32 Given the time that has elapsed since the conduct of the previous analyses of the FVCO and Transit markets and, having regard to market developments and its obligations under the Framework Regulations, ComReg considered it appropriate to carry out a further review of these markets.
- 2.33 As part of this market review process, ComReg has obtained qualitative and quantitative information from FSPs (and MSPs) through a series of formal and informal information requests, as well as follow-up clarifications through meetings or correspondence where appropriate. This supplements information which is provided to ComReg in the performance of its regular operations (e.g. for the Irish Communications Market Quarterly Key Data Report (**'Quarterly Key Data Report(s)'**)⁴³. ComReg has also reviewed, in detail, NRAs' experiences of regulating the Relevant Markets in other European jurisdictions, and has carefully analysed guidance available from the EC, BEREC and other relevant commentators before arriving at its views in this Decision.

⁴⁰ See "[Market Analysis - Interconnection Market Review Wholesale Call Origination and Transit Services, Decision Notice D04/07, ComReg Document No. 07/80](#)", October 2007 (the '**2007 Decision**').

⁴¹ Access Seekers as referred to throughout this Decision are those undertakings (or other authorised operators) that purchase, or could potentially purchase, wholesale FACO and/or Transit services.

⁴² 2014 Retail Access Market Review Decision was notified to the European Commission under Case IE-2014-1629.

⁴³ A recently published Quarterly Report is the Irish Communications Market Quarterly Key Data Report, Data as of Q4 2014, [ComReg Document 15/27](#), 12 March 2015.

2.34 ComReg has also carried out market research surveys to inform its understanding of consumer and business attitudes/behaviours in RFTS markets, which has already been published by ComReg and is referred to throughout this Decision (and is referenced in Appendix A). ComReg is mindful that surveys, while a useful practical means of gathering information on consumer and business preferences/behaviours, need to be interpreted with care and that stated preferences of survey respondents can overestimate what they will actually do in practice. Therefore, ComReg does not solely rely on consumer/business surveys alone in forming its conclusions as set out in this Decision. ComReg considers all information available to it.

Information Sources Relied Upon

2.35 In conducting its analysis, as noted in the paragraphs above, ComReg has drawn on data from a number of sources, including:

- (a) **2012 Statutory Information Requests⁴⁴**: Information provided by Service Providers in response to detailed statutory information requests issued by ComReg in October 2011 in which both quantitative and qualitative information on the RFTS market(s) and the Relevant Markets was sought;
- (b) **2014 Statutory Information Requests⁴⁵**: Information provided by Service Providers in response to detailed statutory information requests issued by ComReg in August 2014 in which both quantitative and qualitative information on the RFTS market(s) and the Relevant Markets was sought;
- (c) **Quarterly Key Data Reports or 'QKDR(s)'**: Information provided to ComReg by Service Providers for the purpose of its Quarterly Key Data Reports and Market Analysis activities;

⁴⁴ Pursuant to its powers under section 13D(1) of the Communications Regulation Act 2002 (as amended), ComReg issued a series of information requests to Service Providers in October 2011 with responses being provided to these in the period up to the first quarter of 2012.

⁴⁵ Pursuant to its powers under section 13D(1) of the Communications Regulation Act 2002 (as amended), ComReg issued a series of information requests to Service Providers in August 2014 with responses being provided to these in the period up to and following Q3 of 2014.

- (d) **The 2012 Market Research**⁴⁶. ComReg carried out market research surveys to inform its understanding of consumer and business attitudes/behaviours in the retail fixed voice markets.⁴⁷ ComReg notes that the results of this survey have already been published by ComReg as part of the Fixed Voice Call Termination ('**FVCT**') Consultation⁴⁸, and in the 2014 Retail Access Market Review Decision.
- (e) **ComReg's Consumer ICT Survey** (the '**2013 Consumer ICT Survey**') dated April 2013⁴⁹ and the **Business ICT Survey** (the '**2013 Business ICT Survey**') dated June 2013⁵⁰ (together referred to as the '**2013 ICT Surveys**');
- (f) Other information in the public domain.

2.36 ComReg refers to the outputs of these data sources throughout the remainder of this Decision.

Consultation Process

2.37 ComReg conducted a public consultation in accordance with Regulation 12 of the Framework Regulations with the issue of the Consultation in April 2014.

2.38 Seven Submissions to the Consultation were received from a range of industry stakeholders (together referred to as the Respondent(s)), namely:

- ALTO;
- BT;
- Eircom;
- Magnet;
- Sky;
- Telefonica; and
- Vodafone.

2.39 Throughout this Decision, ComReg has summarised Respondents' main views and has carefully considered them before setting out its position.

⁴⁶ See 'Retail Access to the Public Telephone Network provided at a Fixed Location for Residential and Non Residential Customers' [ComReg Document 12/117a](#), October 2012 (the '**2012 Market Research**').

⁴⁷ ComReg is mindful that surveys, while a useful practical means of gathering information on consumer and business preferences/behaviours, need to be interpreted with care and that stated preferences of survey respondents can overestimate what they will actually do in practice.

⁴⁸ Market Review, Wholesale Voice Call Termination Services Provided at a Fixed Location, Consultation and Draft Decision, [ComReg Document 12/96](#), September 2012 (the '**FVCT Consultation**').

⁴⁹ See 'ComReg Consumer ICT Survey', [ComReg Document 13/46](#), April 2013 (the '**2013 Consumer ICT Survey**').

⁵⁰ See 'ComReg Business ICT Survey', [ComReg Document 13/61](#), June 2013 (the '**2013 Business ICT Survey**').

- 2.40 As noted in paragraph 2.23 and 2.24, in accordance with Regulation 27(1) of the Framework Regulations, ComReg consulted with the CCPC regarding its assessment of the Relevant Markets.
- 2.41 As noted in paragraph 2.25 and 2.26, ComReg also made its draft measures accessible to the EC, BEREC and NRAs in other Member States pursuant to Regulation 13(3) of the Framework Regulations.

Structure of the Decision

2.42 The remainder of this Decision is structured as follows:

- **Section 3:** This section provides an overview of the main retail market developments and trends and ComReg's assessment of these and the RFTS market more generally.
- **Section 4:** This section defines the FACO Markets from both a product and geographic perspective;
- **Section 5:** This section assesses the extent of competition within the FACO Markets (including the whether the 3CT is met and whether the FACO Markets are susceptible to *ex ante* regulation), and considers whether any FSP has SMP within those markets;
- **Section 6:** This section defines the Transit Market from both a product and a geographic perspective.
- **Section 7:** This section assesses the extent of competition within the Transit Market (including the whether the 3CT is met and whether the Transit Market is susceptible to *ex ante* regulation).
- **Section 8:** This section sets out the main competition problems that might occur, absent regulation, within the FACO and adjacent markets, along with the likely consequential impacts for competition and consumers.
- **Section 9:** This section discusses and imposes regulatory remedies on Eircom in the FACO Markets aimed at addressing competition problems. It also discusses and amends/removes obligations in the Retail Access Markets as a consequence of this.
- **Section 10:** This section discusses and removes remedies that have, to date, been imposed upon Eircom in the Transit Market.
- **Section 11:** This section considers Respondents' comments on the Regulatory Impact Assessment of the proposed approaches to regulation in the Relevant Markets as set out in the Consultation.
- **Section 12:** This section sets out the next steps that will follow the publication of this Decision.
- **Appendix A:** This appendix provides references to the market research referred to through this Decision.

- **Appendix B:** This appendix contains a copy of a letter from the CCPC setting out its Opinion concerning ComReg's market definition and competition assessment of the Relevant Markets.
- **Appendix C:** This appendix sets out a copy of the EC's response concerning ComReg's notified draft measures with respect to the Relevant Markets.
- **Appendix D:** This appendix sets out ComReg's consideration of the European Commission's Response concerning ComReg's notified draft measures with respect to the Relevant Markets.
- **Appendix E:** This appendix updates, as of Q4 2014, the main trends and developments in the RFTS market as were discussed in the Consultation and further considered in Section 3 and elsewhere throughout this Decision.
- **Appendix F:** This appendix sets out an updated analysis of trends in the Transit Market as were discussed in the Consultation and further considered in Sections 6, 7 and elsewhere throughout this Decision
- **Appendix G:** This appendix sets out ComReg's final Regulatory Impact Assessment of the approaches to regulation in the Relevant Markets and the Transit Market.
- **Appendix H:** This appendix sets out the final Decision Instrument which gives legal effect to the conclusions and positions as set out in this Decision.

2.43 We have also noted earlier that this is a non-confidential version of the Decision. Certain information within the Decision has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂. Should an individual service provider wish to review its own redacted information, it should make a request for such in writing to ComReg (to arvydas.vidziunas@comreg.ie) and indicate the specific paragraph numbers of the Decision within which the redacted information being requested is contained. ComReg will consider requests for redacted information in accordance with its Guidelines on the treatment of confidential information⁵¹ and will, subject to the protection of commercially sensitive and confidential information, respond accordingly.

⁵¹ Contained in ComReg Document 05/24, "Guidelines on the treatment of confidential information" dated 22 March 2005.

3 Retail Market Developments, Trends and Assessment

- 3.1 Given the overlap in comments/issues raised in response to Sections 3 (Retail Market Trends and Developments) and 4 (Retail Market Assessment) of the Consultation, these two sections are considered together below in this Section 3 of the Decision rather than separately.

Position set out in the Consultation

- 3.2 In sections 3 and 4 of the Consultation, ComReg set out its preliminary view on recent trends/developments in the Retail Fixed Telephone Services ('RFTS') market since the 2007 Decision⁵² along with its preliminary assessment of the RFTS market. These preliminary views are summarised below.

Retail Trends and Developments

- 3.3 The main trends/developments in the RFTS market as discussed in Section 3 of the Consultation, included:
- (a) **Growth in the number and type of retail providers of RFTS**⁵³: ComReg noted an increase in the number of competing FSPs, with a mix of technologies/platforms used by such FSPs to provide RFTS. Notable entrants in the RFTS market since the 2007 Decision included Sky, UPC and Vodafone. Apart from UPC⁵⁴ and Eircom, which are the main Independent FSPs⁵⁵, the significant majority of FSPs providing RFTS did so the basis of wholesale access to Eircom's network, in particular, through FACO products, services and facilities such as Single Billing through Wholesale Line Rental ('SB-WLR')⁵⁶;

⁵² See "Market Analysis - Interconnection Market Review Wholesale Call Origination and Transit Services, Decision Notice D04/07, [ComReg Document No. 07/80](#)", October 2007 (the '2007 Decision').

⁵³ See paragraphs 3.2 to 3.20 of the Consultation.

⁵⁴ UPC's RFTS is delivered over its hybrid fibre-coaxial cable access television ('CATV') based broadband network using Internet Protocol ('IP') (also known as voice over broadband or 'VOB').

⁵⁵ See paragraph 3.2 of the Consultation.

⁵⁶ SB-WLR is a wholesale product which combines Wholesale Line Rental ('WLR') with Fixed Voice Call Origination ('FVCO')

- (b) **Changes in Fixed and Mobile Traffic Growth Patterns**⁵⁷: ComReg noted a decline in overall RFVC traffic and growth in mobile voice traffic (that had been relatively static since Q4 2010), although it was noted that a significant proportion of residential and business users continue to avail of RFTS. It was also noted that consumers appear to use RFTS and MTS for different purposes and perceive price differences between the two types of services, indicating that these services are likely to be complementary;
- (c) **Growth in the provision of Managed VOB and Unmanaged VOIP based RFTS**⁵⁸: Growth in the provision of Managed VOB⁵⁹ based RFTS had been observed, the majority of which is offered as part of a bundle over UPC's CATV network. While there has been an uptake in the use of Unmanaged VOIP⁶⁰ services by consumers, the degree of substitution from RFTS to Unmanaged VOIP services appeared to be limited, and the pattern of usage for Unmanaged VOIP appeared to be much less frequent than for other voice telephony services;

⁵⁷ See paragraphs 3.21 to 3.31 of the Consultation.

⁵⁸ See paragraphs 3.32 to 3.48 of the Consultation.

⁵⁹ For the purposes of the Consultation and this Decision, 'Managed VOB' means VOIP provided by an FSP either directly using its own network, or indirectly by renting the access path from a third party. This was discussed further in paragraphs 3.34 and 4.87 of the Consultation.

⁶⁰ Unmanaged VOIP or Over the Top ('OTT') VOIP, for the purpose of the Consultation, meant that the FSP itself does not provide the access paths to its customers and does not have a switching platform and interconnection path(s). Its customers must access the Unmanaged VOIP service via the public internet or over other applications using their broadband connection provided by another supplier.

- (d) **Decline in standalone provision of RFVC with a tendency for RFVC and RFVA to be sold together and purchased from a single supplier**⁶¹: At the time of the 2007 Decision it was common for FSPs to purchase wholesale standalone Carrier-Pre-Selection⁶² ('CPS')⁶³ CPS from Eircom and to utilise this to provide RFVC customers, with the customer purchasing the line rental element separately from Eircom. However, since 2007 ComReg noted there has been a gradual but significant decline in demand for standalone CPS, falling from 111,521 CPS lines in Q1 2007 to 16,602 in Q4 2014 and, as a consequence, the provision of standalone RFVC services by FSPs was very limited. It was noted that FSPs instead favoured the purchase of Eircom's FACO based SB-WLR and White Label Access⁶⁴ products. The significant decline in the purchase of wholesale standalone CPS services suggested that retail end-users had a strong preference for purchasing retail line rental and calls from the same retail provider of RFTS.
- (e) **Increasing trend towards the consumption of services in packages and bundles**⁶⁵: ComReg identified a strong tendency for RFVC and RFVA to be purchased from a single retail FSP (and also often bundled with broadband, its subscription based television ('Pay TV') service and more recently, MTS).
- (f) **NGA roll-out by Eircom**⁶⁶: ComReg noted that Eircom had launched an NGA network, which had the potential to support a full range of services including RFTS, Pay TV, and broadband. This was considered to be ultimately likely to result in a technological shift in the way in which Eircom provides RFTS to customers using NGA based broadband services, in particular through Managed VOB, although, such a change had not yet occurred.

⁶¹ See paragraphs 3.49 to 3.54 of the Consultation.

⁶² Carrier Pre-Selection is a wholesale product that involves the provision of a standalone FVCO service that enables the FSP to provide an end-user with a calls only service, with the end-user continuing to purchase its line rental service separately from Eircom.

⁶³ It had been common for FSPs to purchase wholesale CPS from Eircom and to utilise this to provide RFVC to customers, with the customer purchasing the line rental element separately from Eircom. In this respect it was noted that CPS lines fell from 111,521 in Q1 2007 to 15,982 in Q3 2013. SB-WLR was the predominant wholesale product relied upon by access seekers to provide both RFTS with it being noted in the Consultation that there were 375,351 SB-WLR access paths at Q3 2013 having risen from 352,052 in Q3 2011.

⁶⁴ WLA is a managed 'end-to-end' voice calls product that includes WLR, FVCO and Transit along with other non-regulated wholesale inputs. FSPs that use Wholesale Switchless Voice ('SV') to offer RFTS would be classed as 'Resale FSPs'.

⁶⁵ See paragraphs 3.55 to 3.64 of the Consultation.

⁶⁶ See paragraphs 3.65 to 3.70 of the Consultation.

Retail Market Assessment

3.4 Having identified the key market trends and developments, and having regard to the 2012 Market Research⁶⁷ as well as other data available to it, ComReg set out its preliminary opinion on the likely scope of the RFTS market from a product and geographic perspective. As explained in the Consultation, ComReg is not obliged to conclude on a precise definition of the market for RFTS. The purpose of its assessment was to inform ComReg's subsequent review of the FVCO and Transit markets in Sections 4, 5, 6 and 7 of the Consultation (and subsequent decision). ComReg's preliminary view of the market for provision of RFTS was as follows (in Section 4 of the Consultation):

- (a) As a first step, ComReg sought to identify the focal product at the retail level which could be used as the basis for assessing potential complementary or substitutable products. ComReg's preliminary view was that the appropriate starting focal point for the assessment of potential RFTS substitutes was RFVC made from a fixed line telephone connected to a narrowband network (together being RFTS). While ComReg noted that there was a distinction between RFVC and the underlying RFVA service (which provides a platform that enables an end-user to make and receive calls), there is likely to be a high degree of complementarity between the products. This was because most customers prefer to purchase RFVA and RFVC from a single supplier given their complementary nature and, therefore, switching generally occurs across the two services in tandem. However, ComReg noted that the inclusion, or otherwise, of RFVA within the assessment would be unlikely to have a material impact on the outcome in any case. This relationship between RFVC and RFVA had, in any case, been accounted for throughout the analysis conducted in the Consultation.⁶⁸

⁶⁷ See 'Retail Access to the Public Telephone Network provided at a Fixed Location for Residential and Non Residential Customers' [ComReg Document 12/117a](#), October 2012 (the '2012 Market Research') as set out in Appendix A of the Consultation.

⁶⁸ See paragraphs 4.4 to 4.46 of the Consultation.

- (b) ComReg then sought to assess the degree to which RFTS customer may switch to another product in response to changes in RFTS prices. ComReg considered the factors that are likely to affect the responsiveness of end-users to changes in RFTS prices. The 2012 Market Research suggested that there is low end-user awareness of specific call costs, potentially due to the complexity of retail call pricing, and the wide range of call products listed by FSPs. However, the cost of making calls and line rental were typically considered by respondents to be of high importance when choosing an FSP for the provision of RFTS. This suggested that customers have a better understanding of call or line rental costs at the time when they choose an FSP/supplier, and that call prices, either directly or indirectly, are likely to impact on consumer and business decisions when it comes to choosing an FSP for the provision of RFVCs. Despite end-users having a low awareness of specific call costs in general, behaviour in terms of the use of different ways to make different call types suggested that at least a sizeable proportion of consumers were likely to have some degree of awareness of the relative cost of making certain call types (local/national/mobile/international etc) from a fixed line telephone, mobile telephone or a VOIP service.⁶⁹
- (c) ComReg considered that Managed VOB provided by Eircom over its NGA network was likely to be a suitable alternative to RFTS provided over its narrowband network. ComReg's preliminary conclusion as to the likely scope of the RFTS product market was that it is likely to include:
- RFTS provided to a fixed location over a narrowband copper network;
 - Managed VOB based RFTS provided to a fixed location over a wide area fibre network, whether FTTC or FTTH, using VDSL; and
 - Managed VOB based RFTS provided to a fixed location over a CATV network.

ComReg left open the question as to whether Managed VOB provided over ADSL technologies were likely be an effective substitute for a RFTS offered over a narrowband network (or Managed VOB on a CATV or VDSL network) and intended to monitor the situation on an ongoing basis.⁷⁰ ComReg considered that Unmanaged VOIP was not an effective substitute for RFTS.

- (d) ComReg did not consider that MTS are likely to fall within the same RFTS market as identified at (c) above, with these services appearing to be more complementary products⁷¹. ComReg also considered that a fixed line like telephony service that is provided using mobile network inputs ('**Converged Service**') did not appear to represent a suitable alternative for end-users seeking a RFTS.⁷²

⁶⁹ See paragraphs 4.47 to 4.78 of the Consultation.

⁷⁰ See paragraphs 4.87 to 4.151 of the Consultation.

⁷¹ See paragraph 4.152 to 4.176 of the Consultation.

⁷² See paragraphs 4.177 to 4.186 of the Consultation.

- (e) ComReg considered that the degree of competitive constraint posed by FWA based RFTS products is not likely to be substantial. However, ComReg left open the question as to whether RFTS provided over localised Fixed Wireless Access ('FWA') or alternative fibre networks fall within the same RFTS market as identified at (c) above.⁷³
- (f) Finally, ComReg sought to define the likely geographic scope of the RFTS market. ComReg's preliminary conclusion was that there was insufficient evidence to suggest that sub-national RFTS markets exist. Although there were some perceived structural variations emerging that may indicate a trend towards differentiation in competitive conditions for RFTS between urban and rural areas within Ireland, ComReg noted that this appeared to be related more to the provision of product bundles comprising broadband, RFTS and Pay TV services (and RFVA when bundled with NGA broadband) rather than the price of RFVCs. There was no apparent evidence of differentiated pricing or functional differences with respect to RFTS (whether RFVA or RFVC) on a geographic basis. Despite the structural variations identified between urban and rural areas in the provision of RFVA and broadband (reflected in the Large Exchange Areas ('LEA(s)') identified in the **2013 Bundles Decision**⁷⁴), ComReg indicated that it had not observed a clearly identifiable break in the pricing of RFTS, such that would support the definition of sub-national geographic markets⁷⁵.

Respondents' Views

Retail Trends and Developments

- 3.5 Six out of the seven Respondents expressed views on ComReg's assessment of the main trends and developments in the provision of RFTS.
- 3.6 ALTO, BT, Magnet, Telefonica and Sky agreed with ComReg's overall assessment of trends and developments in the provision of RFTS, in some cases commenting on particular aspects of the analysis.
- 3.7 Eircom disagreed with ComReg's assessment of the main trends and developments in the provision of RFTS.
- 3.8 ComReg has summarised the Respondents' main views below, grouping the key issues raised into the identified themes below, namely:
- (a) ComReg's analysis is based on outdated and inaccurate information (see paragraphs 3.9 to 3.13 below);

⁷³ See paragraphs 4.119 to 4.131 of the Consultation.

⁷⁴ 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>. See discussion in paragraph 9.27 of the Consultation.

⁷⁵ See paragraphs 4.190 to 4.219 of the Consultation.

- (b) Competition from MTS has not been adequately taken into account (see paragraphs 3.14 to 3.15 below);
- (c) Competition from OTT services has not been adequately taken into account (see paragraphs 3.16 to 3.18 below); and
- (d) Other key developments affecting RFTS market have not been adequately taken into account (see paragraphs 3.19 to 3.22 below).

ComReg's analysis is based on outdated and inaccurate information

- 3.9 Eircom considered that the information relied on by ComReg in the Consultation was outdated, incomplete, and did not accurately reflect current customer attitudes/trends. Eircom considered that the information used by ComReg had, in some cases, been over 12 months old and considered that more recent data would show a greater decline in RFTS.
- 3.10 Eircom stated that the information used by ComReg relating to the take-up and use of Retail Fixed Voice Access ('RFVA')⁷⁶ included a significant proportion of RFVA lines that are no longer used to make or receive Retail Fixed Voice Calls ('RFVC'). Eircom pointed to a significant number of so-called "phantom lines", being lines where consumers purchase RFVA as part of a wider bundle due to the pricing dynamics, but do not use it for a RFVC service. Eircom considered that including these phantom lines in the assessment of demand for RFVA products presented a false picture of continued growth in the actual number of RFVA lines.
- 3.11 More specifically, Eircom argued that:
- "A significant minority of Eircom's voice and broadband customers [redacted] have either stopped using their fixed telephone lines altogether, or have significantly reduced usage to a "de minimus" level in recent years. These customers have not, however, chosen to migrate to a standalone broadband product, usually because the pricing differentials are not sufficient to motivate them to change their package."⁷⁷*
- 3.12 Eircom went on to speculate that this phenomenon would also likely apply to Sky and UPC (but did not present evidence to support this).
- 3.13 In Eircom's view, the phenomenon of phantom lines indicates that many consumers are substituting RFTS with MTS, Managed VOB, or other OTT services. Hence, Eircom argued that the increase in phantom lines illustrates a growing decline in demand for traditional RFVA lines.

⁷⁶ RFVA would be more commonly known as line rental.

⁷⁷ Eircom Submission, page 5.

Competition from MTS has not been adequately taken into account

- 3.14 Magnet considered that a MTS is not a true alternative substitute for RFTS, but is more a complementary product.
- 3.15 Eircom was of the view, however, that MTS have become a substitute for standalone RFTS, and referred to the evidence that Eircom had presented⁷⁸ in response to the consultation process leading to the 2014 Retail Access Market Review Decision⁷⁹ in which it considered that it had included evidence of consumers' continued migration to mobile; fixed customers switching to a mobile connection; and increasing competition from MTS in the RFTS market. More specifically, Eircom argued that:
- (a) Business customers increasingly see MTS as a viable substitute to RFTS as MSPs target these customers with incentives to replace RFTS with MTS, such as with line rental reductions and fixed-mobile converged products;
 - (b) The regulatory environment (e.g. the decrease in regulated Mobile Termination Rates ('**MTRs**')) has facilitated substitution from RFTS to MTS;
 - (c) Substitution between RFTS and MTS is facilitated by MSPs supporting additional services such as geographic number portability ('**GNP**'), alarm monitoring, and electronic payment services;
 - (d) Substitution between RFTS and MTS is set to accelerate further due to Ireland's age demographic and the upcoming entry of two new Mobile Virtual Network Operators ('**MVNOs**')⁸⁰;
 - (e) Some conclusions drawn by ComReg from the available data in relation to MTS are flawed. For example, the emergence of MTS pricing that offers "unlimited calls" makes the comparison of specific call prices (such as local calls) irrelevant; and
 - (f) The impact of regulation should have been considered by ComReg when analysing prices of RFTS and MTS, in particular, RFTS offerings are constrained by regulation compared to MTS offerings).

⁷⁸ See http://www.comreg.ie/publications/submissions_to_consultation_12_117.583.104473.p.html and <http://www.comreg.ie/fileupload/publications/ComReg1395s.pdf>

⁷⁹ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 14/89](#), Decision D12/14, August 2014 ('**2014 Retail Access Market Review Decision**').

⁸⁰ UPC and Carphone Warehouse are expected to launch MVNO based MTS during 2015.

Competition from OTT services has not been adequately taken into account

- 3.16 Eircom argued that ComReg's assessment failed to acknowledge the increasing use of OTT applications as substitutes for real-time RFTS. In Eircom's view, the younger consumers (which see OTT services as being more appealing) will continue to play a decisive role in the continued decline in the use of RFTS. Eircom asserted that Ofcom had purportedly acknowledged that OTT services were likely to be the main driver behind the decline of fixed voice volumes⁸¹ in the UK market(s).
- 3.17 Hence, in Eircom's view, ComReg had not factored the prospective growth in usage of OTT services over the lifetime of this market review into its assessment of the FACO Markets.
- 3.18 Telefonica, while agreeing that the main trends and developments had been identified, considered that ComReg should closely monitor developments in the roll-out of VOB, particularly, given ongoing investments in fibre networks.

Other key developments affecting RFTS market have not been adequately taken into account

- 3.19 Magnet did not agree that there had been a significant increase in competition from FSPs. In its view, the only real new FSP since the 2007 Decision is UPC, given that the entry of Sky and Vodafone had effectively replaced Smart and BT, who had exited the RFTS market. Magnet also noted that:
- “bundling products is not a new phenomenon and shouldn't be treated as such by ComReg”.*
- 3.20 Sky noted that ComReg did not present evidence of a connection between increasing uptake of bundled services and Sky's entrance in the broadband market. Furthermore, Sky considered that its Pay TV service is excluded from its bundled offers and thus, Sky is not *per se* providing triple play bundles. Sky also noted that its ability and incentive to bundle service is different to that of its main competitors as Sky did not provide RFTS, broadband and TV services over the same vertically integrated network platform (Sky's Pay TV service is provided over satellite whereas its RFTS and broadband services are provided over fixed networks).
- 3.21 ALTO and BT expressed concern that the shift towards Next Generation ('NG') services could allow Eircom to entrench its dominance in the RFTS market. Magnet noted, more generally, that NG access ('NGA') will potentially change the way that voice is delivered in the short to medium term.

⁸¹ Ofcom, Communications Market Report, 1 August 2013, page 336, available at http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/2013_UK_CM.R.pdf.

3.22 Eircom considered that ComReg's analysis had failed to take adequate account of key recent markets developments such as the entry of Sky into the RFTS market; the withdrawal of the Department of Social Protection's ('DSP') Telephone Allowance Scheme ('TAS') which, according to Eircom, has resulted in abnormally high churn across Eircom's former DSP customer base; and the roll-out of NGA and the launch of standalone broadband ('SAB')⁸² services in Ireland which, according to Eircom, will lead to a reduction in the number of RFTS subscriptions purchased as part of a wider broadband bundle.

Retail Market Assessment

3.23 Six out of the seven Respondents expressed views on likely scope of the market for the provision of RFTS.

3.24 ALTO, BT, Magnet, Sky and Telefonica generally agreed that ComReg has appropriately identified the affected retail markets, although in some cases commented on specific parts of the analysis.

3.25 Eircom disagreed with ComReg's assessment of the likely scope of the market for the provision of RFTS for a number of reasons.

3.26 ComReg has summarised the Respondents' views below, grouping the key issues raised into the identified themes, namely:

- (a) The RFTS product market definition should be amended (discussed in paragraphs 3.27 and 3.28 below); and
- (b) The assessment of the geographic scope of the RFTS market is inadequate and sub-national geographic markets exist (discussed in paragraphs 3.29 to 3.31 below).

The RFTS product market definition should be amended

3.27 Magnet considered that Managed VOB services provided over an ADSL network and RFTS provided over a national FWA network should be included in the relevant RFTS product market.

3.28 Eircom considered that separate product markets exist for the supply of standalone RFTS on the one hand, and RFTS sold within a wider (broadband) bundle on the other. In Eircom's view, end-user behaviour is consistent with users not viewing the individual elements of a bundle as a substitute for the bundle as a whole. Eircom noted that the analysis of switching behaviour suggests that consumers do not switch from a bundle to standalone elements of the bundle (or piece together various elements of the bundle) or *vice versa*.. Eircom also refers in its response to economies of scope for bundled products and different competitive conditions for standalone and bundled RFTS in support of its position.

⁸² A SAB is a standalone retail broadband connection without the need for the retail customer to also purchase a RFVA (including as part of a RFTS).

The assessment of the geographic scope of the RFTS market is inadequate and sub-national geographic markets exist

- 3.29 Eircom considered that sub-national geographic markets exist for the supply of RFVA within a wider (broadband) bundle in urban areas (LEAs) and in non-urban areas ('**non-LEAs**'), and that this was not acknowledged in ComReg's retail market assessment. As a result, in Eircom's view, the different competitive conditions in relation to the supply of RFVA within and outside the LEAs have not been reflected in the geographic scope of the proposed wholesale FACO Markets (with ComReg's preliminary view in the Consultation being that this was national in scope as opposed to sub-national).
- 3.30 Eircom also considered that ComReg's retail market assessment failed to take adequate account of the pricing constraints imposed by Universal Service Obligations ('**USO**'), in particular, the requirement to offer Geographically Averaged Pricing ('**GAP**'). Sky raised a similar issue although ultimately agreed with ComReg's preliminary conclusions.
- 3.31 Sky noted that Eircom's national pricing for RFTS may have resulted from USO regulation, but nonetheless it could be the case that Eircom would choose to maintain national uniform pricing absent such regulation. Sky also noted that ComReg had not found evidence of sub-national pricing by other FSPs who (unlike Eircom) are not constrained by regulation.

ComReg's Assessment of Respondents' Views

- 3.32 In paragraphs 3.5 to 3.31 above, ComReg has summarised the key issues raised by Respondents in relation to ComReg's preliminary assessment of recent trends/developments in the RFTS market, along with its preliminary assessment of the likely scope of the market for the provision of RFTS. ComReg considers these Respondents' views below.

Key Trends and Developments

- 3.33 Below, ComReg assesses Respondents' views under each of the key themes identified in paragraph 3.8 above, in particular,
- (a) ComReg's analysis is based on outdated and inaccurate information (see paragraphs 3.37 to 3.52 below);
 - (b) Competition from MTS has not been adequately taken into account(see paragraphs 3.53 to 3.67 below);
 - (c) Competition from OTT services has not been adequately taken into account (see paragraphs 3.69 to 3.74 below); and
 - (d) Other key developments affecting RFTS market have not been adequately taken into account (see paragraphs 3.75 to 3.89 below).

- 3.34 Prior to doing so, having refreshed a variety of information sources ComReg notes that it has updated its analysis of the trends and main developments originally presented in section 3 of the Consultation, with this now set out in Appendix D of this Decision (the '**Updated Retail Trends Analysis**'). The Updated Retail Trends Analysis also informs ComReg's positions as set out throughout this Decision.
- 3.35 In general, the Updated Retail Trends Analysis shows no major changes to those trends/developments identified in the Consultation, such that they would lead ComReg to materially alter its preliminary views set out in the Consultation, and now finalised in this Decision. As noted in the Updated Retail Trends Analysis, ComReg highlights the following developments since the publication of the Consultation.
- The rate of decline in RFVC traffic has slowed down during 2014;
 - Eircom's market share of RFTS subscriptions has continued to decline with Eircom having 47.2% of all RFTS subscriptions at the end of Q4 2014; and
 - The rate of decline in standalone RFTS subscriptions has continued during 2014.
- 3.36 ComReg considers below the issues raised by Respondents, having regard to the Updated Retail Trends Analysis.

ComReg's analysis is based on outdated and inaccurate information

- 3.37 ComReg disagrees with Eircom's comments referred to in paragraphs 3.9 and 3.10 above, that ComReg's analysis was based on outdated and inaccurate information.
- 3.38 In the Consultation⁸³ ComReg clearly highlighted the sources of information that it had relied upon to support its analysis including:
- (a) Market research surveys carried out to inform its understanding of consumer and business attitudes/behaviours in the retail fixed voice markets, which has already been published by ComReg (the '**2012 Market Research**')⁸⁴;
 - (b) ComReg's Consumer ICT Survey (the '**2013 Consumer ICT Survey**') dated April 2013⁸⁵ and the Business ICT Survey (the '**2013 Business ICT Survey**') dated June 2013⁸⁶ (together referred to as the '**2013 ICT Surveys**');

⁸³ See paragraphs 1.38 to 1.46 of the Consultation.

⁸⁴ See 'Retail Access to the Public Telephone Network provided at a Fixed Location for Residential and Non Residential Customers' [ComReg Document 12/117a](#), October 2012 (the '**2012 Market Research**').

⁸⁵ See 'ComReg Consumer ICT Survey', [ComReg Document 13/46](#), April 2013 (the '**2013 Consumer ICT Survey**').

⁸⁶ See 'ComReg Business ICT Survey', [ComReg Document 13/61](#), June 2013 (the '**2013 Business ICT Survey**').

- (c) Data gathered from operators on a quarterly basis via statutory information requests⁸⁷ for the purpose of the publication of ComReg's Quarterly Key Data Reports ('**QKDR(s)**')⁸⁸ ('**QKDR Statutory Information Requests**');
 - (d) Data gathered from operators via statutory information requests issued by ComReg⁸⁹ within which both quantitative and qualitative information on the retail fixed voice market and the Relevant Markets was sought ('**Relevant Market Statutory Information Requests**');
 - (e) Information obtained through non-statutory based information requests; and
 - (f) Information provided to ComReg in subsequent follow-up correspondence and discussions in relation to (a) and (b) above;
- 3.39 The above information clearly spanned different time horizons, however, it included the most up-to-date information then available to ComReg. However, ComReg also highlighted in the Consultation that it intended to re-refresh some of the data sources identified above in parallel with the conduct of the consultation process, and would take such updated data into account when issuing its final decision.
- 3.40 Subsequently, in Q3 2014 ComReg issued further statutory information requests to operators seeking updated quantitative data on the RFTS, FACO (and Transit) markets ('**2014 Statutory Information Requests**')⁹⁰, with such information largely updating that obtained previously through the Relevant Market Statutory Information Requests identified above. The information gathered pursuant to those 2014 Statutory Information Requests also provided updated information on the RFTS market.
- 3.41 ComReg also continued to seek information from operators, including Eircom, on a non-statutory basis (for which it is grateful), including with respect to the RFTS market. ComReg has also had regard to recent information provided by operators in response to the most QKDR Statutory Information Requests, including that which is published in the QKDR itself. The trends and the main developments relating to the RFTS market which were presented in section 3 of the Consultation were also updated using the latest QKDR information and other sources identified above, with this set out in the Updated Retail Trends Analysis set out in Appendix D and elsewhere in this Decision.

⁸⁷ Pursuant to its powers under section 13D(1) of the Communications Regulation Acts 2002 to 2011 (as amended).

⁸⁸ The Q4 2014 QKDR.

⁸⁹ Pursuant to its powers under section 13D(1) of the Communications Regulation Acts 2002 to 2011 (as amended). ComReg issued a series of information requests to Service Providers in October 2011 with responses being provided to these in the period up to the first quarter of 2012.

⁹⁰ Pursuant to its powers under section 13D(1) of the Communications Regulation Acts 2002 to 2011 (as amended). ComReg issued a series of information requests to Service Providers in August 2014 with responses being provided to these in the period up to Q3 of 2014.

- 3.42 While ComReg acknowledges that some time has elapsed since the gathering the 2012 Market Research, based on the information that ComReg has reviewed subsequently, ComReg has not seen or been presented with any meaningful evidence that would indicate that end-user attitudes have changed to a sufficiently significant extent such that it may materially affect ComReg's overall analysis and conclusions set out in this Decision. Furthermore, ComReg notes that Eircom did not substantiate its views by providing any material evidence that would show a significant change from the outputs emanating from 2012 Market Research. Where Eircom has provided purported evidence of any changes, these have been considered throughout this Decision. ComReg also notes that other Respondents also largely agreed with ComReg's preliminary conclusions on the main trends and developments in the RFTS since the 2007 Decision.
- 3.43 ComReg's analysis has also been informed by its recently completed the 2014 Retail Access Market Review Decision⁹¹ within which it has drawn conclusions on a number of matters which have been raised by Eircom in response to the Consultation (and which were also raised by Eircom in its response to the consultation leading to the 2014 Retail Access Market Review Decision).
- 3.44 Finally, as noted above, ComReg has revised its assessment of key retail market trends within Appendix D of this Decision.
- 3.45 On that basis, ComReg does not, agree that its analysis was or is based on inaccurate and outdated information.
- 3.46 ComReg also disagrees with Eircom's comments relating to the treatment of inactive RFVA lines, the so-called *phantom lines*. ComReg highlighted the decline in RFVC traffic, corresponding with an increase in RFVA subscriptions over the same period, in paragraphs 3.22 to 3.24 of the Consultation. This observation implied a trend of decreasing RFVC traffic per subscriber. However, the fact that the number of RFTS subscribers (the majority of which would purchase RFVC and RFVA from the same FSP) continues to increase⁹², indicates that consumers and businesses seem to maintain a preference for the retention of RFVA for a number of reasons (although ComReg agrees that this is increasingly as part of a bundle with RFVC, fixed broadband and broader bundles of services)⁹³.

⁹¹ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 14/89](#), Decision D12/14, August 2014 ('**2014 Retail Access Market Review Decision**').

⁹² As of Q3 2014 there were 1,580,476 RFTS subscriptions which is an increase of 0.5% since Q2 2014 and an increase of 4.8% since Q3 2013.

⁹³ For example, see slides 43 and 85 from 2012 Market Research where the most cited reasons for retaining a fixed line telephone are highlighted.

- 3.47 The evidence presented by Eircom in support of its arguments around ‘phantom lines’ is somewhat tautological. In particular, Eircom has presented data relating to a particular group of its RFVC customers that purchase its ‘Talk Off-peak’ RFTS package. Eircom argues that 30% of these customers have either stopped using their fixed telephone lines altogether, or have significantly reduced usage to a “*de minimus*” level in recent years.
- 3.48 First, ComReg notes that Eircom’s Talk Off-peak product is likely to be suited to relatively ‘light users’ of RFVC services, and therefore this particular group of customers are unlikely to be representative of all customers purchasing RFVC services from Eircom. Thus inferences drawn by Eircom from this group of customers regarding the prevalence of *phantom lines* across a broader customer-base may overstate the proportion of customers that are generating low volumes of traffic. It is not clear, then, that Eircom’s observations in relation to the behaviours of this particular cohort of its own customers would apply to RFTS customers more generally, including Sky and UPC customers (ComReg also notes that neither Sky nor UPC raised this issues in relation to their customers).
- 3.49 Secondly, Eircom has not been explicit about how it defines “*de minimus*” usage of RFVC services. As such, it is not entirely clear how Eircom determines what constitutes ‘*phantom lines*’.
- 3.50 Eircom also speculates that these customers with low or no usage of RFVC services have not migrated to a standalone broadband product “....*usually because the pricing differentials are not sufficient to motivate them to change their package*”.⁹⁴ Notably, Eircom has not presented material evidence to support this claim. ComReg notes that all RFVA lines, including those that may be ‘inactive’ for some period of time, can be used at any time to make RFVCs. ComReg considers that RFTS subscribers, including those who may not normally or frequently use RFVA to make telephone calls, may place value on having the ability to make and/or receive calls on that RFVA line, if required. This is somewhat supported by the evidence garnered in the 2013 Consumer ICT Survey, where it is noted that while 87% of respondents indicated that they use a landline for making calls, 65% of such respondents used landline to receive calls⁹⁵.
- 3.51 For these reasons, ComReg does not agree with Eircom’s view that RFTS subscribers that are not currently generating RFVC traffic should be excluded from the analysis. ComReg notes that retail competition exists for these subscribers, which is also reflected in upstream wholesale demand in the wholesale FACO Markets (and for Transit).

⁹⁴ Eircom Submission, page 5.

⁹⁵ See slide 26 of the 2013 Consumer ICT Survey.

3.52 ComReg also does not agree that the existence of inactive RFTS subscribers, who are only likely to represent a small proportion of the total number of RFTS subscribers⁹⁶, in itself indicates that there is a sufficient level of substitution between RFTS, MTS or other OTT services (see further discussion below on competition from MTS and OTT services).

Competition from MTS has not been adequately taken into account

3.53 As referred to in paragraphs 3.15 above Eircom expressed the view that MTS were an effective substitute for RFTS, citing a number of factors in support of this.

3.54 ComReg considers that the trends referred to by Eircom do not, in and of themselves, imply that a sufficient incidence of switching from RFTS to MTS is occurring such that MTS would be an effective substitute. As highlighted⁹⁷ in the 2014 Retail Access Market Review Decision and in the Updated Retail Trends Analysis (which includes more recent data), the available evidence suggests that consumers and businesses predominantly demand access to both RFTS and MTS, and therefore consider RFTS and MTS to be broadly complementary. In particular:

- Data gathered from the operators for via the QKDR Statutory Information Requests⁹⁸ indicates that overall fixed voice subscriptions are increasing quarter on quarter since Q1 2011;
- The 2013 Consumer ICT Survey⁹⁹ showed that a high percentage of respondents purchased RFTS and MTS (69% purchased RFTS and 97% purchased MTS);
- The 2013 Business ICT Survey¹⁰⁰ showed that a high percentage of respondents used RFTS and corporate MTS (86% used RFTS and 59% used corporate MTS).

Eircom's assertion that substitution between RFTS and MTS has increased considerably amongst the business end-user segment of the RFTS market also does not align with the factual evidence observed by ComReg. For example, the number of business RFTS subscriptions increased from 225,738 in Q1 2010 to 233,475 in Q4 2014 (an increase of some 3.4%)¹⁰¹.

⁹⁶ For example, 2013 Consumer ICT survey indicated that only 10.2% of all respondents with home landline service are not using the landline service for making or receiving calls.

⁹⁷ See paragraphs 4.121 to 4.155 of the 2014 Retail Access Market Analysis Decision.

⁹⁸ The recently published QKDR is the Irish Communications Market Quarterly Key Data Report, Data as of Q4 2014, [ComReg Document 15/27](#), March 2015 ('**Q4 2014 QKDR**').

⁹⁹ 2013 Consumer ICT Survey.

¹⁰⁰ 2013 Business ICT Survey.

¹⁰¹ These figures are based on data presented in the Q4 2014 QKDR. This rate of growth is likely to be understated since, prior to Q4 2014, Digiweb's residential subscriptions were incorrectly reported in the 'business RFTS subscriptions' figure. These subscriptions were not, however, included in the Q4 2014 figure.

- 3.55 As noted, above, ComReg's 2013 Business ICT Survey also indicated that 86% of respondents were using RFTS.
- 3.56 ComReg acknowledges that the emergence of a Converged Services¹⁰² indicates that mobile operators are increasingly targeting business subscribers. However, as noted in the Consultation¹⁰³, the scale of these Converged Service product offerings has to date been limited and such services also differ in terms of their relative pricing and product characteristics relative to RFTS¹⁰⁴. Based on the evidence to date (and on a forward looking basis), having regard to the lack of any significant take-up¹⁰⁵, it suggests that Converged Services do not appear at this point to be sufficiently interchangeable with more traditional RFTS such that they would be an effective substitute. Rather, these products appear to be targeted at niche business customers that have a mobile workforce.¹⁰⁶ ComReg acknowledges that it is possible that such services may, in the future, become more widespread and it will continue to monitor developments in this regard.
- 3.57 Likewise, the fact that some mobile operators offer geographic number portability ('GNP'), along with other services traditionally offered only by FSPs, is not suggestive in itself that there is a sufficient substitution between RFTS and MTS to warrant the inclusion of both these two types of services in the same relevant market.
- 3.58 ComReg has considered Eircom's assertion that declining MTRs have accelerated the level of fixed-to-mobile substitution. ComReg notes that MTRs are a wholesale charge, and therefore will primarily impact on calling parties making Off-net¹⁰⁷ calls to MTS end-users, whether such calls are made from a mobile or a fixed line telephone. In the 2012 Mobile Voice Call Termination Market Review Decision ('**2014 MVCT Market Review Decision**') ComReg set out its position that MTRs set above an efficient level of costs can give rise to competitive and distributional impacts for FSPs and smaller MSPs with large traffic outflows to other more established MSP networks.

¹⁰² See paragraph 3.4(d) above.

¹⁰³ See paragraphs 4.177 to 4.186 of the Consultation.

¹⁰⁴ The Consultation noted that the fixed monthly fixed charge associated with FMS products is more expensive than a typical RFTS, but includes additional features and functionalities.

¹⁰⁵ At the end of March 2015 the number Vodafone's One Net Express Service users stood at [redacted].

¹⁰⁶ For example, Vodafone's One Net Express product description (available on Vodafone's business website at <http://www.vodafone.ie>) describes the service as combining "...the features of your office phone with the flexibility and freedom of your mobile in one scalable cloud based phone system. It makes your mobiles and landlines work together... seamlessly."

¹⁰⁷ An 'Off-net' call refers to a call between two subscribers that each have a different Service Provider for their provision of calls.

- 3.59 In this respect, amongst the concerns highlighted were that consumers would face inefficient signals on the pricing of Off-net mobile to mobile ('**M2M**') calls and fixed to mobile ('**F2M**') calls, leading to increased use of On-net¹⁰⁸ M2M calls (and other services). This can also result in consumers being deterred from making Off-net M2M and F2M calls.
- 3.60 Therefore, while ComReg agrees that above efficient cost MTRs may potentially impact upon consumer calling patterns¹⁰⁹, the extent to which this would lead to increased fixed to mobile substitution is not clear cut, particularly given MTR reductions can both increase the propensity for end-users to make both off-net M2M calls and F2M calls. For example, an increased propensity for end-users to increase their F2M calling patterns as a result of MTR reductions being passed through into lower retail charges, may lessen the likelihood that they would give up their RFTS and substitute to a MTS (ComReg equally recognises that MTR reductions may lead certain called mobile end-users to give up their RFTS where any previous concerns they had about the cost of people calling them on their mobile may be abated).
- 3.61 Notwithstanding the above, ComReg has also focused its analysis, insofar as the RFTS market is concerned, on the available retail evidence. To this end, ComReg has analysed retail data from various sources (including those identified in the Consultation, paragraphs 3.37 to 3.44 above and the Updated Trends Analysis set out in Appendix D of this Decision).

¹⁰⁸ 'On-net call' refers to a call between two subscribers that share the same Service Provider for their provision of calls.

¹⁰⁹ Having regard to the extent to which calling parties FSPs chooses pass through MTRs (including any increases or decreases in such) into their retail pricing for calls to mobiles.

3.62 In any case, it is ComReg's view that the low end-user awareness of prices generally¹¹⁰ is likely to diminish any impact on demand in response to retail price changes. In this respect, the continued trend for households, and even more so businesses, to retain a RFTS would appear to reflect a perception amongst a significant number of end-users that MTS are more expensive for making some types of calls. In this respect, the 2012 Market Research identified that 68%¹¹¹ of residential users perceived the cost of making a call using a MTS to be more expensive than the cost of making a call using a RFTS when calling a local or national geographic number. Furthermore, the predominant reason cited by household respondents for retaining a fixed line telephone¹¹² was that it was cheaper to make some types of calls (cited by 73% of respondents with a RFTS), 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 RFTS). We also noted in paragraph 3.54 above that the 2013 Business ICT Survey showed that a high percentage of respondents used RFTS and corporate MTS (86% used RFTS and 59% used corporate MTS), thus suggesting that RFTS continue to be important for a significant number of business users, notwithstanding any competition from MTS. ComReg also notes that Eircom did not provide any material evidence that a reduction in MTRs has increased substitution between RFTS and MTS, nor did it provide any material evidence to suggest that end-users' cost awareness has increased substantially in recent years.

¹¹⁰ See paragraphs 4.55 to 4.63 of the Consultation where end-user awareness of cost of line rental and fixed voice calls is presented.

¹¹¹ 2012 Market Research 2012, Slide 36.

¹¹² 2012 Market Research 2012, Slide 43.

- 3.63 ComReg does not agree with Eircom's assertion that changing age demographics in Ireland and the entrance of two new MVNOs will necessarily increase substitution between RFTS and MTS. ComReg acknowledges that the 2012 Market Research indicates¹¹³ that there is a relationship between respondents' age and the uptake of RFTS, with 39% of respondents in the age category 18-25 having using a RFTS. ComReg equally notes that respondents in the age categories above this showed a markedly higher incidence of using a RFTS.¹¹⁴ However, ComReg notes that the number of RFTS subscriptions continues to increase¹¹⁵. Figure 7 in the Updated Retail Trends Analysis illustrates both the total number of subscriptions and the market shares (in terms of subscriptions) of the main RFTS service providers over a five year period. At the end of Q4 2014 there were 1,587,261 fixed voice subscriptions (an increase of 3.8% on Q4 2013). ComReg has not observed or been presented with any material evidence to suggests that demographic factors are resulting in more pronounced fixed to mobile substitution in recent years.
- 3.64 In relation to the impact of MVNO entry on the RFTS market, Eircom has not provided any material evidence to support its view that existing MVNOs have had an impact on competition in the RFTS market or to quantify the impact on competition in the RFTS market (if any) it asserts that new MVNO entry will have. MVNO MSPs have, to date, tended to target specific mobile users segments (e.g. ethnic minorities and those with high propensity to call international destinations etc.), at least in the initial years following their launch. ComReg also notes that the combined MVNO share of the retail mobile market measured in subscriber terms is less than 7%¹¹⁶, notwithstanding such MVNOs having been active in the market for a number of years¹¹⁷. Furthermore, two new MVNOs, namely Carphone Warehouse and UPC are expected to enter the mobile market later this year. ComReg further notes that some service providers that operate in both the mobile market and the RFTS markets have tended to cross-sell MTS and RFTS to their customer base (e.g., Eircom through its emobile brand offers MTS bundled with RFTS and other services), potentially as a customer retention strategy thereby potentially limiting any substitution of those customers from RFTS to MTS). ComReg notes that UPC, once it enters the mobile market, will be a further service provider who may also adopt similar strategies although it is still too early to say whether this will actually be the case.

¹¹³ 2012 Market Research, Slide 11.

¹¹⁴ The 2012 Market Research, Slide 11, shows that 46% (aged 26-35), 69% (aged 36-45), 71% (aged 46-55), 85% (aged 56-65) and 95% (aged 65+) of Respondents had RFTS.

¹¹⁵ See paragraph E.6 of the Updated Retail Trends Analysis.

¹¹⁶ See Q4 2014 QKDR, Figure 4.7.1.

¹¹⁷ ComReg notes that the largest MVNO (in subscriber terms) is Tesco Mobile Ireland and it entered the MTS market in November 2007, having obtained a MTS market share of 5.2% since then. Its MTS market share has grown from 3.8% in Q4 2012 to 5.2% in Q4 2014.

- 3.65 Overall, ComReg has not seen any material evidence to suggest that the entry of two additional MVNOs would be likely to increase substitution between RFTS and MTS.
- 3.66 Finally, ComReg notes Eircom's comments in relation to ComReg's pricing analysis of RFTS and MTS presented in the Consultation. The primary purpose of the pricing analysis was to highlight the existing differences in pricing structures of RFTS and MTS. As noted by ComReg in the Consultation¹¹⁸, while charges for out-of-bundle RFVC calls appear to be lower in comparison to charges for out-of-bundle mobile calls, RFTS and MTS tariffs often differ in terms of inclusive minute allowances and other important product aspects, thus complicating the pricing comparison between the two services. The material presented in Tables 5 and Table 6¹¹⁹ in the Consultation (which set out set out prices for a range of RFTS and MTS provided by Eircom and Vodafone) was not employed to make a precise assessment of relative prices, but rather to highlight general differences in prices of RFTS and MTS services supplied by Eircom (and its subsidiary, Meteor) and Vodafone respectively.¹²⁰ In relation to the impact of regulation on RFTS pricing, ComReg considers that speculation on the likely pricing structures of RFTS absent wholesale regulation would not have materially impacted upon its preliminary view on the level of substitution between RFTS and MTS.
- 3.67 In summary, ComReg has conducted an analysis of fixed-to-mobile substitution based on the evidence that it has collected from industry participants through various mechanisms. This evidence has been presented in the Consultation, in the paragraphs above, and in the Updated Trends Analysis set out in Appendix D of this Decision). As discussed above, Eircom has disagreed with parts ComReg's assessment, but in many cases has not presented material evidence that contradicts ComReg's views.
- 3.68 For these reasons, ComReg sees no reason to change its position, and remains of the view (as expressed in the Consultation¹²¹) that MTS is unlikely to be a sufficiently effective substitute to RFTS such that MTS fall within the same product market as RFTS. ComReg does, however, recognise that some end users may rely solely on MTS to make their calls.

¹¹⁸ See paragraphs 4.161 and 4.162 of the Consultation.

¹¹⁹ See page 107 and 108 of the Consultation.

¹²⁰ It is notable, in itself, that each of these companies simultaneously offers RFTS and MTS services. Since, if as Eircom claims, MTS is a substitute for RFTS, it is not clear why Vodafone would have taken the necessary steps to offer RFTS using FACO and WLR.

¹²¹ See paragraphs 4.152 to 4.176 of the Consultation.

Competition from OTT services has not been adequately taken into account

3.69 As referred to in paragraphs 3.16 and 3.17 above Eircom considered that competition from OTT services had not been adequately taken account of in ComReg's assessment of the RFTS market. Eircom referred to a statement by Ofcom, which Eircom asserted constituted an acknowledgement by Ofcom that ORR services were likely to be the main driver behind the decline of fixed voice volumes in the UK.

3.70 ComReg notes that Ofcom made the following observation in relation to declining demand for fixed voice calls in 2012:

*"...the main driver of the decline in fixed voice volumes is likely to have been increasing use of text-based communication services, such as text messaging, email, instant messaging, social networking and micro-blogging sites. Increasing use of voice over IP services may have also had some impact on fixed call volumes."*¹²²

3.71 It is, therefore, not the case that Ofcom referred to OTT services as the main driver of the decline in FTS over that period. Rather, Ofcom attributed the trend to a number of factors, with voice over IP services identified as potentially having an impact.

3.72 Overall, ComReg does not agree with Eircom's view. ComReg is of the view that the Consultation¹²³ fully considered such matters, having highlighted that a sizeable number of end-users (particularly residential end-users¹²⁴) occasionally using OTT services (categorised as Unmanaged VOIP¹²⁵ services in the Consultation) to make certain types of calls (primarily international calls)¹²⁶. However, ComReg noted that households and businesses primarily use a RFTS or MTS to make local, national and international calls.

¹²² [Communications Market Report 2013](#) (August), Ofcom, page 336.

¹²³ See paragraphs 3.45 to 3.48 and 4.142 to 4.151 of the Consultation.

¹²⁴ The use of Unmanaged VOIP by business users is not common, as evidenced from the 2012 Market Research (see slides 86, 106 and 110), noting at the same time that 95% of business respondents indicated they had a RFTS.

¹²⁵ Unmanaged VOIP or Over the Top ('OTT') VOIP, for the purpose of the Consultation, were classed as meaning that the Service Provider itself does not provide the access paths to its customers and does not have a switching platform and interconnection path(s). Its customers must access the Unmanaged VOIP service via the public internet or over other applications using their broadband connection provided by another supplier.

¹²⁶ As noted in paragraph 3.47 of the Consultation, the 2012 Market Research showed that household respondents indicated a clear preference for using their landline, rather than their mobile telephone, to make calls to other fixed numbers (e.g. 80% preferred to use their RFTS for calls to national fixed numbers) whereas Unmanaged VOIP was cited as their communications method of choice for calls by only a very small number of respondents (e.g. only 2% preferred to use Unmanaged VOIP for calls to national fixed numbers). However, a higher but still relatively low number of respondents indicated Unmanaged VOIP as their communications method of choice for international calls (11% preferred to use Unmanaged VOIP for international calls compared to 55% preferring RFTS and 12% preferring MTS making international calls).

- 3.73 ComReg notes that Eircom has not provided any material evidence indicating that Unmanaged VOIP services provide an effective competitive constraint in the RFTS market. ComReg acknowledges that OTT services may be partially substitutable for RFVCs, for a specific cohort of end-users and for specific call types. However, the evidence observed by ComReg suggests that overall, these services are more of a complement to RFTS and MTS. For example, Unmanaged VOIP tends to be used more frequently for international calls, and can only be used over an existing broadband connection which may give rise to quality of service issues, unlike RFTS. ComReg notes Unmanaged VOIP has had, if any, a limited impact on demand for RFTS, with overall RFTS subscriber numbers increasing by 3.8% in the year to Q4 2014.¹²⁷
- 3.74 Hence, ComReg remains of the opinion that, given the existing differences in functional characteristics and patterns of use, Unmanaged VOIP calls are not likely to be an effective substitute for RFTS. However, ComReg will continue to monitor the situation and review its position, where appropriate.

Key developments affecting RFTS market have not been adequately taken into account

- 3.75 ComReg notes comments expressed by Magnet regarding competition among FSPs, which are referred to in paragraph 3.19 above. In the Consultation, ComReg has acknowledged¹²⁸ that Vodafone's entry into the RFTS market was somewhat balanced by BT's exit. ComReg notes that in 2009 BT transferred its consumer and small business broadband and voice customer base to Vodafone¹²⁹. However, since then Vodafone has also grown its subscriber base (and market share) through a combination of organic growth and through other acquisitions. ComReg notes that other new entrants, namely Sky and UPC have acquired a significant market share since the 2007 Decision (as explained in the Consultation and evidenced by Eircom's declining market share over the period Q4 2007 to Q3 2013)¹³⁰ and, together with Vodafone this has done more than just simply replace the market share held by those operators that left the market (as was suggested by Magnet).

¹²⁷ ComReg notes that the 2012 Market Research (Slide 16) showed that 36% of household respondents indicated they used Unmanaged VOIP, however the frequency of use varied considerably with 20% of such respondents using it at least once a day, whereas the remaining 80% of respondents used Unmanaged VOIP much less frequently.

¹²⁸ See paragraph 3.71 of the Consultation.

¹²⁹ ComReg notes that in 2009 BT transferred its consumer and small business broadband and voice customer base to Vodafone. See <https://community.vodafone.ie/t5/Billpay-Packages/BT-and-Vodafone-Agreement-to-Significantly-Boost-Competition-and/td-p/2078>.

¹³⁰ See Figure 7 in the Updated Retail Trends Analysis.

- 3.76 In relation to issues raised by Magnet concerning the consumption of services in packages and bundles, ComReg noted in the Consultation¹³¹ that the uptake of bundles has increased significantly since the last market review, when the majority of consumers purchased RFTS on a standalone basis. ComReg agrees that the bundling of services is not a new trend, and that operators have offered bundled services for a number of years. However, ComReg has observed that demand for bundles has increased significantly since the 2007 Decision, and ComReg considers this trend to be of potential relevance in its assessment of the upstream FACO and Transit markets.
- 3.77 ComReg notes Sky's comments referred to in paragraph 3.20 above that ComReg had not presented evidence of a connection between increasing uptake of bundled services and Sky's entrance in the broadband market. ComReg considers that it is not necessary, for the purpose of this market review, to establish a precise connection between Sky's entry into the RFTS market and the increasing number of bundled subscriptions. In particular, ComReg notes that this would have no impact on the assessment of competition in the wholesale FACO and Transit markets (which is the primary focus of this market review).
- 3.78 Nevertheless, ComReg notes that since Sky's entry into the RFTS market in Q3 2013 the rate of uptake of bundled services (especially the uptake of triple play services) has increased substantially. ComReg's view is that this is at least in part due to Sky's presence in the market¹³².
- 3.79 ComReg does not agree with Sky's assertion that Sky is not offering triple play bundles in Ireland. As evident from way in which its services are advertised by Sky's on its website¹³³, RFTS, broadband and Pay TV services are offered as part of a single bundle for a single price. ComReg also refers to Sky Group's Annual Report 2013 where it is noted that:

*"Sky is the UK's fastest growing home communications company and this year, we achieved another product milestone with the launch of a communications service to complete **our triple play offering in Ireland**"¹³⁴. [EMPHASIS ADDED]*

¹³¹ See paragraphs 3.55 to 3.64 of the Consultation.

¹³² For example, based on information provided by operators for the purpose of the QKDR, the number of triple and quadruple play subscriptions has grown from 182,150 in Q1 2013 to 418,339 in Q3 2014.

¹³³ See advertised triple play offers <http://www.sky.com/ireland/bundles/> (accessed on 20 April 2015 however also applied previous to this date).

¹³⁴ See page 10 of the annual report available at <http://corporate.sky.com/documents/publications-and-reports/2013/annual-report-2013.pdf>

- 3.80 Sky also suggested that given that it relies on more than one physical network to provide triple play bundles there is a distinction between its own incentives to bundle, and those faced by its competitors. While this may be the case in the context of any assessment of potential anti-competitive conduct (and ComReg makes no comments in this regard), whether Sky's ability and incentive to bundle services in retail markets is different from that of its competitors is of minimal relevance to ComReg's assessment of competition in the wholesale FACO and Transit Markets.
- 3.81 ComReg disagrees with Eircom's comments referred to in paragraph 3.22 above that ComReg has not adequately accounted for the entry of Sky in the Consultation.¹³⁵ ComReg notes that, while Sky has gained market share in the RFTS market¹³⁶, it uses Eircom's regulated FACO products (either directly, or indirectly via BT) as the wholesale inputs for its supply of RFTS. As noted in the Consultation¹³⁷, the assessment of the RFTS and the upstream FACO Markets takes place against the backdrop of the Modified Greenfield Approach¹³⁸. In this context, absent regulation, SB-WLR services would not likely be made available by Eircom and, therefore, Access Seekers (including Sky) would not be able to offer RFTS using these wholesale inputs. In this respect, Sky's competitive impact in the retail market is only possible in the presence of upstream regulation.

¹³⁵ For example, see paragraph 3.16 of the Consultation.

¹³⁶ See Figure 7 in the Updated Retail Trends Analysis where Sky's market share of retail subscriptions is shown to be 6.4% as at Q4 2014.

¹³⁷ See paragraphs 1.23, 4.189 and 5.2 of the Consultation.

¹³⁸ In line with the "Modified Greenfield Approach" set out in the Explanatory Note to the 2007 Recommendation, ComReg's assessment starts from the assumption that SMP regulation is not present in the markets under consideration, i.e. no *ex ante* regulation in the specific FACO markets or Transit market 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 and proportionate.

- 3.82 As noted in the 2014 Retail Access Market Review Decision¹³⁹ (which took place in the context of SB-WLR access, price control and related remedies being imposed in retail markets), the potential movement of SB-WLR and margin squeeze remedies upstream into the FACO Markets may address competition problems in the RFVA Markets¹⁴⁰. In these circumstances, ComReg will review, as relevant, the competition problems in the RFVA Markets in light of these remedies being available in the upstream FACO Markets and ComReg will consult on a 3CT assessment in respect of the LLVA Bundled Market and HLVA Markets (as defined in the 2014 Retail Access Market Review Decision) without undue delay.¹⁴¹
- 3.83 In relation to Eircom's comment that ComReg failed to adequately account for the withdrawal (in January 2014) of the DSP's TAS, ComReg notes that Eircom has not provided evidence indicating that such withdrawal has had a significant impact on the overall RFTS market. ComReg also notes that no other Respondent that provides RFTS (or MTS) raised this as an issue in their Submissions.
- 3.84 However, ComReg considers that aggregate RFTS subscriptions data, which provides a dynamic picture of the market, offers an informative overall view of trends in the RFTS market.¹⁴² This data, naturally, should also reveal any significant developments in the market.
- 3.85 It is not evident from RFTS subscriptions data supplied for ComReg's QKDR that the withdrawal of the TAS has resulted in an acceleration in the rate of decline rate of standalone RFTS subscribers (when compared with the periods before the withdrawal of the TAS). To the contrary, in the 12 months period to September 2014 after the TAS withdrawal, the total number of standalone RFTS subscriptions decreased by 15,461 subscriptions, whereas over the same 12 month period in 2013 (the period prior to the TAS withdrawal) standalone RFTS subscriptions decreased by 37,265.

¹³⁹ See paragraph 1.12, 2.18, 5.57, 5.73 and 6.11 of the 2014 Retail Access Market Review Decision.

¹⁴⁰ In accordance with the MGA the assessment of Retail Access Markets would have regard to the need for regulation in view of the presence and sufficiency of upstream wholesale remedies in the FACO Markets.

¹⁴¹ As noted in paragraphs 1.15 and 1.16 and in Appendix D, the European Commission Response invited ComReg to proceed with a review of the Retail Access Markets without undue delay.

¹⁴² ComReg considers that aggregate level data is more informative for the purpose of assessing the behaviour of RFTS subscribers overall. This is because overall market data provides results that are more reflective of the overall impacts of a policy. For example, TAS recipients are likely to be more cost sensitive compared to the broader population, and therefore are unlikely to be representative of the broader population.

- 3.86 Therefore, ComReg is satisfied that the withdrawal of TAS has not had a material impact on the demand for RFTS, such that it requires additional consideration in this market review. ComReg also notes Eircom's comments in paragraph 3.22 with respect to NGA developments. Contrary to Eircom's view, the impact of NGA deployment on the RFTS was assessed¹⁴³ in the Consultation. In this respect, ComReg discussed its expectations that Eircom would ultimately replace the PSTN narrowband network with a Managed VOB service, at least within the footprint of its NGA network, although the timing for such was noted as being uncertain. ComReg notes that, with the exception of UPC deploying a Managed VOB service (which was also noted in the Consultation¹⁴⁴), there is little other evidence of NGA roll-out having had a significant impact on the provision of RFTS or on the FACO Markets. In particular, the RFTS market is primarily supplied using Eircom's narrowband voice network (either by Eircom or its SB-WLR customers). Furthermore, demand for SB-WLR is growing (see Figure 9 in the Updated Retail Trends Analysis).
- 3.87 ComReg acknowledges that, over time, NGA networks may facilitate the delivery of higher quality Managed VOB based RFTS, and that for some end-users, Unmanaged VOIP might be an alternative for making certain types of calls. However, there is no material evidence to suggest that such developments will have a significant effect on the RFTS market within the timeframe of this market review. Conversely, the evidence examined by ComReg in the Consultation¹⁴⁵ indicated that, for the majority of customers (and especially for business RFTS customers), Unmanaged VOIP calls do not represent an effective substitute for RFTS.

¹⁴³ For example, see paragraphs 3.65 to 3.70 of the Consultation.

¹⁴⁴ See paragraphs 4.101 to 4.109 of the Consultation.

¹⁴⁵ See paragraph 4.148 of the Consultation.

- 3.88 Contrary to Eircom's assertions, the launch and impact of standalone broadband ('SAB') services was discussed¹⁴⁶ in the Consultation. ComReg noted that Eircom was not actively¹⁴⁷ advertising its standalone broadband products, and that there were only a negligible number of standalone ADSL-based or VDSL-based SAB subscriptions at the end of Q4 2013. ComReg notes that the number of such standalone ADSL or VDSL based SAB subscriptions at the end of Q4 2014¹⁴⁸ remains relatively small compared to the number of ADSL or VDSL broadband subscribers who purchase broadband in a package with RFTS¹⁴⁹. Thus, RFTS continue to be predominantly delivered to households and businesses over the PSTN. We acknowledge that this may change in the future as and when Managed VOB based RFTS are made more widely available, however, ComReg considers that PSTN based RFTS will, on a forward looking basis, continue to be the predominant means of supply.
- 3.89 Given the low number of SAB subscriptions, it is unlikely that the availability of a SAB service in itself has had a significant impact on the RFTS market. Furthermore, ComReg has not observed evidence suggesting that such SAB products have been used by competing FSPs to provide RFTS services. ComReg also notes that Eircom has not provided any actual evidence to support its argument that the availability of a SAB service has made a significant impact in the RFTS market (even to the extent there were evidence, given the relatively low SAB volumes, ComReg does not consider that this would alter its views).
- 3.90 The evidence examined by ComReg, which was presented in the Consultation and again in the Updated Retail Trends Analysis, does not support Eircom's view that SAB is having a significant impact on the RFTS market. Given that Eircom has not provided any alternative evidence in support of its view, ComReg has no reason to depart from its position as set out in the Consultation.

Retail Market Assessment

- 3.91 Below, ComReg now assesses Respondents' views under each of the key themes identified in paragraph 3.26 above, in particular:
- (a) The retail product market definition should be amended (discussed in paragraphs 3.92 to 3.99 below); and
 - (b) The assessment of the geographic scope of the RFTS market is inadequate and sub-national geographic markets exist (discussed in paragraphs 3.100 to 3.105 below).

¹⁴⁶ See, for example, paragraph 4.112 of the Consultation.

¹⁴⁷ By actively this means in a conspicuous and public way such that any consumer could themselves see the product is available and seek to obtain SAB (rather than say a SAB service being offered by Eircom as a form of retail defence).

¹⁴⁸ At a retail level, the number of Eircom's SAB subscribers stood at [redacted] while the total number of wholesale SAB and VUA lines stood at [redacted].

¹⁴⁹ Figure 3.1.2 of the Q4 2014 QKDR shows that there were 1,258,758 fixed broadband subscriptions in Q4 2014, of which 832,179 were ADSL and VDSL subscriptions.

The retail product market definition should be amended

- 3.92 As referred to in paragraphs 3.27 and 3.28 above Magnet and Eircom suggested that the retail product market definition should be amended, citing a number of reasons for this.
- 3.93 ComReg notes Magnet's comment that ComReg should include Managed VOB services provided over an ADSL network within the scope of the RFTS product market. As discussed in the Consultation¹⁵⁰, ComReg considered the question as to whether the provision of a range of xDSL based broadband technologies could potentially be used to provide a Managed VOB based RFTS, in particular, subject to the quality of the broadband connection, pricing and other characteristics of the associated RFTS service. Given the uncertainty regarding the sufficiency of the quality of ADSL based broadband services, the lack of material entry to date by services providers offering Managed VOB over ADSL and uncertainty regarding the likely future entry by FSPs, ComReg left open the question of whether ADSL based Managed VOB should be included in the RFTS market.
- 3.94 While Managed VOB services over ADSL networks are available in the market¹⁵¹, ComReg remains of the opinion that there is insufficient evidence yet to determine whether ADSL based broadband services would be an effective substitute for a RFTS provided over a narrowband, or CATV, network. ComReg notes that the provision of Managed VOB services over ADSL networks remain negligible¹⁵², and there is no available evidence that there will be a significant rollout of Managed VOB over ADSL within the lifetime of this market review.¹⁵³
- 3.95 Magnet also noted that RFTS provided over FWA network could offer effective competition in the RFTS market if a national product were made available. In the Consultation¹⁵⁴, ComReg considered this question and set out the reasons why it considered that the degree of competitive constraint posed by FWA based RFTS products was limited. The reasons for this included the low and declining demand for FWA based broadband generally¹⁵⁵ and RFTS provided over FWA¹⁵⁶.

¹⁵⁰ See paragraphs 4.110 to 4.118 of the Consultation.

¹⁵¹ For example, Blueface provides partially managed VOIP based RFVC. However, Blueface customers need to purchase broadband services from broadband providers.

¹⁵² Blueface had a total of [%< [REDACTED]] customers (or [%< [REDACTED]] of RFTS subscriber market share) as of Q4 2014.

¹⁵³ Vodafone was [%< [REDACTED]]

[REDACTED]

¹⁵⁴ See paragraphs 4.119 to 4.126 of the Consultation.

¹⁵⁵ As of Q4 2014, there were 48,486 active FWA broadband connections, a fall of 19.8% in the previous 12 months. At its peak in Q1 2008, there were 123,456 FWA subscribers.

- 3.96 ComReg notes that there are numerous FWA broadband networks of different sizes in Ireland. However, none of the existing FWA broadband providers can currently offer FWA services on a national basis. Moreover, due to the declining demand for FWA broadband and RFTS, ComReg considers that FWA is unlikely to offer an effective competitive constraint on a significant scale in the RFTS market over the period of this review.
- 3.97 As noted in the Consultation¹⁵⁷, ComReg is not required to reach a definitive view on the boundaries of the RFTS market. Thus, ComReg continues to leave open the matter of whether calls provided over FWA networks should be included in the RFTS market. ComReg notes that the inclusion, or otherwise, of RFTS provided over FWA networks in the retail market does not impact upon ComReg's assessment of competition in the FACO Markets (given the small and declining demand for FWA based RFTS).
- 3.98 In paragraph 3.28 above, ComReg noted Eircom's view that separate product markets exist for the supply of standalone RFTS, and that of RFTS within a wider (broadband) bundle. ComReg made a similar distinction¹⁵⁸ in the 2014 Retail Access Market Review Decision¹⁵⁹ where it defined, amongst other things, separate product markets for (a) standalone RFVA, and (b) RFVA sold with other services. Within that decision it was noted¹⁶⁰ that absent wholesale regulation in such markets Eircom would hold SMP in both of these markets, with close to 100% and 66% subscription market shares respectively. Since the 2014 Retail Access Market Review Decision was a review of a retail market(s), ComReg was required to reach a definitive conclusion on the boundary of these relevant markets.

¹⁵⁶ ComReg has estimated that as of Q4 2014 there were [X [REDACTED]] subscribers being served over FWA networks, which represents approximately 1.3% of all RFTS subscriptions.

¹⁵⁷ See paragraph 4.187 of the Consultation.

¹⁵⁸ ComReg decided that RFVA and RFVC are in separate markets. See paragraphs 4.48 to 4.58 of the 2014 Retail Access Market Review Decision

¹⁵⁹ See paragraphs 4.102 to 4.120 of the 2014 Retail Access Market Review Decision.

¹⁶⁰ For example, see paragraph 5.74 of the 2014 Retail Access Market Review Decision.

3.99 In this market analysis, ComReg is focused on how competition problems in the FACO Markets could lead to competition problems in downstream RFTS markets. Figure 6 in the Updated Retail Trends Analysis shows that SB-WLR remains the main driver of competition in the provision of RFTS. This is the case regardless of whether RFTS is provided on a standalone basis, or in a broader product-bundle. Therefore, ComReg considers that, for the purpose of this market review, it is not necessary to specifically define retail markets, or to make any definitive distinction between standalone-RFTS and RFTS sold within a bundle. However, ComReg takes full account of retail market conditions when examining the impact of indirect constraints in the FACO Markets¹⁶¹. Hence, in this context ComReg leaves open the question of whether separate product markets exist for the supply of standalone RFTS, and RFTS within a wider (broadband) bundle, for the purpose of this particular market analysis exercise.

The assessment of the geographic scope of the RFTS market is inadequate and sub-national geographic markets exist

3.100 ComReg disagrees with Eircom's views, referred to in paragraphs 3.29 and 3.30 above in relation to the existence of sub-national geographic for the supply of RFTS. ComReg is of the view that geographic scope of the RFTS market was adequately examined¹⁶² in the Consultation. In particular, ComReg noted that there was some variance in competitive conditions between different geographic areas, particularly within UPC's network footprint. However, as noted in the Consultation, ComReg has seen no material evidence to date that any such variance has resulted in geographically differentiated pricing and/or functional differences in RFTS products such that could indicate that separate sub-national geographic markets exist.

3.101 Hence, while ComReg has observed variations of competitive conditions between certain geographic areas, these are not sufficient at this time to suggest that sub-national markets exist or will evolve within the lifetime of this market review. In particular, a common pricing constraint appears to apply across areas where there is some variance in the conditions of competition. For example, between urban and rural areas. Such common pricing constraints undermine the identification of separate geographic markets at this time.

3.102 ComReg disagrees with Eircom's comment that ComReg, in its assessment of the geographic market definition, failed to take adequate account of the pricing constraints such as GAP imposed on Eircom by the USO. ComReg explicitly noted this caveat in paragraph 4.204 of the Consultation.

¹⁶¹ For completeness, ComReg considered how market shares would appear if a similar approach to market definition was taken for RFTS. Q3 2014 data indicates that, once we exclude FSPs that rely on Eircom's FACO and SB-WLR products to provide RFTS¹⁶¹, Eircom would have close to 100% of all standalone RFTS subscriptions and 66% of all RFTS subscriptions bundled with broadband and/or other services.

¹⁶² See paragraphs 4.190 to 4.219 of the Consultation.

- 3.103 Furthermore, as noted in the Consultation¹⁶³, ComReg highlighted that Eircom had reduced the effective price of retail bundles that include RFTS and NGA broadband within the LEAs. Having regard to its obligations imposed under the 2013 Bundles Decision¹⁶⁴ (amongst which various price ceilings and floors are set to prevent Eircom imposing a margin/price squeeze in the WBA and WPNIA markets), Eircom applied a €3 discount on its SB-WLR product, but only when it is bundled with WBA¹⁶⁵ (**‘€3 WLR Discount’**). This SB-WLR discount when bundled with WBA also provided a margin to allow Eircom to set a lower price for retail bundles that include RFTS and next generation broadband than may otherwise have been possible. ComReg noted, in arriving at the 2013 Bundles Decision, that Eircom and its wholesale customers face greater competition in the provision of retail bundles within the LEA and required some pricing flexibility in order to compete with UPC.
- 3.104 However, following the publication of the Consultation, and as noted by a number of Respondents, Eircom subsequently withdrew the SB-WLR discount in January 2015. ComReg considers that this discount withdrawal, supports ComReg’s view that competitive conditions between geographic areas are not differentiated enough to suggest the existence of sub-national RFTS markets.
- 3.105 Moreover, the requirement for GAP imposed by the USO does not prevent other FSPs from applying geographically differentiated pricing. In the Consultation¹⁶⁶ ComReg highlighted the lack of evidence of sub-national pricing or marketing in the supply of RFTS generally, a point noted by Sky in its comments at paragraph 3.30 above. ComReg notes that FSPs (including FSPs not designated with a USO based GAP obligation) continue to offer uniform rates for RFTS throughout Ireland, and advertise RFTS on a national basis¹⁶⁷. ComReg’s therefore maintains its preliminary view that there is no clearly identifiable break in pricing that would merit delineation of narrower than national geographic markets.

¹⁶³ See paragraphs 5.231 to 5.233 of the Consultation.

¹⁶⁴ 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>.

¹⁶⁵ 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 were all variants of current generation broadband products (existing Bitstream and Line Share) and next Generation (Bitstream Plus and Virtual Unbundled Access) broadband products

¹⁶⁶ See paragraphs 4.211 to 4.215 of the Consultation.

¹⁶⁷ For example, see <http://www.eircom.net/>, <http://www.upc.ie/> or <http://www.vodafone.ie/> for examples of advertised RFTS services with a single price irrespective of location (as at 10 December 2014).

ComReg's Position

3.106 Having considered Respondent's views referred to in paragraphs 3.32 to 3.105 above, along with developments in the market generally, ComReg considers that its preliminary assessment of RFTS market as set out in the Consultation remains valid.

3.107 In this respect ComReg has decided that:

- (a) The appropriate starting focal point at the retail level for the assessment of potential product substitutes for RFTS is RFVC made from a fixed line telephone connected to a narrowband network (together being RFTS). However, ComReg notes that the inclusion, or otherwise, of RFVA within the assessment would be unlikely to have a material impact on the result in any case. This is because most customers prefer to purchase RFVA and RFVC from a single supplier given their complementary nature and therefore switching generally occurs across the two services in tandem. This relationship between RFVC and RFVA has, in any case, been accounted for throughout the analysis and in the round it does not have a material impact on the assessment of wholesale FACO and Transit markets;
- (b) The scope of the RFTS product market includes:
 - RFTS provided to a fixed location over a narrowband copper network;
 - Managed VOB based RFTS provided to a fixed location over a wide area fibre network, whether FTTC (using VDSL) or FTTH; and
 - Managed VOB-based RFTS provided to a fixed location over a CATV network;
- (c) MTS do not fall within the RFTS market as such services appear to be more complementary products;
- (d) ComReg leaves open the question as to whether Managed VOB over ADSL technologies are likely be an effective substitute for a RFTS offered over a narrowband network (or managed VOB on a CATV or VDSL network) and intends to monitor the situation on an ongoing basis.
- (e) The degree of competitive constraint posed by FWA based RFTS products is not likely to be substantial. However, ComReg leaves open the question as to whether RFTS provided over localised FWA or alternative fibre networks fall within the same RFTS market as identified at (d) above
- (f) The question as to whether separate product markets exist for the supply of standalone RFTS and RFTS within a wider (broadband) bundle is left open as it does not have a material impact on the analysis of the wholesale markets which are the subject of this review; and

(g) In relation to the geographic scope of the market for supply of RFTS, although there are some perceived structural variations emerging that may indicate a trend towards differentiation in competitive conditions for RFTS between urban and non-urban areas within Ireland, this appears to be related more to the provision of product bundles comprising broadband, RFTS and Pay TV services (and RFVA when bundled with NGA broadband) rather than the price of RFVCs. ComReg has seen no material evidence of differentiated pricing or functional differences with respect to RFTS (whether RFVA or RFVC) on a geographic basis. Despite the structural variations identified between urban and rural areas in the provision of RFVA and broadband (reflected in ComReg's LEA and outside LEAs), ComReg has not observed a clearly identifiable break in the pricing of RFTS, such that would support the defining of narrower than national geographic markets. The RFTS market is therefore considered to be national in scope.

3.108 ComReg intends to closely monitor developments over the period covered by this analysis and will review its position if there are material developments that might affect the impact the RFTS market on the FACO and Transit markets.

4 Wholesale FACO Market Definition

Position set out in the Consultation

- 4.1 In Section 5 of the Consultation, ComReg considered the boundaries of the relevant FACO Market(s) from a product and geographic perspective. This involved assessing demand-side, supply-side constraints and indirect constraints. In so doing, ComReg considered the following issues:
- (a) Identifying the focal FVCO products, being the initial products from which potential wholesale substitute products were then considered¹⁶⁸;
 - (b) Whether the relevant FACO product market includes wholesale Switchless Voice ('**SV**') services¹⁶⁹;
 - (c) Whether any alternative FACO products should be included in the relevant wholesale markets having regard to the effectiveness of any direct constraints from demand-side substitutes and/or supply-side substitutes (including self-supplied inputs)¹⁷⁰;
 - (d) Whether any RFTS products should be included in the relevant wholesale markets having regard to the effectiveness of any indirect constraints from the retail market¹⁷¹; and
 - (e) What is the geographic scope of the relevant FACO Markets¹⁷².

FACO Product Market Definition

- 4.2 In identifying the focal products ComReg set out its preliminary view that FVCO and FA fell within the same product market, which was defined as FACO Market. This reflects the fact that (a) FA (or Wholesale Line Rental ('**WLR**')) and FVCO services are predominantly purchased by wholesale customers together from the same supplier¹⁷³, and (b) it is not technically possible for a wholesale customer to purchase FA/WLR from one wholesale supplier and FVCO from another¹⁷⁴.

¹⁶⁸ See paragraphs 5.8 to 5.71 of the Consultation.

¹⁶⁹ See paragraphs 5.72 to 5.76 of the Consultation.

¹⁷⁰ See paragraphs 5.77 to 5.132 of the Consultation.

¹⁷¹ See paragraphs 5.133 to 5.210 of the Consultation.

¹⁷² See paragraphs 5.217 to 5.236 of the Consultation.

¹⁷³ For example, ComReg noted in paragraphs 3.49 to 3.54 of the Consultation that there has been a significant decline in the wholesale customers' demand for Eircom's standalone FVCO based wholesale Carrier Pre-select ('**CPS**') product since the 2007 Decision, with Eircom's Single Billing-Wholesale Line Rental product ('**SB-WLR**'), which combines FVCO and WLR, now accounting for over 95% of Access Seekers' demand.

¹⁷⁴ As noted in paragraph 5.38 of the Consultation WLR and CPS purchases from Eircom are inextricably linked. Note that where CPS only was purchased, Eircom would sell the retail line rental services (self-supply of WLR) to the retail customer.

- 4.3 Having considered the issues in (a) to (d) above, ComReg's preliminary view was that there are likely to be two separate product markets, namely the Low Level FACO ('**LL-FACO**') Market, and the High Level FACO ('**HL-FACO**') Market, (referred to together as the '**FACO Markets**').
- 4.4 The LL-FACO Market is comprised of:
- (a) wholesale fixed access ('**FA**') to the public telephone network for the provision of voice telephony services by means of (i) PSTN, or (ii) ISDN Basic Rate Access ('**ISDN BRA**') which supports 2 voice channels; and
 - (b) Fixed Voice Call Origination ('**FVCO**'), being calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange¹⁷⁵ associated with the FA at which the voice call was originated (due to the absence of 'code hosting/sharing' under current industry call routing rules)^{176 177}. FVCO does not distinguish between the types of telephone numbers being called.
- 4.5 The proposed HL-FACO Market was comprised of:
- (a) wholesale FA to the public telephone network for the provision of voice telephony services by means of (i) ISDN Fractional Rate Access ('**ISDN FRA**'), which supports between 14 to 30 voice channels or (ii) ISDN Network Primary Rate Access ('**ISDN PRA**'), which supports up to 30 voice channels; and

¹⁷⁵ In the Consultation ComReg described three exchange levels within Eircom's network. The FVCO products currently provided by Eircom vary mainly in terms of the point of interconnection ('**POI**') in its network at which calls can be handed over to the Access Seeker and at which the Access Seeker is interconnected. In this respect, FVCO is sometimes bundled with Transit whereby traffic is handed over by Eircom to the Access Seeker at the following exchange levels within its network. (a) the primary exchange level (typically the local exchange to which the calling party's telephone line is connected); (b) tandem/secondary exchange level (a regional exchange higher up in the network which would be connected to a number of primary exchanges); or (c) double-tandem/tertiary exchange level (national telephone exchange at the highest level in the network which would be connected to a number of primary exchanges).

¹⁷⁶ As noted in paragraph 5.26 to 5.28 of the Consultation, due to the absence of code hosting, Access Seekers cannot use a third party call transit provider between Eircom's primary exchange and the Access Seeker's nearest point of interconnect.

¹⁷⁷ Each Access Seeker purchasing FVCO (whether via the standalone CPS product or with SB-WLR) is allocated a unique network code by Eircom and Eircom uses this code to route the originated calls, based on predefined routing tables etc, to the Access Seeker's nearest POI. The routing rules do not allow more than one such network code to be allocated to an Access Seeker's points of interconnection. While an Access Seeker that is interconnected deeply within Eircom's network can take its own FVCO traffic at the primary exchange level, because of the absence of code hosting or sharing, Eircom cannot route another Access Seeker's unique FVCO traffic to the other deeply interconnected Access Seeker's POI. Code hosting / sharing would allow a deeply interconnected Access Seeker to accept another Access Seeker's FVCO traffic (originated on Eircom's network). However, this would likely require significant modification of the existing call routing rules of both Eircom and interconnected operators and the capacity of their respective interconnection infrastructure. As far as ComReg is aware, there has never been any request from an Access Seeker or Eircom to modify the existing code routing rules.

- (b) FVCO, being calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange level at which the voice call was originated (due to the absence of 'code hosting/sharing' under current industry call routing rules). FVCO does not distinguish between the types of telephone numbers being called.
- 4.6 The identification by ComReg of separate HL-FACO and LL-FACO markets related to underlying differences in demand-side and supply-side conditions associated with the FA component of FACO. In particular, a distinction was drawn between a traditional Public Switched Telephone Network ('**PSTN**') line which supports one voice channel and the various types of Integrated Services Digital Network ('**ISDN**') lines, which can support between two and thirty voice channels. ComReg's preliminary conclusion that there was a distinction between low capacity ISDN BRA products (which ComReg considered were substitutable with PSTN products) and higher capacity ISDN PRA/FRA products (which were not considered substitutable with PSTN products) was due to apparent differences in terms of pricing, functionality and demand-side considerations. ComReg considered that LL-FACO products were likely to be purchased as a wholesale input for the provision of RFTS for residential and small business users, whereas HL-FACO would be suited to larger business customers¹⁷⁸.
- 4.7 ComReg noted in the Consultation that Eircom was the only FSP providing wholesale HL-FACO and LL-FACO products in Ireland. In addition to LL-FACO and HL-FACO products sold to wholesale customers, ComReg set out its preliminary view that Eircom's self-supply, including its supply of FACO via Managed VOB, is also included in the FACO Markets (ComReg noted that Managed VOB is ultimately likely to replace Eircom's traditional circuit switched telephony services).
- 4.8 ComReg's preliminary view in the Consultation was that the FACO Markets do not include:
- Wholesale switchless voice services ('**Wholesale SV**'). Wholesale SV was excluded on the basis that it is typically used by FSPs that do not operate their own switching or interconnection infrastructure. The functionality of Wholesale SV is, therefore, significantly different from that of FACO products since purchasers of the latter are required to operate switching infrastructure in order to receive the FVCO traffic component;¹⁷⁹

¹⁷⁸ See paragraphs 5.48 to 5.67 of the Consultation.

¹⁷⁹ See paragraphs 5.72 to 5.76 of the Consultation.

- Self-supply of FACO by alternative (non-Eircom) vertically integrated RFTS providers. This is on the basis that (a) alternative FSPs are not offering HL-FACO or LL-FACO (b) there is unlikely to be significant demand from third parties for a FACO product self-supplied by alternative RFTS networks (because alternative networks do not share Eircom's ubiquitous coverage), and (c) ComReg considered that alternative RFTS networks would not enter the FACO Markets in response to a SSNIP.¹⁸⁰ Also, self-supply of FACO was not included in the scope of the relevant product market because the supply of RFTS on alternative networks was not considered to exert a sufficiently effective indirect constraint on the FACO Markets that would prevent a profitable SSNIP of FACO products by a hypothetical monopolist ('HM').
 - FACO being provided on a mobile telephone network¹⁸¹; and
 - Managed VOB provided over xDSL¹⁸² or Leased Lines¹⁸³ as a substitute for FACO because there is not yet evidence of significant substitution taking place between FACO products and Managed VOB, to the extent that would prevent the HM from exercising a profitable SSNIP of HL-FACO or LL-FACO.
- 4.9 The above assessment included ComReg considering the potential for alternative FSPs to, instead of purchasing SB-WLR, purchase wholesale broadband inputs such as Local Loop Unbundling ('LLU') and WBA and offer a Managed VOB based solution. However, ComReg noted that there was no evidence to suggest that these wholesale broadband products themselves would be considered by FSPs to be a substitute for FACO products.

Geographic scope of the FACO Markets

- 4.10 In the Consultation¹⁸⁴ ComReg assessed the geographic scope of the FACO Markets having regard to the following criteria:
- (a) geographic differences in entry conditions over time;
 - (b) variation in the number and size of potential competitors;
 - (c) distribution of market shares;
 - (d) evidence of differentiated pricing strategies or marketing; and
 - (e) geographical differences in demand characteristics.

¹⁸⁰ See assessment of direct and indirect constraints for each alternative platform throughout Section 5 of the Consultation.

¹⁸¹ See paragraphs 5.189 to 5.198 of the Consultation.

¹⁸² See paragraphs 5.93 to 5.110 of the Consultation.

¹⁸³ See paragraphs 5.111 to 5.115 of the Consultation.

¹⁸⁴ See paragraphs 5.217 to 5.236 of the Consultation.

- 4.11 ComReg's preliminary view was that the FACO Markets are national in scope.¹⁸⁵ ComReg noted that, given the lack of direct and indirect constraints in the FACO Markets generally, the conditions of competition appear to be sufficiently homogenous such that there are no sub-national geographic markets. This was notwithstanding the emergence of some localised competitive pressure in the provision of retail bundles which, as a result of the regulated price control on SB-WLR, had then indirectly resulted in Eircom offering a discount for SB-WLR when bundled with WBA sold within the LEA.
- 4.12 ComReg proposed to monitor the impact of retail competition on FACO prices within the LEA over the period of the current review, with a view to identifying whether there is any resulting emergence of differentiated competitive constraints in the FACO Markets.

Respondents' Views

FACO Product Market Definition

- 4.13 All seven Respondents expressed views on ComReg's definition of the scope of the FACO Markets from a product perspective.
- 4.14 Generally speaking, ALTO, BT, Magnet, and Telefonica agreed with ComReg's proposed definition of the FACO Markets, although they provided comments on particular aspects of ComReg's assessment.
- 4.15 Vodafone and Sky agreed with elements of ComReg's approach.
- 4.16 Eircom disagreed with ComReg's assessment for a number of reasons.
- 4.17 ComReg has summarised the Respondents' main views on the FACO product market definition below, grouping the key issues raised into the identified themes below, namely:
- (a) Whether the proposed FACO product market is technologically neutral (discussed in paragraphs 4.18 below);
 - (b) Whether it is appropriate to broaden the FVCO product market to also include FA/WLR (discussed in paragraphs 4.19 to 4.20 below);
 - (c) The appropriate exchange-level boundary for the FVCO component of FACO (discussed in paragraphs 4.21 to 4.25 below);
 - (d) ComReg's assessment of direct and indirect constraints (discussed in paragraphs 4.26 to 4.31 below); and
 - (e) Call origination to NTC numbers should be identified as a market for all originating operators (discussed in paragraph 4.32 below);

¹⁸⁵ This is consistent with ComReg's preliminary view that the RFTS market is national, notwithstanding the emergence of some localised competitive pressures particularly in the provision of RFTS bundles.

Whether the proposed FACO product market is technologically neutral

4.18 Vodafone argued that ComReg had taken an Eircom-centric view of the FACO Markets that is not technologically neutral as it uses Eircom's switching hierarchy, and does not take account of market conditions.

Whether it is appropriate to broaden the FVCO product market to also include FA/WLR

4.19 Sky agreed with ComReg's proposed inclusion of FA/WLR and FVCO within the FACO Markets. It considered that this approach should not materially alter the regulatory outcome, in terms of ultimate SMP based remedies.

4.20 Vodafone also agreed with ComReg's proposal to include FA/WLR and FVCO within the FACO Markets (as well as IP based voice services). However, Vodafone suggested that ComReg could have reduced risk by defining a narrower FVCO only market, with FA/WLR then being provided as an associated facility to the FVCO service via an SMP based regulatory obligation.

The appropriate exchange-level boundary for the FVCO component of FACO

4.21 ALTO agreed that the boundary of the FVCO component was at double tandem exchange level.¹⁸⁶

4.22 BT did not agree with ComReg's preliminary view in the Consultation¹⁸⁷ that the boundary of the FVCO component of the FACO Markets is at the double-tandem exchange level. BT noted that Eircom has a choice to either use its own tandem / double-tandem Transit or an alternative provider of Transit at the primary exchange level.

4.23 Eircom noted that ComReg's data on the volume of FVCO traffic being handed over at each exchange level in its network is no longer accurate. According to Eircom, the volume of traffic handed over at its primary level exchanges has increased from the 70% level identified by ComReg¹⁸⁸ to 75%.

4.24 Sky agreed that the boundary of the FVCO component should be extended up to the double tandem exchange level, given the lack of availability of a code hosting facility on Eircom's network. Sky specifically noted that:

"This is important given the lack of availability of a code hosting facility on Eircom's network that would allow third party competition for trunk transiting where operators are not interconnected to some or all of Eircom's primary exchanges."¹⁸⁹

¹⁸⁶ Note that ALTO made this comment in its response to Question 6 in the Consultation concerning the definition of the Transit Market. See paragraph 6.18 of this Decision.

¹⁸⁷ See paragraph 7.31 of the Consultation. The point is made in relation to the boundary between the adjacent transit and FVCO markets.

¹⁸⁸ See paragraph 5.25 of the Consultation.

¹⁸⁹ See paragraph 2.3 of Sky's submission.

4.25 Vodafone expressed concerns that the product market definition was not technology neutral given that it related to Eircom's network hierarchy.

ComReg's assessment of direct and indirect constraints

4.26 Eircom considered that ComReg's proposed definition of the FACO Markets is not forward-looking, as is required for ComReg to carry out a reasonable SMP assessment. Eircom argued that ComReg's assessment:

- (a) failed to take adequate consideration of the evolution of consumer attitudes and developing trends that are critical to the process of market definition and review;
- (b) ignored the recent developments which have fundamentally altered the conditions of competition for RFVA (e.g. growth in MTS and Managed VOB); and
- (c) failed to consider imminent or foreseeable technological and economic developments over a reasonable forward-looking timeframe, with such developments in its view being widely expected to impact the market definition and the competitive assessment;

4.27 Eircom considered that ComReg's proposed definition of the FACO Markets was too narrow, and ignored the existence of strong demand-side substitutability from VOB. Eircom noted that the Romanian national regulatory authority ('**NRA**') recently defined the call origination market in such a way that includes managed VOIP technology, and that this resulted in the deregulation of the call origination market in Romania.

4.28 Eircom disagreed with ComReg's assessment of the impact of indirect constraints on the FACO Markets. First, Eircom argues that ComReg has ignored the existence of strong demand side substitutability with MTS.

4.29 Second, Eircom also disagreed with ComReg's derivation of Price-Cost Ratios in the Consultation¹⁹⁰. According to Eircom, the estimates mix average customer usage derived from the Q3 2013 QKDR, with prices from February 2014. Eircom argues that, rather than using a weighted average approach to derive HL-FACO and LL-FACO prices as a means of estimating profit margins, ComReg should have instead requested operators to supply actual data for usage of each type of ISDN customer, with accurate figures for ISDN BRA, ISDN FRA and ISDN PRA. Eircom considered that ComReg should also have included ancillary service charges, and future price evolutions (not least, call termination charge reductions and other changes proposed by ComReg) before calculating any existing gross profit margins, and considering whether pass-through would occur at all. Eircom argues that the work requires a more robust factual basis that takes into account the real number of access lines in active use (excluding Eircom's so-called 'phantom lines').¹⁹¹

¹⁹⁰ See paragraphs 5.155 to 5.158 of the Consultation.

¹⁹¹ Note that Eircom's argument relating to in-active '*phantom lines*' lines was discussed in paragraphs 3.46 to 3.52 of this Decision.

- 4.30 Magnet made the following comments in relation to direct and indirect constraints in the FACO Markets:
- (a) Magnet agreed with ComReg's assessment of the impact of direct constraints on the FACO Markets. In particular, Magnet agreed that there is no alternative FACO provider and that no alternative provider will emerge.
 - (b) Magnet agreed with ComReg that RFTS on an alternative platform is not a direct constraint.
 - (c) Managed VOB provided over an xDSL connection should be included in the definition of the FACO Markets. Especially since Eircom is likely to launch a new Managed VOB product in the short term and Blueface already sells Managed VOB. Magnet considered that customers would switch from a traditional RFTS to Managed VOB in response to a SSNIP.
 - (d) MTS (which, in Magnet's view is a complement for RFTS) or small fibre networks do not pose a threat to Eircom in the FACO Markets.
- 4.31 Vodafone agreed that IP voice should be included in the FACO Markets.

Call origination to NTC numbers should be identified as a market for all originating operators

- 4.32 Eircom argued that ComReg should identify a FACO sub-market covering call origination to NTCs, in which all originating operators would have SMP.¹⁹²

Geographic Scope of the FACO Markets

- 4.33 Six out of seven Respondents expressed views on ComReg's definition of the geographic scope of the FACO Markets.
- 4.34 ALTO, BT, Telefonica and Magnet agreed with ComReg's assessment that the FACO Markets are national in scope, given that there is homogenous pricing and service provision throughout Ireland. ALTO and BT both noted that Eircom's recent approach to providing wholesale bundles¹⁹³ had distorted the market between the Large Exchange Areas ('LEA(s)')¹⁹⁴ and non-LEAs.

¹⁹² Eircom argues that if Eircom is determined to have SMP in this sub-market, all operators should be treated the same. To do otherwise would be unfairly discriminatory and contrary to the interests of captive consumers.

¹⁹³ ComReg assumes that these Respondents' were referring to a €3 WLR discount introduced (and subsequently withdrawn) by Eircom (applying where WLR is sold with next generation wholesale broadband) ('€3 WLR Discount') in LEAs. See further discussion in Section 9.

¹⁹⁴ LEAs are exchange areas within which Eircom faces greater competition in the provision of product bundles, which include RFVA.

- 4.35 Eircom submitted that there are marked differences in the competitive conditions for RFVA within the LEAs (where UPC is present), and non-LEAs, and that these differences should be reflected in the geographic scope of the proposed upstream wholesale FACO market. At a minimum, Eircom considered that ComReg should reflect the significantly different conditions for the supply of RFVA in LEAs and non-LEAs when determining what remedies to apply in the FACO Markets in these different areas.
- 4.36 Sky considered that Eircom's national RFTS pricing is not evidence of a national FACO market, because Eircom is required (as the USP) to maintain geographically averaged prices for services. Nonetheless, Sky noted that it could be the case that, even absent a regulatory obligation, Eircom would choose to maintain uniform pricing nationally for RFTS. Sky acknowledged that ComReg has found no evidence of sub-national pricing by other operators, who, unlike Eircom, are not constrained by regulation.

ComReg's Assessment of Respondents' Views

- 4.37 In paragraphs 4.13 to 4.36 above, ComReg summarised the key issues raised by Respondents concerning ComReg's preliminary definition of the FACO Markets from both product and geographic perspectives. ComReg considers these views below.

FACO Product Market Definition

- 4.38 Below, ComReg assesses Respondents' views on the FACO product market definition under each of the key themes identified in paragraph 4.17 above, in particular:
- (a) Whether the proposed FACO product market is technologically neutral (discussed in paragraphs 4.39 to 4.41 below);
 - (b) Whether it is appropriate to broaden the FVCO product market to also include FA/WLR (discussed in paragraphs 4.42 to 4.45 below);
 - (c) The appropriate exchange-level boundary for the FVCO component of FACO (discussed in paragraphs 4.46 to 4.53 below);
 - (d) ComReg's assessment of direct and indirect constraints (discussed in paragraphs 4.54 to 4.71 below); and
 - (e) Call origination to NTC numbers should be identified as a market for all originating operators (discussed in paragraphs 4.72 to 4.74 below).

Whether the proposed FACO product market is technologically neutral

- 4.39 In response to Vodafone's comments referred to in paragraph 4.18 above, ComReg notes that it deliberately takes a technologically neutral approach to defining the relevant markets. This is evident from Section 5 of the Consultation, which specifically analyses competitive constraints arising from various technology platforms before concluding on a preliminary position. By starting with a technologically neutral approach, and then eliminating potential products offered over technologies that are shown not to represent a substitute for the focal product, ComReg arrived at a preliminary position where only a sub-set of technologies actually fall within the product-market. This outcome is not inconsistent with ComReg having taken a non-technology neutral approach.
- 4.40 As set out in paragraphs 5.3 to 5.6 of the Consultation, the approach adopted by ComReg for defining the relevant market(s) is to initially identify a focal product with a specific set of features and characteristics, then consider whether there are demand-side and/or supply-side substitutes that should be included within the relevant product market.
- 4.41 For the purpose of this market analysis, ComReg considers that it is appropriate to start with Eircom's FVCO product as the focal product. This is because Eircom is the only provider of FVCO in Ireland. From that starting point, throughout Section 5 of the Consultation, ComReg undertook a thorough analysis of the potential for various technologies to offer an effective substitute for Eircom's FVCO product.

Whether it is appropriate to broaden the FVCO product market to also include a FAWLR component

- 4.42 ComReg notes Sky's view referred to in paragraph 4.19 above that the inclusion of FAWLR and FVCO in a combined FACO Market should not materially alter the regulatory outcome in terms of SMP remedies. ComReg also notes Vodafone's agreement with ComReg's proposed definition of the FACO product market. In response to Vodafone's comment that ComReg could have defined a narrower FVCO-only market, with FAWLR being provided as an associated facility to the FVCO service via an SMP based regulatory obligation, ComReg refers to the additional evidence it has reviewed subsequently, which is set out below.

- 4.43 As noted in Figure 9 in the Updated Retail Trends Analysis (in Appendix D of this Decision), as at Q4 2014 there were a total of 493,419 indirect access lines¹⁹⁵ comprised of standalone CPS lines (16,602), SB-WLR (377,649) and WLA (99,168), with CPS lines representing just under 3.4% of the total of these¹⁹⁶. These figures continue to show¹⁹⁷ that, at the wholesale level, the purchase of a combined WLR and FVCO product (SB-WLR) continues to be the predominant means of supply, with the calls only FVCO based CPS product being in the significant minority.
- 4.44 Additionally, ComReg would note that Figure 10 in the Updated Retail Trends Analysis shows that as at Q4 2014, the total number of unbundled lines was 84,089 of which 70,778 were Line Share and 13,311 were fully unbundled lines. Where Line Share has been used by Access Seekers to provide broadband, it has also involved the Access Seeker purchasing SB-WLR to provide a RFTS.
- 4.45 Having considered the Respondent's views, the above data and the Updated Retail Trends Analysis more generally, ComReg considers that its analysis as set out in the Consultation¹⁹⁸ remains appropriate and that FAWLR and FVCO fall within the same FACO product market.

The appropriate exchange-level boundary for the FVCO component of FACO

- 4.46 In relation to BT's comments referred to in paragraph 4.21 above that the boundary of the FVCO component of FACO should not be extended to the double tandem exchange, ComReg acknowledged in the Consultation¹⁹⁹ that some service providers are interconnected with Eircom's primary exchanges, and can receive FVCO traffic at those exchanges.

¹⁹⁵ Note that Indirect access 'paths' (rather than lines) are greater given it measures voice channels and, for example, ISDN services include 2 or more channels.

¹⁹⁶ CPS is 4.7% of total SB-WLR and CPS lines.

¹⁹⁷ In paragraph 5.40 of the Consultation it was then noted that Figure 21 below shows that as at Q3 2013 there were a total of 443,791 indirect access lines comprised of CPS lines (15,982), SB-WLR (337,881) and WLA (89,928), with CPS lines then representing 3.6% of the total of these.

¹⁹⁸ See paragraphs 5.38 to 5.47 of the Consultation.

¹⁹⁹ See paragraphs 5.19 to 5.37 and 7.34 of the Consultation. ComReg also examined the depth of Access Seekers interconnection in section 7 of the Consultation dealing with the Transit Market.

- 4.47 In this respect, ComReg noted in paragraph 5.25 of the Consultation that according to information provided by undertakings in response to the 2014 Statutory Information Requests approximately [§< [REDACTED]] of FVCO traffic is handed over by Eircom to Access Seekers at the primary exchange level. However, a large number of Access Seekers purchasing SB-WLR are not interconnected at Eircom's primary or secondary exchange levels. Having regard to Eircom's comments at paragraph 4.23 above, ComReg has refreshed its analysis and, based on information obtained from Eircom²⁰⁰, as at September 2014, approximately [§< [REDACTED]] of FVCO traffic is handed over by Eircom to Access Seekers at the primary exchange.
- 4.48 As noted in the Consultation, as it stands, owing to the absence of code hosting²⁰¹, Access Seekers cannot use a third party call Transit provider between Eircom's primary exchange and the Access Seeker's nearest point of interconnection. Therefore, Access Seekers that are not interconnected directly with a given exchange cannot choose a third party Transit supplier to provide Transit of FVCO calls on their behalf. This is particularly relevant for small operators that are not interconnected with many, or any, of Eircom's primary (and in some cases secondary) exchanges. These operators are not able to benefit from the economies of scope enjoyed by Transit providers that are carrying large volumes of traffic to and from primary and tandem exchanges. Therefore, in order to compete in the RFTS market effectively they require the ability to receive FVCO traffic at a higher exchange levels in Eircom's network.
- 4.49 For these reasons, ComReg had proposed a boundary that recognises that demand exists for various types/levels of FVCO. ComReg notes that Sky expressed agreement with ComReg's preliminary views in this regard.
- 4.50 ComReg disagrees with Vodafone's comment referred to in paragraph 4.25 above, that the product market definition was not technology neutral (given that it related to Eircom's network hierarchy). The product market definition must have regard to the manner within which FVCO is actually provided and by whom and it therefore reflects this. ComReg would note that it has also included NG FACO within the product market definition. We also note that in the Consultation ComReg proposed to define the FVCO component in a technology neutral manner, despite referring to Eircom's switching hierarchy²⁰².

²⁰⁰ Eircom's response to the 2014 Statutory Information Request.

²⁰¹ See footnotes 176 and 177 above.

²⁰² FVCO was defined as being ".....calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (**or equivalent**) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange level at which the voice call was originated (due to the absence of 'code hosting/sharing' under current industry call routing rules)....**EMPHASIS ADDED.**

- 4.51 As noted in the Consultation²⁰³, the potential for a technological shift to IP interconnection in the future may, within the period covered by this review, be likely to discourage Access Seekers from investing in deeper interconnection at Eircom's primary exchanges (or indeed augmenting capacity at existing exchanges), including those Access Seekers with a smaller retail customer-base and traffic volumes and for which the cost of doing so would be likely to be uneconomic.
- 4.52 Given the above and the reasons articulated in the Consultation, ComReg remains of the view that the FVCO component of FACO should include the supply of FVCO at the primary, tandem, and double tandem exchange levels (or their equivalent).
- 4.53 However, ComReg notes that should code-hosting/sharing become available, this could lead to a change in the product market boundary and elements of tandem and double-tandem FVCO could become more contestable (and potentially more competitive). In that case, there may be justification for reviewing the approach to market definition and/or remedies as applied to tandem FVCO and double-tandem FVCO.

ComReg's assessment of direct and indirect constraints

- 4.54 ComReg disagrees with Eircom's views referred to in paragraphs 4.26 and 4.27 above that ComReg's preliminary FACO market definition is not forward looking. ComReg considered in detail within the Consultation various technologies that could represent a potential substitute for FACO, or that could offer some degree of competitive constraint (either direct²⁰⁴ or indirect²⁰⁵) in the FACO Markets. Based on its assessment, ComReg reached a preliminary view that these alternative retail and wholesale products do not provide sufficiently effective constraint on the FACO Markets to warrant their inclusion in these markets.
- 4.55 Contrary to assertions made by Eircom, in the Consultation²⁰⁶ ComReg included a detailed assessment of consumer attitudes and developing trends in the retail markets. This assessment was, amongst other things, then used to inform ComReg's subsequent preliminary assessment of the retail markets²⁰⁷, and ultimately the definition of the FACO Market(s) (and associated competition assessments)²⁰⁸.

²⁰³ See paragraph 5.35 of the Consultation.

²⁰⁴ See paragraphs 5.77 to 5.132 of the Consultation for a discussion of direct constraints in the FACO market, which include a discussion of whether OAOs would be likely to switch to providing Managed VOB over broadband or leased lines.

²⁰⁵ See paragraphs 5.133 to 5.210 of the Consultation for a discussion about indirect constraints arising from alternative retail products, including Managed VOB products offered over other networks.

²⁰⁶ See section 3 of the Consultation.

²⁰⁷ See section 4 of the Consultation.

²⁰⁸ See section 5 of the Consultation.

- 4.56 When defining the FACO product markets, ComReg specifically took into account the extent to which various RFTS and MTS products would be likely to constrain Eircom in the FACO Markets²⁰⁹.
- 4.57 The impact of retail MTS services was considered at length in the Consultation²¹⁰ and further in the earlier retail market assessment within this Decision²¹¹. Based on this assessment, ComReg was (and remains) satisfied that MTS does not pose a sufficiently effective indirect constraint in the upstream FACO Market(s) to prevent a HM from imposing a profitable SSNIP of SB-WLR. The evidence available to ComReg suggested that RFTS and MTS appear to be used by households and businesses primarily in a complementary fashion. ComReg therefore does not consider that MTS fall within the FACO Markets.
- 4.58 Throughout sections 3, 4, 5 and 6 of the Consultation, ComReg discussed technological and economic developments that are presently occurring in the market-place, and those that are likely to occur over the period of this review. For example, ComReg discussed the growth of Managed VOB as an RFTS product since the 2007 Decision (with UPC being the most notable entrant).²¹² ComReg considered the implications of these retail developments in its competition assessment. In particular, in its assessment of indirect constraints²¹³. ComReg explained the reasons why it considered that these retail trends would be unlikely to effectively constrain Eircom in the FACO Markets over the period of this review, including that any such indirect constraints were insufficient to warrant MTS being included within the FACO product markets.
- 4.59 ComReg therefore disagrees with Eircom's view that its proposed definition of the FACO Markets is unduly narrow, and that ComReg has ignored the existence and impact of VOB.
- 4.60 With respect to Eircom's reference to the deregulation of the call origination market by the Romanian NRA ('**ANCOM**'), ComReg notes that (according to the European Commission comment on ANCOM's notification)²¹⁴ the conditions of competition observed by ANCOM in its relevant market appear to be significantly different from those which can be observed in Ireland. Most notably:

²⁰⁹ See paragraphs 5.133 to 5.210 of the Consultation.

²¹⁰ The indirect constraint posed by MTS in the FACO markets was considered in paragraphs 4.189 to 4.198 of the Consultation, whereas substitutability between RFTS and MTS products (at the retail level) was assessed earlier in the Consultation in paragraphs 3.152 to 3.176.

²¹¹ See paragraphs 3.53 to 3.67 of this Decision.

²¹² See paragraphs 3.32 to 3.48 of the Consultation.

²¹³ See paragraphs 5.133 to 5.216 of the Consultation.

²¹⁴ Commission Decision concerning Case RO/2013/1533: Access to the public telephone network at a fixed location for residential and non-residential customers in Romania and Case RO/2013/1534: Call origination on the public telephone network provided at a fixed location in Romania, Brussels, 16.12.2013 C(2013)9619 final

- (a) **Eircom is the only wholesale provider of call origination in Ireland, and therefore has 100% market share:** In contrast, there were five FSPs providing wholesale call origination in Romania at the time of the decision, and the market share of the incumbent network operator (Romtelecom) in that market fell from 73% in 2008 to 64% in 2012 (when self-supply was included).
 - (b) **Competition in the Irish RFTS is heavily reliant on FSPs having access to Eircom's FACO products²¹⁵:** Whereas in Romania there were 25 FSPs using their own infrastructure to provide RFTS, and these FSPs represent nearly 50% of RFTS subscriptions.
 - (c) **Alternative RFTS networks in Ireland have limited coverage:** The coverage of alternative infrastructures in Romania is equivalent to that of the incumbent Romtelecom.
 - (d) **Lack of residential mass-market 'home-zone' product on Irish mobile networks.** ANCOM noted that MSPs in Romania were providing 'home-zone'²¹⁶ services to residential customers. To date, MSPs have not entered residential RFTS markets in Ireland. As discussed in paragraphs 4.177 to 4.185 of the Consultation, Vodafone are providing Converged Services to a limited set of business customers. However, these products are targeted at niche markets and have very low uptake (approximately 8,969 subscribers as at April 2014).
 - (e) **Romanian consumers appear to exhibiting different calling preferences to those experienced in Ireland.** In Romania, 92% of voice traffic was conducted through mobile networks, with the volume of RFTS traffic decreasing by 37% between 2009 and 2012. In Ireland, 71% of total voice traffic was conducted on mobile networks as at Q1 2015 and RFTS has decreased by approximately 25% in the three years since Q1 2012.
- 4.61 As referred to in paragraphs 4.28 to 4.29 above, Eircom expressed the view that ComReg's approach to the assessment of the likely extent of the pass-through of a SSNIP of SB-WLR into RFTS prices was inadequate.

²¹⁵ At the end of Q3 2014, Eircom had 47.8% of all fixed voice subscriptions, and a further 31.1% of RFTS subscriptions were provided using Eircom's SB-WLR, CPS or white label products. This means that only 21% of RFTS lines in Ireland are provided on alternative networks (represented by UPC on Figure 4 of Appendix A)

²¹⁶ In the Consultation (paragraphs 4.177 to 4.185) home zone product, being a fixed like telephony service that is provided using mobile network inputs was classified as a '**Converged Service**'.

- 4.62 ComReg does not accept Eircom's view. The approach set out in the Consultation²¹⁷ involved comparing FACO prices with RFTS prices to determine the extent to which a 5%-10% increase in the price of FACO could impact on RFTS prices (if they were passed on by Eircom's wholesale customers to their RFTS subscribers). FACO prices were derived by generating a blended rate that included an average estimated number of call origination minutes per month as well as a monthly WLR charge. As highlighted in the Consultation²¹⁸, these wholesale charges were derived from Eircom's RIO Price List²¹⁹, which has separate WLR charges for 'high-level' FVA and 'low-level' FVA products. RFTS prices themselves were obtained in 'real-time' from FSPs' websites. Notional retail packages were then constructed based on an average number of minutes used per household/business, as estimated from industry usage figures supplied to ComReg's for the purpose of its QKDR.
- 4.63 ComReg considered that it was not necessary to include ancillary charges related to SB-WLR when estimating the wholesale / retail price ratio, since doing so would be unlikely to have a significant effect on the estimated pass-through given low demand for these services (the average RFVA customer consumes very small amounts of ancillary services).
- 4.64 ComReg acknowledges that its approach to estimating notional retail demand for LL-FACO and HL-FACO for the purpose of applying a SSNIP was a proxy based on QKDR data, but nevertheless considers the estimate to be sufficiently robust for this purpose.
- 4.65 ComReg notes Magnets view referred to in paragraph 4.30 above that Managed VOB provided over an xDSL connection should be included in the FACO Markets. In the Consultation²²⁰, ComReg discussed the potential for FSPs to switch from using Eircom's SB-WLR based wholesale FACO product as a means to provide RFTS, to instead using a wholesale Managed VOB based product. ComReg set out its view that such a switch is likely to occur at some point in the future, however, the timing of this is uncertain, and there is no evidence of significant substitution currently taking place between FACO products and Managed VOB, to the extent that would prevent a HM from exercising a profitable SSNIP of HL-FACO or LL-FACO. This remains the case today, and on a forward looking basis (for the period covered by this review).

²¹⁷ See paragraphs 5.140 to 5.165 of the Consultation.

²¹⁸ See footnote 372, paragraph 5.152 of the Consultation.

²¹⁹ www.eircomwholesale.ie.

²²⁰ See paragraphs 5.93 to 5.110 of the Consultation.

- 4.66 We also noted in the Consultation²²¹ that, in the context of the assessment of retail markets, that the evidence with respect to Managed VOB services provided over xDSL networks is less certain at this stage. Alternative FSPs (being those other than Eircom) have not, to date, materially launched retail VOB based RFTS services on XDSL networks and the evidence available to ComReg does not suggest that this is likely to occur in any meaningful way within the period of this market review. However, ComReg acknowledges that Managed VOB over XDSL network, subject to the quality of the broadband services as well as its pricing could, from a functional perspective, be a potential substitute for RFTS provided over a narrowband copper network. ComReg has also noted Eircom's plans with respect to its future plans for VOB over its VDSL based FTTC network and that this would likely ultimately replace, when available, its traditional RFTS service offered over its narrowband copper network.
- 4.67 Having regard to the above, ComReg considers that on a forward-looking basis, RFTS based on Managed VOB services provided over the following platforms are likely, from functional and pricing perspectives, to represent a substitute retail product for RFTS provided over a narrowband network.
- (a) Managed VOB offered on a CATV network; and
 - (b) Managed VOB offered on a VDSL network.
- 4.68 ComReg leaves open the question as to whether Managed VOB over ADSL technologies are likely be an effective substitute for a RFTS offered over a narrowband network (or Managed VOB on a CATV or VDSL network) but intends to monitor the situation on an ongoing basis.
- 4.69 ComReg notes Magnet's comment that there is no alternative FACO provider, or is any likely to emerge. ComReg also notes Magnet's view that Eircom's ubiquity is important to purchasers of FACO. These views are consistent with ComReg's analysis in Section 5 of the Consultation and in this Decision.
- 4.70 ComReg also notes Magnet's view that there is no real competitive threat from localised fibre networks (such as its own fibre network), or from MTS (which, in Magnet's view, is a complementary product). These views are consistent with ComReg's analysis in Section 5 of the Consultation and in this Decision
- 4.71 In relation to Vodafone's comment referred to in paragraph 4.31 above regarding ComReg's proposed inclusion of IP voice, ComReg notes that this preliminary view applied to Managed VOB self-supplied by Eircom over its NGA network, or over a CATV network.

²²¹ See paragraphs 4.137 to 4.139 of the Consultation.

Call origination to NTC numbers should be identified as a market for all originating operators

- 4.72 ComReg notes Eircom's argument in paragraph 4.32 above that separate markets could exist for calls to NTC numbers originating on other FSP or MSP networks. ComReg notes that it is not clear whether separate markets could be defined for the provision of call origination to NTC numbers from alternative FSP or MSP networks, or whether alternative FSPs or MSPs would have SMP in those markets. In any case, ComReg notes that this market review is primarily focused on assessing the FACO markets.
- 4.73 Notwithstanding this, for the purpose of this review ComReg considers that it is not unreasonable to include call origination to NTC numbers in the FACO Markets. In Section 4 of the Consultation, ComReg set out its preliminary view that at the retail level it is unlikely that there are separate markets for FVCO made from a fixed location to different types of telephone numbers including non-geographic numbers. In this regard, Eircom provides call origination to NTC numbers using the same infrastructure that it uses to provide FACO, such that, from a functional perspective, there is a high-degree of supply-side substitution between calls made from Eircom's fixed telephone network to various types of numbers.
- 4.74 ComReg remains of the view that the call origination to NTC numbers should be included in the FACO Markets. ComReg may further consider the question as to whether or not similar NTC-type issues exist on other networks/suppliers and whether regulatory intervention is required. .

Geographic Scope of the FACO Markets

- 4.75 As noted in paragraphs 4.33 to 4.36, a number of Respondent's expressed views on ComReg's assessment of the geographic scope of the FACO Markets.
- 4.76 ComReg notes that ALTO, BT Magnet and Telefonica agreed with ComReg's assessment that the FACO Markets were national in scope.
- 4.77 ComReg disagrees with Eircom's comments referred to in paragraph 4.35 that there are marked differences in the competitive conditions for RFVA within the LEAs (where UPC is present), and outside of the LEAs. ComReg notes that there is no significant evidence to suggest that the competitive conditions are different in the provision of FACO between these types of areas. Notably, Eircom is the sole provider of FACO in both the LEA and Non-LEA areas, and there is no evidence of Eircom responding to indirect constraint arising from RFTS competition within the LEA (or Non-LEA). In particular, Eircom has national FVCO and WLR prices, despite having a degree of flexibility under the regulatory pricing regime²²² to de-average its wholesale charges having regard to the need to comply with its obligations not to cause a margin squeeze.

²²² ComReg is required to undertake an assessment of the geographic scope of the FACO Markets absent regulation. However, Eircom is currently subject to price controls in its provision of FACO in Ireland. However, where the price controls offer some flexibility, the behaviour of the regulated entity can be somewhat informative to the overall assessment.

- 4.78 In particular, ComReg noted in the Consultation²²³ and above²²⁴ that Eircom took steps to reduce its price of retail bundles that include RFTS and NGA within LEA via the €3 WLR Discount. In order to comply with the obligation not to cause a margin squeeze, Eircom was required to offer an analogous discount on SB-WLR/NGA wholesale bundles²²⁵. Accordingly, Eircom applied a €3 discount on its SB-WLR product, but only when it is bundled with WBA²²⁶.
- 4.79 ComReg noted, in arriving at the 2013 Bundles Decision, that Eircom and its wholesale customers face greater competition in the provision of retail bundles within the LEA and required some pricing flexibility in order to compete with UPC. ComReg also noted that Eircom's proposal to apply this SB-WLR discount only to bundles implied that the more intense competitive conditions relate specifically to the provision of retail bundles and not to the FACO market specifically. For example, Eircom has not lowered the price of standalone SB-WLR, or its FVCO component, in any specific geographic area.
- 4.80 However, as noted by a number of Respondents, Eircom withdrew the above SB-WLR discount in January 2015. ComReg considers that this, alongside the other mentioned considerations, is suggestive that Eircom does not face significantly different competitive conditions specifically in the provision of FACO between different geographic areas.
- 4.81 ComReg notes Sky's comment that Eircom's national pricing does not, in itself, support national FACO Markets due to Eircom being constrained by retail price controls under the USO. ComReg considered a number of features in its preliminary assessment of the geographic boundaries of the FACO Markets. In assessing evidence of sub-national pricing, ComReg acknowledged²²⁷ existing price controls, and the extent to which Eircom is constrained to some extent by these controls.

²²³ See paragraphs 5.231 to 5.233 of the Consultation.

²²⁴ See paragraph 3.103 above.

²²⁵ 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>.

²²⁶ 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 were all variants of current generation broadband products (existing Bitstream and Line Share) and next Generation (Bitstream Plus and Virtual Unbundled Access) broadband products

²²⁷ See paragraphs 5.229 to 5.233 of the Consultation.

- 4.82 It is notable that Eircom was granted a degree of flexibility by ComReg in the pricing of retail and wholesale bundles comprising of FACO and NGA broadband. This flexibility allowed Eircom to offer a discount for the retail and wholesale bundles within the LEAs. However, Eircom has chosen to dispense with offering discounted bundles in the LEAs (where UPC is offering similar bundles), and instead offers a national price.
- 4.83 Therefore, while ComReg acknowledges Sky's comment insofar as Eircom is restricted from providing standalone FACO at geographically differentiated prices, there are cases where Eircom does have a degree of flexibility to apply discounts for FACO when bundled with NGA broadband, but has chosen to adopt national pricing.
- 4.84 In any case, and as acknowledged by Sky, ComReg's assessment of the geographic market incorporated not only Eircom's behaviour, but also that of other FSPs, who, unlike Eircom, are not constrained by regulation. In doing so, ComReg found no evidence of sub-national markets in its assessment.
- 4.85 With regards to the geographic boundaries of the FACO Markets, ComReg intends to continue to monitor the situation and to revisit its market definition, competition analysis and/or remedies as appropriate in light of emergence of stable differences in the intensity of competition between different geographic areas.

ComReg's Position

- 4.86 In paragraphs 5.8 to 5.215 of the Consultation ComReg analysed the FACO Markets from a product perspective and set out its preliminary view that there were two separate LL-FACO and HL-FACO Markets, both of which encompass FA/WLR and FVCO as described therein. In paragraphs 4.13 to 4.32 of this Decision ComReg set out Respondents' views before subsequently considering these in paragraphs 4.38 to 4.85 above.
- 4.87 In paragraphs 5.217 to 5.236 of the Consultation ComReg analysed the FACO Markets from a geographic perspective and set out its preliminary view that each of the separate LL-FACO and HL-FACO Markets are national in scope. In paragraphs 4.33 to 4.36 of this Decision ComReg set out Respondents' views before subsequently considering these in paragraphs 4.75 to 4.85 above.
- 4.88 In summary, ComReg has decided to maintain its position with respect to the definition of the FACO Markets, from both a product and geographic perspective, as set out in the Consultation and, as more particularly described below.

FACO Product Market Definition

- 4.89 ComReg's position is that there are two separate product markets namely the Low Level FACO ('**LL-FACO**') Market, and the High Level FACO ('**HL-FACO**') Market, (referred to together as the '**FACO Markets**').
- 4.90 The LL-FACO Market is comprised of:

- (a) wholesale fixed access ('**FA**') to the public telephone network for the provision of voice telephony services by means of (i) PSTN, or (ii) ISDN Basic Rate Access ('**ISDN BRA**') which supports 2 voice channels; and
- (b) Fixed Voice Call Origination ('**FVCO**'), being calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange associated with the FA at which the voice call was originated (due to the absence of 'code hosting/sharing' under current industry call routing rules)²²⁸. FVCO does not distinguish between the types of telephone numbers being called.

4.91 The HL-FACO Market is comprised of:

- (a) wholesale FA to the public telephone network for the provision of voice telephony services by means of (i) ISDN Fractional Rate Access ('**ISDN FRA**'), which supports between 14 to 30 voice channels or (ii) ISDN Network Primary Rate Access ('**ISDN PRA**'), which supports up to 30 voice channels; and
- (b) FVCO, being calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange level at which the voice call was originated (due to the absence of 'code hosting/sharing' under current industry call routing rules). FVCO does not distinguish between the types of telephone numbers being called.

4.92 The inclusion above of FVCO and FA/WLR within the broader FACO Markets reflects the fact that (a) FA (or Wholesale Line Rental ('**WLR**')) and FVCO services are predominantly purchased together by wholesale customers from the same supplier²²⁹, and (b) it is not technically possible for a wholesale customer to purchase FA/WLR from one wholesale supplier and FVCO from another²³⁰.

²²⁸ See footnotes 176 and 177 above.

²²⁹ There has been a significant decline in the wholesale customers' demand for Eircom's standalone FVCO based wholesale CPS product since the 2007 Decision, with Eircom's SB-WLR now accounting for over 95% of Access Seekers' demand.

²³⁰ WLR and CPS purchases from Eircom are inextricably linked. Where 'CPS only' was purchased, Eircom would sell the retail line rental services (self-supply of WLR) to the retail customer.

- 4.93 The identification by ComReg of separate HL-FACO and LL-FACO markets relates to underlying differences in demand-side and supply-side conditions associated with the FA component of FACO. In particular, a distinction is drawn between a traditional Public Switched Telephone Network ('**PSTN**') line which supports one voice channel and the various types of Integrated Services Digital Network ('**ISDN**') lines, which can support between two and thirty voice channels. ComReg's conclusion that a distinction needs to be drawn between low capacity ISDN BRA products (which ComReg considers are substitutable with PSTN products) and higher capacity ISDN PRA/FRA products (which are not considered substitutable with PSTN products) is due to apparent differences in terms of pricing, functionality and demand-side considerations. ComReg considers that LL-FACO products are likely to be purchased as a wholesale input for the provision of RFTS for residential and small business users, whereas HL-FACO are more likely to be suited to larger business customers²³¹.
- 4.94 Eircom is the only FSP providing wholesale HL-FACO and LL-FACO products in Ireland. In addition to LL-FACO and HL-FACO products sold to wholesale customers, ComReg's position is that Eircom's self-supply, including its supply of FACO via Managed VOB, is also included in the FACO Markets (noting that Managed VOB is ultimately likely to replace Eircom's traditional circuit switched telephony services).
- 4.95 ComReg's position is that the FACO Markets do not include:
- Wholesale switchless voice services ('**Wholesale SV**'). Wholesale SV is excluded on the basis that it is typically used by FSPs that do not operate their own switching or interconnection infrastructure. The functionality of Wholesale SV is, therefore, significantly different from that of FACO products since purchasers of the latter are required to operate switching infrastructure in order to receive FVCO traffic;
 - Self-supply of FACO by alternative (non-Eircom) vertically integrated RFTS providers. This is on the basis that (a) alternative FSPs are not offering HL-FACO or LL-FACO (b) there is unlikely to be significant demand from third parties for a FACO product self-supplied by alternative RFTS networks (because alternative networks don't share Eircom's ubiquitous coverage), and (c) ComReg considered that alternative RFTS networks would not enter the FACO Markets in response to a SSNIP.²³² Also, self-supply of FACO is not included in the scope of the relevant product market because the supply of RFTS on alternative networks is not considered to exert a sufficiently effective indirect constraint on the FACO Markets that would prevent a profitable SSNIP of FACO products by a HM.
 - FACO being provided on a mobile telephone network; and

²³¹ See paragraphs 5.48 to 5.67 of the Consultation.

²³² See assessment of direct and indirect constraints for each alternative platform throughout Section 5 of the Consultation and Section 4 of this Decision.

- Managed VOB provided over xDSL or Leased Lines as a substitute for FACO because there is not yet evidence of significant substitution taking place between FACO products and Managed VOB, to the extent that would prevent the HM from exercising a profitable SSNIP of HL-FACO or LL-FACO.
- 4.96 Finally, ComReg considered the potential for alternative FSPs to, instead of purchasing SB-WLR, purchase wholesale broadband inputs such as Local Loop Unbundling ('LLU') and WBA and offer a Managed VOB based solution. However, ComReg notes that there is no evidence to suggest that these wholesale broadband products themselves would be considered by FSPs to be a substitute for FACO products.

FACO Geographic Market Definition

- 4.97 ComReg's position is that the FACO Markets are national in scope. ComReg notes that, given the lack of effective direct and indirect constraints in the FACO Markets generally, the conditions of competition appear to be sufficiently homogenous such that there are no sub-national geographic markets.
- 4.98 ComReg proposes to monitor the impact of retail competition on FACO prices within the LEA over the period of the current review, with a view to identifying whether there is any resulting emergence of differentiated competitive constraints in the FACO Markets.

5 Wholesale FACO Markets Competition Assessment and Three Criteria Test and SMP Assessment

Position set out in the Consultation

- 5.1 In the Consultation²³³, ComReg assessed competition in the FACO Markets and, in so doing,:
- (a) carried out an assessment as to whether any operator had significant market power ('SMP')²³⁴; and
 - (b) examined whether the three criteria test ('3CT')²³⁵ was met²³⁶;
- 5.2 As was evident from the analysis, the SMP assessment and the 3CT were inextricably linked, given the significant overlap between the issues considered. In order to avoid undue repetition, ComReg drew significantly on its preceding competition analysis within Section 6 of the Consultation.

The Three Criteria Test

- 5.3 The 3CT sets out relevant criteria that must be cumulatively satisfied in order to determine whether a relevant market should be subject to *ex ante* regulation. 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.
- 5.4 The three criteria identified above were examined in the Consultation²³⁷ and ComReg's preliminary views on whether each of these criteria are met is summarised below.

²³³ See Section 6 of the Consultation.

²³⁴ See paragraphs 6.13 to 6.168 of the Consultation.

²³⁵ See paragraphs 6.169 to 6.189 of the Consultation.

²³⁶ ComReg was not required to conduct a 3CT under the 2007 Recommendation (which identified that FVCO is susceptible to *ex ante* regulation) but ComReg decided to do so because the market was being broadened to include an FAWLR component and also because the European Commission was, at that time, bringing in a new Recommendation (now the 2014 Recommendation) under which FVCO would no longer require *ex ante* regulation (unless it met the 3CT).

²³⁷ See paragraphs 6.169 to 6.189 of the Consultation.

The presence of high and non-transitory barriers to entry

- 5.5 ComReg examined (throughout the SMP assessment) the nature and dynamic behind the barriers to entry present in the FACO Markets. ComReg identified a number of factors in the Consultation²³⁸ that are likely to act as a barrier to entry in the FACO Markets. These included:
- (a) The incumbent FACO supplier, Eircom, controls infrastructure that is difficult for a new entrant to replicate.²³⁹
 - (b) The incumbent FACO supplier, Eircom, has a large customer base and diversified product range, and therefore benefits from significant economies of scale, scope and density.²⁴⁰
 - (c) There are likely to be considerable sunk costs that would be incurred when entering the FACO Markets.²⁴¹
 - (d) The incumbent FACO supplier, Eircom, benefits from being vertically integrated.²⁴²
- 5.6 ComReg's analysis in Section 6 of the Consultation indicated that barriers to entry remain high in the FACO Markets, and that Eircom has maintained high and stable market shares in both these markets. ComReg's preliminary view was therefore that the first criterion of the 3CT would be met in relation to the FACO Markets.

A market structure which does not tend towards effective competition within the relevant time horizon

- 5.7 ComReg's preliminary view was that the FACO Markets are not likely to tend towards effective competition within the relevant time horizon for this market review on the basis that²⁴³:

²³⁸ See paragraphs 6.177 to 6.178 (and in more detail in paragraphs 6.48 to 6.84) of the Consultation.

²³⁹ See paragraphs 6.57 to 6.70 of the Consultation for discussion on the sunk costs associated with replicating Eircom's FACO network.

²⁴⁰ See paragraphs 6.71 to 6.78 of the Consultation for further discussion on economies of scale, scope and density.

²⁴¹ See paragraphs 6.57 to 6.70 of the Consultation for discussion on the varied degrees of sunk costs associated with different types of entry in the FACO Markets.

²⁴² See paragraphs 6.79 to 6.84 the Consultation for a further explanation of vertical integration as a barrier to entry in the FACO Markets.

²⁴³ See paragraphs 6.179 to 6.184 (and in more detail in paragraphs 6.14 to 6.44 and 6.44 to 6.45) of the Consultation

- (a) Eircom has maintained a high and stable market share of 100% in each of the FACO Markets²⁴⁴, and demand for FACO has remained strong and relatively stable since the 2007 Decision. In the analysis, ComReg considered actual market shares as well as hypothetical market shares, which set out the likely position if the self-supply of vertically-integrated CATV, FWA and alternative fibre based FSPs providing RFTS were included in the FA component of the FACO Markets²⁴⁵. Such hypothetical market shares showed that Eircom had a relatively stable market share over time of approximately 80% for the HL-FACO Market, and for the LL-FACO Market, it was also above 80% (notwithstanding a decline of approximately 20% since Q3 2009, based on the trend to date ComReg did not consider it probable that, within the lifetime of this review, Eircom's market share would fall close to or below 50%).
- (b) There is no observable evidence that Managed VOB, or any other potential source of constraint, will provide effective competition in the FACO Markets over the period of this review.²⁴⁶
- (c) There is no evidence of RFTS suppliers substituting SB-WLR with their own Managed VOB solutions on any significant scale.

5.8 ComReg's preliminary view was, therefore, that the second of the 3CT criteria would be met in relation to the FACO Markets.

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

- 5.9 ComReg considered that competition law would be unlikely to be sufficient to effectively address market failures in the FACO Markets because²⁴⁷:
- (a) Certain remedies to address identified market failures that are available under regulation could not be imposed at all or imposed effectively under competition law.²⁴⁸
 - (b) Compliance requirements associated with the required regulatory intervention would need to be maintained over time.

²⁴⁴ ComReg analysed existing competition in paragraphs 6.14 to 6.44 and potential competition (including the impact of indirect constraints) in paragraphs 6.45 to 6.147 of the Consultation.

²⁴⁵ See Figure 3, Figure 23 and Figure 24 as set out in the Consultation.

²⁴⁶ Notably, Access Seekers have continued to use FACO to provide RFTS, often purchasing WBA (and to a lesser extent Line Share) alongside SB-WLR, rather than providing Managed VOB using Eircom Full Unbundling or SAB products. As discussed in paragraphs 3.88 and 4.44, demand for these products remains very low and they are not being used to provide Managed VOB.

²⁴⁷ See paragraphs 6.185 to 6.188 of the Consultation.

²⁴⁸ See Sections 8 and 9 of the Consultation, which respectively identified the potential competition problems that arise as a result of Eircom's SMP in the FACO Markets, and which set out proposed remedies aimed at addressing these competition problems.

- (c) Frequent and/or timely intervention is likely to be required to remedy competition problems in an effective, timely and efficient manner. This can be managed more effectively through *ex ante* rather than *ex post* regulatory regulation.
 - (d) Creating regulatory certainty up-front is important for protecting the investment incentives of FSPs, including Eircom.
 - (e) Time delays involved in remedying competition problems through *ex post* competition law would be likely to render it less effective.
- 5.10 On that basis, ComReg's preliminary view was that the third criterion of the 3CT would be met in relation to the FACO Markets.

Preliminary conclusions on the 3CT

- 5.11 ComReg's preliminary view was that the FACO Markets met the 3CT and, therefore, are susceptible to *ex ante* regulatory intervention.

SMP Assessment

- 5.12 In the Consultation, ComReg conducted an analysis to assess whether an operator had SMP in the FACO Markets, in which it considered the effectiveness of:²⁴⁹
- (a) **existing competition:** an assessment of factors such as vertical integration, market shares, relative strength of existing competitors, barriers to expansion, indirect constraints, and pricing behaviour ;²⁵⁰
 - (b) **potential competition:** an assessment of factors such as control of infrastructure not easily duplicated, technological advantages or superiority, barriers to entry in the FACO Markets, as well as considering the overall strength of potential competitors;²⁵¹ and
 - (c) **countervailing buyer power ('CBP'):** an assessment of the impact posed by any strong buyers of FACO on the competitive behaviour of the FACO provider ²⁵².
- 5.13 ComReg noted that Eircom is the sole supplier in the FACO Markets, having held a stable 100% market share in each such market over time. It therefore does not face existing competition within such markets.

²⁴⁹ The framework and approach used by ComReg to assess SMP was set out in paragraphs 6.1 to 6.12 of the Consultation, including the factors which ComReg considered to be most relevant to the assessment of SMP.

²⁵⁰ See paragraphs 6.13 to 6.44 of the Consultation.

²⁵¹ See paragraphs 6.45 to 6.147 of the Consultation.

²⁵² See paragraphs 6.148 to 6.168 of the Consultation.

- 5.14 ComReg considered what would be Eircom's hypothetical market share if the self-supply of vertically-integrated cable TV, FWA and alternative fibre based FSPs providing RFTS were to be included in the FACO Markets. ComReg noted that, in this scenario, Eircom's hypothetical market share has fallen to approximately 80% in the LL-FACO Market since Q3 2009 (largely due to UPC's entry in the retail market). However, ComReg considered it unlikely that Eircom's hypothetical market share would fall close to or below 50% within the lifetime of this review. ComReg noted that Eircom would have a similar hypothetical market share in the HL-FACO Market, and that this had been relatively stable over time.
- 5.15 ComReg also examined the impact of indirect pricing constraints arising from the competition within the retail market(s) on competition within the FACO Markets. Indirect constraints were not considered to be sufficiently effective to constrain Eircom's supply of FACO, most notably, because Eircom is vertically integrated and is in a position to compete with cable TV, FWA and other fibre-based FSPs in the retail markets directly through its own retail arm.
- 5.16 ComReg also considered the extent to which potential competition in the FACO Markets would be likely to effectively constrain Eircom's market power. ComReg's preliminary view was that barriers to entry are likely to remain high over the period of this market review, and that the potential for FSPs to switch to Managed VOB is not likely to result in the FACO Markets tending towards effective competition over that period of time.
- 5.17 ComReg also noted that demand for SB-WLR is continuing to grow, and evidence of material Managed VOB use by existing SB-WLR users has not yet emerged.
- 5.18 ComReg's preliminary view was that it is unlikely that Eircom would be sufficiently constrained by CBP such that it would prevent it from behaving independently of competitors, customers and consumers. In particular, ComReg saw no evidence of CBP being exercised by Eircom's FACO customers.
- 5.19 Overall, ComReg's preliminary view was that Eircom is likely to have SMP in both of the FACO Markets. Absent regulation, ComReg considered that this would enable Eircom to act independently of its competitors, customers and consumers.

Respondents' Views

- 5.20 Six of the seven Respondents expressed views on ComReg's competition assessment (either the SMP test or the 3CT).
- 5.21 ALTO, BT, Magnet, Sky and Telefonica generally agreed with ComReg's 3CT and SMP assessment (although in some cases provided comments on particular aspects of the analysis).²⁵³

²⁵³ Vodafone did not express an explicit view on ComReg's 3CT and SMP assessments, however, given it considered various remedies identified in Section 9 of the Consultation, it appears to have tacitly accepted ComReg's preliminary views on these matters.

- 5.22 ALTO agreed with ComReg's assessment of SMP. ALTO agreed that the competition assessment tends to fulfil the 3CT. ALTO considered that voice access competition at the wholesale layer has not developed in Ireland, and almost all wholesale and volume retail service providers are dependent on Eircom's voice access products such as WLR and call origination.
- 5.23 BT agreed with ComReg's assessment of SMP, and that the 3CT is satisfied in the FACO Markets. BT argued that competition has not developed in the FACO Markets, and therefore high-volume RFTS providers (with the exception of UPC) are predominantly dependent on Eircom's FACO products. BT was also concerned that the lack of competition in the supply of FACO means that the downstream markets are vulnerable to Eircom's vertical integration. In particular, BT noted that Eircom may have the ability and motive to implement a margin squeeze in the supply of SV.
- 5.24 Magnet agreed with ComReg's SMP assessment, and particularly with ComReg's proposed exclusion of self-supply of alternative FSPs providing RFTS from the FACO Markets. Magnet considered that Eircom's ubiquitous access network poses a barrier to entry for potential entrants in the FACO market.
- 5.25 Magnet considered that SIP trunking and Managed VOB are not real competitors for FACO in the short-term, because both are in their infancy. Magnet noted, however, that Eircom's planned 'VOIP' products should be monitored, and pre-emptively be included in ComReg's SMP designation. In relation to ComReg's assessment of CBP, Magnet agreed that there is no alternative wholesale supplier, and there is unlikely to be an alternative supplier in the future. For this reason, Magnet considered that OAOs do not have any bargaining power when negotiating with Eircom for the supply of FACO.
- 5.26 Magnet also agreed with ComReg that the infrastructure involved in supplying FACO is not easily replicated. Thereby resulting in high barriers to entry.
- 5.27 Magnet also commented on Eircom's withdrawal of the SB-WLR discount in the LEA²⁵⁴. Magnet noted that the subsequent 'price-increase' indicates that Eircom may not face the competitive constraints that Magnet suggests were behind Eircom's rationale for the introduction of the discount in the first place.. Magnet considered that this will impact on the analysis in the Consultation, in particular, the indirect pricing constraint assessment and the pass-through of the effective wholesale price increases to their retail customers.
- 5.28 Telefonica agreed with ComReg's assessment of SMP and considered that the FACO Markets meet the 3CT, including that these markets are not likely to tend towards effective competition.

²⁵⁴ See paragraph 4.78 above.

5.29 Eircom disagreed with ComReg's competition assessment for a number of reasons. Eircom considered that ComReg's 3CT and SMP assessment was not sufficiently forward looking, and could not therefore be considered to be adequate. Eircom questioned the lack of a forward looking approach with respect the use of retail pricing data in ComReg's analysis. Eircom also reiterated a number of arguments that it raised in relation to ComReg's assessment of the RFTS market²⁵⁵. In this case Eircom argued that ComReg had failed to take adequate account of strong retail demand-side substitution and indirect pricing constraints arising from MTS and Managed VOB.

ComReg's Assessment of Respondents' Views

5.30 ComReg notes that, apart than Eircom, other Respondents agreed with ComReg's 3CT and SMP assessment of the FACO Markets. ComReg's consideration of Respondents' views below therefore largely focuses on the comments raised by Eircom referred to in paragraph 5.29 above.

5.31 In terms of the forward looking nature of ComReg's analysis, ComReg acknowledges that ultimately Managed VOB is likely to supersede PSTN based RFTS for many (but not necessarily all) customers at some point in the future. For example, there are likely to be efficiency gains available to FSPs providing Managed VOB to customers as part of a broadband bundle, since it means using one network rather than two separate networks to provide the service.

5.32 However, as ComReg discussed throughout the Consultation and in Sections 2 and 4 of this Decision, competition in the RFTS market to date remains predominantly based on PSTN based RFTS and, on a forward looking basis, it is unclear as to the extent to which FSPs will migrate to Managed VOB based RFTS, along with the timing of any such move. In this context, ComReg considers that Eircom's narrowband PSTN will continue to be the predominant platform for the provision of RFTS to the significant majority of retail customers into the future (even more so for customers purchasing standalone RFTS or those customers where broadband services are not available or of a sufficient quality). Apart from the retail market considerations above, the continued growth in demand for SB-WLR ²⁵⁶, notwithstanding Eircom's removal of the €3 WLR discount in January 2015, suggests a lack of any immediate and sufficiently effective constraint on Eircom in the FACO Market.

²⁵⁵ ComReg has addressed these retail-related issues in the retail section of this Decision (see Section 3).

²⁵⁶ The growth of SB-WLR subscriptions is illustrated in Figure 5 in Appendix D (the Updated Trend Analysis).

5.33 Although ComReg has seen no evidence to date of Access Seekers substituting PSTN-based FACO products with Managed VOB on any significant scale, there is some evidence that it may be set to occur to some degree over the period of this review. In particular, Vodafone [~~]~~

[REDACTED]

[REDACTED]

5.34

[REDACTED]

5.35 ComReg will continue to monitor any entry by Managed VOB service providers and the take up of such services by consumers, and any evidence of material competitive constraints arising in the FACO Markets will be considered, with the regulatory framework being adjusted as appropriate.

5.36 For the reasons already discussed in paragraph 4.54 to 4.64 above, ComReg disagrees with Eircom's argument that its competition assessment is not forward looking, and that it fails to take adequate account of the strength of indirect pricing constraints arising from MTS and VOB. Furthermore, as noted above, ComReg has addressed the issues raised by Eircom in relation to ComReg's assessment of the retail markets within Section 3 and 4 of this Decision.

5.37 ComReg notes the concerns expressed by BT with respect to potential competition problems in the FACO Markets. These are considered more specifically within the discussion of competition problems and remedies to address such problems (in Sections 7 and 9 of this Decision).

5.38 ComReg notes Magnet's comment about Eircom's withdrawal of the €3 SB-WLR Discount (when sold in a bundle with broadband) as being indicative of a lack of competition in the provision of RFTS (and associated wholesale services). ComReg notes that Eircom's pricing of wholesale services is intrinsically linked to the broader regulatory framework, as well as to competition in downstream markets. ComReg acknowledges that the withdrawal by Eircom of the wholesale discount is consistent with ComReg's broader observation that there is no evidence to suggest that Eircom is constrained in the FACO Markets.

ComReg's position

- 5.39 In summary, ComReg maintains its position with respect to the FACO Markets competition assessment (both its application of the 3CT, and the SMP assessment), as set out in the Consultation and further considered through this Section 5 above.
- 5.40 ComReg, therefore, considers that the HL-FACO Market and LL-FACO Market each meet the 3CT, and that *ex ante* regulation is justified within these markets. ComReg considers that Eircom has SMP in both the HL-FACO and the LL-FACO Markets.

Designation of Eircom with Significant Market Power

- 5.41 In paragraphs 5.12 to 5.41 above (and in section 5 of the Consultation), ComReg considered a wide range of factors to examine whether any undertaking enjoys a position of SMP in each of the FACO Markets identified in Section 4. These factors have included:
- (a) existing competition in the FACO Markets;
 - (b) potential competition in the FACO Markets; and
 - (c) the strength of any CBP.
- 5.42 ComReg's position is that the FACO Markets are not effectively competitive, and that Eircom would not be sufficiently constrained by the above factors such that it would be prevented from behaving, to an appreciable extent, independently or competitors, customers and consumers in those markets.
- 5.43 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 to designate an undertaking under Regulation 27(4) of the Framework Regulations as having SMP.
- 5.44 Having regard to the conclusions reached in the above market analysis, ComReg's position is that Eircom should be designated as having SMP in (a) the LL-FACO Market and (b) the HL-FACO Market.

6 Wholesale Transit Market Definition

Position set out in the Consultation

6.1 In Section 7 of the Consultation, ComReg considered the definition of the Transit Market from product and geographic perspectives.²⁵⁷ This involved assessing any relevant demand-side constraints, supply-side constraints and indirect constraints

Product Market Assessment

6.2 In considering the boundary of the Transit Market from a product perspective, ComReg considered the following issues:

- (a) Identification of a transit focal product, including addressing issues such as²⁵⁸:
- the identification of the boundary between the FVCO, Fixed Voice Call termination ('**FVCT**') and Transit markets²⁵⁹;
 - whether an IP-based Transit service would fall within the Transit market;²⁶⁰
 - whether there are separate relevant markets for Transit to different types of telephone numbers²⁶¹; and
 - whether *trunk* and *pure*²⁶² Transit fall within separate Transit markets.²⁶³
- (b) Identification and assessment of direct constraints on the focal product including an assessment of potential demand-side and supply-side substitutes²⁶⁴; and
- (c) The assessment of the geographic scope of the Transit Market²⁶⁵.

²⁵⁷ ComReg noted that Transit is no longer identified by the European Commission as being susceptible to *ex ante* regulation (Transit was listed in the 2003 Recommendation but is not listed in the 2007 Recommendation and the 2014 Recommendation), but that to date ComReg had found Eircom to have SMP in the Transit market and had continued to impose remedies on Eircom this market.

²⁵⁸ See paragraphs 7.11 to 7.68 of the Consultation.

²⁵⁹ See paragraphs 7.19 to 7.40 of the Consultation.

²⁶⁰ See paragraphs 7.41 to 7.45 of the Consultation.

²⁶¹ See paragraphs 7.46 to 7.52 of the Consultation.

²⁶² In the Consultation ComReg identified *pure* Transit as Transit involving the conveyance of call traffic between two non-interconnected Service Providers, whereas *trunk* transit product involve the conveyance of call traffic of a Service provider to a deeper switching point within its network.

²⁶³ See paragraphs 7.63 to 7.66 of the Consultation.

²⁶⁴ See paragraphs 7.69 to 7.102 of the Consultation.

²⁶⁵ See paragraphs 7.102 to 7.104 of the Consultation.

- 6.3 Having considered these above issues, ComReg's preliminary view²⁶⁶ was that the Transit product market included:
- all elements of call routing that takes place between FVCO and FVCT, including switching and conveyance;
 - calls to national geographic, non-geographic and mobile numbers (referred to as '**Domestic Transit Services**');;
 - both *trunk* and *pure* Transit²⁶⁷ provided over copper and/or fibre networks (i.e. irrespective of the underlying infrastructure employed);
 - Eircom's self-supply, as well as its supply in the wholesale market; and
 - self-supply and wholesale supply of other Transit service providers that are active in the provision of wholesale Transit services.
- 6.4 ComReg's preliminary view was that the Transit product market did not include either FVCO or Termination (being MVCT or FVCT). Additionally, the international Transit market was considered likely to be a separate market.
- 6.5 ComReg's preliminary view was that the Transit Market did not include the self-supply of Transit by FSPs or MSPs that are not providing wholesale Transit services. However, such self-supply was considered further in the context of the subsequent application of the 3CT²⁶⁸, including the assessment of barriers to entry.

Geographic Market Assessment

- 6.6 In the Consultation, ComReg assessed the geographic scope of the Transit Market having regard to the following criteria:
- Geographic differences in entry conditions over time²⁶⁹;
 - Variation in the number and size of potential competitors and distribution of market shares²⁷⁰;
 - Evidence of differentiated pricing strategies or marketing²⁷¹; and
 - Geographical differences in demand characteristics²⁷².
- 6.7 Based on its analysis of the above, ComReg set out its preliminary view that in the Transit Market:

²⁶⁶ See paragraphs 7.103 to 7.105 of the Consultation

²⁶⁷ See footnote 262 above.

²⁶⁸ See in paragraphs 7.209 and 7.278 of the Consultation.

²⁶⁹ See in paragraphs 7.108 and 7.123 of the Consultation.

²⁷⁰ See in paragraphs 7.124 and 7.126 of the Consultation.

²⁷¹ See in paragraphs 7.127 and 7.136 of the Consultation

²⁷² See in paragraphs 7.137 and 7.139 of the Consultation.

- (a) there have been geographic differences in entry over time and there are likely to be some variations in competitive conditions across individual or groups of Transit routes. Nevertheless, BT had maintained a large, near national wholesale Transit network footprint, although it still relied upon Eircom for Transit services, in particular, on a small number of low-volume Transit routes, such as those to remote or small Eircom exchanges, or to smaller FSPs;
 - (b) there are differences in demand characteristics between Transit routes; and
 - (c) there had been no evidence of Transit prices varying between Transit routes (although Eircom's Transit prices were subject to an SMP based price control obligation).
- 6.8 ComReg recognised that within the Transit Market there were particular routes where competition is likely to be more developed compared to other routes. ComReg's preliminary view was that there was also likely to be a common pricing constraint that extended to routes where there was less competition. This preliminary view was based on ComReg's assessment of (a) barriers to entry and replicability of different Transit routes; and (b) the commercial and practical considerations that would be likely to influence the pricing strategies of existing Transit service providers, absent regulation.
- 6.9 ComReg also noted that defining sub-geographic markets on a route-by-route basis would, in its view, be difficult in a practical sense. In this respect, ComReg had observed that barriers to entry have been overcome on a number of routes and this dynamic could continue into the future, meaning that competitive pressures may be unstable and change over time. Additionally, ComReg noted the potential for IP interconnection to change network handover points between operators. Defining a route-by-route Transit Market could, therefore, become redundant over time.
- 6.10 ComReg's preliminary view was that, on balance, the Transit Market is likely to be national in scope.

Respondents' Views

- 6.11 Six Respondents' expressed views in relation to ComReg's definition of the Transit Market. ALTO, BT, Eircom and Vodafone disagreed with aspects of ComReg's analysis, whereas Magnet and Telefonica broadly agreed with the proposed Transit Market definition (although in some cases had comments).
- 6.12 ComReg has summarised the Respondents' main views on Transit Market definition, grouping the key issues raised into the identified themes below, namely:
- (a) Whether sub-national or route based Transit markets exist (discussed in paragraphs 6.13 to 6.16 below);
 - (b) Whether self-supply of Transit by non-wholesale suppliers should be included in the market (discussed in paragraph 6.17 below); and
 - (c) Other issues (discussed in paragraphs 6.18 to 6.21 below).

Whether sub-national or route based Transit markets exist

- 6.13 ALTO noted that many of its members disagreed with ComReg's preliminary conclusions on the geographic market assessment for the Transit Market. ALTO noted that, whilst Eircom may have national coverage in the Transit Market, no other operator had or would be likely to have this level of coverage.
- 6.14 BT considered that localised Transit markets exist. BT noted that, according to ComReg's assessment, only 28%²⁷³ of exchanges are served by three Transit service providers.
- 6.15 Eircom considered that there are sub-national or destination-based Transit markets. In particular, Eircom considered that there may be different competitive conditions within components of the Transit market, either geographically based, or based on the destination network. However, since Eircom agrees with ComReg that the national Transit Market, or any (hypothetical) sub-geographic markets, would fail the 3CT, Eircom did not see much value in developing the market definition analysis further. However, Eircom noted that in the event that ComReg was to alter its preliminary position and impose *ex ante* regulation in the Transit Market, Eircom requested that it be given an opportunity to respond further on this point.
- 6.16 Magnet considered that the hand-over point should be defined at the double-tandem exchange level²⁷⁴ citing the reason that it was very expensive to interconnect at the primary exchange levels. It noted that it only interconnects with Eircom's network at two exchanges, namely the [X< [REDACTED] [REDACTED] exchanges and that interconnecting at these two Eircom exchanges was sufficient to meet its internal demands. Magnet also considered that the Transit Market should be defined as being national in scope. Magnet noted that there would always (implicitly) be more calls terminating and originating in an urban area due to population density.

²⁷³ BT referred to Table 15 in the Consultation (page 250) in which ComReg examined the extent to which competitive conditions vary between *trunk* Transit routes (Transit between Eircom exchanges). For the purpose of that assessment, ComReg had assumed that Transit to each Eircom exchange represented a *trunk* Transit route (which meant that there were then 50 trunk Transit routes). The number of Transit service providers connected to an exchange represented the number of competitors providing services over a given route and ComReg had categorised Eircom exchanges according to how many wholesale Transit providers are interconnected with each exchange. This analysis showed that 23 exchanges (46%) were served by Eircom plus 1 other transit service provider; 14 exchanges (28%) were served by Eircom plus 2 other transit service providers; and 8 exchanges (16%) were served by Eircom plus 3 other transit service providers.

²⁷⁴ See footnote 175 above describing the primary, tandem and double-tandem exchange levels within Eircom's network.

Whether self-supply of Transit by non-wholesale suppliers should be included in the market

6.17 Magnet considered that self-supply of Transit by a non-wholesale supplier ('Internal Transit')²⁷⁵ should not be included in the Transit market because there may be no economic incentive for service providers offering RFTS or MTS to offer wholesale Transit services.

Other comments

- 6.18 ALTO, mirroring BT's comments, did not agree with an aspect of ComReg's proposed Transit product market definition, and commented on the boundary of the FVCO component of the FACO Market agreeing that this was at the double-tandem exchange level. However, it considered that Eircom had a choice to either use its own tandem or double-tandem Transit, or indeed select an alternative Transit provider at the primary exchange level. ALTO noted that its members would originate indirect access or SB-WLR based calls through the Eircom primary exchange level and, if ALTO members could do this, it considered that it clearly must be a matter of selection / preference on the part of Eircom.
- 6.19 BT and ALTO referred to Figure 26 in the Consultation²⁷⁶, where ComReg had presented a simplified diagram for the purpose of visually representing the relationship between different wholesale components of a call, including the distinction between *pure* Transit and *trunk* Transit, as well as FVCO and FVCT. BT and ALTO suggested that Figure 26 appeared to identify a type of Transit that takes place between primary exchanges, including for Eircom.
- 6.20 Magnet agreed that international Transit fell within a different market because there is insufficient supply-side substitution between Domestic Transit Services (Transit provided within Ireland) and international Transit services. Magnet also noted that it previously supplied international Transit (before withdrawing from the market), but not Domestic Transit Services.

²⁷⁵ For the purpose of the Consultation and this Decision, wholesale Transit minutes provided by a Transit supplier to external third parties is referred to as '*External Transit*'. The self-provision of Transit is referred to as '*Internal Transit*'. Collectively External Transit and Internal Transit are referred to as '*Total Transit*'.

²⁷⁶ See page 231 of the Consultation.

6.21 Vodafone considered that ComReg's proposed Transit Market boundaries are flawed given its earlier comments in which it had disagreed with ComReg's definition of the boundary of the FVCO component of the FACO Market. In this respect, Vodafone noted that as the Transit Market boundary must align with the boundaries of the FVCO and Termination product markets and, in light of its earlier disagreement with ComReg's assessment of the boundary of the FACO Market, it therefore disagreed with ComReg's assessment of the boundary of the Transit Market. Vodafone also considered that, based on the Transit Market boundary proposed by ComReg, there would still be elements of the Transit Market that, in its view, would be amenable to *ex ante* regulation. However, Vodafone noted that if the FACO Market/Transit Market boundary issues are addressed by ComReg, then Vodafone considered that ComReg's approach to the 3CT would be valid.

ComReg's Assessment of Respondents' views

6.22 In paragraphs 6.13 to 6.21 above, ComReg has summarised the key issues raised by Respondents concerning ComReg's preliminary definition of the Transit Market. Below, ComReg assesses Respondents' views under each of the key themes identified in paragraph 6.12 above, in particular:

- (a) Whether sub-national or route based Transit markets exist ((discussed in paragraphs 6.25 to 6.36 below);
- (b) Whether self-supply of Transit by non-wholesale suppliers should be included in the market (discussed in paragraphs 6.37 to 6.40 below); and
- (c) Other issues (discussed in paragraphs 6.41 to 6.46 below).

6.23 Before doing so, ComReg would note that in Appendix F of this Decision it has updated its analysis of the main trends and developments in the Transit Market as were discussed in Section 7 of the Consultation ('**Updated Transit Analysis**'). This Updated Transit Analysis is referred to in the discussion throughout this Section 6 and elsewhere (where relevant) in this Decision.

6.24 The data set out in the Updated Transit Analysis has been obtained from service providers via the 2014 Statutory Information Requests (and subsequent follow-up correspondence/discussions) and includes information relating to interconnection, Transit demand, traffic patterns, market shares and competition across different Transit routes.

Whether sub-national or route based Transit markets exist

6.25 As set out in paragraphs 6.13 to 6.20 above, a number of Respondents considered that sub-national geographic Transit markets might exist, in particular, for those Transit routes on which the number of competing Transit suppliers differed.

- 6.26 In the Consultation²⁷⁷, ComReg analysed differences in competitive conditions between Transit routes based on the then set of available information. ComReg has obtained more recent data from service providers via the 2014 Statutory Information Requests (and other non-statutory based requests for information), which it has incorporated into the Updated Transit Analysis set out in Appendix F of this Decision.
- 6.27 The Updated Transit Analysis shows that there are variations in the number of Transit suppliers offering services on each of the *trunk* and *pure* Transit routes identified. In this respect, ComReg has identified 46 *trunk*²⁷⁸ Transit routes (see Table 1 and Table 2 of the Updated Transit Analysis) and 30 *pure* Transit routes (See Table 3 in the Updated Transit Analysis) in total.
- 6.28 With respect to the *trunk* Transit routes, Table 2 of the Updated Transit Analysis identifies that:
- (a) Eircom faces competition on all but one *trunk* Transit route (representing 2% of *trunk* Transit routes). This one exchange²⁷⁹ is an uncontested *trunk* Transit route, but accounts for [§< [REDACTED]] (less than 1%) of FVCT traffic on Eircom's network.
 - (b) There are a further twenty-three *trunk* Transit routes where only Eircom and one other competing service provider (BT) are supplying Transit. Such routes account for [§< [REDACTED]] (over half) of total FVCT traffic on Eircom's network.
 - (c) There are a further 5 *trunk* Transit routes where only Eircom and two other competing service providers are supplying Transit. Such routes account for [§< [REDACTED]] (under 10%) of total FVCT traffic on Eircom's network.
 - (d) On the remaining 17 *trunk* Transit routes there are at least three competing *trunk* Transit providers (BT, Eircom and UPC). Such routes account for [§< [REDACTED]] (over a third) of total FVCT traffic on Eircom's network.
- 6.29 With respect to the *pure* Transit routes, Table 3 in the Updated Transit Analysis groups service provider networks according to how many wholesale *pure* Transit providers are interconnected with other service providers, with the number of *pure* Transit providers being indicative of the number of competitors present on a given *pure* Transit route. Table 3 identifies that:
- (a) Eircom is the only supplier of *pure* Transit on 40% of routes. i.e., 40% of service providers (12 service providers) interconnect with Eircom only, and therefore rely entirely on Eircom for the supply of *pure* Transit. These Transit routes collectively carry [§< [REDACTED]] (less than 1%) of overall Transit demand;
 - (b) Eircom faces competition from one other Transit provider on 23% of *pure* Transit routes (7 service providers); and

²⁷⁷ See paragraphs 7.105 to 7.142 of the Consultation.

²⁷⁸ These 46 *trunk* transit routes are comprised of 28 primary exchanges, 14 tandem exchanges and 4 double-tandem exchanges in Eircom's network.

²⁷⁹ This is the Castlebar exchange located in County Mayo.

- (c) Eircom faces competition from at least two alternative *pure* Transit suppliers on 37% of routes (11 service providers).
- 6.30 In ComReg's view, it is not obvious that each of the above-mentioned *trunk* Transit and *pure* Transit routes would necessarily represent separate geographic markets. For example, it is unlikely to be a pragmatic approach to define separate Transit markets by each *trunk* Transit route, or for each individual *pure* Transit route between service providers' networks. In many cases, as noted in the Consultation,²⁸⁰ despite some variation the competitive conditions (including between routes appear to be sufficiently similar, such that it is ComReg's position that the routes could be combined into a broader Transit market.
- 6.31 In the case of the routes described above in relation to which Eircom is the only provider of *trunk* or *pure* Transit, it is ComReg's position that given these routes involve such low volumes of Transit traffic, they are unlikely to represent markets worth monopolising in and of themselves (i.e. there is only one *trunk* Transit route in which Eircom is the only *trunk* Transit provider and this route represents only 2% of all *trunk* Transit routes, and, while Eircom is the only *pure* Transit provider on 40% of routes, such routes account for less than 1% of overall Transit demand). Consistent with its view expressed in the Consultation, ComReg considers that it is likely that these routes form part of a broader Transit product market which is subject to a common pricing constraint. In this respect, ComReg has observed that Transit services are typically offered on a national basis, with no geographic differentiation in prices (even for service providers offering Transit that are not subject to SMP type regulation).
- 6.32 In relation to ALTO's view that no operator has the same level of Transit coverage as Eircom, as noted above (and in the Updated Transit Analysis), ComReg notes that BT and Vodafone²⁸¹ have (save for 1 different exchange each) replicated a large proportion of Eircom's *trunk* Transit network, with UPC also having increased its presence on *trunk* Transit routes since the Consultation²⁸².

²⁸⁰ See paragraphs 7.106 to 7.144 of the Consultation.

²⁸¹ As noted above, Vodafone is not an active supplier in the wholesale Transit Market.

²⁸² As noted in the Updated Transit Analysis, the time of the publication of the 2007 Decision, BT had already interconnected with a large number of Eircom exchanges. However, since then, BT has expanded its depth of interconnection further, with several other service providers having also replicated parts of Eircom's *trunk* Transit network. This replication of Eircom's *trunk* Transit network has been driven by investment by UPC, Vodafone, and several other FSPs and MSPs with increased interconnection with Eircom's tandem and primary exchanges. For example, in 2009 Vodafone was interconnected with [redacted] of Eircom exchanges, and is now interconnected with [redacted] of Eircom's forty six exchanges ([redacted]). Similarly, in 2009 UPC was interconnected with [redacted] of Eircom's exchanges, but is now interconnected with [redacted] of Eircom's exchanges.

- 6.33 It is also likely that a shift to IP interconnection will begin to emerge over the next number of years, and this will be likely to lead to changes in the location and numbers of points of interconnect on networks, potentially further lowering barriers to entry and/or expansion. While the timing for this is uncertain, ultimately this will be likely to lower (and over time eliminate) the need for circuit switched Transit services since IP voice traffic will be handed between networks at more centrally located peering facilities.
- 6.34 Given the above and having regard to the analysis in the Consultation, ComReg considers that it is not appropriate to define sub-national geographic markets for Transit.
- 6.35 With respect to Magnet's comments regarding the boundary of the Transit Market, ComReg would note that insofar as *trunk* Transit is concerned, the boundary has been drawn to include traffic conveyance/routing from the Eircom double-tandem to primary exchange levels. As noted in Section 4, ComReg has also drawn the boundary of the FVCO component of the FACO Markets to include calls conveyed and routed through any switching stages (or equivalent) up to a point of interconnection taking place at the primary, tandem, or double-tandem exchange associated with the FA at which the voice call was originated (due to the absence of 'code hosting/sharing' under current industry call routing rules)²⁸³.
- 6.36 However, ComReg will continue to monitor the developments in the Transit market, and will consider further reviewing its position in light of this.

Whether self-supply of Transit by non-wholesale suppliers should be excluded from the market

- 6.37 In paragraph 6.17 above ComReg noted Magnet's view that Internal Transit supply of non-wholesale suppliers should be excluded from the Transit Market.
- 6.38 ComReg notes that it considered whether to include service providers' self-supply of Transit in the Consultation²⁸⁴ with ComReg's preliminary view being that the self-supply of Internal Transit services by Vodafone, and other vertically integrated Transit service providers, should not be included in the Transit Market for the purposes of this review. This view was based on ComReg's assessment that such self-supply of Transit services is unlikely to provide a sufficiently effective and immediate constraint on the provision of Transit services by a HM supplier of Transit.

²⁸³ See paragraph 4.90(b) above.

²⁸⁴ See paragraphs 7.84 and 7.94 of the Consultation.

- 6.39 ComReg maintains its view, although we do recognise (and did so in the Consultation) that self-supply by certain vertically integrated service providers not active in the wholesale market may have some effect on the Transit Market, in particular, it may reduce demand for External Transit. ComReg also considered the potential for Vodafone's (and other non-wholesale service providers') self-supplied Internal Transit to impact the development of effective competition over a longer time horizon as part of its application of the subsequent 3CT²⁸⁵.
- 6.40 For the avoidance of doubt, ComReg considered in the Consultation²⁸⁶ whether the Internal Transit supply of service providers who are active in the wholesale market should be included in the Transit Market and set out its preliminary view that it should be included. ComReg maintains this position.

Other Issues

- 6.41 In paragraphs 6.18 to 6.20 above ComReg noted that Respondents had raised a number of other issues regarding the definition of the Transit Market.
- 6.42 With respect to ALTO's and BT's views suggesting that Eircom had a choice to either use its own tandem or double-tandem Transit, or indeed select an alternative Transit provider at the primary exchange level, ComReg does not consider this to be a realistic scenario. Eircom is not likely to face incentives to use an alternate Transit supplier in circumstances where it has a ubiquitous Transit network with adequate capacity.
- 6.43 In relation to ALRO's and BT's comments concerning Figure 26 set out in the Consultation, ComReg would like to clarify that Figure 26 was intended to be a stylistic, simplified diagram, provided for illustrative purposes, showing the wholesale components of a call and the associated switching levels in the Transit Market and did not show a primary-to-primary exchange interconnection level.
- 6.44 With respect to these parties' comments on the boundary of the FVCO component of the FACO Markets, ComReg has set out its conclusions on such matters in Section 4 of this Decision.
- 6.45 In relation to Vodafone's comments summarised at paragraph 6.20 above, that it disagreed with the Transit Market boundary given its disagreement with ComReg's assessment of the boundary of the FVCO component of the FACO Markets, ComReg has set out its conclusions on the definition of the FACO Markets in Section 4 of this Decision. The Transit Market definition consequently aligns with the definition of the FACO Markets.
- 6.46 ComReg also noted Magnet's agreement with ComReg's assessment that international Transit falls into a market separate to the national Transit Market.

²⁸⁵ See paragraphs 7.145 to 7.282 of the Consultation.

²⁸⁶ See paragraphs 7.77 to 7.87 of the Consultation.

ComReg's Position

- 6.47 Having regard to the consideration of Respondents' view above, including the Updated Transit Analysis and the analysis in the Consultation, ComReg's position is that the Transit Market is national in its geographic scope and includes:
- all elements of call routing that takes place between FVCO and FVCT, including switching and conveyance;
 - calls to geographic, non-geographic and mobile numbers;
 - both *trunk* and *pure* Transit provided over copper and/or fibre networks (i.e. irrespective of the underlying infrastructure employed);
 - Eircom's self-supply, as well as its supply in the wholesale market; and
 - self-supply and wholesale supply of other Transit service providers that are active in the provision of wholesale Transit services.
- 6.48 The above Transit Market does not include either FVCO or Termination (either MVCT or FVCT). Additionally, the international Transit market is considered to be a separate market.
- 6.49 ComReg's position is that the above Transit Market does not include the self-supply of Transit by FSPs or MSPs that are not providing wholesale Transit services.
- 6.50 ComReg will continue to monitor developments in the Transit Market and may review its position should the circumstances warrant it.

7 Transit Market Three Criteria Test

Position set out in the Consultation

- 7.1 In Section 7 of the Consultation²⁸⁷, ComReg considered whether the 3CT was cumulatively met in relation to the Transit Market in order to determine whether the Transit Market is susceptible to *ex ante* regulation. In so doing, ComReg considered the following criteria:
- (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.

Whether high and non-transitory barriers to entry are present

- 7.2 In examining whether there were high and non-transitory barriers to entry in the Transit Market²⁸⁸, ComReg considered a number of factors including the replicability of Transit networks, absolute cost advantages and economies of scale and scope and sunk costs.
- 7.3 ComReg's preliminary view on barriers to entry in the Transit Market were that:
- (a) significant elements of Eircom's Transit network had been replicated by several large service providers (though in some cases for Internal Transit only). This was more so with respect to *trunk* Transit;
 - (b) Eircom did not appear to enjoy any absolute cost advantages in the provision of Transit to the extent that it is likely to act as a high and non-transitory barrier to entry in this market, given that parallel (though geographically limited) infrastructure has been deployed by several other service providers for the purpose of providing External Transit and Internal Transit;
 - (c) economies of scale have been achieved to varying degrees by a number of service providers, and therefore were unlikely to represent a significant barrier to entry;
 - (d) sunk costs associated with investment in Transit infrastructure, including those involved in establishing direct interconnection for the purpose of Internal Transit supply, were mitigated for service providers that have a significant retail subscriber base and call traffic volumes;
 - (e) sunk costs associated with entry are unlikely to be significant for service providers with extensive Transit infrastructure already in place (e.g. BT Ireland and Vodafone); and

²⁸⁷ See paragraphs 7.146 to 7.283 of the Consultation.

²⁸⁸ See paragraphs 7.153 to 7.205 of the Consultation.

- (f) capacity constraints are unlikely to act as a significant barrier to entry on a forward-looking basis.
- 7.4 On that basis, ComReg's preliminary view was the Transit Market was not likely to meet the first criterion of the 3CT. In particular, barriers to entry did not appear to be high and non-transitory on a forward-looking basis.
- 7.5 Since the three criteria test is a cumulative test, where one of the 3CT criteria is not met, the 3CT would be failed. Notwithstanding ComReg's preliminary view that the first criteria of the 3CT in the Transit Market is not likely to be met, ComReg nonetheless considered the two remaining criterion of the 3CT.

Whether there is a market structure which does not tend towards effective competition within the relevant time horizon

- 7.6 In the Consultation²⁸⁹, ComReg then assessed whether the Transit Market is likely to tend towards effective competition within the relevant time horizon. In order to meet this criterion, ComReg noted that it must be satisfied that, absent regulation, the Transit Market, and ultimately the affected retail markets, would not tend towards effective competition within the period of this review²⁹⁰.
- 7.7 ComReg examined whether there were observable trends towards effective competition; whether alternative service providers were in a position to roll out infrastructure to the extent that they would be able to effectively compete with the incumbent in the Transit Market; and whether there are any expected or foreseeable technological and economic developments that would impact on competition within the time period of the market review. ComReg observed the following trends:
- (a) While noting that, in some cases, the data set available to ComReg was limited, in particular, with respect to information regarding Internal Transit shares of supply, ComReg had nonetheless observed a decrease in Eircom's share of supply of External Transit, corresponding with increasing shares of supply of other competing Transit providers, in particular, BT and, to a lesser extent, UPC.
 - (b) ComReg had also observed an increase in direct interconnection between alternative service providers thereby bypassing or reducing the need for the purchase of External Transit services, most notably by Vodafone. However, these conditions were variable across service providers, depending on their scale.

²⁸⁹ See paragraphs 7.207 to 7.278 of the Consultation.

²⁹⁰ Note that a market may tend towards effective competition, not only by means of new entry into the Transit Markets, but also by the deployment of alternative infrastructures by Access Seekers that would allow them to offer substitute services at the retail level in the absence of regulation in the relevant market.

- (c) ComReg had also observed that a small number of *trunk* Transit routes were characterised by one External Transit supplier, namely Eircom. However, ComReg it noted that it was somewhat questionable whether such routes are worth monopolising.
 - (d) ComReg also noted that the advent of IP Interconnection is likely to more easily support the Transit Market tending towards effective competition in the longer term.
 - (e) In terms of potential entry into the Transit Market, ComReg considered a number of scenarios. While entry by some service providers was considered possible, it was unclear whether it would be likely to the extent that it would substantially increase the effectiveness of competitive constraints in the Transit Market.
- 7.8 ComReg's preliminary view was that whether the Transit Market tended towards effective competition was finely balanced. Nevertheless, ComReg's view was that on a prospective basis, the market is likely to tend towards effective competition over the longer term. ComReg's preliminary view was, therefore, that the Transit Market is not likely to meet the second criterion of the 3CT.

Whether competition law alone is sufficient to adequately address the market failure(s) concerned

- 7.9 In the Consultation²⁹¹, ComReg then assessed whether competition law by itself would be sufficient to deal with market failures identified in the market analysis, in the absence of *ex ante* regulation. ComReg considered that, if competition problems were to arise in the Transit Market (for example, excessive pricing or effective refusal to supply the service), competition law would be unlikely to be sufficient to effectively address market failures.
- 7.10 ComReg's preliminary view was that the third criterion of the 3CT would be met in relation to its application to the Transit Market.

Overall Preliminary Conclusions on the 3CT

- 7.11 ComReg's overall preliminary view was that the Transit Market would not be likely to meet the first and second criteria of the 3CT and, therefore, was not susceptible to *ex ante* regulatory intervention. As such, ComReg proposed to withdraw regulation in the Transit Market with this being further considered in Section 10 of the Consultation.

²⁹¹ See paragraphs 7.279 to 7.282 of the Consultation.

Respondents' Views

- 7.12 Seven Respondents' expressed views in relation to ComReg's 3CT assessment of the Transit Market. Telefonica, Eircom and Vodafone²⁹² generally agreed with ComReg's preliminary conclusions whereas ALTO, BT and Magnet did not agree. Sky noted ComReg's preliminary views²⁹³.
- 7.13 BT considered that high barriers to entry persisted in some areas, and noted that:
- the 3CT is met on two-thirds of Transit routes;
 - in order to capture the localised nature of competition, ComReg should conduct the 3CT on a sub-national geographic basis;
 - there were an insufficient number of Transit service providers, such that the Transit Market should not be considered competitive;
 - BT did not provide Transit on some routes that it considered were not likely to be commercially viable; and
 - absent regulation, Eircom could take advantage of its customers on routes where there is little or no infrastructure competition present. For example, by raising prices, and then reducing them later in response to competitive investment.
- 7.14 BT considered that the Transit Market would not tend towards effective competition within the relevant time horizon, and that competition would be localised. BT argued that, following the withdrawal of regulation from the Transit Market, Eircom would be able to benefit from economies of scale and scope that would not be shared by its competitors, and that competition issues would arise.
- 7.15 BT considers that competition law alone is inadequate to address any market failures(s) that may arise in the Transit Market absent *ex ante* regulation. According to BT, this is due to damage that could occur whilst *ex post* competition cases are litigated.
- 7.16 ALTO mirrored BT's views summarised above. ALTO considered that barriers to entry were high, that competition was localised, and that competition law alone was insufficient to address any competition issues arising absent regulation. ALTO added that it expected Eircom would increase its prices in geographic centres where there was only one supplier. ALTO expects Eircom to reduce prices and drive out competition in areas that are tending towards competition.

²⁹² Vodafone noted that its agreement with ComReg's 3CT was subject to ComReg correctly specifying the market definition for the Transit Market.

²⁹³ Sky made only a more general comment about the approach taken by ComReg, and did not explicitly agree or disagree with ComReg's position.

- 7.17 Magnet considers that the Transit Market should be subject to regulation as it satisfies the 3CT. It requested that ComReg undertake a further, more in-depth consultation on this matter. Magnet considered that, absent regulation, the market would be foreclosed by Eircom, and that small operators like Magnet would have no choice of Transit supplier.
- 7.18 Magnet argues that UPC is not a switched Transit network, and therefore does not qualify as an alternative Transit supplier. On that basis, Magnet asserted that a duopoly exists, that barriers to entry are high, and that only companies with a large international presence are able to afford to enter the Transit Market to a meaningful extent. Magnet noted that this 'duopoly' (presumably referring to Eircom and BT) may require *ex ante* regulation.
- 7.19 Magnet noted ComReg's acknowledgement that VoIP would make trunk switching costs redundant. Magnet argued that if this development were to happen in the short-to-medium term, operators would withdraw from the Transit Market (potentially leaving a monopoly), or would refrain from entering the Transit market. In which case, there would not be effective competition in this area.
- 7.20 Magnet agreed with ComReg that competition law is insufficient.
- 7.21 Magnet considered that *ex ante* regulation is required to ensure continuity of Transit supply, to prevent collusion from taking place, and to ensure a smooth transition to VOIP.
- 7.22 Sky noted that ComReg's 3CT assessment of the Transit market appeared to contradict ComReg's 3CT assessment with respect to the FACO Markets. In particular, Sky indicated that ComReg suggests that IP Interconnection is likely to result in the Transit Market tending towards effective competition. However, Sky argues that this contradicts ComReg's analysis of the impact of NG FACO in the FACO Markets (where ComReg's preliminary view was, in the context of the SMP/3CT assessment, that self-supply of Managed VOB was not likely to impose an effective competitive constraint).

ComReg's Assessment of Respondents' Views

- 7.23 ComReg has grouped and addressed Respondents' main views on the application of the 3CT to the Transit Market under the themes identified below:
- (a) Competition is localised and de-regulation poses pricing risks (discussed in paragraphs 7.24 to 7.29 below);
 - (b) The Transit Market is not competitive (discussed in paragraphs 7.32 to 7.39 below);
 - (c) Economies of Scale (discussed in paragraphs 7.40 to 7.42 below);
 - (d) Inclusion of UPC in the Transit Market (discussed in paragraph 7.43 below);
 - (e) VOIP will lead to exit from the Transit Market (discussed in paragraph 7.44 to 7.46 below); and
 - (f) Inconsistent treatment of IP Interconnection and Managed VOB (discussed in paragraphs 7.47 to 7.49 below);

Competition is localised and de-regulation poses pricing risks

- 7.24 ComReg notes the views expressed by ALTO, BT and Magnet that competition in the Transit Market is localised and that the withdrawal of regulation could result in Eircom exploiting its customers on certain non-competitive routes.
- 7.25 As discussed in Section 6 and the Updated Transit Analysis, ComReg has acknowledged that the number of Transit suppliers can differ across routes. Specifically, ComReg's analysis shows that, of the thirty *pure* Transit routes and forty-six *trunk* Transit routes, there are twelve *pure* Transit routes and one *trunk* Transit route over which Eircom is the only supplier. While this represents 17% of all Transit routes (both *trunk* and *pure* Transit), such routes account for less than 1%²⁹⁴ of overall Transit traffic. It is evident that, notwithstanding differences in the number of suppliers, these are routes characterised by very low traffic volumes.
- 7.26 As noted in the Updated Transit Analysis²⁹⁵ and in Section 6 above, on most Transit routes²⁹⁶, BT is competing with Eircom. In particular, as noted in the Updated Transit Analysis, 50% of *trunk* Transit routes and 23% of *pure* Transit routes have at least one competing supplier, with 48% of *trunk* Transit routes and 37% of *pure* Transit routes respectively being serviced by two or more Transit suppliers.
- 7.27 As discussed in paragraphs 6.28 to 6.30 above, ComReg's position is that given those routes on which there is less competition involve such low volumes of overall Transit traffic that they are unlikely to represent markets worth monopolising in themselves. Consistent with this view in Section 6 above, ComReg considers that these routes are likely to be subject to a common pricing constraint.
- 7.28 Noting the above, in particular the analysis in Section 6, ComReg did not consider it appropriate to define sub-national geographic Transit Markets and, in view of this ComReg's competition assessment takes place in this context.
- 7.29 ComReg also notes that a number of service providers have interconnected directly, thereby reducing (in some cases by-passing entirely) the need for External Transit. The threat of such self-supply should also impose a degree of competitive constraint on suppliers in the Transit Market.
- 7.30 While ComReg acknowledges that the withdrawal of regulation from the Transit Market could lead to changes in competitive dynamics, on a prospective basis, ComReg considers that the presence of competitors, who have already invested in Transit infrastructure, should pose a further degree of competitive constraint and act to minimise the risks of any anti-competitive behaviour by Eircom.

²⁹⁴ Figures calculated by based on responses to the 2014 Statutory Information Request.

²⁹⁵ See Table 1 and Table 2 of the Updated Transit Analysis concerning competition on *Trunk* Transit routes and Table 3 of the Updated Transit Analysis concerning competition on *pure* Transit routes.

²⁹⁶ BT competes with Eircom on [x<■] of the 28 *trunk* Transit routes and [x<■] of the 30 *pure* Transit routes.

7.31 ALTO also commented that, in areas that are tending towards competition, Eircom could reduce prices to drive out competition, thereby stranding the investments made by ALTO members. Similarly, Magnet expressed a concern that Eircom would foreclose the Transit Market. ComReg notes that the Transit Market appears to be characterised by high upfront capital costs (associated with building the network), and then, once the network is in place, relatively lower variable costs. Given that both BT and UPC are both already established in the Transit Market, with infrastructure already in place (and the costs already sunk), it does not suggest that these competing Transit service providers would be unable or unwilling to compete with Eircom in the event Eircom were to reduce prices in an anti-competitive manner.

Transit Market is not competitive

7.32 ComReg notes the views expressed by BT, ALTO and Magnet that the Transit Market is not competitive.

7.33 As discussed above, and in the Updated Transit Analysis, a number of routes in the Transit Market are characterised by two large suppliers. BT, which has [X] of the Transit Market, and Eircom, which has [X].²⁹⁷ ComReg notes that UPC also has a significant presence in the Transit Market, with [X] market share.

7.34 Despite the variance in the number of competitors on certain routes in the Transit Market at present, there is evidence that barriers to entry have been overcome by several FSPs and MSPs. As discussed in the Consultation²⁹⁸ and Section 6 of this Decision, BT and Vodafone have replicated Eircom's Transit network across most Transit routes, and several other FSPs and MSPs have replicated Eircom's network on a significant number of routes.²⁹⁹

²⁹⁷ Note that these market shares do not include self-supply. Calculating shares based on Total Transit is difficult because ComReg's definition of the Transit Market (set out in Section 6) would exclude on-net trunk traffic generated, or received, by networks that only have a single switch or a non-hierarchical network. This would mean that, while Eircom would have a significant volume of internal 'on-net' traffic included within the analysis, the analogous traffic generated on flat networks such as that operated by UPC, would be excluded. This could potentially produce a skewed assessment of market share.

²⁹⁸ See Section 7 of the Consultation.

²⁹⁹ See paragraphs F.14 to F.17 of the Updated Transit Analysis for an analysis of the extent of the replication of Eircom's transit network by other FSPs and MSPs.

- 7.35 Notably, in the case of Vodafone (and to a lesser extent Telefonica), the alternative Transit network was built for the purpose of switching and conveyance of large volumes of its own mobile voice traffic³⁰⁰. While not supplying Transit to third parties, these suppliers have demonstrated that barriers to entry have been and can be overcome in circumstances where a network is generating sufficient volumes of traffic. BT and UPC have shown that economies of scale can also be achieved by FSPs acting as a Transit service provider for several smaller service providers, thereby increasing the amount of aggregate Transit traffic managed on their networks (which can contribute to more economically recovering the cost of replicating Transit routes).
- 7.36 ComReg considers that the upfront costs of entering the Transit Market do not in themselves imply that medium to long term barriers to entry exist. It acknowledges that, for small service providers with low traffic volumes, it is unlikely to be feasible to replicate Eircom's Transit network. The presence of sometimes significant upfront capital costs is a common feature of many markets and, in some cases, can act as a natural constraint on the number of competitors in a market. However, this feature does not imply barriers to entry are insurmountable such that *ex ante* regulation will always be required. In this case, although the Transit Market is concentrated, it is worth noting that BT (the 'entrant' in this market) now has a significant market share, is mostly competing at the wholesale level and therefore should face sufficiently strong incentives to compete with Eircom for wholesale traffic, particularly in circumstances where it provides a range of wholesale products, other than Transit, to other service suppliers.
- 7.37 In addition, since the 2007 Decision UPC has entered the Transit Market and has gained a sizeable share of the market. UPC has also replicated a large number of Transit routes. These factors indicate not only that there is already a degree of competition present, but that third party Transit suppliers are capable of replicating Eircom's Transit network and entering the market.
- 7.38 With respect to Magnet's comments that a duopoly exists, given the number of competitors and the potential for self-supply of Transit, ComReg does not agree that a duopoly exists.
- 7.39 Given that a number of competitors are present in the supply of Transit, ComReg notes that the need for entrants, and small FSPs/MSPs, to establish a degree of interconnection with a Transit supplier could be considered a normal upfront unavoidable cost of doing business, and is analogous to the costs involved in securing supply contracts in other industries.

³⁰⁰ ComReg would note that [REDACTED]

Economies of Scale

- 7.40 It is clear that Eircom, as the incumbent telecommunications service provider, benefits from carrying large volumes of traffic on its network. However, as is evident from ComReg's Updated Transit Analysis, Eircom is not the only service provider benefiting from large traffic volumes and the associated economies of scale. For example, BT, as Eircom's main competitor in the Transit Market, has an extensive network which carries significant and increasing volumes of Transit traffic. The growth of BT and UPC as Transit providers in recent years, despite Eircom being the SMP Transit provider, suggests that economies of scale and scope are unlikely to impede competition.³⁰¹
- 7.41 Notably, MSPs are generating larger traffic volumes than FSPs, and therefore are well placed to install Transit capacity, as required to meet their own needs.
- 7.42 The evidence available does not suggest that Eircom has any disproportionate scale economy advantage relative to large MSPs, or in fact its main rival in the Transit Market, BT or UPC.

Inclusion of UPC in the Transit Market

- 7.43 ComReg disagrees with the view expressed by Magnet that UPC's Transit supply should not be included in the Transit Market. Irrespective of whether UPC is providing switched or IP based Transit, UPC is an active supplier in the Transit Market. UPC is interconnected with [redacted] Eircom exchanges, at primary, tandem and double-tandem levels. UPC is also interconnected with [redacted] other networks. It thus provides both *trunk* and *pure* External Transit on these routes in substantial volumes to other service providers, and also for its self-supply. As such and having regard to the analysis in the Consultation³⁰², ComReg considers it appropriate to include UPC supply in the Transit Market.

VOIP will lead to exit from Transit Market

- 7.44 Magnet expressed concerns that the anticipated shift from circuit switched telephony to VOIP could discourage entry, and result in existing Transit suppliers withdrawing from the market, leaving a monopoly. Magnet argued that regulation is required to ensure that Transit services remain available during the transition to VOIP.

³⁰¹ See paragraphs F.19 to F.25 of the Updated Transit Analysis for a discussion of shares of supply of External Transit.

³⁰² See paragraphs 7.77 to 7.82 of the Consultation.

- 7.45 The evidence suggests that barriers to entry in the Transit Market have been overcome. While there is a possibility that any shift to VOIP may discourage new service providers from supplying Transit on certain routes (say because any investment in circuit switched network infrastructure might be based on a truncated asset-life) we also note that any shift to VOIP may also lead to a shift to IP rather than circuit switched based interconnection, with such a move likely to reduce the number of points of interconnection within or between networks, thereby further lowering entry barriers on a forward looking basis.
- 7.46 ComReg does not find it credible that existing Transit suppliers would withdraw from the Transit Market whilst there remains demand for Transit services. ComReg notes that there are a number of FSPs offering Transit under commercial terms. These service providers have invested in Transit infrastructure, and therefore are likely to continue to provide Transit services as long as there is demand for those services. As such, ComReg considers that, absent regulation, Transit services would remain available up to, and throughout, any transition period to VOIP.

Inconsistent treatment of IP Interconnection and Managed VOB

- 7.47 ComReg disagrees with Sky's comment that ComReg's assessment of the impact of IP Interconnection in Transit Market contradicts ComReg's view on the impact of IP interconnection on Managed VOB in the FACO Markets. In the Consultation³⁰³ and now confirmed in this Decision, ComReg proposed to include Eircom's notional wholesale supply of Transit over an IP network within the Transit Market. In doing so, ComReg explicitly noted that this reflected the approach it had taken in the FACO Markets.
- 7.48 ComReg highlighted in the Consultation³⁰⁴ that IP based Transit may have a number of impacts on the Transit Market. The medium-term impacts were noted as being related to incentives on FSPs and MSPs to invest in circuit switched network infrastructure. ComReg also noted that IP interconnection could lead to the Transit Market tending towards effective competition in the long term, although the timing of this was noted as being uncertain. This point was consistently made in the Consultation in the context of the assessment of the FACO Markets³⁰⁵, including in support of the reasoning justifying the delineation of the boundary of the FVCO component of FACO being set up to the Eircom double-tandem exchange level (on the basis that service providers would, given the eventual move towards IP interconnection, be less likely to invest in circuit switched interconnection).

³⁰³ See paragraphs 7.40 to 7.44 of the Consultation.

³⁰⁴ See paragraphs 7.270 to 7.273 of the Consultation.

³⁰⁵ See, for example, paragraphs 5.33 and 5.35 of the Consultation.

7.49 The long-term impact of IP Interconnection is not a single overriding factor that ultimately changes ComReg's conclusions on the 3CT for the Transit Market. Rather, ComReg has arrived at a view that the Transit Market does not satisfy the 3CT for a range of reasons, including strong evidence of barriers to entry having been overcome, and the presence of two to three significant competitors in the Transit Market, as well as Internal Transit being supplied by many other non-wholesale service providers. These are important differentiating factors between the FACO Markets and the Transit Market.

ComReg's Position

- 7.50 Having regard to the analysis in Section 7 of the Consultation and having considered Respondents' views in paragraphs 7.23 to 7.49 above, ComReg has decided that the Transit Market would, on a forward looking basis, not be likely to meet the first and second criteria of the 3CT and, therefore, is not susceptible to *ex ante* regulatory intervention. As such, ComReg proposes to withdraw regulation of Transit services. This is considered further in Section 10.
- 7.51 ComReg acknowledges that the deregulation of the Transit Market may, in some cases, require FSPs and MSPs to re-negotiate commercial Transit supply contracts. A six month sunset period for the withdrawal of regulation from the Transit Market is discussed in Section 10 below, with such a sunset period being specified in order to allow Eircom's wholesale customers sufficient time to seek out alternative Transit arrangements (should they decide to change supplier) whilst maintaining service continuity, thus ultimately minimising any impact of the de-regulation of the Transit Market on service providers and ultimately end users.

8 Competition Problems

Position Set out in Consultation

- 8.1 In Section 8 of the Consultation, ComReg discussed competition problems that would be likely to arise, absent regulation, in various wholesale and related markets, given Eircom's SMP in the FACO Markets and its incentives to engage in anti-competitive behaviours.
- 8.2 Absent regulation in the FACO Markets, ComReg considered that Eircom would have the potential ability and incentive to influence a range of competition parameters, including prices, innovation, output and the variety or quality of goods and services provided. In general, ComReg discussed various types of competition problems that may arise in a market where an operator has SMP, including:
- (a) Exploitation of customers or consumers by virtue of its SMP position through, for example, setting excessive wholesale charges;
 - (b) Leveraging its market power into adjacent vertically or horizontally related markets through price and non-price means with a view to foreclosing or excluding competitors in downstream retail and/or upstream wholesale markets; and
 - (c) Engagement in behaviours that would result in delay or deter network investment and entry into the FACO Markets, and ultimately the RFTS market.

Respondents' Views

- 8.3 Five parties responded to ComReg's assessment of competition problems with four broadly agreeing and one disagreeing.
- 8.4 Telefónica agreed with the competition problems identified by ComReg.
- 8.5 Eircom stated that it disagrees with ComReg's assessment of '*competition problems*' on the basis that it disagrees with ComReg's assessment of competition in the FACO Markets.
- 8.6 ALTO agreed with ComReg's competition concerns as outlined in the Consultation document. ALTO submitted that it remained concerned about the viability of wholesale competition in light of Eircom's vertically integrated position in the market. ALTO considered that Eircom has the ability to engage in margin squeeze type behaviours with respect to its pricing of FACO and RFTS services by offering discounted SV services.
- 8.7 BT agreed with ComReg's assessment citing the following experiences as examples of where it considered that competition problems have occurred (despite the existence of SMP remedies):

- (a) **Inefficiency/Inertia:** BT argued that attempts by FSPs to negotiate SLAs for FACO products have been frustrated by a lack of progress. BT argues that a truly competitive wholesaler would either come to an agreement within a shorter timeframe, or would face losing its customers.
 - (b) **Leveraging:** BT argued that Eircom has a significant margin between the SB-WLR price and its underlying network costs, which enables it to leverage.
 - (c) **Information asymmetry:** BT argued that Eircom's FACO customers are being provided with less information about network fault management and resolution than Eircom's retail business. The lack of information inhibits alternative FSPs from offering service assurances to their retail customers, which places them at a competitive disadvantage relative to Eircom's retail arm.
 - (d) **Discriminatory practices:** BT argued that alternative FSPs face delays when requesting access to FACO products or improvements to SLAs. Furthermore, such FSPs have insufficient information to assess whether the reasons given by Eircom for such delays are legitimate.
- 8.8 Magnet agreed with ComReg's assessment in relation to competition problems. Magnet considered that, since Eircom is vertically and horizontally integrated, absent regulation, Eircom would face incentives to engage in (a) excessive pricing and (b) setting unfavourable terms; and (c) other anti-competitive actions.
- 8.9 Sky did not comment specifically on ComReg's assessment of competition problems. However, Sky referred in its response to a previous submission it made regarding the 2012 Retail Access Market Review Consultation³⁰⁶ where it made the following comments relating to competition problems:

"Eircom has consistently and often significantly failed to meet its service level agreement targets for WLR....."

Eircom has consistently and often significantly performed better at repairing faults for its own retail arm than for its WLR customers"³⁰⁷

ComReg's Assessment of Respondents' Views

- 8.10 ComReg notes that Respondents other than Eircom generally agreed with ComReg's preliminary assessment of competition problems.

³⁰⁶ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 12/117](#), October, 2012 ('**2012 Retail Access Market Review Consultation**).

³⁰⁷ Sky Response to ComReg Document No. 12/117, page 4.

- 8.11 ComReg notes that its assessment of competition problems is intrinsically linked with its conclusion (in Section 5) that Eircom has SMP in the FACO Markets. ComReg discusses in Chapter 8 of the Consultation the reasons why it considers that competition problems that would be likely to arise in the FACO Markets (in the absence of regulation) as a result of Eircom having SMP in this market. Most notably, ComReg noted that Eircom faces incentives to engage in exploitative and exclusionary behaviour in the FACO Market because it supplies FACO to its downstream competitors.
- 8.12 ComReg has addressed Eircom's comments on the assessment of competition in the FACO Markets in Section 5 of this Decision (with the issues such as whether MTS and other services are an effective indirect constraint in the FACO Markets also considered in Section 4). In this respect, ComReg decided that Eircom has SMP in the FACO Markets given the absence of effective competition. For the reasons set out in Sections 4 and 5 of this Decision, ComReg therefore also disagrees with Eircom's view on competition problems.
- 8.13 For the reasons set out in Section 8 of the Consultation, and consistent with the views expressed by ALTO, BT, and Magnet in response to that section, ComReg maintains its view that Eircom has the ability and incentive to engage in the identified competition problems in the FACO Markets, absent regulation.

ComReg's Position

- 8.14 ComReg considers it likely that competition problems would arise in the FACO Market absent regulation. In particular, Eircom would have the ability and incentive to engage in behaviours of the type described in Section 8 of the Consultation. For example, by exploiting customers, leveraging SMP into downstream and adjacent markets, and by foreclosing competition in the FACO Market(s), and in other related markets.

9 Imposition of Remedies in the FACO Markets

- 9.1 In Section 9 of the Consultation ComReg set out its proposed approach to implementing remedies in the FACO Markets having regard to the identified competition problems. In doing so, ComReg:
- (a) reviewed the legal framework for imposing remedies;³⁰⁸
 - (b) reviewed existing FVCO, Transit and WLR remedies imposed under the 2007 Decision and in other decisions;³⁰⁹
 - (c) assessed the regulatory approaches to imposing regulatory remedies in the FACO Markets;³¹⁰ and
 - (d) proposed and justified regulatory remedies in the FACO Markets relating to access, non-discrimination, transparency, price-control and cost accounting, and accounting separation as well as the withdrawal of certain remedies.³¹¹
- 9.2 This section summarises ComReg's proposed approach as set out in the Consultation, summarises and assesses Respondents' views on this, and then sets out ComReg's final position.

ComReg's overall approach to FACO Remedies

- 9.3 In addition to receiving comments from Respondents on specific remedies proposed in the Consultation, ComReg also received a number of general comments relating to its proposal to impose remedies in the FACO Markets. We will begin by considering these comments on the overall proposal, before examining the more specific points raised.
- 9.4 In the Consultation, ComReg proposed that a range of remedies should be imposed upon Eircom in the FACO Markets, namely:
- (a) Access obligations;³¹²
 - (b) Non-discrimination obligations;³¹³
 - (c) Transparency obligations;³¹⁴
 - (d) Price control and cost accounting obligations;³¹⁵ and

³⁰⁸ See paragraphs 9.2 to 9.6 of the Consultation

³⁰⁹ See paragraphs 9.7 to 9.28 of the Consultation

³¹⁰ See paragraphs 9.29 to 9.35 of the Consultation

³¹¹ See paragraphs 9.36 to 9.283 of the Consultation

³¹² See paragraphs 9.37 to 9.129 of the Consultation

³¹³ See paragraphs 9.131 to 9.163 of the Consultation

³¹⁴ See paragraphs 9.164 to 9.205 the Consultation

(e) Accounting separation obligations³¹⁶.

9.5 In the Consultation, ComReg proposed to withdraw the SB-WLR (access and associated) remedies applied to the then retail narrowband access market under the 2007 RNA Decision (now replaced by the 2014 Retail Access Market Review Decision³¹⁷), and to impose them instead in the upstream FACO Markets. The decision to re-position the SB-WLR obligation from the retail level to the upstream FACO Markets is to reflect ComReg's preference to address competition problems at the most upstream level possible (in this case at the wholesale level in the FACO Markets), thereby potentially enabling regulation to be lifted or lessened in downstream retail markets. The proposed inclusion of SB-WLR remedies in the FACO access obligations also reflects the product definition of the FACO Markets whereby there is an observed prevalence in demand for FVCO and FA as a combined product.

Respondents' Views

- 9.6 Seven Respondents expressed views in relation to ComReg's proposed set of remedies.
- 9.7 Telefónica agreed with the proposed remedies.
- 9.8 Eircom disagreed with ComReg's proposed approach for imposing remedies in the FACO Markets. Eircom considers that a number of the proposed obligations are unnecessary, and are onerous on Eircom. Eircom argues that ComReg has provided no evidence that the new or enhanced remedies it proposes are either necessary or proportionate. Eircom argues that the market in question is one that is in decline as a result of direct and indirect competition from the burgeoning over-the-top ('OTT') applications industry, as well as increasingly cheap MTS.
- 9.9 Eircom also considered that ComReg had not fully considered the relative effectiveness, and cost, associated with alternative combinations of remedies.
- 9.10 BT generally agreed with the proposed access remedies.
- 9.11 While agreeing in principle with ComReg's proposal to impose remedies on Eircom, Magnet, ALTO, Vodafone and Sky argued that the remedies proposed by ComReg should be extended further (the details of these arguments are considered under the specific sections below).

ComReg's Assessment of Respondents' Views

- 9.12 ComReg notes that all Respondents, save for Eircom, agreed that remedies should be imposed on Eircom in the FACO Markets.
- 9.13 ComReg proposed remedies on the basis that:

³¹⁵ See paragraphs 9.206 to 9.276 of the Consultation

³¹⁶ See paragraphs 9.277 to 9.283 of the Consultation.

³¹⁷ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 14/89](#), Decision D12/14, August 2014 ('**2014 Retail Access Market Review Decision**').

- (a) the FACO Markets meet the 3CT;
 - (b) Eircom has SMP in each of the FACO Markets; and
 - (c) competition problems would be likely to arise in the FACO Markets absent regulatory intervention.
- 9.14 ComReg has considered these matters further in Sections 4, 5 and 7 of this Decision, and maintains its preliminary views as were set out in the Consultation. On that basis, ComReg is required to impose at least one regulatory remedy upon the SMP undertaking, namely Eircom, in each of the FACO Markets. .
- 9.15 The remedies proposed by ComReg in Section 9 of the Consultation were specifically aimed at addressing the competition problems that were identified. These competition problems have been discussed further in Section 8 of this Decision.
- 9.16 With that in mind, ComReg is required to put in place appropriate remedies that address these competition problems in the most effective and proportionate manner. This involves an assessment of specific remedial options. This was undertaken in Section 9 of the Consultation (as well as in the Regulatory Impact Assessment). This assessment considered the extent to which specific remedy options were likely to be effective, necessary and proportionate.
- 9.17 ComReg has considered the impact of OTT services and MTS in its retail market assessment and its subsequent wholesale competition assessment of the FACO Markets. For the reasons discussed in Sections 2 to 5 of this Decision, ComReg's position is that that these services do not act (nor are they likely to act within the period of this review) as a sufficiently effective competitive constraint on Eircom in the FACO Markets.
- 9.18 ComReg disagrees with Eircom's assertion that ComReg provided no evidence that the proposed new or developed remedies were necessary or proportionate. ComReg assessed these remedies in detail throughout Sections 9 and 11 of the Consultation with the analysis including a consideration of whether and why the proposed remedies were necessary and proportionate (amongst other things).
- 9.19 Regarding comments made by Respondents on specific remedies, ComReg addresses these comments throughout the remainder of this section.

ComReg's Position

- 9.20 ComReg considers that it is justified in imposing remedies on Eircom in the FACO Markets because:
- (a) the FACO Markets meet the 3CT and Eircom has SMP in each of the FACO Markets³¹⁸; and
 - (b) competition problems would be likely to arise in the FACO Markets absent regulatory intervention.³¹⁹

³¹⁸ See section 5 of this Decision.

³¹⁹ See section 7 of this Decision.

- 9.21 Throughout the remainder of this section 9, ComReg will consider Respondents' comments on the detail of the remedies themselves, in particular:
- (a) Access remedies are considered in paragraphs 9.22 to 9.103 below;
 - (b) Non-discrimination remedies are considered in paragraphs 9.104 to 9.153 below;
 - (c) Transparency remedies are considered in paragraphs 9.154 to 9.173 below;
 - (d) Price control and cost accounting remedies are considered in paragraphs 9.174 to 9.251 below; and
 - (e) Accounting separation remedies are considered in paragraphs 9.253 to 9.261 below.

Access Remedies

Position set out in the Consultation

- 9.22 In the Consultation³²⁰, ComReg proposed to impose obligations upon Eircom requiring it to *inter alia* (a) provide access to specified wholesale products services and facilities; and (b) to meet reasonable requests for access from wholesale customers for various 'current generation' circuit switched FACO products, services and facilities. The proposed measures are intended to prevent Eircom from denying competing RFTS providers access to the wholesale inputs necessary to provide RFTS and associated services. ComReg proposed a range of obligations³²¹, including (but not limited to) Eircom having to:
- (a) provide SB-WLR and Ancillary Services on SB-WLR, Interconnection Services, Co-Location facilities and PAC Services;
 - (b) negotiate in good faith with undertakings requesting access;
 - (c) not to withdraw Access to facilities already granted without the prior approval of ComReg;
 - (d) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of products, services or facilities;
 - (e) to provide access to co-location or other forms of associated facilities sharing insofar as it relates to interconnection services necessary to support access to FACO, products, services and facilities;
 - (f) to provide access to services needed to ensure interoperability of end-to-end services to End-Users, including facilities for intelligent network services;
 - (g) to provide access to OSS or similar software systems necessary to ensure fair competition in the provision of services;

³²⁰ See paragraphs 9.37 to 9.129 of the Consultation.

³²¹ See paragraphs 9.62 to 9.121 of the Consultation.

- (h) to interconnect networks or network facilities; and
 - (i) to provide access in accordance with a range of conditions governing fairness, reasonableness and timeliness.
- 9.23 ComReg also proposed to re-position the existing requirement to provide access to SB-WLR from the then downstream RNA markets into the upstream FACO Markets in order that the relevant competition problems could be addressed at the most upstream level possible, thereby presenting greater opportunities for the removal of regulation in downstream markets.
- 9.24 ComReg also proposed not to impose specific requirements on Eircom to provide wholesale access to next generation VOIP based FACO services³²² (**Next Generation FACO** or **NG FACO**) because, amongst other things, competition would be safeguarded in the medium through Access Seekers having access to traditional circuit switched TDM based FVCO and copper/fibre based WLR (**Current Generation FACO** or **CG FACO**), while at the same time seeking to encourage Access Seekers to develop their own NG FACO capabilities over a longer time horizon, thereby encouraging more effective and sustainable competition at the retail level.
- 9.25 ComReg proposed that existing regulatory obligations governing the requirement to provide standalone CPS (being CPS not provided with WLR), Carrier Access³²³ (**CA**) and Carrier Select (**CS**)³²⁴ were no longer warranted or justified on the basis that demand for these products has significantly decreased, and the risks of foreclosure in the event of the non-availability of this product therefore appeared to be minimised. ComReg set out its preliminary view that given the nature of retail competition (whereby end-users predominantly purchase RFVA and RFVC from the same supplier), such standalone CPS, CA and CS obligations were no longer necessary to safeguard competition. Obligations to provide CPS together with WLR (being SB-WLR) were, however, proposed.
- 9.26 In the Consultation³²⁵ ComReg also considered a range of statutory criteria that it is required to consider³²⁶ when imposing access obligations, including, *inter alia*:
- (a) examining the technical and economic viability of using or installing competing facilities;

³²² Internet Protocol (**IP**) based FVCO that would be delivered over an upstream regulated wholesale broadband access (**WBA**) product or indeed through broadband enabled via local loop unbundling.

³²³ Carrier Access (**CA**) allows the end-user to manually choose its preferred Access Seeker (RFVC provider) for onward carriage or delivery of its calls by dialling a carrier access code before dialling the called party's telephone number.

³²⁴ Carrier Select (**CS**) is a service provided by Eircom whereby the end-user's telecommunications equipment, such as a private automatic branch exchange (**PABX**) or similar equipment, automatically dials a carrier access code which routes the end-user's calls to the Access Seeker (alternative RFVC provider) for onward carriage or completion of the call.

³²⁵ See paragraphs 9.4, 9.46 and 9.122 of the Consultation.

³²⁶ Such criteria are set out in Regulation 12(4) of the Access Regulations.

- (b) the feasibility of providing access;
- (c) the initial outlay of investment by the undertaking; and
- (d) the need to safeguard competition in the long term.

Respondents' Views

- 9.27 All seven Respondents expressed views on ComReg's approach to the imposition of access remedies. As noted above, all Respondents, save Eircom, agreed that remedies should be imposed on Eircom in the FACO Markets. However, there were mixed views regarding the detail of the specific remedies.
- 9.28 The key themes commented upon by Respondents' are:
- (a) Removal of requirement for Eircom to provide standalone CPS, CA and CS services (summarised in paragraphs 9.29 to 9.35 below).
 - (b) Whether VOIP based Next Generation FACO obligations should be imposed (discussed in paragraphs 9.36 to 9.39 below);
 - (c) Absence of adequate fixed number portability arrangements undermines potential for Managed VOB to be effective (discussed in paragraphs 9.40 to 9.41 below);
 - (d) SLA obligations are inadequate and require further specificity (discussed in paragraphs 9.42 and 9.44 below); and
 - (e) The provision of Interconnection and co-location should be efficient discussed in paragraphs 9.45 and 9.46 below).

Proposed removal of requirement to provide standalone CPS, Carrier Access and Carrier Select services

- 9.29 Eircom agreed with ComReg's proposed withdrawal of CA, CS and standalone CPS obligations citing their decline in use and questioning the need to maintain these wholesale products having regard to the consequential cost to Eircom.
- 9.30 ALTO states that there are still undertakings using standalone CPS who have no viable alternative and requested ComReg to undertake a full assessment of any proposal to remove this service as an access remedy.
- 9.31 Magnet considers that ComReg has not adequately justified the removal of CS and standalone CPS obligations. Magnet proposed that ComReg should issue a separate consultation to consider the matter.
- 9.32 Vodafone disagreed with the proposed withdrawal of the obligation to provide standalone CPS. Vodafone notes that while this is a declining portion of the market (primarily used by customers in the business-space), it considered standalone CPS to be a key enabler to facilitate competitive market entry. Vodafone indicated that given that retail customers purchase standalone voice services from Vodafone, it is indicative of a strong preference for purchasing access directly from Eircom and calls from other suppliers. It considered that the withdrawal of standalone CPS remedy would be to gift Eircom a substantial portion of these retail customers.

- 9.33 BT acknowledged ComReg's rationale for withdrawing the obligation on Eircom to provide CPS as a standalone product, but considered that the seriousness of the proposed withdrawal is lost within the breath of this Market Review. For this reason, BT suggested that ComReg should consult separately on the withdrawal of these services.
- 9.34 BT also commented that it must be clarified that any removal of CPS regulation does not impact the CPS facilities within WLR. BT suggested that the proposal should be represented as a withdrawal of obligations on Eircom to meet "CPS-only" orders.
- 9.35 BT noted that there are still thousands of retail customers using this service, and that for some of those customers there is no easy alternative. BT considers that discussion is required as to what should happen to the existing customers and how will this be managed.

Whether VOIP based Next Generation FACO obligations should be imposed

- 9.36 Magnet, and Vodafone disagreed with ComReg's proposal to not impose an access remedy requiring Eircom to provide a wholesale VOIP service. BT noted that it is not evident that alternatives to a wholesale VOIP service exist. ALTO argued that not including an obligation on Eircom to provide a wholesale VOIP service would be a catastrophe for competition unless ComReg takes steps to correct the current fixed number portability situation.
- 9.37 Magnet and BT argue that ComReg should include access remedies requiring Eircom to provide IP-based FVCO to ensure that appropriate regulation is in place in time for Eircom's imminent launch of a retail managed VOB services. Magnet notes that:
- "The cost of VoIP is expensive and until such a market exists and to climb the ladder of investment operators will purchase IP Based FVCO and thus, it should be regulated."³²⁷*
- 9.38 Vodafone disagreed with ComReg's proposal not to mandate the provision of an IP equivalent of WLR/CPS. Vodafone expressed the view that ComReg has significantly underestimated the operational, technical and financial thresholds involved in the deployment of VOIP services by FSPs.
- 9.39 Vodafone and BT argued that ComReg's proposal not to impose 'next generation' FACO access remedies would allow Eircom to undercut competitor OAOs (who purchase current generation FACO from Eircom) in the retail market by offering retail Managed VOB at a lower price than that which competitor OAOs could offer. i.e., a margin squeeze could arise (note that concerns in relation to the risk of margin squeeze will also be addressed later in relation to price control obligations).

³²⁷ Magnet's Submission, response to Question 10.

Absence of adequate fixed number portability arrangements undermines potential for Managed VOB to be effective

- 9.40 BT, Vodafone and ALTO expressed concern that the current fixed number portability³²⁸ processes would struggle to support the high volumes of porting transactions that would be required in circumstances where the wholesale services ultimately underpinning the delivery of RFTS was to change from SB-WLR³²⁹ to a self-supplied Managed VOB service.
- 9.41 Vodafone highlighted difficulties specific to the inadequacy of exiting fixed number portability arrangements and number management as potential barriers to OAOs in developing their own VOIP based solutions.

SLA obligations are inadequate and require further specificity

- 9.42 Vodafone considers that ComReg's proposed SLA obligations are inadequate, and that a more effective remedy is required. According to Vodafone, this is evident from the length of time that it has taken the industry to reach agreement on an updated NGA SLA (which Vodafone argues is based on similar SLA obligations to that proposed by ComReg in the Consultation). Vodafone argues that the SLA remedy should include:
- (a) an explicit obligation requiring Eircom to negotiate in good faith on SLAs;³³⁰
 - (b) a requirement that the SLAs meet reasonable market requirements;³³¹
 - (c) Service Level Guarantees ('**SLGs**') that incentivise Eircom to provide adequate levels of service; and
 - (d) wholesale SLA performance metrics based on Universal Service Obligation ('**USO**') targets;
- 9.43 Sky expressed the view that ComReg should use SLA obligations to strengthen Eircom's incentives to comply with its Quality-of-Service ('**QOS**') targets in retail and wholesale markets, including in the FACO Markets. Sky highlighted recent performance issues with the Universal Gateway ('**UG**')³³² as an example of a QOS issue. Sky considers that in cases where Eircom and other FSPs cannot agree SLAs and associated compensation measures, ComReg should mandate appropriate SLAs and compensation.

³²⁸ Fixed number portability is the facility whereby an end user is able to keep its telephone number when switching its provision of RFTS from one service provider to another.

³²⁹ Where existing retail customers switch services to a different FSP, but such services continue to be delivered over Eircom's SB-WLR product, it does not involve number porting as the underlying network remains that of Eircom.

³³⁰ This obligation was proposed by ComReg in section 7.5 of the Draft Decision Instrument.

³³¹ This obligation was proposed by ComReg in section 7.1 of the Draft Decision Instrument.

³³² Eircom Wholesale's UG is an order management and fault handling system designed to be the primary access point between Eircom and Access Seekers. It accepts and validates Access Seeker orders and faults and is a software "brokerage" system into Eircom's internal production and fault management systems.

9.44 In terms of the potential for SLA disagreements to be resolved via the dispute resolution process, BT argued that the existing dispute process has not been effective. BT noted that it takes approximately eighteen months to resolve complex dispute issues, which prevents OAOs from promptly responding to retail opportunities as they arise. BT suggested that ComReg should establish what it termed '*a lower-level ComReg led adjudication process*' to deal with less complex disputes in a more streamlined manner.

The provision of Interconnection and co-location should be efficient

9.45 BT agrees with ComReg's proposed access remedies relating to requirements to provide various Interconnection Services and Co-Location³³³. However, BT and ALTO requested that ComReg include an additional requirement that Eircom provide interconnection and co-location services not just on a cost-orientated basis but also in a '*process-efficient*'³³⁴ manner. BT considers that aspects of co-location are currently over engineered, and therefore include unnecessary costs. In particular, BT suggested that OAOs are required to buy significantly larger power units than are actually required.

9.46 Magnet considers that Eircom should be required to negotiate in good faith when providing co-location.³³⁵

ComReg's Assessment of Respondents' Views

9.47 ComReg assesses Respondent's views on the themes identified in paragraph 9.28 above as follows:

- (a) Proposed removal of requirement to provide standalone CPS, Carrier Access and Carrier Select services (discussed in paragraphs 9.48 to 9.58 below).
- (b) Whether VOIP based Next Generation FACO obligations should be imposed (discussed in paragraphs 9.59 to 9.65 below);
- (c) Absence of adequate fixed number portability arrangements undermines potential for Managed VOB to be effective (discussed in paragraphs 9.66 to 9.70 below);
- (d) SLA obligations are inadequate and require further specificity (discussed in paragraphs 9.71 to 9.90 below); and
- (e) The provision of Interconnection and co-location should be efficient discussed in paragraphs 9.91 to 9.96 below);

³³³ See paragraphs 9.78 to 9.88 of the Consultation.

³³⁴ See page 10 of the BT response.

³³⁵ As noted above, the obligation was proposed by ComReg in section 7.5 of the Draft Decision Instrument and covers co-location.

Proposed removal of requirement to provide standalone CPS, Carrier Access and Carrier Select services

- 9.48 As noted from paragraph 9.29, several Respondents' considered that it was premature to remove standalone CPS, CA and CS obligations on the basis of their being purported demand for such services and that they facilitate market entry. Some Respondents also suggested a lack of transparent consultation and/or justification for the proposed removal, indicating that further consultation was required. Having considered such views, ComReg maintains its position that these obligations should be removed, given the risk in terms of any negative effects on competition and consumers appear to be minimal.
- 9.49 In the Consultation³³⁶ ComReg assessed whether an obligation for Eircom to provide standalone CPS, CA and CS remedies would be justified. For the reasons discussed in the Consultation, ComReg proposed that such obligations were not required to address the competition problems that had been identified. In doing so, ComReg gave interested parties the opportunity to express their views, along with any supporting evidence, for its consideration. ComReg does not, therefore, see the need to further consult on the matter.
- 9.50 As discussed by ComReg in the Consultation³³⁷, and in Section 3 and 4 of this Decision, standalone CPS usage has been steadily declining since 2007. Standalone CPS represents less than 3.4% of total indirect access lines³³⁸ and has declined significantly from the figure of 111,521 in Q1 2007, to 16,602 in Q4 2014. The data therefore suggests that service providers continue to migrate their customers (retail and wholesale) from standalone CPS to SB-WLR.
- 9.51 Demand for CA and CS has also declined such that, as at Q4 2014, CA and CS represents 0.5% and 0.4% respectively of total indirect access lines. The share of standalone CPS lines when taken as a percentage of overall RFTS subscriptions³³⁹, including PSTN, ISDN and Managed VOB over CATV networks, is less than 0.5% when combined.
- 9.52 Overall, the data therefore suggests that FSPs and OAOs continue to migrate their customers (retail and wholesale) from standalone CPS to SB-WLR.

³³⁶ See paragraphs 2.51, 9.72, 9.77, 9.125 to 9.127 and 9.129 of the Consultation.

³³⁷ See paragraphs 3.50 to 3.53 and 9.73 of the Consultation.

³³⁸ CPS is 4.2% of total SB-WLR and standalone CPS lines.

³³⁹ As noted in section 3 above, there were 1,587,261 RFTS Subscriptions in Q4 2014.

- 9.53 ComReg notes that, of the Respondents that disagreed with its proposed withdrawal of the standalone CPS access remedies (Magnet also disagreed with ComReg's withdrawal of CS), no Respondent offered meaningful evidence to suggest that their withdrawal would lead to the likelihood of significant competition problems occurring. Vodafone, for example, claimed that the removal of standalone CPS would provide a sales opportunity for Eircom's retail arm, on the basis that the standalone RFVC customers would most likely switch to also purchasing calls from Eircom (who would already be their line rental supplier). ComReg notes that in practice, Vodafone (and other FSPs) is well placed to compete for those customers using SB-WLR or WLA.³⁴⁰ More generally, evidence suggests that retail competition no longer appears to be based on demand for a RFVC only product as evidenced from the decline in standalone CPS (CA and CS). As such, ComReg is not convinced by Vodafone's argument that standalone-CPS is an enabler for entry by service providers into the RFTS market. Given that demand for standalone RFVC is low, and decreasing, it is doubtful that such an obligation would provide an effective entry path to the retail market for an FSP. ComReg further notes that all of the existing [redacted] purchasers of standalone CPS from Eircom also currently purchase either SB-WLR or Wholesale SV services. This suggests that these purchasers should have the capability to readily migrate their standalone CPS customers, from a technical perspective, to SB-WLR or Wholesale SV Services and allow for continuity of service.
- 9.54 Vodafone also argued that retail customers purchasing standalone RFVC from Vodafone indicate a strong preference for maintaining a direct relationship with Eircom for their access. However, Vodafone has not provided evidence in support of this, and as noted in paragraph 9.50, very few customers continue to purchase access from Eircom while purchasing calls from another supplier. Therefore, the impact of such preferences for a minority cohort of Vodafone's customers is likely to be negligible in terms of competition in RFTS markets.
- 9.55 Having regard to the nature of competition in the RFTS market(s) whereby there is a clear preference amongst end-users to purchase both line rental and calls from a single supplier, ComReg is satisfied that, absent a standalone CPS, CA and CS remedies being imposed, SB-WLR (and other) access obligations proposed in the Consultation and now in this Decision should be sufficient to remedy the related competition problems identified in Section 8, thereby facilitating competition.

³⁴⁰ ComReg notes that, as of Q4 2014 Vodafone [redacted]

- 9.56 Having regard to the above, including the reasoning set out in the Consultation, ComReg is removing Eircom's existing standalone CPS, CA and CS obligations, subject to the sun-set period set out below. Such removal does not, of course, prevent Eircom from continuing to provide such services on a commercial basis if it so wishes (subject to compliance with its other obligations as imposed). For the avoidance of doubt, notwithstanding the removal of the standalone CPS remedy, the CPS access obligation embedded within the SB-WLR access remedy is not being removed.
- 9.57 In order to facilitate existing purchasers of standalone CPS, CA and CS services making any necessary adjustments at the wholesale and/or retail level (say to allow wholesale and or retail customer notifications to take place in a timely manner and minimise disruption to associated services during the transition period) ComReg has decided that a six (6) month sunset period from the effective date of the Decision Instrument (attached at Appendix H) is appropriate. During this timeframe Eircom cannot withdraw standalone CPS, CA and CS services already provided to existing FSPs. However, during this time Eircom is also not required to either fulfil new standalone CPS, CA and CS order requests from existing purchasers or for other potential 'first time' purchasers. The rationale for this is that to do otherwise would perpetuate the provision of a service for which a regulatory obligation to do so is ultimately being withdrawn (although such withdrawal does not prevent Eircom from continuing to offer such a service). As noted above, this does not prevent Eircom from continuing to provide such services on a commercial basis if it so wishes. Where Eircom seeks to withdraw such services on foot of the removal of the obligations through this Decision, it should provide a reasonable notice period in accordance with any contractual provisions in place with the relevant wholesale customers, in order that existing wholesale purchasers can notify their own downstream customers of the removal of the related service and, where appropriate, make other arrangements for delivering service to their customers. This might for example include the service provider switching from purchasing wholesale CPS service from eircom to purchasing SB-WLR instead and using this to offer a RFTS.
- 9.58 ComReg also notes a concern raised by BT that ComReg be explicit that any withdrawal of regulation relates only to standalone CPS (and CA and CS). ComReg notes that this was the original intention as set out in the Consultation and has been specified as such in the Decision Instrument accordingly.

Whether VOIP based Next Generation FACO obligations should be imposed

- 9.59 ComReg proposed not to impose specific requirements on Eircom to provide wholesale access to NG FACO services. As referred to in paragraphs 9.36 to 9.39 above, Eircom agreed with ComReg's proposal, while several other Respondents' disagreed.

- 9.60 ComReg disagrees with arguments made by Magnet, BT, and ALTO that Eircom should be required to provide Managed VOB-based NG FACO. ComReg set out various reasons for this proposal in paragraphs 9.53 to 9.55 of the Consultation. ComReg noted that alternative FSPs may, in the future, be able to ultimately replicate an Eircom NG FACO product by, for example, using WBA and self-supplying Managed VOB over a WBA or WPNIA based broadband connection. In that case, remedies requiring Eircom to provide wholesale Managed VOB may not be justified.
- 9.61 ComReg also considered that the competition problems identified in the FACO Markets could be addressed through the proposed SB-WLR obligations, and that extending regulation to cover NG FACO could discourage investment in Managed VOB technologies by FSPs.
- 9.62 ComReg notes that Respondents have not provided compelling evidence to support arguments that competition will be harmed if regulation is not extended to cover Managed VOB (or evidence that would run counter to the analysis presented by ComReg). There are several examples in Ireland of where FSPs offer Managed VOB to their retail customers e.g. UPC and, to a much lesser extent, Blueface. As noted above³⁴¹, Vodafone also has plans to ultimately deploy a Managed VOB service [§< ██████████]. Given these and other developments, over a longer time horizon, it suggests that self-supplied Managed VOB based entry may occur on a broader scale. However, the timing of this and its competitive impact is uncertain. In these circumstances, it is not clear that imposing NG FACO remedies would be proportionate and justified, including having regard to the need to ensure long-term sustainable independent competition.
- 9.63 Respondents have also expressed concern that not imposing NG' FACO access remedies would allow Eircom to undercut competitor OAOs (who purchase CG FACO from Eircom) in the retail market by permitting Eircom to offer retail Managed VOB based services at a lower price than that which competitor OAOs could offer using SB-WLR i.e. a margin squeeze could arise. ComReg considers margin-squeeze related issues under ComReg's consideration of Respondents' views on price control remedies in paragraphs 9.198 to 9.251 below (in the consideration of pricing remedies).

³⁴¹ See footnote **Error! Bookmark not defined.** above.

- 9.64 Overall, ComReg maintains its view that Eircom should not be required to provide NG FACO. It should, however, be noted that while not imposing any access (or other) regulatory obligations with respect to NG FACO, ComReg still requires Eircom to meet reasonable requests for access to IP Interconnection for the conveyance of VoIP (and related) services³⁴², such interconnection identified in the Consultation as Next Generation Interconnection Services. Additionally, in accordance with other access obligations being imposed³⁴³, Eircom cannot withdraw access to facilities already granted (such as SB-WLR), without ComReg's prior approval, with access to such services continuing to provide safeguards for competition.
- 9.65 ComReg will monitor retail and wholesale prices over the period of this review to see how the market evolves.

Absence of adequate fixed number portability arrangements undermines potential for Managed VOB to be effective

- 9.66 ComReg acknowledges concerns raised by Vodafone, BT and ALTO in paragraphs 9.40 and 9.41 above in relation to the scalability of existing fixed number portability ('FNP') systems to support the mass-migration of RFTS based on SB-WLR to RFTS (and or wholesale voice services) based on Managed VOB.
- 9.67 ComReg would point out that, in order to meet their obligations under Regulation 25 of the Universal Service Regulations³⁴⁴, operators must ensure that a mechanism for porting and activation of numbers is available to ensure that call completion can successfully take place after an end-user's telephone number is ported. ComReg agrees that the current FNP manual porting process may not be scalable and that operators may not be relying on the FNP database for routing information due to concerns regarding the accuracy of the data held on the database.

³⁴² As proposed in the Consultation at paragraph 9.56.

³⁴³ See section 7.5(ii) of the draft Decision Instrument in the Consultation, and now confirmed in the final Decision Instrument set out in Appendix H of this Decision.

³⁴⁴ Regulation 25 of the Universal Service Regulations 2010 requires that undertakings must ensure that a subscriber with a number from the national numbering scheme can, upon request, retain his or her number independently of the undertaking providing the service.

- 9.68 Concerns relating to the integrity of the data held on the FNP database arise from some operators not, for example, updating the relevant data on the database after porting has been completed. ComReg has recently completed an audit on the data in the FNP database in order to determine its accuracy and use. The issue of accuracy on the FNP database is exacerbated by the manual nature of the FNP database update process, with such updates occurring after the number port has completed. This manual post port process heightens the risk that the gaining/porting operator may not update the database thereby further undermining its accuracy. ComReg would note that the FNP database was intended to be an interim solution while industry considered how it might meet its number portability obligations. However, a more effective replacement system was never developed by industry.
- 9.69 ComReg considers that the existing FNP system, which requires the gaining operator to manually update the FNP database after porting numbers onto their network, is in need of replacement. Current manual processes for updating the data on the database are unlikely to be fit for purpose should large scale Managed VOB services emerge. ComReg is of the view that there are alternative porting solutions available to the current system which industry could consider and ComReg has initiated and facilitated industry discussions and workshops aimed at allowing industry the opportunity to bring about the required improvements to the porting process.
- 9.70 Overall, the primary responsibility for implementing an effective FNP system to meet their regulatory obligations rests with all relevant operators. On that basis, ComReg considers that issues surrounding the adequacy of FNP solutions should be overcome by relevant service providers themselves. In resolving these issues, industry should be aware that porting processes and systems also need to be future-proofed, and therefore flexible and capable of operating in a Managed VOB environment.

SLA obligations are inadequate and require further specificity

- 9.71 As noted in paragraph 9.42 to 9.44 above, a number of Respondents raised concerns regarding ComReg's proposed SLA remedies. In particular, relating to:
- Delays in the negotiation of SLAs;
 - Eircom's lack of incentives to meet service targets set out in SLAs; and
 - The effectiveness of the dispute resolution mechanism.
- 9.72 It was also argued by Vodafone that ComReg should include wholesale SLA performance metrics based on Universal Service Obligation ('**USO**') targets.

- 9.73 ComReg notes that, in the first instance, while SLA development requires discussion and negotiation between Eircom and its wholesale customers Eircom are required to negotiate in good faith and respond appropriately to reasonable requests for access. ComReg would also note that while Eircom have an obligation to conclude³⁴⁵ an SLA, to date no operator has raised a formal dispute with regard to a failure to conclude agreement on SLAs.
- 9.74 ComReg acknowledges that there have been a number of instances where delays have arisen in SLA negotiations. However, given that negotiations inevitably involve two or more parties and that delays may not necessarily always be attributable to an individual party, the obligation to conclude an SLA remains with Eircom.
- 9.75 Delays in SLA negotiations for FACO services in the context of requests for access could damage competition in downstream markets. For example, in circumstances where Access Seekers have not access to SLAs for FACO products, services and facilities with Eircom, they may not be in a position to guarantee quality of service to their customers in downstream retail/wholesale markets.
- 9.76 The negotiation of SLAs (including in the context of Eircom's other obligations) is a precursor to the provision, by Eircom, of fair, reasonable and timely access to FACO products. It is therefore important, in terms of providing for effective competition in downstream markets, that an effective negotiation process is in place. This necessarily involves Eircom, as the SMP FACO provider, negotiating in good faith with its wholesale customers. While negotiations may not always result in the relevant parties agreeing to an outcome, it is important that negotiations are concluded as quickly as possible so that an outcome is achieved in a fair, reasonable and timely manner.
- 9.77 The ability and incentive for Eircom, as an SMP operator, to obstruct its competitors in downstream markets, along with the resulting impact on competition and consumers, was discussed in Section 8 of the Consultation and Section 8 of this Decision. ComReg maintains its view that regulatory obligations to minimise the risk of such behaviour occurring remain appropriate. ComReg also considers that there may be cases where regulatory oversight of the SLA negotiation process (i.e. a regulatory back-stop) is required to prevent Eircom from causing unreasonable delays in negotiations.
- 9.78 To this end, to better facilitate more effective and timely completion of SLA negotiations, ComReg is amending the general obligation to negotiate SLAs in good faith, originally set out in part 8.3(ii) of the Draft Decision Instrument set out in the Consultation³⁴⁶, to now require that Eircom must:

³⁴⁵ The obligation to conclude an SLA means that Eircom have brought negotiations on the SLA to a conclusion, it does not necessarily mean that agreement has been achieved but that Eircom have made their final offer which Operators may accept or reject. If the SLA is agreed it will be implemented at a later date.

³⁴⁶ See Appendix H of the Consultation.

“Negotiate in good faith with Undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs (either in the case of a new SLA or an amendment to an existing SLA). Following a request from an Undertaking for a new SLA or an amendment to an existing SLA Eircom shall within one (1) month of the receipt of such a request provide the Undertaking with details of the SLA Negotiation Period. Negotiations in respect of a new SLA or an amendment to an existing SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Undertaking makes such a request. Within one (1) month of the date the Undertaking makes such a request Eircom may seek an extension to the six (6) month period from ComReg.”

- 9.79 A request from an Access Seeker for a new SLA or an amendment to an existing SLA needs to be considered by Eircom in the context of its obligation to meet reasonable request for access. In practice, this means that Eircom shall, at the initiation of SLA negotiations (which can be on foot of a request for access from an Access Seeker or where Eircom itself is seeking to introduce an SLA), propose:
- (i) projected timeframes for the acceptance or rejection of the requested SLA amendment (or new SLA) as being a reasonable request for access; and
 - (ii) projected timeframes within which the SLA will be concluded noting that Eircom are subject to an obligation to conclude SLA negotiations within 6 months.
- 9.80 While typically SLA negotiations might commence at an industry meeting, they may also commence on foot of a written request for access from an Access Seeker(s). Where Eircom accede to the request to amend the SLA, the agreed negotiation timeframe should be recorded in the meeting minutes or other document exchanged by the parties (as appropriate). If there is not agreement on this timeline, then an Access Seeker may request ComReg to investigate Eircom’s compliance with the obligation to negotiate in good faith.
- 9.81 If the agreed timeline and associated dates are not met, i.e. an SLA has not been concluded and/or if the Access Seeker is of the view that the delay was caused by Eircom and is unreasonable, then the Access Seeker may request ComReg to investigate Eircom’s compliance with the above obligation to negotiate in good faith (if it feels that the delay was caused by Eircom to delay the delivery of the SLA) as well as Eircom’s obligation to meet reasonable requests for access and to conclude an SLA.

- 9.82 While negotiations in respect of a new SLA or an amendment to an existing or proposed SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Access Seeker(s) makes such a request, this does not mean that negotiations cannot conclude before the end of the 6 month period specified in the obligation. Neither is an Access Seeker precluded from raising a dispute or compliance issue with ComReg during that negotiation period in respect of Eircom's compliance with its SMP obligations. Furthermore, at any time, it is open to ComReg to investigate, on its own initiative, Eircom's compliance with its SMP obligations.
- 9.83 Any investigation by ComReg as to what represents a reasonable timeframe for concluding an SLA will depend on the nature and complexity of the access request, and on the evidence presented by parties to ComReg regarding the SLA negotiation. ComReg may also consider whether such SLA negotiations have been carried out in accordance with Eircom's other SMP obligations, as relevant, including but not limited to those relating to non-discrimination.
- 9.84 The timing of any subsequent launch of the SLA will depend on whether system developments are required in order to give effect the associated changes. Normal advance notification procedures/timeframes (required under Eircom's Transparency obligations) will apply. However, ComReg may be amenable to reducing the advance notification periods in such circumstances.
- 9.85 It should be noted that the above obligation requiring Eircom to negotiate in good faith in relation to the conclusion of legally binding and fit-for-purpose SLAs does not, under any circumstances, limit the existing legal powers of ComReg (including but not limited to its enforcement powers) to intervene on its own initiative at any stage in respect of Eircom's compliance with its SMP obligations (including but not limited to those requiring Eircom to grant undertakings access in a fair, reasonable and timely manner or to provide in detail the objective reasons for a refusal or partial grant of an access request).
- 9.86 In relation to views expressed by some Respondents that, to date, Eircom has faced a lack of incentives to comply with service targets set out in the SLA, ComReg notes that SLAs provide for service credits to be provided by Eircom to its wholesale customers in cases where Eircom has not met its SLA targets. The level of these service credits is, in accordance, with the final Decision Instrument³⁴⁷, to be fair and reasonable. Additionally, given service credits form part of the terms and conditions for access, such service credits are also subject to agreement between Eircom and its wholesale customers and Eircom must, amongst other things, meet all reasonable requests for access in this regard.

³⁴⁷ Part 8.3(iv) of the draft Decision Instrument in the Consultation provided that Eircom was required to ensure that Service Credits are fair and reasonable. This is confirmed in the final Decision Instrument in Appendix H of this Decision.

- 9.87 ComReg's position is, however, that service credits should be set at a level such that Eircom faces adequate incentives to comply with its SLA targets. To that effect, Eircom must ensure that the level of the service credits are fair and reasonable, thereby ensuring that Eircom is sufficiently incentivised to meet the agreed service levels and not engage in constructive refusal to supply type behaviours.
- 9.88 In relation to views expressed that the dispute resolution process is not effective, ComReg is of the view that the existing dispute resolution process is fit for purpose and would note that the Dispute Resolution Procedures³⁴⁸ were subject to public consultation. In some instances, while the dispute resolution process may, having regard to the particular circumstance of each case, take time to reach a conclusion, it is important that ComReg follows due process to establish the facts and to reach an informed decision where disputes have arisen between operators. As such, ComReg is constrained in terms of the extent to which it can shorten the dispute process. ComReg will continue to make best efforts to resolve disputes in a timely manner and would note that recent disputes have tended to be resolved in periods as short as 4 months.
- 9.89 To facilitate more effective and timely completion of SLA negotiations and to minimise risks associated with constructive refusal of access through unnecessarily prolonged negotiations, ComReg is continuing to impose an obligation on Eircom to conclude SLA negotiations within a reasonable time period. ComReg is amending the obligation to require eircom to conclude SLAs within a maximum period of six months, unless otherwise agreed by ComReg. ComReg will also require that the level of the service credits in SLAs should be fair and reasonable,
- 9.90 In relation to the views expressed that SLA performance metrics should be based on USO targets, ComReg would note that eircom are required, amongst other things, to negotiate in good faith and to grant undertakings access in a fair reasonable and timely manner. ComReg can also intervene under its own initiative to carry out an investigation where there is a potential concern regarding eircom's compliance with its obligations. Access Seekers are free to make requests to Eircom for amendments to SLAs, which Eircom will be obliged to consider in the context of its relevant SMP obligations.

The provision of Interconnection and Co-location should be efficient

- 9.91 As noted in paragraphs 9.45 and 9.46 above, BT and ALTO, while supportive of ComReg's proposed imposition of access obligations requiring Eircom to provide various Interconnection Services and Co-Location, requested that ComReg include an additional requirement that Eircom provide interconnection and co-location services not just on a cost-orientated basis but also in a '*process-efficient*' manner, suggesting that certain aspects of co-location are over engineered thus unnecessarily raising BT's costs.

³⁴⁸ See Dispute Resolution Procedures, Response to Consultation and Decision, [ComReg Document 03/89](#), Decision D18/03, July 2003 ('**Dispute Resolution Procedures**').

- 9.92 The Consultation proposed that Eircom should be required to provide specific products and services, including Current Generation Interconnection Services³⁴⁹. In addition, it was proposed that Eircom should be required to meet reasonable request for the provision of Next Generation Interconnection Services³⁵⁰. Therefore, access to Next Generation Interconnection Services would be subject to an assessment of 'reasonableness' by Eircom. The different approaches were justified by ComReg (i.e. Current Generation Interconnection Services was mandated while Next Generation Interconnection Services was available on reasonable request) on the basis that while Current Generation Interconnection Services were currently available, well established and predominantly used to support the provision of TDM based FVCO, Next Generation Interconnection Services were still nascent but, in the context of the potential emergence of the self-supply of IP based FVCO could become increasingly important. Furthermore, having regard to Eircom's proposed access obligations, Eircom was also to be required to provide access in a fair, reasonable and timely manner³⁵¹, and in this context, it is open to operators to make requests for access for the provision of interconnection and/or co-location services in a manner different to that which is currently provided, with Eircom being obliged to respond to such requests in accordance with its obligations.
- 9.93 Separately, it was proposed that both Current Generation Interconnection Services and co-location were to be subject to a price control obligation of cost-orientation (as is currently the case). The Consultation further proposed that Eircom would only be allowed to recover its actual costs, adjusted for efficiencies [EMPHASIS ADDED] plus a reasonable rate of return. The adjustment for efficiencies is to ensure that Eircom is unable to recover inefficiently incurred costs. This position is maintained in this Decision.
- 9.94 With respect to the specific example cited by BT whereby it suggests that in purchasing co-location services, it is required to buy significantly larger power units than are actually required, ComReg notes that the Consultation proposed³⁵² that Eircom continue³⁵³ to be subject to a separate transparency requirement to publish a Reference Interconnect Offer ('RIO') and ensure that it is sufficiently unbundled so that Access Seekers are not required to pay for facilities that are not necessary for the access requested. If BT considers that it is being required to by unnecessary services then it is open to BT to raise the matter with ComReg in the context of Eircom's compliance with its relevant obligations.

³⁴⁹ See section 7.2(v) of the Draft DI in Appendix H of the Consultation, now confirmed in the final Decision Instrument in Appendix H of this Decision.

³⁵⁰ See section 7.4 of the Draft DI in Appendix H of the Consultation, now confirmed in the final Decision Instrument in Appendix H of this Decision.

³⁵¹ See section 8.1 of the Draft DI in Appendix H of the Consultation, now confirmed in the final Decision Instrument in Appendix H of this Decision.

³⁵² See paragraph 9.172 and 9.181 of the Consultation.

³⁵³ The 2007 Decision also imposed this obligation and it has, therefore, been in place to date.

- 9.95 With respect to Magnet's comments that Eircom should be required to negotiate in good faith when providing co-location, ComReg notes that co-location falls within the definition of access and has also been specifically mandated as an access requirement, with Eircom also to be subject to a requirement to ensure that it negotiates in good faith with undertakings requesting access³⁵⁴. Obligations to negotiate in good faith regarding co-location are therefore within the scope of the access obligations being imposed upon Eircom. If Magnet wishes to make a request to Eircom for Co-Location in an alternative form to that which is already provided, then Eircom must consider this in accordance with its relevant regulatory obligations.
- 9.96 ComReg's position is that the requirement that Interconnection Services and Co-Location is provided in an efficient manner is already catered for within the then proposed obligations, as is the requirement to negotiate in good faith regarding access to co-location. Therefore, further amendment to the proposed obligations is not warranted at this time.

ComReg's Position on Access Remedies

- 9.97 Having considered Respondents' views in paragraphs 9.47 to 9.95 above ComReg has, save for the obligations identified below, decided to largely maintain its position on Access Remedies as set out in the Consultation³⁵⁵:
- 9.98 To ensure effective and timely completion of SLA negotiations, ComReg is amending the general obligation to negotiate SLAs in good faith, originally set out in part 8.3(ii) of the Draft Decision Instrument set out in the Consultation, to now require that Eircom must conclude SLA negotiations within a six month period.
- 9.99 As noted in paragraph 9.26 above, in the Consultation ComReg considered a range of statutory criteria that it is required to consider when imposing access obligations.
- 9.100 The consideration of these criteria in the Consultation remains valid, notwithstanding the amendments to the obligations as originally proposed in the Consultation and identified above.
- 9.101 ComReg's position is that the obligations requiring Eircom to provide access to FACO products, services and associated facilities, are proportionate and justified. Conversely, ComReg considers that it is neither proportionate, nor is it justified, to impose remedies upon Eircom with regard to the provision of NG FACO, standalone CPS, CA and CS. ComReg has, consequently, provided a sunset period of 6 months after which standalone CPS, CA and CS obligations are being withdrawn.

³⁵⁴ See paragraph 9.71 to 9.89 above.

³⁵⁵ The access remedies proposed in the Consultation were summarised in paragraphs 9.22 to 9.26 above.

9.102 ComReg set out its view in the Consultation that access obligations alone would be insufficient to resolve the identified competition problems and maintains this view. For example, the imposition of access obligations alone would not resolve issues such as excessive pricing or margin squeeze, discrimination on price or quality grounds, or ensure transparency of terms and conditions of access.

9.103 The access obligations are set out in Sections 7 and 8 of the Decision Instrument set out at Appendix H of this Decision.

Non-Discrimination Remedies

Position set out in the Consultation

9.104 In the Consultation ComReg, proposed to impose a range of non-discrimination obligations upon Eircom³⁵⁶ having regard to a range of identified competition problems, including:

- (a) non-discrimination obligations to ensure equivalent treatment of Access Seekers by Eircom in its provision of services and information to them;
- (b) non-discrimination obligations to ensure that Eircom provides the same services and information to Access Seekers as Eircom supplies to itself;
- (c) non-discrimination to be applied on an Equivalence of Outputs ('**EoO**')³⁵⁷ standard;

³⁵⁶ See paragraphs 9.131 to 9.163 of the Consultation.

³⁵⁷ This standard recognises that Eircom would be required to provide access to services and information in a manner which achieves the same standards in terms of functionality, price, terms and conditions, service and quality levels as Eircom provides to itself, albeit potentially using different systems and processes.

(d) Eircom having to provide a Statement of Compliance ('SoC') to ComReg to demonstrate how it is meeting its non-discrimination obligations, including for existing FACO products, services and facilities and where there are changes to existing or the introduction of new FACO products, services and facilities. A distinction was proposed in the approach to the timeframe within which a SoC should be provided to ComReg with respect to changes to existing products on the one hand, and new products on the other. In the case of an existing³⁵⁸ FACO product, service or facility, a SoC is to be provided by Eircom to ComReg within three (3) months of the effective date of the decision³⁵⁹. In the case of an amendment to an existing FACO product, service or facility, a SoC is to be provided by Eircom to ComReg three (3) months in advance of it being made available. In the case of new FACO products, services and facilities a SoC is to be provided by Eircom to ComReg within six seven (7) months of it being made available.

9.105 The SoC is an obligation which had been introduced in other regulated markets where Eircom has been found to have SMP, with it now being extended for the first time to the FACO Markets. However, there had been some amendments made to the obligation proposed for the FACO Markets, principally to improve ComReg's ability to monitor Eircom's compliance with non-discrimination obligations, and to improve detection of any non-compliance. Specifically, Eircom was to be required to demonstrate to ComReg that it has put in place appropriate risk identification, control and governance processes such that it can reasonably demonstrate that, on an ongoing basis, it is ensuring its compliance with its non-discrimination obligations.

9.106 The above remedies are intended to ensure that Eircom does not favour its downstream arm, or unduly favour any particular wholesale customer, to the detriment of competition and ultimately consumers. The intent is also to ensure that Eircom has implemented a governance structure that results in issues giving rise to the risk of discrimination being remedied.

9.107 ComReg also did not propose to impose non-discrimination obligations upon Eircom with respect to NG FACO, however, it was noted that Eircom would be subject to non-discrimination obligations with respect to Next Generation Interconnection Services (with Eircom also subject to access and other obligations for such services).

³⁵⁸ The effective date of the decision in this context referred to the date at which ComReg would notify Eircom of the final Decision Instrument.

³⁵⁹ Given the proposed SoC obligation was proposed to be introduced for the first time, it was to be applied to existing services, with any amendments to existing services captured by a proposed separate obligation.

Respondents' Views

- 9.108 All of the seven Respondents commented on ComReg's approach to the imposition of non-discrimination remedies. The Respondents agreed in principle with the imposition of non-discrimination remedies, but five³⁶⁰ of the seven Respondents disagreed with ComReg about what form the obligations should take and made comments in this regard.
- 9.109 BT, Vodafone, Sky and ALTO believed that ComReg's proposed measures do not go far enough to address the competition problems that ComReg has identified, whereas Eircom argued that the proposed approach was onerous and not justified. Magnet added that it is important that the non-discrimination obligation is enforced rigorously.
- 9.110 ComReg has summarised the Respondents' main views below, grouping the key issues raised into the identified themes, namely:
- (a) An Equivalence of Inputs standard should be adopted (discussed in paragraphs 9.111 to 9.116 below); and
 - (b) Statement of Compliance Issues (discussed in paragraphs 9.117 to 9.119 below);
 - (c) Functional separation obligations should be imposed (discussed in paragraphs 9.120 to 9.122 below); and
 - (d) Establishment of an independent adjudicator to facilitate swift resolution of issues (discussed in paragraph 9.123 below).

An Equivalence of Inputs standard should be adopted

- 9.111 ALTO expressed the view that, absent functional separation, the next-best approach to stimulate/enhance competition would be to implement an Equivalence of Inputs ('**Eoi**')³⁶¹ standard.
- 9.112 BT argued that Eoi based order processing would considerably reduce the opportunity for Eircom to discriminate in service provision and service assurance. Therefore, BT considered that ComReg needed to move from what it saw as being dated EoO based regulation towards a stronger Eoi regime. BT adds that Eircom are currently upgrading their processes to bring them in line with those used for NGA order processing. As such, this is an opportune time to implement Eoi remedies.
- 9.113 BT considers that Eircom had engaged in discriminatory practices over the years (referring to a 2014 investigation by ComReg), noted that EoO based remedies had been in place across various regulated markets, and it suggested that this was evidence of EoO not working.

³⁶⁰ BT, Eircom, ALTO, Sky, Vodafone.

³⁶¹ Under this standard Eircom would be required to provide access to services and information in a manner which achieves the same standards in terms of functionality, price, terms and conditions, service and quality levels, systems and processes as Eircom provides to itself.

- 9.114 Magnet considered that ComReg should impose an EoI based obligation, noting that doing so would require Eircom's retail business to purchase FACO through the same channels that other undertakings use (including the operational support systems ('OSS') such as the Eircom Universal Gateway ('UG')³⁶²). Magnet suggests that there is clear evidence that the existing EoO obligation provides Eircom retail with an advantage over alternative operators. Magnet considered that moving to an EoI would avoid this type of discrimination.
- 9.115 Sky argued that, where one or more services included in a bundle already carried an EoI obligation, that standard should extend to other services in the bundle. Otherwise the EoI obligation is effectively diluted by the EoO standard applied to other services in the bundle.
- 9.116 Vodafone disagreed with ComReg's proposed imposition of an EoO based non-discrimination standard. Vodafone considered that an EoI standard should be more efficient for Eircom, and therefore the only reason why Eircom would not implement EoI of its own accord is that it perceives a competitive advantage for its retail arm in maintaining an EoO approach. Vodafone argues that, by facilitating this, ComReg will not address the competition problem that has been identified.

Statement of Compliance Issues

- 9.117 Eircom accepted, in principle, ComReg's proposal that it should be required to submit a SoC demonstrating its compliance with the non-discrimination obligations. However, Eircom submitted that the proposed scope of the SoC was disproportionate, and not justified. Eircom considered that the obligations are particularly onerous, will be expensive to implement, and will require Eircom to put in place various internal governance and control measures that go beyond what is required to verify the implementation of an EoO obligation. Eircom considered that ComReg had failed to provide a reasonable justification for increasing the regulatory burden in a market that should, according to Eircom, be a candidate for deregulation on a forward-looking assessment basis.
- 9.118 Sky supported ComReg's proposal that Eircom should be required to submit a written SoC to ComReg, which would demonstrate Eircom's compliance with its non-discrimination obligations. Such a requirement appears appropriate, particularly in the absence of an EoI standard being adopted in the FACO Markets. However, Sky considers that, in the interest of greater transparency, Eircom should be required to also provide compliance statements to OAOs in 'confidential' form so that wholesale customers can assess, and potentially challenge Eircom's claims regarding compliance.
- 9.119 Similarly, BT and ALTO argued that non-confidential parts of the Statement of Compliance ('SoC') should be made available for OAOs to review.

³⁶² Eircom Wholesale's UG is an order management and fault handling system designed to be the primary Access point between Eircom and Access Seekers. It accepts and validates Access Seeker orders and faults and is a software "brokerage" system into Eircom's internal production and fault management systems.

Functional separation obligations should be imposed

9.120 ALTO, BT and Magnet considered that ComReg should impose an obligation on Eircom to functionally separate its wholesale and retail businesses³⁶³. ALTO and BT argue that the lack of a functional separation remedy has hindered competition in Ireland.

9.121 ALTO and BT considered that, compared with ComReg's proposed approach in the Consultation, functional separation would create greater upstream competition and stimulate more investment in infrastructure based competition.

9.122 ALTO also noted that recent improvements in technology mean that functional separation could now be implemented with virtual system separation, rather than the more onerous physical separation.

Establishment of an independent adjudicator to facilitate swift resolution of issues

9.123 Magnet suggested the establishment of an independent adjudication facility that could investigate and rule on non-discrimination issues in a timelier manner.

ComReg's Assessment of Respondents' Views

9.124 ComReg assesses Respondent's views on the themes identified in paragraph 9.110 above as follows:

- (a) An Equivalence of Inputs standard should be adopted (see paragraphs 9.125 to 9.128 below);
- (b) Statement of Compliance Issues (see paragraphs 9.129 to 9.140 below);
- (c) Functional separation obligations should be imposed (see paragraphs 9.144 to 9.146 below); and
- (d) Establishment of an independent adjudicator to facilitate swift resolution of issues (discussed in paragraphs 9.147 to 9.149 below).

An Equivalence of Inputs standard should be adopted

9.125 As referred to in paragraphs 9.111 to 9.116 above ALTO, BT, Magnet, Sky and Vodafone considered that an EoI non-discrimination standard should be imposed for varying reasons.

³⁶³ In accordance with the provisions in the Access Regulations.

- 9.126 As set out in the Consultation, ComReg considered that the EoO non-discrimination standard is appropriate and proportionate in the context of CG FACO being regulated (noting that NG FACO is not to be subject to regulatory obligations³⁶⁴), particularly given that the existing provision of CG FACO products, services and facilities is provided largely over a legacy copper network and over legacy Eircom systems. However, ComReg notes that Eircom's systems and processes are such that when CG FACO services are being provisioned with wholesale NGA WBA services, in particular, Bitstream+ and Virtual Unbundled Access³⁶⁵ ('VUA'), the imposition of an EoO non-discrimination standard can, in some circumstances, be considered reasonable and proportionate. In general, ComReg considers that the competition problems identified in the FACO Markets (and other related markets)³⁶⁶ can be addressed on the basis of the proposed EoO non-discrimination standard. However, following further consideration of the matter by ComReg, it considers that there are some exceptions to this (now noted below) where an EoO non-discrimination standard would more adequately address these competition concerns.
- 9.127 Having considered Respondents' views ComReg has reflected further on its preliminary views as set out in the Consultation and considers that an EoO standard for SB-WLR is justified, proportionate and reasonable under certain circumstances. In particular, such circumstances arise with respect to ordering processes when a SB-WLR and a NGA WBA service are being provided to an Access Seeker concurrently using a 'combined order'. In this respect, a combined order type exists on Eircom's order management systems whereby concurrent ordering of SB-WLR and NGA WBA products can take place using a single order. This type of concurrent order is transacted through the same Eircom order handling mechanism and interface for all Access Seekers, as well as Eircom's retail arm. ComReg notes that NGA WBA orders are subject to an EoO non-discrimination standard by virtue of pre-existing SMP obligations imposed on Eircom in the WBA market via the 2013 WBA NGA Remedies Decision³⁶⁷. Therefore, ComReg considers that it is justified, proportionate and reasonable to require that Eircom is subject to an EoO standard for ordering processes for SB-WLR when SB-WLR is ordered in conjunction with NGA WBA using a combined order type.

³⁶⁴ Note that ComReg's then proposed FACO access remedies and now confirmed in this Decision do not impose access obligations upon Eircom with respect to NG FACO.

³⁶⁵ VUA is wholesale active access product provided by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users' connections at the local exchange. It allows a level of control to the Undertaking similar to that afforded to the Access Seeker connecting their own equipment to a fully unbundled local loop.

³⁶⁶ As discussed in Section 8 of this Decision.

³⁶⁷ Next Generation Access ('NGA'): Remedies for Next Generation Access Markets, [ComReg Document 13/11](#), ComReg Decision D03/13, 1 January 2013 ('**2013 WBA NGA Remedies Decision**')

9.128 Similarly for an SB-WLR service which is in use with an NGA WBA service to provide services to a user i.e. post provisioning or which is provisioned together with an NGA WBA service, ComReg also considers that Eircom should be subject to an Eol standard for fault handling and fault repair services for the SB-WLR service element. This Eol standard shall apply regardless of whether the SB-WLR and NGA WBA services have been ordered using a combined order or ordered separately. Again, ComReg notes that NGA WBA service assurance is subject to Eol by virtue of pre-existing SMP obligations imposed on Eircom in the WBA market via the 2013 WBA NGA Remedies Decision and fault handling and fault repair services for NGA WBA services and SB-WLR services are managed using the same interface and processes for all Access Seekers, as well as Eircom's retail arm. Therefore, ComReg considers that it is justified, reasonable and proportionate that Eircom is subject to an Eol standard for fault handling and fault repair processes for SB-WLR in these circumstances.

Statement of Compliance Issues

9.129 As referred to in paragraphs 9.117 to 9.119 above, Eircom disagreed with the proposed extension of SoC obligations.

9.130 Contrary to Eircom's views, ComReg does not accept that it has not justified the imposition of the proposed SoC obligations, with a clear justification and proportionality assessment having been reasoned in the Consultation³⁶⁸ including on the basis of the need to ensure effective monitoring and enforcement of non-discrimination obligations, given the potential for any non-compliance to impact ultimately on competition in downstream or adjacent markets. ComReg notes that Eircom has been identified as having SMP in the FACO Markets and has the ability and incentive to engage in anti-competitive practices discussed earlier in Section 8. On this basis ComReg is required to implement regulatory measures aimed at best addressing the competition problems identified. ComReg proposed a SoC obligation on the basis that ComReg needs to be in a position to adequately monitor and assess Eircom's compliance with its non-discrimination obligations so that it can ultimately ensure an even playing field exists to facilitate competition in downstream wholesale³⁶⁹ and RFTS markets. Discrimination by its very nature is often behaviourally based, and absent a SoC it means that the risks of not detecting any such problems are heightened. Allied to this, absent a risk of detection it further reduces Eircom's incentives to comply with its non-discrimination obligations.

³⁶⁸ See paragraphs 9.146 to 9.161 of the Consultation.

³⁶⁹ Including markets involving the provision of Wholesale SV/WLA.

- 9.131 As explained in paragraph 9.153 of the Consultation, the proposed SoC obligations were broader³⁷⁰ than the SoC obligations that had been imposed in other regulated markets³⁷¹. However, ComReg remains of the view that this broadening is justified given the difficulties that have been faced in monitoring non-discrimination with the SoC that is in place in various other regulated markets. The enhanced SoC obligation in the FACO Markets means that ComReg should be better placed than before to identify instances where Eircom has failed to comply with its non-discrimination obligations.
- 9.132 With regard to the cost to Eircom of implementing the revised SoC obligation, ComReg considers that the additional measures are unlikely to represent a significant incremental burden on Eircom, with the augmented measures being such as would be expected from Eircom in the application of good practice with respect to internal governance processes thereby allowing it to effectively ensure it meets its non-discrimination obligations.
- 9.133 Some Respondents suggested that Eircom's SoC should be made available for review by its wholesale customers or published. The requirements governing the SoC obligations are informed by the need for oversight by ComReg regarding Eircom's active monitoring of its compliance with its non-discrimination obligations. The continuation of ComReg's monitoring of Eircom's compliance with its obligations, in conjunction with the requirement to provide a SoC to ComReg (detailing the steps Eircom has taken to ensure compliance), significantly enhances ComReg's oversight of Eircom's compliance with its non-discrimination obligations.
- 9.134 Given the SoC obligation exists to ensure that ComReg has adequate and detailed oversight of how Eircom ensures compliance with its non-discrimination obligations, ComReg maintains its view that it is not appropriate to make it available to undertakings and that Eircom should only be required to provide the SoC to ComReg.

³⁷⁰ The broadened scope and nature of the SoC obligation requires Eircom to demonstrate that it has put in place appropriate risk identification, control and governance processes such that it can reasonably demonstrate that, on an ongoing basis, it is ensuring its compliance with its non-discrimination obligations.

³⁷¹ Note that a SoC had not been in place in the precursor markets to the FACO Markets which were analysed in the 2007 Decision. However, since then the concept of the SoC obligation had been adopted in other regulated markets and was being extended to the FACO Markets, but broadened in light of experience.

- 9.135 However ComReg is of the view that some material in the SoC, relating to any changes to regulated products services and facilities is of particular and immediate relevance to Access Seekers. The changes to regulated products services and facilities detailed in the SoC are required as an outcome of Eircom's internal governance processes regarding its compliance with its obligations, i.e. where Eircom change products, services or facilities in order to maintain compliance with its regulatory obligations. These changes may arise due to an Eircom internal governance review detecting an issue that could give rise to compliance concerns and which is addressable through a change to a regulated product, service or facility. Another example may be a technology or network change which may give rise to an equivalence issue, detected through Eircom's regulatory governance process, which in turn can be resolved by a change to a regulated product, service and facility. As Access Seekers rely on such regulated products, services and facilities, ComReg considers that these issues are of particular relevance and should be communicated to Access Seekers in a timely and transparent manner. This is discussed further below.
- 9.136 ComReg also notes that, on foot of its receipt and consideration of the SoC, it is open to ComReg to initiate a compliance investigation where it considers that a breach of Eircom's non-discrimination obligations may have occurred. In such cases, ComReg may also seek additional information from all concerned parties thereby providing an opportunity to express views on the relevant issues.
- 9.137 The obligation upon Eircom to comply with the non-discrimination obligations ultimately rests with Eircom and Eircom have the particular expertise and knowledge of their own systems and processes to allow any potential risks of non-compliance to be more readily identified. Compliance can be supported through Eircom applying that knowledge and expertise within an effective internal regulatory governance structure, thereby ensuring that issues which may give rise to potential discrimination are identified, monitored and rectified by Eircom itself.
- 9.138 The SoC allows ComReg to have oversight of the nature, operation and effectiveness of Eircom's internal regulatory governance structures. However, ComReg agrees with some Respondents views that particular outcomes arising from such application by Eircom of its internal regulatory governance can have significance for Access Seekers as the outcomes of such governance by Eircom may give rise to the need to amend FACO products, services, or facilities in order to remedy (or ameliorate against the risks of) compliance concerns.

- 9.139 When such issues arise and are identified by Eircom's internal governance processes ComReg is of the view that, in order to remain or come into compliance with its non-discrimination obligations, remedial action should immediately be taken by Eircom. A remediation plan, including timelines that reflect the prioritisation of the need to remedy the issue(s), must be put in place in order to remove the risk of or actual (or potential) non-compliance. In addition, interim measures must be put in place by Eircom, with immediate effect to remedy the risk of actual or potential non-compliance. Where, in the context of remedying these actual or potential compliance issues, the need to change FACO products services and facilities arises, ComReg's position is that the required remediation and the issue giving rise to it should be appropriately communicated to industry by Eircom.
- 9.140 In discussions with ComReg Eircom has voluntarily committed to communicate sufficient information regarding issues requiring remediation such that Access Seekers understand the issue that has been identified by Eircom and how Eircom will remedy the issue (where necessary) in relation to a whole or part change to a FACO product, service and facility. This information includes the timeline for remediation and the development required for the relevant FACO products, services and facilities.
- 9.141 As Eircom has made these voluntary commitments to ComReg, ComReg does not consider that it is necessary to impose an obligation on Eircom to publish this information at this time. However, ComReg will monitor Eircom's communications with Access Seekers in this regard and may consider whether the imposition of an obligation is ultimately required in order to ensure that an appropriate and reasonable level of information is being made available by Eircom to Access Seekers.
- 9.142 ComReg also notes that in the context of the proposed transparency obligations set out in the Consultation³⁷², ComReg sought to impose a requirement upon Eircom to publish information identifying and justifying any permissible differences between the products, services, facilities and processes as set out in the RIO and the comparable products, services, facilities and processes which Eircom provides to itself. Such permissible differences arise in an EoO environment and in a more restrictive way in an EoI environment.
- 9.143 ComReg is of the view that the combination of the transparency obligation to publish permissible differences combined with Eircom's commitment to voluntarily publish 'impermissible' differences and the plan for their resolution in effect provides an appropriate degree of transparency to Access Seekers. ComReg would also note that this published material, in effect, equates to key elements of some of the material provided to ComReg through Eircom's SoC. In order to ensure that the information on permissible differences provided by Eircom is of sufficient quality ComReg has imposed the obligation to ensure that it provides an appropriate level of detail to Access Seekers.

³⁷² See paragraph 10.12 of Appendix H in the Consultation.

Functional separation obligations should be imposed

9.144 As noted in paragraphs 9.120 to 9.122 above, ALTO, BT and Magnet considered that ComReg should impose functional separation obligations upon Eircom.

9.145 ComReg has considered Respondents' suggestion that a functional separation remedy should be imposed upon Eircom. The conditions under which ComReg may impose such a remedy are detailed under Regulation 14 of the Access Regulations where it is stated:

“Where the Regulator concludes—

(a) That the appropriate obligations imposed under Regulations 9 to 13 have failed to achieve effective competition, and

(b) That there are important and persisting competition problems or market failures identified in relation to the wholesale provision of certain access product markets,

it may as an exceptional measure, in accordance with Regulation 8(5), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.”

9.146 Regulation 14 is exercised where obligations imposed under Regulations 9 to 13 have failed to achieve effective competition. In this Decision, ComReg is imposing a range of remedies under Regulation 9 to 13 of the Access Regulations with a view to ultimately promoting effective competition in downstream markets. ComReg may consider, at an appropriate time, whether a strategic review of the overall effectiveness of both Eircom's own initiatives and the implementation of the obligations in this Decision (including the EoI/EoO and enhanced SoC obligations) is required, including whether or not the functional separation of Eircom's wholesale arm would lead to better competitive market outcomes.

Establishment of an independent adjudicator to facilitate swift resolution of issues

9.147 As noted in paragraph 9.123 above, Magnet sought the appointment of an independent adjudicator to more swiftly resolve complaints/issues arising with respect to potential compliance with non-discrimination obligations.

9.148 ComReg does not agree. ComReg has the function of investigating potential non-compliance by SMP operators with their regulatory obligations, either on its own initiative or in response to a dispute raised by an undertaking³⁷³. ComReg further notes that it seeks to investigate disputes as quickly as is possible, having regard to the particular circumstances of each case and in accordance with its published 2010 Dispute Resolution Procedures.

³⁷³ Pursuant to section 10 of the Communication Regulation Act 2002 (as amended) and Regulation 31 of the Framework Regulations 2011.

9.149 Should an undertaking consider that Eircom is non-compliant with its obligations, it should raise a dispute or complaint with ComReg.

ComReg's Position on Non-Discrimination Remedies

9.150 Having considered Respondents' views referred to in paragraphs 9.124 to 9.149 above ComReg has decided to amend its position as set out in the Consultation and to also impose an obligation of EoI in the particular circumstances outlined above.

9.151 ComReg considers that imposing an obligation of EoO in conjunction with an EoI obligation for SB-WLR in particular circumstances (namely where a SB-WLR and a NGA WBA service are being provided to an Access Seeker concurrently using a 'combined order') with the SoC obligation is the most balanced and proportionate approach to addressing the non-discrimination related competition problems identified in the FACO Markets at this time. ComReg therefore considers that other measures, such as functional separation or full EoI for all FACO product, services and facilities, would not be proportionate or justified at this time.

9.152 ComReg does not consider that requiring Eircom to provide copies of the SoC it provides to ComReg to third parties would be appropriate. However, ComReg notes that the material in the SoC could be used by Eircom to meet its transparency obligation to publish information on permissible differences between the products, services, facilities and processes as set out in the RIO and the comparable products, services, facilities and processes which Eircom provides to itself, should it choose to do so.

9.153 The non-discrimination obligations are set out in Section 9 of the Decision Instrument attached at Appendix H of this Decision.

Transparency Remedies

Position set out in Consultation

9.154 To address potential competition problems associated with asymmetry of information and to support access, non-discrimination, price control and other obligations, ComReg in the Consultation ComReg proposed³⁷⁴ to impose a range of transparency obligations upon Eircom including requirements to:

- (a) maintain and publish a reference interconnect offer ('**RIO**'), being a contractual offer, with this having to contain a minimum specified set of details, including prices and requirements with respect to Wholesale Switchless Voice ('**SV**') services;
- (b) put in place a RIO change management and advance change notification process, including with respect to product and price changes;
- (c) publish key performance indicators, performance metrics and service level agreements;

³⁷⁴ See paragraphs 9.164 to 9.205 of the Consultation.

- (d) put in place non-disclosure agreement procedures governing the legitimate sharing of confidential and/or commercial information; and
- (e) ensure transparency in its bills by making its wholesale invoices sufficiently disaggregated, detailed and clearly presented such that a wholesale customer can reconcile invoices to Eircom's RIO and RIO prices.

Respondents' Views

9.155 Four out of seven Respondents expressed views on ComReg's approach to the imposition of transparency remedies. Telefonica agrees with the transparency remedies proposed by ComReg. ALTO was generally supportive of ComReg's approach, while Eircom expressed a number of reservations. BT was also generally supportive, but made a comment regarding advance notification timeframes for non-price changes (discussed in paragraph 9.160 below).

9.156 ComReg has summarised the Respondents' main views below, grouping the key issues raised into identified themes, namely:

- (a) Lack of justification for the extension of the notification period for new product introductions (discussed in paragraph 9.157 below);
- (b) Notification timings under the transparency obligations should be aligned with the timeframe for providing the SoC under the non-discrimination obligations (discussed in paragraph 9.158 below); and
- (c) Lack of clarity regarding the requirement to publish Performance Metrics (discussed in paragraph 9.159 below); and
- (d) Ability for ComReg to mandate notification timeframes for proposed non-price amendments or changes to the RIO (discussed in paragraph 9.160 below).

Lack of justification for the extension of the RIO notification period for new product introductions

9.157 Eircom expressed the view that ComReg has not provided any justification or reasoning for the proposed changes to the existing transparency remedies which extended the minimum notification period to ComReg to 7 months for the changes to the RIO where new products were introduced. Eircom considered that the timescale should be reduced to no more than one month.

Notification timings under the transparency obligations should be aligned with the timeframe for providing the SoC under the non-discrimination obligations

9.158 Eircom also requests ComReg to reconsider the proposed timings for the submission of the SoC to ComReg and their interaction with the advance notification timescales concerning amendments to existing products or the introduction of new products as set out in the transparency obligations.

Lack of clarity regarding the requirement to publish Performance Metrics

9.159 With respect to the proposed transparency obligation requiring Eircom to make its Performance Metrics publicly available on its website, Eircom suggested that ComReg had not provided sufficient detail about the Performance Metrics themselves and noted that this was impacting its ability to assess the proportionality of the proposed obligation.

Ability for ComReg to mandate notification timeframes for non-price changes to Eircom's RIO

9.160 BT argued that the proposed text of the transparency obligations does not appear to address the situation where it is not possible for OAOs to implement a non-pricing change within six months. For example, when an FSP is contracted to provide its retail customers with a specific service level for a period that is longer than six months. To accommodate for such circumstances, BT suggested that ComReg must be able to mandate other notification timeframes.

ComReg's Assessment of Respondents' Views

9.161 ComReg assesses Respondent's views on the themes identified above in paragraph 9.156 as follows:

- (a) Lack of justification for the extension of the RIO notification period for new product introductions (discussed in paragraphs 9.162 to 9.165 below);
- (b) Notification timings under the transparency obligations should be aligned with the timeframe for providing the SoC under the non-discrimination obligations (discussed in paragraph 9.166 below);
- (c) Lack of clarity regarding the requirement to publish Performance Metrics (discussed in paragraph 9.167 to 9.169 below); and
- (d) Ability for ComReg to mandate notification timeframes for proposed non-price amendments or changes to the RIO (discussed in paragraph 9.170 below).

Lack of justification for the extension of the RIO notification period for new product introductions

- 9.162 ComReg disagrees with Eircom's view referred to in paragraph 9.157 above that the proposed 7³⁷⁵ month advance notice period for the introduction of new FACO products, services and facilities lacked justification. As set out in paragraph 9.187 of the Consultation the proposed notification period is to allow Access Seekers to factor in proposed product changes into their commercial decision making activities and to make any necessary adjustments or developments to billing or other systems, as appropriate. These advance notification requirement also provides a transparent mechanism according to which ComReg can *ex ante* monitor compliance by Eircom with its access, non-discrimination, pricing and other obligations. Recognising the added complexity and level of work that can be associated with Access Seekers availing of new products, ComReg clearly differentiated its approach with respect to changes to existing products on the one hand (which have advance notification timeframes of between 2-3 months), and new products on the other hand (which have advance notification timeframes of between 6-7 months).
- 9.163 ComReg also notes that it had proposed to impose an obligation on Eircom to meet reasonable requests for access, including requests for access to Next Generation Interconnection Services³⁷⁶, such as IP interconnection. Such a request (or similar requests for access to other Interconnection Services), were it to be met, would be likely to involve significant changes to the existing circuit switched interconnection regime and, therefore, would warrant the 7 month advance notification period in order to allow Access Seekers to adapt to such.
- 9.164 However, ComReg acknowledged within the proposed obligation that a one-size-fits-all advance notification timeframe may not be appropriate in all circumstances and allowed for a degree of flexibility whereby ComReg can, at its discretion and having regard to the circumstances of each case, reduce the advanced notification period for new products. In exercising this discretion, ComReg will, amongst other things, seek to balance the interests of both Eircom and Access Seekers having regard to its statutory objectives and functions. ComReg would also note that where circumstances require a longer publication period it can, at its discretion, extend the publication period as required.
- 9.165 ComReg, therefore, intends to maintain the proposed 7 month advance notification timeframe for RIO amendments with respect to the introduction of new products, to require a 3 month notification period for non-price changes to existing products and to allow for a degree of flexibility where required.

³⁷⁵ Eircom is to make any proposed amendments publicly available at least six (6) months in advance of their coming into effect, with ComReg receiving notification of such one (1) month prior to this (totalling seven months in advance).

³⁷⁶ Defined in the Draft Decision Instrument in Appendix H of the Consultation as "...circuit switched based interconnection used for the conveyance of FVCO and includes CSI/H, IBI/H ISI/H, and CG Interconnection Paths;"

Notification timings under the transparency obligations should be aligned with the timeframe for providing the SoC under the non-discrimination obligations

9.166 Given ComReg is maintaining the 6 to 7 month advance notification period (as appropriate) for RIO amendments with respect to the introduction of new products, and given this timeframe was already aligned with the timeframe in the non-discrimination obligation concerning the provision of a SoC, ComReg does not propose to make any changes to this obligation. ComReg does not therefore agree with Eircom's position as referred to in paragraph 9.158 above,

Lack of clarity regarding the requirement to publish Performance Metrics

9.167 With respect to Eircom's suggestion of a lack of clarity regarding the requirement to publish Performance Metrics ComReg does not accept that this is the case.

9.168 ComReg notes that the Draft Decision Instrument set out in the Consultation clearly defined Performance Metrics³⁷⁷ as:

"...the aggregate performance levels achieved by Eircom within a specified period, as calculated in accordance with the methodology and service parameter definitions set out in its Service Level Agreements"

9.169 Performance Metrics measure Eircom's performance in achieving the service parameters set out in its SLAs. i.e., how Eircom actually performs in achieving the targets/parameters set out in its SLAs. ComReg notes that eircom currently measures and assesses its performance against Performance Metrics for SB-WLR for individual Access Seekers, including for use in calculating whether or not any SLA service credits fall due for payment to Access Seekers. ComReg considers that aggregating these measurements at an industry level and publishing them on its publicly available website does not constitute a disproportionate burden.

Ability for ComReg to mandate notification timeframes for non-price changes to Eircom's RIO

9.170 With respect to BT's comments referred to in paragraph 9.160 above, ComReg would note that the advance notification timeframes being imposed under the transparency obligations³⁷⁸ with respect to non-pricing changes can, *".....be varied with the agreement of ComReg or at ComReg's discretion."* Where circumstances require a longer publication period ComReg can, at its discretion, extend the publication period as required.

ComReg's Position on Transparency Remedies

9.171 Having considered Respondents' views in paragraphs 9.155 to 9.170 above ComReg has decided to maintain its position as set out in the Consultation and to impose the associated transparency obligations upon Eircom without change.

³⁷⁷ See Appendix H of the Consultation, Section 2.1 of Draft Decision Instrument.

³⁷⁸ See section 10.8 of the Decision Instrument attached at Appendix H of this Decision.

9.172 In this respect, ComReg has decided that the 7 month advance notice period for the introduction of new FACO products, services and facilities is appropriate, with this timeframe being aligned with the timeframe in the non-discrimination obligation concerning the provision of a SoC.

9.173 The transparency obligations are set out in Section 10 of the Decision Instrument attached at Appendix H of this Decision.

Price Control and Cost Accounting Remedies

Position set out in the Consultation

9.174 In the Consultation ComReg proposed a set of price control³⁷⁹ and cost accounting³⁸⁰ obligations to address potential competition problems associated with pricing, including excessive pricing and margin squeeze. These proposed measures includes:

- (a) A general cost accounting obligation and a general cost orientation obligation.
- (b) A price control obligation of cost orientation based on a TD-FL LRAIC+^{381 382} methodology and model in relation to the FVCO component of SB-WLR and Current Generation Interconnection Services³⁸³. The cost orientation methodology is to be further examined in a Separate FVCO Price Control Consultation³⁸⁴. For the avoidance of doubt Next Generation Interconnection Services would be covered by the general cost orientation obligation.³⁸⁵

³⁷⁹ See paragraphs 9.214 to 9.270 of the Consultation.

³⁸⁰ See paragraphs 9.271 to 9.273 of the Consultation.

³⁸¹ Top Down-Forward Looking Long Run Average Incremental Cost+.

³⁸² See paragraphs 9.222 to 9.231 of the Consultation.

³⁸³ See paragraphs 9.232 to 9.233 of the Consultation.

³⁸⁴ Amongst the issues to be considered in this consultation included (a) whether the methodological approach of Top-Down LRAIC+ as the basis of a price control for FVCO remains appropriate (as per the 2007 Decision); (b) whether and how the price control methodology for FVCO should be adjusted in light of the non-recovery of common costs by Eircom through FTRs; and (c) consult on the modelling parameters to support the appropriate cost orientation obligation. At the time ComReg anticipated issuing the Separate FVCO Price Control Consultation in Q2 2014. However, this is now expected to be published in Q4 2015 with modelling work ongoing.

³⁸⁵ See section 12.2 of the draft Decision Instrument attached to Appendix H of the Consultation.

- (c) A price control obligation of cost orientation for calls to non-geographic numbers (sometimes referred to as calls to Number Translation Codes or '**NTCs**'), whereby Eircom is allowed to retain the costs not only of FVCO (based on TD-FL LRAIC+ above), but also additional charges that relate to an uplift or 'retention' that is intended to allow Eircom to recover its reasonable billing costs associated with the service; and an additional bad debt surcharge to reflect the higher incidence of bad debt for calls to certain non-geographic numbers (together known as the '**Retention Rate**'³⁸⁶).
- (d) A price control obligation of cost orientation with respect to co-location and order handling process costs that requires Eircom to ensure that the charges for such services recover no more than its actual incurred costs adjusted for efficiencies (plus a reasonable rate of return on investment)³⁸⁷.
- (e) A price control obligation of cost orientation with respect to order handling process charges associated with Eircom's supply of SB-WLR³⁸⁸. Similar to co-location charges above, it was proposed that order handling process costs associated with SB-WLR should be based on the likely actual costs incurred by Eircom, adjusted for efficiencies, plus a regulated rate of return (based on the Weighted Average Cost of Capital or the '**WACC**' as set by ComReg).
- (f) A retail minus 'X' price control obligation whereby Eircom must provide WLR to Access Seekers at a price that is at least 14% below Eircom's retail line-rental price³⁸⁹. Other price control options for WLR such as cost orientation would be examined in a Separate Access Network Pricing Consultation³⁹⁰.

³⁸⁶ More specifically, the Retention Rate refers to the administrative costs associated with the provision of FVCO to non-geographic numbers and is comprised of billing, credit control, cash collection and management of bad debt.

³⁸⁷ See paragraphs 9.234 to 9.236 of the Consultation.

³⁸⁸ These include those currently set out in tables 3 and 4 in service schedule 401 or Eircom's RIO and its RIO Price List.

³⁸⁹ See paragraphs 9.243 to 9.257 of the Consultation.

³⁹⁰ At the time ComReg anticipated issuing the Separate Access Network Pricing Consultation in Q4 2014. The modelling work has recently been updated to take account of the latest financial figures for the year ended 30 June 2014 which have only recently been finalised. On foot of this, the Separate Access Network Pricing Consultation issued in July 2015 (see "Eircom's Wholesale Access Services, Further specification and amendment of price control obligations in Market 4 and Market 5 and further specification of price control obligation in Market 2, Consultation and Draft Decision, [ComReg Document 15/67](#), 3 July 2015")

- (g) A price control obligation of cost orientation for Ancillary Services on SB-WLR³⁹¹, including Low Value-Customer Premises Equipment Rental ('LV-CPER' whereby Eircom must ensure that it recovers no more than its actual incurred costs adjusted for efficiencies (plus a regulated rate of return set at the WACC)³⁹².
- (h) An obligation not to cause a margin squeeze, including with respect to an SB-WLR Margin Squeeze³⁹³ (the details of which will be consulted upon in the NRT Margin Squeeze Consultation³⁹⁴) and a Wholesale SV³⁹⁵ Margin Squeeze³⁹⁶ (the parameters of which will be further considered and consulted upon in the Separate FVCO Price Control Consultation).
- (i) Cost accounting obligations³⁹⁷ as specified in the 2010 Accounting Separation Decision³⁹⁸.

9.175 In proposing the above obligations, ComReg noted that a number of separate pricing related consultations were to be published over the following months which may have a bearing on the proposed price control obligations within the period covered by this market review³⁹⁹. In particular,

³⁹¹ These include the various calling features (such as call barring, call waiting, caller line identity restriction) which are set out in section 4.2 and 4.3 of the Eircom document entitled "Single Billing through Wholesale Line Rental Product Description" (issue 2.2, dated 5 December 2007) as may be amended from time to time and as is published on Eircom's wholesale website.

³⁹² See paragraphs 9.237 to 9.238 of the Consultation.

³⁹³ See paragraphs 9.262 to 9.263 of the Consultation.

³⁹⁴ A detailed margin squeeze test to prevent a SB-WLR Margin Squeeze was not being imposed in the Consultation. It was, however, to be subject to specification through a separate consultation which was then expected to issue in early Q2 2014. The consultation subsequently issued in Q3 2014, namely "Replicability Test: Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5, Consultation, [ComReg Document 14/90](#), August 2014" ('**2014 NRT Margin Squeeze Consultation**'). A decision has not yet been made on foot of the 2014 NRT Margin Squeeze Consultation. ComReg has recently published an update in relation to this work-stream ("Information Notice, Update to Consultation ComReg document 14/90, [ComReg Document 15/48](#), 8 June 2015" ('**2015 NRT Margin Squeeze Update**')) in which it has signalled that given a number of developments, the matter will now be considered in parallel with the conduct of market analyses with respect to Market 3a/3b as identified in the 2014 Recommendation. The consultation with respect to the market analysis of markets 3a/3b is expected to issue in Q1 2015.

³⁹⁵ See paragraphs 9.264 to 9.270 of the Consultation.

³⁹⁶ Wholesale SV services are end-to-end wholesale voice services purchased by alternative FSPs so that they can provide RFTS without the need to have their own switching or interconnection infrastructure.

³⁹⁷ See paragraphs 9.271 to 9.260 of the Consultation.

³⁹⁸ Accounting Separation and the Cost Accounting Review of Eircom Limited, [ComReg Document 10/67](#), Decision D08/10, August 2010 ('**2010 Accounting Separation Decision**').

³⁹⁹ See footnotes 384, 390 and 394 above.

- (a) ComReg noted that it will consider in a separate and subsequent consultation whether to introduce a specific margin squeeze test in the FACO Markets (and elsewhere) which, if effectively implemented, could allow for the removal of the NRT currently specified in the Retail Narrowband Access ('RNA') market (the '**NRT Margin Squeeze Consultation**').
- (b) ComReg proposed to continue existing margin squeeze test obligations with respect to Wholesale SV services, and to publish a separate consultation at a later date which would examine the parameters of this test, as well as the modelling parameters and other issues (including the recovery of common costs) associated with the cost orientation obligation associated with the FVCO component of SB-WLR (the '**Separate FVCO price Control Consultation**').
- (c) ComReg noted that it would also consult separately at a later date on whether the existing 'retail minus' price control obligation for the WLR element of SB-WLR remains appropriate (the '**Separate Access Network Pricing Consultation**'⁴⁰⁰).

Respondents' Views

- 9.176 Seven Respondents expressed views on ComReg's approach to the imposition of price control remedies. Telefónica agreed with ComReg's approach, whereas the other Respondents disagreed in part with ComReg's approach. Magnet, Sky, Vodafone, BT, and ALTO all argued that the SB-WLR price control should be based on a cost oriented methodology. Eircom disagreed with ComReg's approach, and made a number of comments which are considered below.
- 9.177 ComReg has summarised the Respondents' main views in detail below, grouping the key issues raised into the identified themes, namely:
- (a) The combination of pricing remedies may lead anomalous results in HCA separated accounts (discussed in paragraph 9.178 below);
 - (b) FVCO price approach can give a distorted picture of the profitability of Eircom's FVCO and FVCT services (discussed in paragraph 9.179 below);
 - (c) WLR Retail minus 'X' price control should apply to all related WLR services (discussed in paragraph 9.180 below);
 - (d) WLR price control based on retail minus 'X' should move to one of cost-orientation (discussed in paragraphs 9.181 to 9.187 below);
 - (e) Is cost orientation an appropriate price control for certain Ancillary Services on SB-WLR? (discussed in paragraphs 9.188 to 9.191 below);
 - (f) Retail minus 'X' price methodology for WLR and ancillary services implies competitive RFTS market (discussed in paragraph 9.192 below);

⁴⁰⁰ See footnote 390 above where it is noted that the Separate Access Network Pricing Consultation has been recently published.

- (g) Lack of consistency between retail minus and cost oriented price controls (discussed in paragraphs 9.193 below);
- (h) Greater clarity is required regarding the approach on margin squeeze obligations (discussed in paragraphs 9.194 to 9.196 below); and
- (i) The relationship between cost accounting obligations and accounting separation obligations was unclear with the implementation of cost accounting obligations likely to be problematic (discussed in paragraphs 9.197 to 9.198 below).

The combination of pricing remedies may lead anomalous results in HCA separated accounts

9.178 Eircom argues that the combination of pricing remedies proposed by ComReg is unnecessary, unreasonable, and disproportionate. Eircom argues that the approach may lead to anomalous results in the Historical Cost Accounts ('HCA') separated accounts. In addition, Eircom argues that the prices arising from these inconsistent approaches could lead to a significant under-recovery or over-recovery of the relevant efficiently incurred costs.

FVCO price approach can give a distorted picture of the profitability of Eircom's FCVO and FVCT services

9.179 Eircom noted that, owing to the way in which historically-incurred costs must be presented in its separated accounts, the concurrent application of a LRAIC+ cost methodology to FVCO, and a pure LRIC cost methodology to fixed voice call termination ('FVCT'), may have the effect of:

- making wholesale voice call origination look artificially profitable in Eircom's separated accounts; and
- making wholesale voice call termination look artificially loss-making in Eircom's separated accounts.

WLR Retail minus 'X' price control should apply to all related WLR services

9.180 Eircom considered that, having regard to the factors identified below, ComReg's proposed retail-minus 'X'⁴⁰¹ price control methodology for the WLR component of SB-WLR should be applied to all elements relating to WLR, including ancillary services and that available resources for costing work should be focused on bundles and NGA:

- (a) Eircom's retail unit costs, as a percentage of retail revenue, have increased.
- (b) It's not clear whether the 14% margin is correct for both the PSTN and ISDN products (LL FACO and HL-FACO), the associated connection and rental activity, as well as when services are sold within a bundle compared with services sold outside bundles.

⁴⁰¹ The 'X' is the difference/margin between Eircom retail price for line rental and the price charged for the WLR component of SB-WLR. 'X' is currently set at 14%.

- (c) The Net Revenue Test ('**NRT**') itself should allay any concerns that using an approximate margin could lead to margin squeeze.
- (d) The weighted average revenue for WLR will be considerably lower than 86% of the retail prices applicable to such lines for the previous (2013/14) and current (2014/15) financial year because of the €3 pricing discount on WLR (applying where WLR is sold with NG wholesale broadband) ('**€3 WLR Discount**') in Large Exchange Areas ('**LEAs**').

WLR price control based on retail minus 'X' should move to one of cost-orientation

- 9.181 ALTO, Vodafone, BT, Magnet and Sky all similarly argued that ComReg should replace the existing retail minus price control for WLR with a cost oriented price control.
- 9.182 ALTO and BT submitted that a retail-minus pricing approach for WLR is insufficient to prevent Eircom from engaging in anti-competitive pricing behaviours, particularly as ComReg was not imposing any obligations on Eircom with respect to its NG FACO. ALTO and BT both considered that the planned Separate Access Network Price Control Consultation should be expedited, in light of the then recent Eircom announcement to remove the €3 WLR Discount. BT also argues that the retail-minus price control provides Eircom with a substantial margin, and therefore does not represent an efficient price (suggesting that ComReg implied in paragraph 9.144 of the Consultation that this price was efficient).
- 9.183 BT suggested that, through the effective WLR price increase (as a consequence of the removal of the €3 WLR Discount), Eircom may be attempting to raise rival's costs of supplying RFTS, whilst simultaneously launching its own "retail only" Managed VOB based NG FACO solution. BT argues that, under the retail minus price methodology, there is potential for margin squeeze to occur.
- 9.184 Magnet submitted that a cost oriented price control would ensure that the price control is accurate, would recognise the link between LLU and WLR prices, and would encourage and enable competition.
- 9.185 Sky considered that ComReg should, in the Separate Access Network Price Control Consultation, impose an obligation for cost oriented WLR. Sky presented various arguments for cost oriented WLR, which ComReg is considering in the context of that separate consultation.

- 9.186 However, Sky considers that, as well as carrying out the Separate Access Network Price Control Consultation, ComReg should now impose a high-level cost orientation obligation on Eircom through the FACO Decision. In doing so, Sky considers that ComReg should maintain a cost orientation regime that sets a price that is no higher than the current retail-minus price, until such time that ComReg has determined a specific cost oriented WLR price. Then, once a cost oriented rate for WLR is determined through the Separate Access Network Price Control Consultation, ComReg should require Eircom to rebalance charges so as to take account of the difference (any overpayment) between the prevailing retail minus price control and the new cost oriented price.
- 9.187 Vodafone considered that anchoring the WLR price to the retail line rental price provides too much scope for Eircom, the SMP operator, to leverage its wholesale market power into the RFTS market. According to Vodafone, this is typified by the recent proposals by Eircom to withdraw the €3 WLR Discount, which amount to an increase in Access Seekers' wholesale costs that will be passed on by Eircom's wholesale customers in their retail prices.

Is cost orientation an appropriate price control for certain Ancillary Services on SB-WLR

- 9.188 Eircom considered that cost orientation could work for some ancillary services, in particular where there was no retail equivalent of the product or there is an analogous LLU. In other cases, Eircom argued that cost oriented pricing was not workable. For example, Eircom argued that cost oriented pricing for Customer Premises Equipment ('CPE') or certain call management services was inappropriate. According to Eircom, this is because the level of cost analysis required to separately identify the appropriate allocations of network, wholesaling, and retailing costs to the multitude of individual ancillary services (as distinct from the WLR services) cannot be justified by the potential level of end-user benefit to be derived from a move to cost oriented wholesale prices.
- 9.189 Applying a cost-oriented price control to Ancillary Services on SB-WLR, coupled with a retail minus obligation for the WLR element of SB-WLR carries a risk that Eircom's revenues from the entire SB-WLR service will not allow for the recovery of efficient costs of delivering the service, including an appropriate return on the capital employed.
- 9.190 The proposed remedy would be likely to prove very time-consuming for Eircom, and would probably also have knock-on effects on the costing model and its separated accounts. Eircom would need to undertake more detailed reviews of less material services, and would probably be required to define additional detailed studies to allocate costs at a more granular level.
- 9.191 BT argued that the price of Intelligent Network dips⁴⁰² should be cost orientated.

⁴⁰² IN Dips is a an intelligent network solution designed to address how a telephone call should be connected to its destination or called number in particular circumstances (for example, calls to non-geographic numbers).

Retail minus 'X' price methodology for WLR and ancillary services implies competitive RFTS market

9.192 Eircom argued that the retail minus 'X' price methodology proposed by ComReg for WLR and ancillary services implies that there is sufficient competition for these products.

Lack of consistency between retail minus and cost oriented price controls

9.193 Eircom argues that generally there is a lack of consistency between the proposed WLR retail-minus price methodology and the cost oriented methodology proposed for Ancillary Services on SB-WLR. In this respect, Eircom argues that by proposing (in paragraph 9.239 of the Consultation) that retail minus price control should be applied in respect of the underlying rental elements of SB-WLR, ComReg is implicitly accepting that there is sufficient competitive pressure at the retail level for the relevant downstream retail line rental services. Since ancillary services can only be sold to customers who also take the line rental, Eircom argues that it is not reasonable to propose that the degree of retail competition for the ancillary services is sufficiently less so to justify a separate, cost oriented, price control for a wholesale service that amounts to the simple re-sale of the retail equivalent.

Greater clarity is required regarding the approach on margin squeeze obligations

9.194 Regarding the transfer of the NRT obligation from the RNA markets to the FACO Markets, Eircom considers that an NRT would be applied in a subtly different way at the wholesale level in comparison to its application at the retail level, in that the focal point for the assessment will change to test given wholesale product sets and whether the wholesale prices are too high against a fixed retail revenue (whereas the case previously has been the reverse whereby the retail product revenue is tested against the relevant cost of the wholesale network inputs underpinning the retail product). Eircom considered this to be an important issue which required greater clarity and detail in terms of how ComReg would intend to apply the margin squeeze test, so that the impact of the proposal is fully transparent. Eircom argues that stakeholders should have an opportunity to comment on the details of ComReg's proposed approach.

9.195 ALTO argues that Eircom has an incentive to raise the price of SB-WLR in parallel with the launch of a VOIP service.

9.196 BT argued that Eircom has a significant margin between the SB-WLR price and its underlying network costs, both as a standalone product and within a broadband bundle. BT also noted a risk that the margins of Eircom's SB-WLR customers could be squeezed if Eircom provided VOIP. BT also noted that a margin squeeze could arise from loyalty promotions offered by Eircom to its retail customers⁴⁰³.

⁴⁰³ However, in BTs view the primary flaw in the current regulations is that WLR is not cost orientated hence it does not convey the correct signals for other to invest.

The relationship between cost accounting obligations and accounting separation obligations was unclear, with the implementation of cost accounting obligations likely to be problematic

- 9.197 Eircom submitted that the cost accounting system should be considered by ComReg alongside the published Separated Accounts and other regulated accounts. Eircom considers that the Cost Accounting and Separated Accounting sections of the Consultation were confusing, in that it is not clear what is required of Eircom. Eircom cites an example where ComReg refers to maintaining the framework mandated by the 2010 Accounting Separation Decision, while at the same time referring to the need to ensure that Eircom “maintains” a costing accounting model at the appropriate level.
- 9.198 Eircom also submitted that it would face a number of difficulties if it were required to prepare a statement to show the revenues and costs split between the proposed HL-FACO Market and LL-FACO Market, citing the following issues:
- (a) Eircom does distinguish between ISDN FVCO and PSTN FVCO.
 - (b) Eircom does not split retail call traffic between ISDN Basic Rate Access ('**BRA**') and non-BRA traffic;
 - (c) Eircom has only one set of call routing factors for each call-type, and might need to develop separate route factors for the HL-FACO Market and LL-FACO Market in order to meet the proposed obligations. This would be of significant cost, and would be wasteful;
 - (d) the low materiality of the HL-FACO Market (in terms of its size relative to the LL-FACO Market) is likely to increase the level of the audit scrutiny (and cost) across all the markets (because the materiality thresholds tend to be driven by the revenues and costs of the smaller markets);
 - (e) cost oriented prices for low materiality WLR ancillary services and provisioning/repair services will require more effort in cost allocations and audit review;
 - (f) The proposed remedy would be likely to prove very time consuming for Eircom, and would probably also have knock on effects on the cost accounting model and separated accounts. This is because Eircom would need to undertake more detailed reviews of less material services, and would probably be required to define additional detailed studies to allocate costs at a more granular level.

ComReg's Assessment of Respondents' Views

- 9.199 ComReg assesses Respondent's views on the themes identified in paragraph 9.177 above as follows:
- (a) The combination of pricing remedies may lead anomalous results in HCA separated accounts (discussed in paragraphs 9.201 to 9.202 below);

- (b) FVCO price approach can give a distorted picture of the profitability of Eircom's FVCO and FVCT services (discussed in paragraphs 9.203 to 9.205 below);
- (c) WLR Retail minus 'X' price control should apply to all related WLR services (discussed in paragraphs 9.206 to 9.212 below);
- (d) WLR price control based on retail minus 'X' should move to one of cost-orientation (discussed in paragraphs 9.213 to 9.231 below);
- (e) Cost orientation is not an appropriate price control for certain Ancillary Services on SB-WLR (discussed in paragraphs 9.232 to 9.235 below);
- (f) Retail minus 'X' price methodology for WLR and ancillary services implies competitive RFTS market (discussed in paragraphs 9.236 to 9.238 below);
- (g) Lack of consistency between retail minus and cost oriented price controls (discussed in paragraphs 9.239 to 9.245 below);
- (h) Greater clarity is required regarding the approach on margin squeeze obligations (discussed in paragraphs 9.246 to 9.247 below); and
- (i) The relationship between cost accounting obligations and accounting separation obligations was unclear with the implementation of cost accounting obligations likely to be problematic (discussed in paragraphs 9.248 to 9.249 below).

9.200 At the outset, however, it is important to note that the specific and general price control obligations imposed in this paper form part of a broader approach that has been or will be supplemented by a number of separate consultations over coming months (as identified above⁴⁰⁴). As such, interested parties have had or will have an opportunity over coming months to provide input on the details of the relevant price controls discussed in the Consultation and this Decision.

The combination of pricing remedies may lead anomalous results in HCA separated accounts

9.201 ComReg does not agree with Eircom's views in paragraph 9.178 above that ComReg's proposed price control obligations would lead to anomalous results in the HCA Separated Accounts. ComReg acknowledges that there may be reporting discrepancies in the HCA Separated Accounts as a result of regulatory price control obligations imposed on Eircom. However, this is based on the fact that HCA do not take into account efficiency adjustments or other regulatory pricing adjustments such as considering an appropriate Modern Equivalent Asset ('MEA') for efficiency and investment considerations. As such, it is not unusual to have reporting discrepancies between how regulated prices are derived and reported and actual HCA accounts. For example, regulated prices can be based on forward looking incremental costs whereas HCA are based on historical costs. ComReg considers that this is merely a presentation and reconciliation issue.

⁴⁰⁴ See paragraphs 9.174 and 9.175 above.

9.202 ComReg does not therefore consider that this issue needs to result in changes to the proposed price control obligations.

FVCO price approach can give a distorted picture of the profitability of Eircom's FVCO and FVCT services

9.203 As noted in paragraph 9.179 above Eircom suggested that the concurrent application of a LRAIC+ cost methodology to FVCO, and a pure LRIC cost methodology to FVCT means that FVCO will appear artificially profitable relative to FVCT, the latter appearing to be artificially loss-making.

9.204 ComReg does not consider that there is a risk of under or over recovery from this concurrent approach and, at this point in time, does not consider that this issue needs to result in changes to the proposed price control obligations. ComReg proposed a cost oriented price control of a LRAIC+ for FVCO based on efficiently incurred costs, which are distinctly separate from Eircom's reported historical costs.

9.205 The implications for FVCO (in terms of Eircom's overall cost recovery) as a consequence of moving to a pure LRIC cost orientation price control for FVCT (the latter required under the 2012 Termination Rates Decision⁴⁰⁵) will be subject to consideration in the Separate FVCO Price Control Consultation expected to issues in Q4 2015.

WLR Retail minus 'X' price control should apply to all related WLR services

9.206 As noted in paragraph 9.180 above Eircom considered that, having regard to a number of factors, ComReg's proposed retail-minus 'X' price control methodology for the WLR component of SB-WLR should be applied to all elements relating to WLR including ancillary services. ComReg has considered below each of the factors identified by Eircom in support of its view.

⁴⁰⁵ Mobile and Fixed Voice Call Termination Rates in Ireland, Response to Consultation and Decision, [ComReg Document 12/125](#), Decision D12/12 (the '2012 Termination Rates Decision').

- 9.207 In relation to Eircom's comments that its retail unit costs have increased as a percentage of retail revenue, as noted in the Consultation⁴⁰⁶, the 14% 'X' parameter value has been calculated based on Eircom's HCA accounts, adjusted for efficiencies where relevant, and uses an Equally Efficient Operator ('EEO') cost standard. ComReg notes that according to Eircom's HCA accounts for the financial years ended 2013 and 2014 (without adjusting for possible efficiencies) it shows that Eircom's retail costs associated with the provision of 'narrowband access'/RFA (in essence being its self-supply of WLR) accounted for approximately 16.7% and 16.5% of the total retail price respectively (this is an increase from 2011 and 2012 where it then accounted for 14% and 15% respectively). This is suggestive that the existing 'X' value of 14% may require review and this issue will be considered further by ComReg, including as part of the ongoing Separate Access Network Pricing Consultation. It is important to note that the X-Parameter represents only the retail margin for WLR and, in practice, Access Seekers are likely to bundle additional retail services with it, such as RFVC, which may increase their overall retail margin. ComReg considers that on an interim basis, pending the conclusion of the ongoing Separate Access Network Price Control Consultation and/or having regard to the appropriateness of the level of the 'X' parameter by reference to costs derived from Eircom's HCA accounts and/or any changes in Eircom's wholesale WLR charges, the current margin between WLR and retail line rental of at least 14% remains appropriate.
- 9.208 With respect to Eircom's comments that it was unclear whether the 14% margin is correct for both the PSTN and ISDN products (LL FACO and HL-FACO) and associated services, ComReg notes that this is subject to consideration in the ongoing Separate Access Network Price Control Consultation, which will examine the costs associated with these individual services in greater detail, including whether the 14% retail margin is appropriate. In the meantime, ComReg will continue to impose an obligation on Eircom to apply a 14% margin across the range of services.
- 9.209 ComReg does not agree with Eircom's comments that the presence of the NRT negates the need for the retail minus 'X' price control for the WLR component of SB-WLR. The retail-minus control between the retail line rental price, and the WLR price, ensures that a margin squeeze does not occur between these standalone products. Whereas the NRT is a complementary test designed to ensure that no margin squeeze occurs when retail line rental is sold as part of a bundle of services. Additionally, relying solely on the presence of the NRT would not, in the absence of effective independent⁴⁰⁷ downstream competition, prevent the risks of excessive pricing at the wholesale level.

⁴⁰⁶ See paragraph 9.23 of the Consultation.

⁴⁰⁷ By independent downstream competition, ComReg means downstream competition not reliant on access to SB-WLR.

- 9.210 Eircom argued that ComReg should take into account that the current average revenue for WLR is considerably less than 86% of the retail prices in the relevant period. ComReg acknowledges that this may have occurred due to the temporary and now withdrawn €3 WLR Discount applied by Eircom (only when it is bundled with WBA products). However, ComReg notes that pursuant to the 2014 Retail Access Market Review Decision⁴⁰⁸ ⁴⁰⁹ the WLR margin is required to be *at least* 14% below the retail line rental price. As such, ComReg considers that there is no issue in this regard, and it is merely a reconciliation issue (i.e., as a result of the €3 WLR Discount the accounts will represent a blended average margin between Retail Line Rental and WLR which is greater than 14%. Reconciling this should merely be a matter of identifying the proportion of lines which received the discount and that proportion which did not).
- 9.211 Having regard to the above and the subsequent discussion in paragraphs 9.232 to 9.235 and 9.239 to 9.245 below), ComReg does not agree that a retail minus price control obligation should apply to all elements relating to WLR, including ancillary services. ComReg considers that it is appropriate that the Ancillary Services on SB-WLR should be cost-oriented. However, until such time that ComReg has completed its Separate Access Network Pricing Consultation and subsequent decision, Eircom is to be obliged to set prices for Ancillary Services on SB-WLR no higher than current prices (which are derived using the retail-minus price control of at least 14% pursuant to the 2014 Retail Access Market Review Decision).
- 9.212 Having regard to the above, ComReg does not therefore consider that the issues raised need to result in changes to the price control obligations proposed in the Consultation.

WLR price control based on retail minus 'X' should move to one of cost-orientation

- 9.213 As noted in paragraphs 9.181 to 9.187, a number of Respondents considered that ComReg should introduce a cost-oriented price control now for the WLR element of SB-WLR instead of the retail-minus price control. As discussed above, ComReg has recently published a Separate Access Network Pricing Consultation that is considering that issue.

⁴⁰⁸ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 14/89](#), Decision D12/14, August 2014 ('**2014 Retail Access Market Review Decision**').

⁴⁰⁹ The 2014 Retail Access Market Review Decision effectively continued the Retail minus 14% price control obligation in the then 2007 RNA Decision.

- 9.214 With regard to BT's view that the 14% 'X' value for the retail minus price control provides Eircom with a substantial margin between the retail price of line rental and the actual underlying cost of supplying WLR, ComReg notes that BT has not provided evidence to support its view (although ComReg recognises the potential for the 'X' value not reflecting underlying retail costs in circumstances where this is not justified by Eircom). ComReg understands that this BT view is based, therefore, only on a high-level assessment of the underlying costs of WLR. As noted in paragraph 9.213, ComReg is undertaking a more comprehensive review of these costs as part of its ongoing Separate Access Network Pricing Consultation, potentially leading to an updated price control, as appropriate (where an adjustment to the existing 'X' value for the retail minus price control to ensure it reflects retail costs or a move to cost orientation will be considered).
- 9.215 In relation to BT's argument that the retail-minus price control does not prevent Eircom from engaging in price discrimination type behaviours to the detriment of its wholesale customers, ComReg notes that BT's view appears to be based on the fact that Eircom removed the €3 WLR Discount in the LEA. ComReg does not agree that this constitutes evidence of discrimination by Eircom in and of itself. In this respect, the €3 WLR Discount was a temporary discount for a specified period of time. It was transparent in that it was publicly notified and was available to all Access Seekers which met the terms and conditions of the promotion. As such, ComReg considers that neither the discount, nor its subsequent withdrawal from 1 January 2015 could be considered to be discriminatory in and of itself.
- 9.216 BT expressed concern that Eircom could squeeze the margins of BT's SB-WLR based retail customers with Eircom offering its retail customers a Managed VOB based RFTS at a lower price than BT's PSTN based retail service. BT argued that, to avoid this, the price of existing wholesale Eircom services should reflect any cost reductions enjoyed by Eircom retail arising from a switch to using Managed VOB.
- 9.217 ComReg notes that the scenario highlighted by BT could arise if:
- 9.218 Eircom retail offers Managed VOB at a discounted rate as part of a product bundle with broadband and other services.
- 9.219 Eircom retail offers standalone Managed VOB at a lower price than its standalone PSTN based retail line rental and calls products.
- 9.220 In terms of the likelihood of these scenarios arising, as discussed in Sections 3 and 4 of this Decision, Eircom has indicated that [X
[REDACTED]
- 9.221 There are certain Eircom exchange areas within which the supply of Managed VOB is unlikely to be commercially viable. In these areas, Eircom is likely to continue providing retail customers within PSTN-based RFTS services. Furthermore, it is likely that Managed VOB would be offered initially to Eircom RFTS customers that also purchase broadband, rather than to RFTS-only customers.

- 9.222 For these reasons, a significant proportion of Eircom's retail customers will be likely to continue to be provided with PSTN based RFTS (and a greater proportion, still, of its standalone RFTS customers).
- 9.223 In relation to the first scenario identified by BT above, ComReg has implemented remedies to prevent Eircom from imposing a margin squeeze via retail bundles. In particular, the 2013 Bundles Decision imposed an obligation on Eircom "*not to unreasonably bundle*", as did the 2014 Retail Access Market Review.
- 9.224 These obligations are applied by ComReg using a net revenue test ('**NRT**')⁴¹⁰ that assesses whether Eircom is complying with the obligation not to unreasonably bundle. This The NRT ensures that an appropriate margin is maintained between Eircom's retail bundle prices⁴¹¹, including bundles that have Managed VOB, and the combined price of the Eircom wholesale services that would be required by other FSPs to replicate that retail bundle. The NRT model requires that Eircom maintain a positive margin, which flexes as demand for various wholesale products evolves over time. For example, the NRT model allows Eircom retail to reduce its retail bundle prices when wholesale demand shifts from its line share ('**LS**') and Bitstream products (which are bundled with WLR) to SAB and full LLU.
- 9.225 This means that Eircom retail gains more freedom around its own retail pricing when its wholesale customers move up the ladder of investment. Therefore, Eircom has an incentive to encourage operators to invest in their own infrastructure, which might result in operators developing their own Managed VOB platforms.
- 9.226 In relation to the second scenario identified by BT, where a margin squeeze were to arise from the provision of standalone Managed VOB by Eircom, ComReg is not requiring Eircom to provide a NG FACO wholesale product or to pass on associated cost reductions in the price of existing Eircom wholesale services as suggested by BT.
- 9.227 The WLR margin is set at Eircom's retail line rental price minus at least 14% (as may be amended from time to time). Alternative FSPs may continue to avail of this service, or could ultimately switch to purchasing SAB or full LLU and providing Managed VOB (therefore, they face a similar decision to what Eircom faces). However, ComReg is examining the issue as to whether a separate margin squeeze test is required between an Eircom NG FACO wholesale product and WLR as part of the Separate Access Network Pricing Consultation.

⁴¹⁰ Further details on how this NRT is carried out by ComReg are available from ComReg upon request.

⁴¹¹ Where a bundle means either: a package of services, consisting of bundled Low Level Voice Access ('**LLVA**') and one or more other services, which is on offer or on sale by Eircom to End-Users; or a package of services, consisting of High Level Voice Access ('**HLVA**') and one or more other services, which is on offer or on sale by Eircom to End-Users. See the 2014 Retail Access Market Review Decision.

- 9.228 ComReg will also continue to monitor the roll-out of retail Managed VOB services by FSPs, and assess the impact of this development on the RFTS market and FACO Markets. As discussed above, ComReg has published a Separate Access Network Pricing Consultation in which it is considering, amongst other things, whether the existing retail minus 'X' price control for WLR should move to one of cost orientation. In this context, interested parties have an opportunity to submit further views on this issue.
- 9.229 With respect to Magnet's view noting the importance of establishing a link between the price controls for LLU and WLR, ComReg notes that there is already an existing price control remedy which addresses this issue. In this respect, pursuant to the 2013 Bundles Decision⁴¹² imposed a margin squeeze obligation upon Eircom which ensures that an appropriate economic space is maintained between WLR and LLU.
- 9.230 ComReg does not agree with Sky's view that ComReg should impose a high-level cost-orientation on Eircom for WLR from 1 January 2015 until such time as a model is developed. ComReg notes that it is not practical, pending the completion of the Separate Access Network Pricing Consultation, to impose a high-level cost orientation on Eircom for WLR. To determine an appropriate cost of this service is complex and ComReg considers that, given the materiality of this WLR product, that it would be more prudent at this time to maintain the retail minus 'X' control until such time as it is reviewed in the Separate Access Network Pricing Consultation. As noted above⁴¹³, however, the appropriateness of the 14% 'X' parameter value is subject to consideration of the costs derived from Eircom's HCA accounts.

⁴¹² 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 D04/13, February 2013 (the '2013 Bundles Decision')

⁴¹³ See paragraph 9.207 above.

9.231 Vodafone considered that anchoring the WLR price to the retail line rental price provides too much scope for Eircom, the SMP operator, to leverage its wholesale market power into the RFTS market citing the removal of the €3 WLR Discount as evidence of this. ComReg does not agree with this view. Pursuant to the 2014 Retail Access Market Review Decision the SB-WLR price control requires that WLR must be at least 14% less than the retail line rental price, with the temporary €3 WLR Discount (which was available to all Access Seekers) being consistent with this obligation. In this context, neither the retail minus 'X' price control nor the introduction of the €3 WLR Discount amounted to evidence that Eircom engaged in vertical leveraging behaviour. The minimum margin of at least 14% was maintained between retail line rental (RFA) and WLR during the €3 WLR Discount promotion period and re-aligned on its removal. Consequently, ComReg does not agree with Vodafone's view that this is an actual example of Eircom leveraging its dominance from the wholesale into the retail market. In addition, Eircom is subject to a retail price cap of CPI⁴¹⁴ minus 0% on its narrowband FVA prices and as such the scope for potential WLR price increases is somewhat, but not entirely, limited, particularly in circumstances where annual average changes in CPI have been low (however, ComReg equally recognises that this does not prevent excessive pricing behaviours). Furthermore, ComReg has proposed remedies aimed at preventing Eircom from imposing a margin squeeze on other FSPs (these are discussed further in paragraph 9.246 onwards) and, as outlined above, is considering the question of moving to a WLR cost orientation obligation as part of the ongoing Separate Access Network Pricing Consultation.

⁴¹⁴ Consumer Price Index.

Cost orientation is not an appropriate price control for certain Ancillary Services on SB-WLR

9.232 As referred to in paragraphs 9.188 to 9.191 Eircom cited a number of reasons to support its view that that applying cost oriented pricing to certain Ancillary Services on SB-WLR was not workable, in particular, to CPE and various call management services. ComReg disagrees with Eircom's view which appears to be largely based on the view that determining the cost to Eircom of providing these services is complex. While there may initially be additional analysis required to identify those underlying costs, it is not necessarily the case that such analysis may not be justified or beneficial to end-users, in particular, where any inefficiencies embedded in current prices could be identified and removed through this analysis. In addition, ComReg does not agree with Eircom's view that a cost-oriented price control on Ancillary Services on SB-WLR coupled with a retail minus price control obligation for the WLR element of SB-WLR carries a risk that resulting revenues would not allow for the recovery of efficiently incurred costs including an appropriate cost of capital. Both the retail minus and cost-orientation methodologies have the ability to ensure that efficiently incurred costs can be recovered (including an appropriate return on capital) due to the parameters and assumptions used in the pricing models. The Separate Access Network Pricing Consultation is considering these matters further. In the interim, with respect to WLR it is proposed to maintain current retail minus price control obligation and that Ancillary Services should be cost orientated (see paragraphs 9.206 to 9.212 above).

9.233 Furthermore, as noted by ComReg in the Consultation:

"In particular, given that these services are not likely to be subject to sufficient competitive pressure at the retail level, a retail minus price control obligation would not ensure that the associated wholesale charges are set at an efficient level, with the danger of Eircom pricing excessively with respect to their provision of such services to Access Seekers".⁴¹⁵

9.234 Consequently, ComReg maintains the view that it is appropriate that Ancillary Services on SB-WLR should be cost-orientated. While we recognise that we do not yet have a cost oriented price for Ancillary Services on SB-WLR, ComReg expects to have the Separate Access Network Pricing Consultation completed over the next 6 to 9 months, arising from which there will be a cost-based rate for Ancillary Services on SB-WLR. In the interim, and in the absence of such, ComReg considers that it is reasonable that Eircom should price Ancillary Services on SB-WLR at no more than the current prices (as derived using the retail minus price control of at least 14% pursuant to the 2014 Retail Access Market Review Decision).

⁴¹⁵ See paragraph 9.238 of the Consultation.

9.235 In relation to BT's view that the price of IN dips should be cost oriented, ComReg notes that to date⁴¹⁶, IN dips have been charged across all call volumes such that the impact on each call minute was immaterial. The proportionate cost of Eircom's IN platform support for regulated products has historically been incorporated in the costs of the respective regulated services (i.e., fixed wholesale call origination and fixed wholesale call termination). ComReg considers that this position should be maintained on a forward looking basis pending any further review by ComReg.

Retail minus 'X' price methodology for WLR and ancillary services implies competitive RFTS market

9.236 ComReg does not agree with Eircom's assertion that by proposing a retail-minus price control that ComReg "implicitly accepts that there is sufficient competitive pressure at the retail level for the relevant line rental services".

9.237 As discussed above, ComReg is committed to completing the Separate Access Network Pricing Consultation as soon as possible. However, in the interim and pending the ultimate decision (if appropriate), ComReg maintains the view that the retail-minus price control for SB-WLR remains appropriate.

9.238 As noted by Eircom, there are various factors that result in some products being more amenable to cost oriented price controls than others. These factors may include the complexity of modelling the underlying costs, and whether the wholesale element has a retail counterpart which the retail minus 'X' price can be pegged to.

Lack of consistency between retail minus and cost oriented price controls

9.239 As noted in paragraph 9.193 above, Eircom suggested a lack of consistency between the proposed WLR retail-minus price methodology and the cost oriented methodology proposed for Ancillary Services on SB-WLR.

9.240 ComReg does not agree with Eircom's view, including the Eircom suggestion that ComReg, by proposing a retail minus 'X' price control for the WLR element of SB-WLR, has implicitly accepted that there is sufficient competitive pressure at the retail level for the relevant downstream retail line rental services. As noted in paragraph 9.241 of the Consultation, ComReg highlighted that such a retail minus 'X' approach

"..... can, in the absence of effective competitive pressures at the retail level (say from competing service providers), potentially result in excessive retail, and in turn, wholesale charges being set."

9.241 The proposed adoption of a retail minus 'X' price control for WLR was effectively an interim measure pending the conduct and completion of the Separate Access Network Pricing Consultation, with ComReg noting in paragraph 9.2.46 of the Consultation that:

⁴¹⁶ See ComReg D14/03 on Fixed Interconnection Charging Mechanisms.

“.... a prospective change of the price control obligation to one of cost orientation, if justified, would require a detailed examination of the underlying cost structures of FSPs, and therefore would require significant input from FSPs on the WLR price control alone. ComReg considers that this is best addressed outside the scope of this Consultation ComReg has already started work on and intends to undertake an additional separate price control consultation later this year, which will examine various pricing aspects associated with the Eircom access network including other price control options for WLR such as cost orientation. In the context of WLR, this will examine options such as retail minus and cost oriented price control obligations, and assess which approach best fulfils regulatory objectives of, amongst others, promoting efficient investment and competition to the benefit of consumers”

- 9.242 Based on Respondents’ submissions, ComReg re-iterates its commitment to completing the Separate Access Network Pricing Consultation as soon as possible⁴¹⁷. This consultation delves in greater detail into some of the issues raised by Respondents with respect to the relative merits of applying a cost oriented approach. However, in the interim and pending the ongoing further consultation and further decision (if appropriate) ComReg maintains the view that the retail-minus price control for SB-WLR remains appropriate for now.
- 9.243 ComReg also does not accept Eircom’s argument that as Ancillary Services on SB-WLR (and Order Handling/transaction costs) can only be sold to customers who also purchase RFVA, it is unreasonable to propose that the degree of retail competition for the such services is sufficiently less such that it were to justify a separate cost oriented price control for a wholesale service that amounts to the simple re-sale of the retail equivalent service. In this respect, at the wholesale level, ComReg notes that once an Access Seeker purchases WLR, Eircom effectively becomes an unavoidable trading partner for other services associated with WLR, including Ancillary Services and Order Handling services. In this respect, Eircom faces incentives to charge excessive prices for such services and/or to charge on the basis of inefficiently incurred costs.
- 9.244 Furthermore, as noted above, the retail minus ‘X’ price control is an interim approach pending the conclusion to the Separate Access Network Pricing Consultation. However, ComReg would note that the imposition of the access remedy requiring Eircom to provide WLR is due to the lack of effective retail competition, absent regulation.

⁴¹⁷ As noted in Appendix D, the European Commission Response noted that the price control obligations that will be imposed in the FACO Markets implied a combination of retail minus, cost-orientation and margin squeeze obligations, and called upon ComReg to take the opportunity in future pricing consultations to streamline existing pricing remedies with a view to enhancing transparency and legal certainty for market players.

9.245 Furthermore, having regard to the competition concerns identified in Section 8 of the Consultation and pursuant to Regulation 13 of the Access Regulations, ComReg is not precluded from applying different price control remedies for WLR services on the one hand and Ancillary Services on SB-WLR (and transaction charges) on the other.

Greater clarity is required regarding the approach on margin squeeze obligations

9.246 With respect to Eircom's comments referred to in paragraph 9.194 that greater clarity and detail was required with respect to how ComReg intended to apply the margin squeeze test including Eircom's view that a margin squeeze test would be applied in a subtly different way at the wholesale level in comparison to its application at the retail level, ComReg notes that following the issue of the Consultation the 2014 NRT Margin Squeeze Consultation⁴¹⁸ was published dealing with such matters⁴¹⁹. Providing interested parties with an opportunity to comment on proposed detail of the margin squeeze obligations. ComReg is currently considering responses received in relation to this consultation (including from Eircom) and, having regard to the 2015 NRT Margin Squeeze Update, intends to further consider the matter in parallel with the conduct of the market analysis with respect to markets 3a/3b as identified in the 2014 Recommendation. In so doing, ComReg will continue to ensure clarity as well as minimising unnecessary complexity in the relationship between margin squeeze and other price control obligations in the FACO Markets as appropriate⁴²⁰.

9.247 With respect to comments from ALTO and BT regarding the risks of margin squeeze, these have been considered by ComReg in paragraphs 9.216 to 9.228 above.

⁴¹⁸ See footnote 394 above.

⁴¹⁹ As noted at paragraph 9.263 and elsewhere in the Consultation.

⁴²⁰ As noted in paragraphs 1.15 and 1.16 and in Appendix D, the European Commission Response called upon ComReg to take the opportunity in future pricing consultations to streamline existing pricing remedies with a view to enhancing transparency and legal certainty for market players.

The relationship between cost accounting obligations and accounting separation obligations was unclear, with the implementation of cost accounting obligations likely to be problematic

- 9.248 In relation to Eircom's concerns referred to in paragraph 9.197, in the 2010 Accounting Separation Decision ComReg restructured the cost accounting and accounting separation obligations in order to ensure that there is clarity surrounding these separate obligations. In the context of the 2010 Accounting Separation Decision⁴²¹ (which also sets out cost accounting 'rules'), ComReg notes that it has the discretion to mandate amendments to the structure of the separated accounts in order to ensure it is in a position to monitor and regulate relevant markets⁴²². As Eircom will be aware, in this respect, ComReg confers with Eircom annually in relation to required revisions to the accounts. Thus, the proposed cost accounting (and separated accounting) obligations do not differ from current practice.
- 9.249 With respect to Eircom's comments in paragraph 9.198 that allocating revenues and costs between the HL-FACO Market and LL-FACO Market would be problematic, ComReg does not agree. ComReg does not intend to mandate a split in costs and revenues associated with ISDN and PSTN traffic. ComReg will advise Eircom to the changes that are required to the structure of the accounts to facilitate the adequate identification of costs associated with certain ancillary services. Furthermore, with respect to Eircom's view that Eircom would need to undertake more detailed reviews of less material services, and would probably be required to define additional detailed studies to allocate costs at a more granular level would be very time consuming. ComReg does not agree. While ComReg requires Eircom to prepare and have audited separated accounts at a market level, the requirement to prepare and have audited accounts for particular services is determined annually by ComReg on a case-by-case basis. As such, such services which may or may not require either accounts or an audit annually and that this would be determined as part of ongoing work and review. Consequently, ComReg considers that there is not an undue regulatory burden.

ComReg's Position on Price Control and Cost Accounting Remedies

- 9.250 Having considered Respondents' views in paragraphs 9.199 to 9.249 above, ComReg has decided to maintain its position as set out in the Consultation and to impose the associated price control and cost accounting obligations upon Eircom, subject to a minor amendment.
- 9.251 The price control and cost accounting obligations are set out in Section 12 of the Decision Instrument attached at Appendix H of this Decision.

⁴²¹ Accounting Separation and the Cost Accounting Review of Eircom Limited, [ComReg Document 10/67](#), Decision D08/10, August 2010 ('**2010 Accounting Separation Decision**').

⁴²² See section 5.2.2 of the 2010 Accounting Separation Decision.

9.252 ComReg has highlighted above a number of separate pricing consultations which are being conducted or will be conducted over this market review period. ComReg notes the EC's views (as set out in the European Commission's Response) calling upon ComReg to streamline existing pricing remedies in the context of these future separate pricing consultations with a view to enhancing transparency and legal certainty for market players. ComReg will, in the conduct of these separate pricing consultations (and the associated decisions) seek to do so, having regard to the need to appropriately remedy identified competition problems in a manner which ultimately fosters the development of effective competition to the ultimate benefit of consumers.

Accounting Separation Remedies

Position set out in the Consultation

9.253 In the Consultation⁴²³, ComReg proposed to maintain existing obligations as set out under the 2010 Accounting Separation Decision.

Respondents' Views

9.254 Four out of seven Respondents expressed views on ComReg's approach to the imposition of price control remedies.

9.255 ALTO, BT and Magnet agree with ComReg's approach to imposing accounting separation remedies (Telefónica expressed general agreement with ComReg's proposed remedies). Magnet indicated that Accounting Separation obligations would be easier to monitor if Eircom's wholesale arm was functionally separated.

9.256 ComReg addresses Respondents' views on Accounting Separation Remedies under the theme identified in paragraph 9.257 below⁴²⁴.

Presentation of activity in the Separate Accounts will need to be amended in view of the changed boundaries of the Transit Market

9.257 Eircom argues that the way in which ComReg has redefined the Transit market may also have implications for the format of the Separated Accounts, and for the values attributed to each service category. For example, all or part of the revenue attributable to double tandem call origination may now appear in the call origination account as opposed to the call transit account.

⁴²³ See paragraphs 9.277 to 9.283 of the Consultation.

⁴²⁴ As ComReg has addressed arguments relating to functional separation in paragraphs 9.144 to 9.146 above it does not address Magnets' comment below regarding the impact of functional separation on Accounting Separation obligations.

ComReg's Assessment of Respondents' Views

- 9.258 Regarding Eircom's concerns above regarding the impact of the changes in the Transit Market definition on the format of the separated accounts, ComReg notes that similar issues were previously raised by Eircom in the context of the consultation process leading to the adoption of the 2010 Accounting Separation Decision.
- 9.259 Since then associated changes have been made to the format of the separated accounts without undue difficulty and ComReg expects this to be the case arising from the adoption of this Decision. ComReg will work with Eircom to ensure that this remains the case.

ComReg's Position on Accounting Separation Remedies

- 9.260 Having considered Respondents' view in paragraphs 9.258 to 9.259 above, ComReg has decided to maintain its position as set out in the Consultation and to impose the associated Accounting Separation obligations (as set out in the 2010 Accounting Separation Decision) upon Eircom without change.
- 9.261 The accounting separation obligations are set out in Section 11 of the Decision Instrument attached at Appendix H of this Decision.

Decision Instrument

Position set out in the Consultation

- 9.262 In the Consultation ComReg had set out a draft Decision Instrument⁴²⁵ which was designed to give legal effect to the proposed remedies. ComReg sought views as to whether the wording of the draft Decision Instrument (including the definitions and interpretations used) accurately captured the intentions expressed by ComReg in relation to the proposed remedies. ComReg noted that comments on the wording of the draft Decision Instrument would be addressed separately to comments on the proposed remedies themselves.

Respondents Views

- 9.263 Three of the seven Respondents provided views on the wording of the draft Decision Instrument, namely BT, Eircom and Magnet. All Respondents expressed views on the substance of the proposed remedies themselves which are set out above from paragraph 9.6 onwards.
- 9.264 BT and Magnet generally agreed with the language of the draft Decision Instrument.
- 9.265 Eircom noted that, overall, the draft Decision Instrument seemed clear and reflective of ComReg's intentions. Eircom had some additional comments on particular aspects of the wording.

⁴²⁵ See Appendix H to the Consultation.

- 9.266 Eircom considered that Section 11.1 of the draft Decision Instrument was unclear. Eircom argued that this Section should specify that the obligation to maintain separated accounts is imposed in respect of the relevant market.
- 9.267 Eircom noted that the SMP obligations referred to in Section 16.1(iv) of the draft Decision Instrument were first issued to Eircom by way of a direction letter. ComReg subsequently issued a WLR Information Notice⁴²⁶ advising interested parties that a direction letter had been issued. Eircom argued that Section 16.1 of the draft Decision Instrument should be amended to refer to the directions referred to in the WLR Information Notice rather than simply withdrawing the WLR Information Notice itself.
- 9.268 Finally, Eircom stated that the manner of incorporating certain parameters into the draft Decision Instrument was, in its view, inconsistent. By way of example, Eircom pointed out that one parameter was contained in a definition in Section 2 of the draft Decision Instrument, whereas another parameter was introduced within an obligation set out in the main body of the Decision Instrument. Eircom also considered that items such as costing methods or pricing controls could be moved out of the main body of the draft Decision Instrument and into a schedule which could be easily amended as necessary from time to time.

ComReg's Consideration of Respondents' Views

- 9.269 In relation to Eircom's comment on Section 11.1 of the draft Decision Instrument, ComReg agrees that it was not entirely clear from the previous language that the obligation to maintain separated accounts is imposed in respect of the FACO Markets. ComReg has amended the wording of Section 11.1 of the Decision Instrument (attached as Appendix H to this Decision) to make it clear that the obligation referred to in that Section relates to products, services and facilities falling within the scope of the relevant markets defined and described in Section 4 of the Decision Instrument. However, ComReg would note that Eircom may also be required to provide accounting information relating to products, services and/or facilities not falling within the scope of the FACO Markets from time-to-time, in particular for the purpose of monitoring Eircom's compliance with SMP obligations imposed on Eircom in the FACO Markets, including (but not limited to) price control obligations.
- 9.270 ComReg agrees with Eircom's observation that the SMP obligations referred to in Section 16.1(iv) of the draft Decision Instrument were issued to Eircom in a direction letter. ComReg has amended the wording of Section 16.1(iv) of the Decision Instrument and the definition of ComReg Document No. 08/19⁴²⁷ in Section 2 of the Decision Instrument to ensure that the directions contained in the letter issued to Eircom are captured as well as ComReg Document No. 08/19 itself.

⁴²⁶ ComReg Document No. 08/19 entitled "*Information Notice, Single Billing Wholesale Line Rental, Directions to Eircom regarding retail minus %*" dated 22 February 2008 ("**WLR Information Notice**").

⁴²⁷ The term has been changed to "ComReg Document No. 08/19 and associated Directions" in the Decision Instrument.

9.271 In relation to Eircom's comment about the manner of incorporating parameters into the draft Decision Instrument, ComReg's view is that it is irrelevant whether a parameter is drafted into a defined term or as part of an obligation in the main body of the Decision Instrument. ComReg considers that the particular mechanism adopted to incorporate a parameter into the Decision Instrument has no bearing on the efficacy of the overall obligation. ComReg also considers that moving certain items into a schedule to the Decision Instrument would have no impact on the ease of amendment of the Decision Instrument, as the process for amending the Decision Instrument would be the same irrespective of the approach adopted.

ComReg's Position

9.272 Having considered Respondents' views referred to in paragraphs 9.263 to 9.268 above, ComReg has decided to amend the language previously in Sections 11.1 and 16.1(iv) of the draft Decision Instrument as described in paragraphs 9.269 and 9.270 above.

9.273 ComReg has made some additional changes to the wording of the draft Decision Instrument for the purpose of clarifying the nature of certain obligations contained therein. However, these changes do not impact the substance of the overall obligation and the outcomes remain effectively the same. Any substantive changes to obligations contained in the Decision Instrument are described in detail in this Section 8 above.

10 Withdrawal of Remedies in the Transit Market

Position Set Out in Consultation

- 10.1 In the Consultation⁴²⁸, having regard to ComReg's preliminary view that the Transit Market no longer met the 3CT and on a forward looking basis that the Transit Market is considered to be effectively competitive, ComReg proposed a six month sunset period for the withdrawal of existing Transit remedies.
- 10.2 The purpose of the sunset clause was to allow Eircom's wholesale customers sufficient time to seek out alternative Transit arrangements (should they decide to change supplier) whilst maintaining service continuity, thus ultimately minimising any impact of the de-regulation of the Transit Market on service providers and ultimately end users.

Respondents' Views

- 10.3 Six Respondents expressed views on this issue.
- 10.4 ALTO, BT and Magnet responded noting that as they did not agree that the 3CT was no longer met (having regard to its comments noted in Sections 6 and 7 of this Decision) they also disagreed that regulation should be withdrawn from the Transit Market. ALTO suggested that any sunset period should be at least two years, while Magnet suggested 1 year.
- 10.5 Magnet also called for more public detailed consultation.
- 10.6 Eircom agreed that *ex ante* regulation was not appropriate for the Transit Market. Eircom did not accept that a six month sunset period for the withdrawal of the existing remedies was either reasonable or proportionate. It considered that the purchasers of wholesale Transit services have been on notice of the likely deregulation of these services since the withdrawal of this market from the Commission's 2007 Recommendation.
- 10.7 Sky argued that if ComReg does withdraw Transit obligations on Eircom, the proposed 'sunset period' of 6 months should be extended as it would not give operators sufficient time to find alternative suppliers if Eircom decided to withdraw access to the service, or to increase prices. Sky considered that ComReg should allow a period long enough for operators to resolve these issues.
- 10.8 Telefonica agreed with ComReg's preliminary views.

⁴²⁸ See section 10 of the Consultation.

ComReg's Assessment of Respondents' Views

- 10.9 ComReg considers that six months allows sufficient time for service providers to secure a new source of Transit supply, and make any necessary network changes, if necessary. Allowing this sunset period reduces the chance of disruption of services provided to end-users.
- 10.10 ComReg notes that once it considers that the Transit Market does not meet the 3CT, it is required to ultimately remove regulation. ComReg must strike a balance between this requirement and the need to ensure a smooth transition to deregulation that does not result in undue disruption for service providers, and ultimately consumers. ComReg considers that a six month sunset period achieves this aim and extending regulation to 1-2 years as suggested by some Respondents would not be justified or proportionate.
- 10.11 ComReg notes that it has already carried out a detailed consultation on this issue and does not consider that further consultation is necessary.
- 10.12 ComReg notes that Eircom may, of course, continue to provide Transit services once the obligation has been withdrawn.

ComReg's Position

- 10.13 ComReg has decided that a six month sunset period is appropriate for the withdrawal of existing Transit remedies that were imposed under the 2007 Decision.
- 10.14 During the sunset period Eircom cannot withdraw access to Transit services that are being provided to existing customers at the date of this Decision based on the terms and conditions set out in the 2007 Decision. For the avoidance of doubt, Eircom will not be required⁴²⁹, over the sunset period timeframe, to meet requests from new customers for access to Transit services.

⁴²⁹ Eircom is of course free to do so on a commercial basis.

11 Regulatory Impact Assessment

Position set out in the Consultation

Overview

- 11.1 In Section 11 of the Consultation, ComReg 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 section 9 of the Consultation, along with a consideration of other options.
- 11.2 It was noted that the RIA, in conjunction with the rest of the analysis and discussion set out in the Consultation, set out ComReg's preliminary assessment of the potential impact of the imposition of the proposed regulatory obligations in the FACO Markets and of the proposed removal of regulatory obligations in the Transit Market. The RIA was set out under the headings below.

The principles adopted by ComReg in selecting remedies⁴³⁰

- 11.3 The Consultation referred to the legislative basis upon which ComReg must consider the imposition of Remedies, including under Regulation 8(6) of the Access Regulations and Section 12(1)(a) of the Communications Regulations Act 2002 (as amended).

Description of the policy issue at hand and identified the objectives⁴³¹

- 11.4 The Consultation referred to ComReg's preceding market definition assessment and competition analysis which set out ComReg's preliminary view that the FACO Markets are not effectively competitive and that Eircom should be designated as having SMP in each of these markets. It was noted that ComReg is required to impose on an operator designated as having SMP, one or more of the obligations (or remedies) identified below.
- (a) Access;
 - (b) Transparency;
 - (c) Non-Discrimination;
 - (d) Price Control and Cost Accounting; and
 - (e) Accounting Separation.

⁴³⁰ See paragraphs 11.11 and 11.12 of the Consultation.

⁴³¹ See paragraphs 11.13 to 11.17 of the Consultation.

- 11.5 ComReg noted that it could not, as a matter of law, impose any regulatory obligations in the Transit Market, as this market did not, based on its then preliminary views, meet the 3CT. However, ComReg proposed a sunset period of six months for the withdrawal of existing remedies imposed upon Eircom in the Transit Market.
- 11.6 Regarding the FACO Markets, ComReg stated that its objectives were to enhance the development of effective competition in downstream markets and ultimately to help ensure that consumers can reap maximum benefits in terms of price, choice and quality of service. In so doing, ComReg noted that it was seeking to:
- (a) Prevent exploitative/exclusionary behaviours and/or restrictions or distortions in competition amongst service providers; and
 - (b) Provide regulatory certainty to all service providers through the development of an effective and efficient forward-looking regulatory regime that serves to promote competition.
- 11.7 In pursuing these objectives, ComReg noted that it had considered the impact of specific forms of regulation in the FACO Markets and was of the preliminary view that the remedies specified in Section 9 of the Consultation were both appropriate and justified in light of the market analysis and the identified competition problems.
- 11.8 ComReg then went on to identify and consider the regulatory options open to it.

Identify and describe the potential regulatory obligations⁴³²

- 11.9 In the Consultation, ComReg recognised that regulatory measures should be kept to the minimum necessary to address the identified market failures in an effective, efficient and proportionate manner. A range of potential incremental regulatory options were available to ComReg to address the potential competition problems identified in the FACO Markets with each of these then being considered.

⁴³² See paragraphs 11.18 to 11.46 of the Consultation.

- 11.10 ComReg noted that regulation can be considered to be incremental, such that only those obligations would be imposed which were necessary and proportionate to address the competition problems which had been identified in the Consultation. ComReg explained that the lightest regulatory obligation that could be imposed on an operator designated as having SMP was a transparency obligation⁴³³. Should this be insufficient to address competition problems on its own, ComReg noted that it could then apply non-discrimination obligations⁴³⁴. If this was still insufficient, ComReg would next consider the imposition of access obligations⁴³⁵, or accounting separation obligations⁴³⁶. The final measure that it would consider is whether to impose price control and cost accounting remedies⁴³⁷.
- 11.11 ComReg described all of these potential measures, and then went on to then determine the potential impact of its proposed regulatory approach with respect to the FACO Markets on stakeholders.
- 11.12 ComReg reiterated its preliminary view that the 3CT was not met in relation to the Transit Market and that, therefore, the Transit Market was no longer susceptible to *ex ante* regulation. ComReg had proposed the removal of regulation from the Transit Market. ComReg noted that its regulatory options in the Transit Market were therefore limited to the timing of the withdrawal of existing regulation.
- 11.13 ComReg considered that a six month sunset period for the removal of existing regulation in the Transit Market would allow access seekers sufficient time to seek alternative forms of Transit supply, if required, and would thereby preserve continuity in the supply of retail/wholesale services (if Eircom were to withdraw, or significantly alter, its Transit terms and conditions following deregulation). ComReg reserved its right to re-examine competitive conditions in the Transit Market in future and to intervene if necessary, in order to ensure the continued protection of consumer interests.
- 11.14 ComReg also proposed that Eircom would no longer be required (pursuant to regulation) to meet new requests for access in the Transit Market after the final decision arising from the Consultation comes into effect. ComReg's preliminary view was that it would be illogical to maintain such a requirement for a short period which, having expired, would then be subject to commercial negotiation. ComReg also considered that regulatory certainty would be better preserved for all parties by not requiring access to be met in a regulatory context during the sunset period.

⁴³³ Pursuant to Regulation 9 of the Access Regulations.

⁴³⁴ Pursuant to Regulation 10 of the Access Regulations.

⁴³⁵ Pursuant to Regulation 12 of the Access Regulations.

⁴³⁶ Pursuant to Regulation 11 of the Access Regulations.

⁴³⁷ Pursuant to Regulation 13 of the Access Regulations.

Determine the Impact on Stakeholders⁴³⁸

- 11.15 ComReg considered that the option of regulatory forbearance with respect to the FACO Markets was not appropriate or justified given the potential competition problems identified in the Consultation and therefore discounted this option.
- 11.16 ComReg then considered 4 regulatory options with respect to the FACO Markets along with the potential impact of each option on stakeholders, namely:
- (a) **Option 1:** Impose Access obligations only;
 - (b) **Option 2:** Impose Access, Transparency and Non-Discrimination obligations;
 - (c) **Option 3:** Impose Access, Transparency, Non-Discrimination and Price Control and Cost Accounting obligations;
 - (d) **Option 4:** Impose Access, Transparency, Non-Discrimination, Price Control and Cost Accounting and Accounting Separation obligations.
- 11.17 In assessing each of the options, ComReg considered the potential impact on Eircom, other service providers and consumers, before then going on to consider the potential impact on competition.

Assess the likely impacts and choose the best option⁴³⁹

- 11.18 Having considered its obligations under Regulation 8(6) of the Access Regulations and Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) and, having considered the potential impacts on stakeholders and competition, including the potential impact on the development of competition within the internal market, ComReg's preliminary view was that Option 4 was the most justified, reasonable and proportionate of the suggested approaches to regulation within the FACO Markets. i.e. to impose Access, Transparency, Non-Discrimination, Price Control & Cost Accounting and Accounting Separation obligations.
- 11.19 ComReg considered that Option 4 represented the best means of ensuring that Eircom did not exploit its market power at the wholesale level to the detriment of competition in both upstream and downstream markets, and to the ultimate detriment of consumers.
- 11.20 ComReg noted that Eircom's strong position in both downstream RFTS markets and the FACO Markets meant that Eircom not only had the ability, but also had an incentive, to engage in vertical leveraging and/or foreclosure type behaviours. For example, to impede downstream competitors through price (e.g. excessive/discriminatory pricing) and/or non-price anti-competitive behaviours.

⁴³⁸ See paragraphs 11.47 to 11.48 of the Consultation.

⁴³⁹ See paragraphs 11.49 to 11.56 of the Consultation.

11.21 ComReg considered that the regulatory obligations proposed did not unduly discriminate against Eircom in that they were justified as a means of addressing the competition problems that were identified in the FACO Markets, and were proportionate in that they were the least burdensome means of achieving this objective.

Respondents' Views

11.22 Five Respondents expressed views on ComReg's RIA.

11.23 Telefonica generally agreed with the RIA, while, ALTO, BT, Eircom and Magnet disagreed with aspects of it.

11.24 In commenting on the RIA, in most cases Respondents repeated views relating to issues which had been the subject of their responses on matters set out and discussed in earlier parts of the Consultation. For example, views were repeated on issues including market definition and the imposition/withdrawal of remedies.

11.25 Eircom suggested that many aspects of the Consultation were unclear, preliminary or lacked adequate justification, and that it was, therefore, difficult for it to see how ComReg could properly develop an informed and reasoned RIA. On that basis, Eircom considered that ComReg should publish a supplemental consultation that, at a minimum, addressed the following issues:

- (a) Whether and how the proposed cost accounting obligations would be applied in the FACO Markets;
- (b) How the NRT would be applied when using wholesale rather than retail products as the focal point of the assessment;
- (c) The plan and timetable for removing ex ante regulation from the Retail Access Markets; and
- (d) The treatment of a purported FACO 'sub-market' in which it considered that all operators appeared to have bottleneck control of call origination to NTCs.

11.26 BT reiterated its earlier concerns relating to the proposed deregulation of standalone CPS and considered that a more thorough examination was required of ComReg's proposal to remove obligations relating to standalone CPS. BT considered that ComReg should engage in further consultation on issues which should include:

- (a) A clarification that the removal of SMP obligations related only to standalone CPS and not to CPS sold alongside WLR (i.e., SB-WLR).
- (b) The impact of the withdrawal of regulation on customers whose services are based on standalone CPS.

11.27 Magnet reiterated concerns in relation to:

- (a) the proposed deregulation of the Transit Market, the proposed removal of SMP obligations relating to standalone CPS, CS, and CA.
- (b) its preferences for the imposition of functional separation and an EOI non-discrimination standard; and

(c) that an independent adjudicator should be appointed to deal with non-discrimination complaints.

11.28 ALTO noted that it did not fully agree with ComReg's RIA conclusions, echoing comments raised by BT and Magnet. It also reiterated its concerns regarding ComReg's proposed retail minus price control approach for the WLR element of SB-WLR.

ComReg's Assessment of Respondents' Views

11.29 At the outset ComReg would note that, pursuant to Section 12 of the Communications Regulation Act 2002 (as amended), ComReg's objectives in deciding on an appropriate regulatory approach 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.

11.30 ComReg also takes account of those objectives set out in the Framework Regulations and Access Regulations. Regulation 6(1) of the Access Regulations states that ComReg shall encourage and, where appropriate, ensure, in accordance with the Access Regulations, adequate access, interconnection and the interoperability of services in such a way as to: (a) promote efficiency, (b) promote sustainable competition, (c) promote efficient investment and innovation, and (d) give the maximum benefit to end-users. Pursuant to Regulation 6(3) of the Access Regulations, ComReg, has ensured that obligations imposed are objective, transparent, proportionate and non-discriminatory and are applied in accordance with Regulations 12, 13 and 14 of the Framework Regulations.

11.31 ComReg is also mindful of the need to ensure a consistent regulatory approach, and to ensure that there is no discrimination in the treatment of undertakings providing electronic communications networks and services. Furthermore, ComReg only imposes *ex ante* regulatory obligations where there is no effective and sustainable competition, pursuant to Regulation 16 of the Framework Regulations.

11.32 In paragraphs 11.22 to 11.28 above, ComReg summarised the key issues raised by Respondents concerning ComReg's RIA. ComReg now considers Respondents' views according to the themes identified below:

- (a) Lack of clarity regarding the relationship between proposed remedies and lack of justification for such remedies (discussed in paragraphs 11.35 to 11.44 below);
- (b) Deregulation of the Transit Market and the withdrawal of standalone CPS, CA, CS obligations (discussed in paragraphs 11.45 to 11.46 below); and
- (c) Comments on remedies (discussed in paragraphs 11.47 below).

11.33 Where, in relation to the RIA, Respondents repeated views which they had already raised in relation to earlier parts of the Consultation, ComReg has addressed those views in the relevant section of this Decision. For example, ComReg addresses views already raised by Respondents in relation to the definition of the FACO Markets in section 4 of this Decision and in relation to the imposition of particular remedies in the FACO Markets in section 9 of this Decision.

11.34 ComReg has set out its final RIA, having considered Respondents' views, in Appendix G of this Decision.

Lack of clarity regarding the relationship between proposed remedies and lack of justification for such remedies

11.35 ComReg does not agree with Eircom's comments referred to in paragraph 11.25 above that many aspects of the matters set out in the Consultation were unclear, preliminary or lacked adequate justification.

11.36 In the Consultation and this Decision we have clearly explained, justified and reasoned our approach on all matters. Where ComReg's regulatory approach is related to other separate works streams (which have been or are themselves to be the subject of separate consultation) we have clearly explained the inter-relationships. This is particularly so with respect to ComReg's approach to and discussion on remedies as now finalised in Section 9 of this Decision.

11.37 In this respect, ComReg has noted clearly in this Decision⁴⁴⁰ (and did so in the Consultation⁴⁴¹) that there will be separate consultations⁴⁴² on the question of whether certain price control remedies set out in this Decision may require further amendment in future. ComReg notes that interested parties will have an opportunity to provide further views on specific details to be the subject of these separate pricing consultations. ComReg has also noted in Section 9 of this Decision, that, depending on the outcome of these separate pricing consultations it may, therefore, lead to amendments and/or the withdrawal of the price control obligations imposed in this Decision and in the downstream Retail Access Markets (as set out in the 2014 Retail Access Market Review Decision). In this context, on foot of the completion of the FACO related identified pricing workstreams, and as recommended by the EC (see and as recommended by the EC (see Appendix D), ComReg intends to commence a review of the Retail Access Markets without undue delay.

⁴⁴⁰ See paragraphs 9.174 to 9.260 of this Decision.

⁴⁴¹ See paragraphs 9.175 of this Decision where we re-summarise the discussion of the relationships between this Decision and other separate pricing consultations as set out in the Consultation.

⁴⁴² For example, as discussed in Section 9, ComReg plans to consult separately on price control remedies via the Separate Access Network Pricing Consultation, a further NRT margin squeeze consultation and the Separate FVCO Consultation.

- 11.38 ComReg disagrees with Eircom's view that the remedies proposed in the Consultation were not justified. ComReg undertook a full analysis regarding the appropriateness of remedies in Section 9 of the Consultation and, in so doing, clearly set out why it considered that they were justified, reasonable and proportionate. This approach has continued throughout ComReg's further analysis in Section 9 of this Decision.
- 11.39 With respect to Eircom's comments regarding a suggested lack of clarity in relation to cost accounting obligations, ComReg has addressed this matter in Section 9 of this Decision⁴⁴³.
- 11.40 With respect to Eircom's comments regarding the NRT, ComReg has addressed this matter in Section 9 of this Decision⁴⁴⁴, with further clarity having been provided above.
- 11.41 With respect to Eircom's comments in relation to the treatment of call origination to NTCs on other networks, ComReg has addressed this matter in Section 9 of this Decision⁴⁴⁵.
- 11.42 With respect to a suggested lack of clarity as how the impact of regulation in the FACO Markets might impact regulation in the Retail Access Markets, ComReg notes that Section 16.1(vi) of the Draft Decision Instrument set out in Appendix H of the Consultation, specified which remedies would be consequentially withdrawn from the Retail Access Markets. Section 16.1 of the final Decision Instrument set out in Appendix H of this Decision provides final clarity in this regard.
- 11.43 As noted in this Decision⁴⁴⁶, ComReg has indicated that the ultimate removal of *ex ante* regulation in the Retail Access Markets (either partial removal or full de-regulation) is contingent on a number of factors, including the sufficiency of regulation in wholesale markets to deal with the identified competition problems, as well as a finding that no undertaking has SMP. As noted above, the matters which will be subject to separate pricing consultations will have a bearing on the question of the appropriateness of regulation in the Retail Access Markets and, subject to their outcomes, ComReg will continue to review the situation and amend or withdraw regulation in the Retail Access Markets, as appropriate.). In this context, on foot of the completion of the FACO related identified pricing workstreams, and as recommended by the EC (see and as recommended by the EC (see Appendix D), ComReg intends to commence a review of the Retail Access Markets without undue delay.
- 11.44 As appropriate, ComReg taken account of Eircom's views in the RIA set out in Appendix G of this Decision.

⁴⁴³ See paragraphs 9.248 to 9.249 of this Decision.

⁴⁴⁴ See paragraphs 9.246 to 9.247 of this Decision.

⁴⁴⁵ See paragraphs 4.72 to 4.74 of this Decision.

⁴⁴⁶ See for example, paragraphs 1.40, 9.23 and 9.175 of this Decision.

Deregulation of the Transit Market and the withdrawal of Standalone CPS, CA, CS obligations

- 11.45 With respect to comments from ALTO and Magnet concerning the deregulation of the Transit Market, ComReg has addressed this matter in Section 7, 10 and the RIA set out in Appendix G of this Decision.
- 11.46 With respect to comments from ALTO, BT and Magnet concerning the removal of standalone CPS, CA and CS obligations, ComReg has addressed this matter in Section 9⁴⁴⁷ and the RIA set out in Appendix G of this Decision.

Comments on Remedies

- 11.47 With respect to Magnet's comments concerning the appointment of an independent adjudicator and EoO, ComReg has addressed these matters in Section 9⁴⁴⁸ and the RIA set out in Appendix G of this Decision

ComReg's Position

- 11.48 In paragraphs 11.29 to 11.44 above ComReg has considered Respondents' view on the RIA set out in the Consultation. ComReg has updated its RIA, where appropriate in light of Respondents' views, and its final RIA is now set out in Appendix G this Decision. The RIA should be read in conjunction with the Consultation, along with the analysis and discussion set out in this Decision.
- 11.49 As discussed above, since ComReg has designated Eircom with SMP in the FACO Markets, ComReg is required to impose remedies in that market. In light of the nature of those competition problems that would be likely to arise absent of regulation, ComReg considers that Option 4 represents the most justified, reasonable and proportionate of the available regulatory approaches. Thus, ComReg's reasoned final position is to impose Access, Transparency, Non-Discrimination, Price Control & Cost Accounting and Accounting Separation obligations on Eircom for the period of this review.
- 11.50 As discussed above, ComReg has decided that continued regulation in the Transit Market is no longer warranted because the 3CT is not met. ComReg considers that a six month sunset period for the removal of existing regulation in the Transit Market is appropriate as it would allow access seekers sufficient time to seek alternative forms of Transit supply, if required. ComReg reserves its right to re-examine competitive conditions in the Transit Market in future and to intervene if necessary.

⁴⁴⁷ See paragraphs 9.48 to 9.58 of this Decision.

⁴⁴⁸ See paragraphs 9.125 to 9.128 and 9.147 to 9.149 of this Decision.

12 Next Steps

- 12.1 ComReg has set out its position in the preceding sections regarding its analysis of the Relevant Markets and has today published its Decision on its publicly available website www.comreg.ie and notified Eircom Limited of this Decision.

Appendix A Market Research

- A.1 The 2012 Market Research has been published separately as ComReg Document 12/117a and is available on ComReg's website at the following link:
http://www.ComReg.ie/_fileupload/publications/ComReg12117a.pdf

- A.2 The 2013 Consumer ICT Survey has been published separately as ComReg Document 13/46 and is available on ComReg's website at the following link:
http://www.ComReg.ie/_fileupload/publications/ComReg1346.pdf

- A.3 The 2013 Business ICT Survey has been published separately as ComReg Document 13/61 and is available on ComReg's website at the following link:
http://www.ComReg.ie/_fileupload/publications/ComReg1361.pdf

Appendix B Consultation with the Competition and Consumer Protection Commission

- B.1 The following (see page below) is a copy of the opinion of the Competition and Consumer Protection Commission setting out its position on ComReg's definition of the Relevant Markets and the assessment of competition within such markets.



Jeremy Godfrey
Chairperson
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1

15th June 2015

Re: FACO Markets and Transit Market

Dear Jeremy,

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 and Consumer Protection Commission with respect to ComReg's proposed draft measures arising from its analysis of the Fixed Access and Call Origination (FACO) markets and the Transit market.

On the basis of the facts and analysis presented by ComReg, the Competition and Consumer Protection Commission 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 and Consumer Protection Commission 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 Fixed Access and Call Origination (FACO) markets identified.

Yours sincerely

Dr John Evans
Director
Competition Enforcement Division
Competition and Consumer Protection Commission

Tel: 01 470 3645
E-mail: johnevans@ccpc.ie

Appendix C European Commission Response to ComReg's Notified Draft Measures

- C.1 The following (see pages below) is a copy of correspondence from the European Commission setting out its views pursuant to Article 7 of the Framework Directive.



Brussels, 14.7.2015
C(2015) 5011 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

Fax: 00 35318788193

Dear Mr. O'Brien,

Subject: Commission Decision concerning Case IE/2015/1746: Fixed voice call origination market in Ireland

Comments pursuant to Article 7(3) of Directive 2002/21/EC

Commission Decision concerning Case IE/2015/1747: Transit market in Ireland

Article 7(3) of Directive 2002/21/EC: No Comments

1. PROCEDURE

On 17 June 2015, the Commission registered a notification from the Irish national regulatory authority, Commission for Communications (ComReg)¹, concerning the markets for (i) fixed voice call origination², and (ii) transit³ in Ireland.

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 Corresponding to market 2 of the previously applicable Commission Recommendation 2007/879/EC 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, p. 65.

³ Corresponding to market 10 of the first Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p. 65.

The national consultation⁴ ran from 4 April 2014 to 24 June 2014.

On 25 June 2015, a request for information⁵ (RFI) was sent to ComReg and a response was received on 30 June 2015. Additional information was received from ComReg on 3 July 2015.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The previous review of the fixed voice call origination market in Ireland was assessed under case IE/2007/06726. ComReg designated Eircom as having SMP and imposed the full set of obligations upon it. In case IE/2011/1220⁷ Comreg further specified the transparency obligation and supplemented the existing price control obligation with a margin squeeze test. The latter included a general obligation and a specific requirement not to cause a margin squeeze between the price of the components of the wholesale switchless voice service (SV services) and the prices of the corresponding wholesale call origination and call termination products. The margin squeeze test set the price floors for wholesale call origination and call termination when sold within the SV service (to resellers) whereas call origination and termination were cost-oriented. The Commission commented on the co-existence of two different price methods and invited ComReg to ensure consistency between cost-orientation and the proposed margin-based price floor. A detail of the price control remedy (i.e. regulatory asset lives) was modified in case IE/2009/0916⁸. Cost-accounting and accounting separations were amended in case IE/2010/1104⁹. A WACC-related draft measure was assessed under case IE/2014/1649¹⁰.

The transit markets in Ireland were previously reviewed in cases IE/2007/0673-0674¹¹. ComReg designated Eircom as having SMP in the national transit market

2003 on relevant product and services markets within the electronic communications sector susceptible for ex ante regulation in accordance with the Framework Directive, OJ L 114, 8.5.2003, p. 45.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ SG-GREFFE(2007) D/205268

⁷ C(2011) 4377

⁸ SG-Greffe(2009) D/3230

⁹ C(2010) 5646

¹⁰ C(2014) 7656

¹¹ SG-GREFFE(2007) D/205268 A detail of the price control remedy was modified in case IE/2009/0921, (SG-Greffe(2009) D/3230)).

(which also included incoming international transit) and imposed the full set of remedies on it, including the obligation to offer transit at regulated cost-oriented prices. ComReg also defined a separate *outgoing international transit* market but found this to be effectively competitive and, as a consequence, no service provider was designated as having SMP.

2.2. The notified draft measure

The present notification concerns the full review of the wholesale markets for fixed access and call origination (FACO market) and transit.

2.2.1. Analysis of underlying retail markets

The proposed retail market is considered to be national in scope and includes Retail Fixed Telephony Services (RFTS) provided to a fixed location over a narrowband copper network as well as Managed VOB¹² based RFTS delivered over a broadband access path (via IP rather than through traditional circuit switched telephony) over a fibre or a Cable Access Television (CaTV) network.¹³

2.2.2. Wholesale market definition

FACO market

ComReg defines a FACO market comprising a fixed access (FA) or Wholesale Line Rental component (WLR) and a fixed call origination component (FVCO). According to ComReg, this market definition reflects (i) the nature of retail demand for RFTS where line rental and calls are predominantly purchased by wholesale customers together from the same supplier¹⁴, and (ii) the fact that it is not technically possible for a wholesale customer to purchase FA/WLR from one wholesale supplier and FVCO from another¹⁵. ComReg considers that irrespective of whether or not FA/WLR components are included alongside FVCO within a broader FACO market, this does not materially alter the regulatory outcome as, even if the market were defined to solely encompass FVCO (and SMP was found to exist

¹² For the purposes of the Consultation and the Draft Decision, 'Managed VOB' means Voice Over Internet Protocol (VOIP) provided by a fixed Service Provider either directly using its own network, or indirectly by renting the access path from a third party. ComReg leaves open the question as to whether Managed VOB provided over ADSL technologies are likely be an effective substitute for a RFTS offered over a narrowband network (or Managed VOB on a CATV or VDSL network) and intends to monitor the situation on an ongoing basis.

¹³ The question as to whether separate product markets exist for the supply of standalone RFTS and RFTS within a bundle is left open as, according to ComReg, it does not have a material impact on the analysis of the wholesale markets which are the subject of this market review.

¹⁴ ComReg notes that there has been a significant decline in the wholesale customers' demand for Eircom's standalone FVCO based wholesale Carrier Pre-select ('CPS') product since the 2007 Decision, with Eircom's Single Billing-Wholesale Line Rental product ('SB-WLR'), which combines FVCO and WLR, now accounting for over 95% of access seekers' demand.

¹⁵ ComReg explains that WLR and CPS purchases from Eircom are inextricably linked and notes that where CPS only was purchased, Eircom would sell the retail line rental services (self-supply of WLR) to the retail customer.

in such a market), this could nevertheless result in the imposition of regulatory obligations in relation to the provision of FA/WLR.

ComReg distinguishes between the High Level (HL) and the Low Level (LL) FACO markets, which are both national in scope. While both the HL- and LL-FACO markets comprise FVCO, the border line between the two markets is based on the underlying differences in demand- and supply-side conditions of the FA/WLR component. Thus, the LL-FACO market comprises PSTN¹⁶ and ISDN BRA¹⁷ access (supporting 2 voice channels) while the HL-FACO market comprises ISDN FRA¹⁸ access (which supports between 14 to 30 voice channels) or ISDN PRA access¹⁹ (which supports 30 voice channels).

FVCO is defined as calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection. This interconnection takes place at the primary, tandem, or double-tandem exchange associated with the FA at which the voice call was originated within Eircom's network. FVCO does not distinguish between the types of telephone numbers being called.

In addition to the HL- and LL-FACO products (for which Eircom is the only provider in Ireland), the proposed market includes Eircom's self-supply, notably its notional supply of FACO via Managed VOB (which, according to ComReg, is ultimately likely to replace Eircom's traditional circuit switched telephony services).

Self-supply over CaTV networks is proposed to be excluded from the FACO markets since a FACO product over a CaTV network does not exist and UPC has no plans to offer such FACO product, which is unlikely to appear even in case of increase of Eircom's prices. Furthermore, the CaTV network does not allow for the coverage expected by access seekers since it lacks the ubiquity of Eircom's FACO product²⁰.

ComReg defines the HL- and the LL-FACO markets as being national in geographic scope. ComReg notes that there is no significant evidence to suggest that the competitive conditions are different in the provision of FACO between the LEA (Large Exchange Areas), characterised by a higher degree of competition either based on LLU or other platform (CaTV) and non-LEA areas²¹. ComReg notes that Eircom is the sole provider of FACO in both areas, and there is no evidence of Eircom responding to indirect constraint arising from RFTS competition within the LEA (or non-LEA). In particular, Eircom has national FVCO and WLR prices, despite having a degree of flexibility under the regulatory pricing regime to de-

¹⁶ Public Switched Telephone Network.

¹⁷ Integrated Services Digital Network.

¹⁸ ISDN Fractional Rate Access.

¹⁹ ISDN Network Primary Rate Access.

²⁰ CaTV reaches less than 50% of households and only a small number of premises.

²¹ Such as defined in case IE/2012/1382, C(2012) 8836.

average its wholesale charges having regard to the need to comply with its obligations not to cause a margin squeeze. ComReg proposes to monitor the impact of retail competition on FACO prices within the LEA over the period of the current review, with a view to identifying whether there is any resulting emergence of differentiated competitive constraints in the FACO Markets.

Transit market

ComReg defines the transit market in Ireland as national in scope and including (i) all elements of call routing that takes place between call origination and call termination, including switching and conveyance; (ii) calls to geographic, non-geographic and mobile numbers; (iii) both trunk and pure transit²² provided over copper and/or fiber networks (i.e. irrespective of the underlying infrastructure employed); as well as self-supply and wholesale supply of both Eircom and other transit service providers that are active in the provision of wholesale transit services.

While not explicitly including incoming international transit in the market (as in its previous market review), ComReg explains in the response to the RFI that it would be naturally considered as national traffic once it passes the international gateway.

2.2.3. *Three criteria test*

As neither the FACO markets nor the transit market is listed in the Recommendation on Relevant Markets²³, ComReg carries the three criteria test.

FACO markets

ComReg considers that the first criterion, i.e. the presence of high and non-transitory barriers to entry is met since Eicom controls infrastructure that is difficult to replicate by a new operator who would also have to incur considerable sunk costs when entering the FACO markets and benefits from significant economies of scale, scope and density as well as from being vertically integrated. Regarding the second criterion, Comreg is of the view that the FACO markets are not likely to tend towards effective competition within the relevant time horizon for this market review on the basis that (i) Eircom has maintained a high and stable market share in the FACO markets²⁴, and (ii) there is no observable evidence that managed VOB or any other source of potential direct or indirect constraints would lead to effective competition on the FACO markets within the relevant timeframe²⁵. Finally,

²² ComReg defines *pure* transit as transit involving the conveyance of call traffic between two non-interconnected operators, whereas *trunk* transit involves the conveyance of call traffic of an operator to a deeper switching point within its network.

²³ Commission Recommendation 2014/710/EU of 9 October 2014 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 (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

²⁴ Furthermore, according to the reply to the RFI, Eircom it is the only provider of FACO in Ireland and has maintained a stable market share of 100% in the FACO markets. Adding to that, data provided by ComReg also indicates that total number of WLR lines in Ireland are increasing (i.e. from circa 291 thousand in the Q1 2012 to circa 369 thousand in Q1 2015).

²⁵ Based on the reply to the RFI, total VOB subscriptions, excluding cable, correspond to circa 30

ComReg considers that competition law alone would not be sufficient to effectively address market failures in the FACO markets. ComReg concludes that the markets are susceptible to *ex ante* regulation.

Transit market

ComReg considers that the three criteria test is not fulfilled since the first two criteria are not met. With respect to the first criterion, ComReg notes that barriers to entry do not appear to be high and non-transitory and have been overcome by a number of service providers.

With regard to the second criterion, ComReg considers that there is evidence of existing competition within the market, although at varying degrees depending on the transit route. ComReg concludes that the market tends towards effective competition within the relevant time horizon, thus failing to meet also the second criterion.

ComReg concludes that the market is not susceptible to *ex ante* regulation and proposes to withdraw regulation of transit services following a six month sunset period.

2.2.4. *SMP in the FACO markets*

The main criteria used by ComReg to designate Eircom with SMP in each of the FACO Markets are vertical integration, market shares, relative strength of existing competitors, barriers to expansion, indirect constraints, pricing behaviour, control of infrastructure not easily duplicated, technological advantages or superiority, overall strength of potential competitors and countervailing buyer power.

ComReg proposes to designate Eircom as an SMP operator on both the LL-FACO and the HL-FACO markets. ComReg notes that Eircom has a stable 100% market share in each of the markets over time.

While excluding the self-supply of Managed VOB on a CaTV network from the market definition, ComReg analyses the extent to which its inclusion would impact the SMP assessment. ComReg's analysis shows that Eircom's hypothetical market share on a broader FACO market including self-supply of CaTV, fixed wireless access and fibre access from alternative providers would be approximately 80%.

2.2.5. *Remedies*

Comreg intends to impose the following obligations on Eircom on the LL-FACO and HL-FACO markets:

- access (including SB-WLR²⁶, ancillary services and SLAs),

thousand lines out of a total of 380 thousand VOB subscriptions (including cable) and out of a grand total of circa 1.6 million subscriptions (which include PSTN/ISDN and VOB including cable). Adding to that, take-up of LLU is low and it is mostly bundled with SB-WLR. The same happens with WBA, which, in ComReg's view, suggests that fixed service providers are still using SB-WLR instead of standalone broadband or full standalone LLU.

²⁶ SB-WLR combines WLR and FVCO.

- non-discrimination on an Equivalence of Outputs (EoO) basis except for combined SB-WLR/NGA, SB-WLR/NGBitstream or SB-WLR/VUA orders, in which case the ordering and the provisioning of SB-WLR must be done on an Equivalence of Inputs (EoI) basis),
- transparency (including the publication of a RIO),
- price control and cost accounting²⁷, and
- accounting separation.

Regarding the price control obligation, ComReg proposes the imposition of a "retail minus" obligation for WLR whereby Eircom must provide WLR to access seekers at least 14% below Eircom's retail-line rental price. In addition the price for the CPS component of the SB-WRL service will be based on a TD-LRAIC+ model. With respect to the cost-orientation obligation proposed for ancillary services on SB-WLR²⁸, ComReg explains that in the absence of a cost-oriented price at this stage, the prices will be capped at their current level derived from the existing retail minus obligation. Thus the current prices will remain in place pending the outcome of the separate access network pricing consultation (planned for Q4 2015) which will *inter alia* consider (i) the pricing methodology for products related to WLR, and (ii) whether to move to cost-oriented price control for SB-WLR.

The price control also implies a general obligation not to cause a margin squeeze, the details of which would be consulted upon in the Net Revenue Test consultation (i.e. NRT Margin Squeeze Consultation²⁹). Notwithstanding this general obligation, Eircom must not create a margin squeeze between FVCO and switchless voice services (SV)³⁰, i.e. Eircom should not set the FVCO price in its wholesale SV service below the price floor set in the margin squeeze test model for SV. The margin squeeze between FVCO and Wholesale SV as well as the further specification of the pricing remedies will be further considered in a separate FVCO consultation, expected to be published in Q4 2015³¹.

²⁷ The parameters of which will be further considered and consulted upon in the Separate FVCO Price Control Consultation.

²⁸ As well as for current generation interconnection services, co-location, retention rate and order handling.

²⁹ The NRT margin squeeze consultation (now planned to be conducted in Q4 2015, in parallel with the analyses of Markets 3a and 3b) will consider whether it is appropriate to impose some form of the NRT Test in the call origination market to ensure that existing wholesale remedies cannot be undermined by Eircom through the provision of bundles. Thus, the NRT consultation would be a further specification of the proposed margin squeeze obligation. The current NRT (applicable in the retail access market) reflects different competitive conditions between the LEAs and the non-LEAs.

³⁰ Wholesale SV services are end-to-end wholesale voice services purchased by alternative fixed service providers so that they can provide RFTS without the need to have their own switching or interconnection infrastructure.

³¹ Amongst the issues to be considered: (a) whether the methodological approach of Top-Down LRAIC+ as the basis of a price control for FVCO remains appropriate (as per the 2007 Decision); (b) whether and how the price control methodology for FVCO should be adjusted in light of the non-recovery of common costs by Eircom through FTRs; and (c) consult on the modelling parameters to support the appropriate cost orientation obligation.

Next generation FACO is not proposed to be regulated, while a 6 month sunset clause is set for withdrawing standalone carrier services (i.e. CS, CPS and CA) regulation. Once adequate wholesale measures are put in place as a result of these price-related work streams, ComReg proposes to reassess the former retail access market and consider whether it could be further deregulated³².

3. COMMENTS

The Commission has examined the notification and the additional information provided by ComReg and has the following comments:³³

The need to review the retail access market

The Commission notes that while transferring the WLR obligation from the retail access to the FACO markets, ComReg continues regulating the retail access market. ComReg explains in this respect that further work is required to replace the important price control obligations currently residing in former market 1, including *inter alia* a further specification of the cost orientation methodology and the margin squeeze test on the FACO markets. The Commission notes ComReg's intention to monitor developments in the retail access market and to examine whether, in light of retail developments, regulation within the retail access markets (and the FACO markets) remains appropriate.

In this respect the Commission observes that the retail market shares of Eircom are already relatively moderate (circa 47%) and invites ComReg to proceed with the review of the retail access market without undue delay.

Clarity of regulatory obligations

The Commission notes that the proposed price control obligations imply a combination of retail minus, cost-orientation and margin squeeze, the appropriateness and specificities of which are to be further examined in three pricing consultations planned for Q4 2015, i.e. a separate Access Network Pricing Consultation, a separate FVCO Consultation and a further NRT margin squeeze consultation (which could also lead to a geographic differentiation of remedies between LEAs and non-LEAs, if the current distinction is maintained). This results in a highly complex regulatory setting in Ireland.

The Commission therefore calls upon ComReg to take the opportunity of the forthcoming parallel consultations to streamline the existing pricing remedies, thereby enhancing transparency and legal certainty for market players.

³² In the third review of the retail access (case IE/2014/1629), ComReg defined three separate markets: standalone Lower Level Voice Access, bundled Lower Level Voice Access and High Level Voice Access (sold either on standalone basis or within a bundle). ComReg found Eircom with SMP on all 3 markets and imposed on it (with regard to all three markets) Wholesale Line Rental (set on the basis of retail minus) and CPS, at the wholesale level. At retail level, ComReg imposed an obligation not to unreasonably bundle as well as cost accounting. In addition, ComReg proposes to impose the obligations of retail price control and transparencies on the market for standalone low level voice access. The obligation not to unreasonably bundle maintained the NRT with a more flexible price control for the LEAs as explained below. The Commission urged ComReg to complete the ongoing assessment of the upstream market for call origination as soon as possible and to reassess whether the presently notified markets still warrant ex ante regulation without any undue delay.

³³ In accordance with Article 7(3) of the Framework Directive.

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/EC³⁴ 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 Commission³⁵ 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.³⁶ 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

³⁴ 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.

³⁵ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

³⁶ The Commission may inform the public of the result of its assessment before the end of this three-day period.

Appendix D ComReg's Consideration of the European Commission Response to ComReg's Notified Draft Measures

Overview

- D.1 On 16 June 2015⁴⁴⁹ ComReg notified⁴⁵⁰ the EC regarding its draft measures relating to the analysis of the FACO Markets and Transit Market (the '**Notification**'). On 14 July 2015 the EC responded to ComReg's Notification⁴⁵¹.
- D.2 In the European Commission's Response, the EC commented on two procedural issues related to ComReg's analysis of the FACO Markets (no substantive comments were received from the EC on ComReg's market definition or SMP analysis of each of the Relevant Markets and no comments at all were received from BEREC or the NRAs in other Member States).
- D.3 ComReg is required⁴⁵² to take utmost account of any comments of the EC, BEREC and NRAs in other Member States before reaching its final decision. Below, and elsewhere throughout this Decision, ComReg has considered and taken utmost account of the European Commission's Response.

ComReg's Consideration of the European Commission's Response

- D.4 The European Commission's Response raised two procedural issues related to the draft measures set out in ComReg's Notification. These issues are summarised below along with ComReg's consideration of the issues raised.

⁴⁴⁹ The EC registered ComReg's notification of its draft measures as being complete on 17 June 2015.

⁴⁵⁰ Pursuant to Regulation 13(3) of the Framework Regulations.

⁴⁵¹ A copy of the European Commission's correspondence of 14 July 2015 is set out in Appendix C of this Decision ('**European Commission Response**').

⁴⁵² Pursuant to Regulation 13(6) and Regulation 14(2) of the Framework Regulations.

Invitation to ComReg to review the Retail Access Markets without undue delay

- D.5 Firstly, the EC noted ComReg's intention to transfer SB-WLR and associated price control and other obligations imposed in the already regulated Retail Access Markets (as set out in ComReg's 2014 Retail Access Market Review Decision⁴⁵³) into the upstream FACO Markets. In this respect, the EC also noted that ComReg had explained that further important work was required to replace price control obligations imposed in the Retail Access Markets. The EC noted ComReg's intention to monitor developments in the Retail Access Markets and to examine whether, in light of retail developments, regulation within the Retail Access Markets (and the FACO Markets) remains appropriate.
- D.6 The EC also observed that the retail market shares of Eircom are already relatively moderate (circa 47%)⁴⁵⁴, and invited ComReg to proceed with the review of the Retail Access Markets without undue delay.
- D.7 As noted in this Decision⁴⁵⁵, on foot of the completion of the pricing and related workstreams referred to throughout this Decision, and as recommended by the EC, ComReg intends to commence a review of the Retail Access Markets without undue delay.

Invitation to ComReg to streamline existing pricing remedies

- D.8 Secondly, the EC noted that ComReg's proposed price control obligations that will be imposed in the FACO Markets implied a combination of retail minus, cost-orientation and margin squeeze obligations, which are to be further examined in a range of future pricing consultations⁴⁵⁶. The EC noted that ComReg plans to conduct separate consultations on price control remedies in future, and called upon ComReg to take the opportunity in such consultations to streamline existing pricing remedies, with a view to enhancing transparency and legal certainty for market players.

⁴⁵³ Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, [ComReg Document 14/89](#), Decision D12/14, August 2014 ('**2014 Retail Access Market Review Decision**').

⁴⁵⁴ The retail market share of 47% noted by the EC in the European Commission's Response is calculated based on the total number of RFTS subscribers as at Q4 2014 (see paragraph E.2 in Appendix E of this Decision), rather than relating to specifically to the market shares in the markets defined and subject to regulation pursuant to the 2014 Retail Access Market Review Decision.

⁴⁵⁵ See, for example, paragraphs 1.37, 1.40, 1.46, 3.82, 11.37 and 11.43 of this Decision.

⁴⁵⁶ These future pricing consultations are identified in Section 9 of this Decision and include the Separate Access Network Pricing Consultation, the NRT Margin Squeeze Consultation and the Separate FVCO Price Control Consultation.

D.9 As noted in this Decision⁴⁵⁷, as recommended by the EC, ComReg will seek to streamline existing pricing remedies within the various separate pricing consultations, as and where appropriate. In doing so, ComReg will seek to appropriately remedy the competition problems identified in Section 8 of this Decision (and any competition problems that may be identified pursuant to the separate pricing consultations), in a manner which ultimately fosters the development of effective competition to the ultimate benefit of consumers.

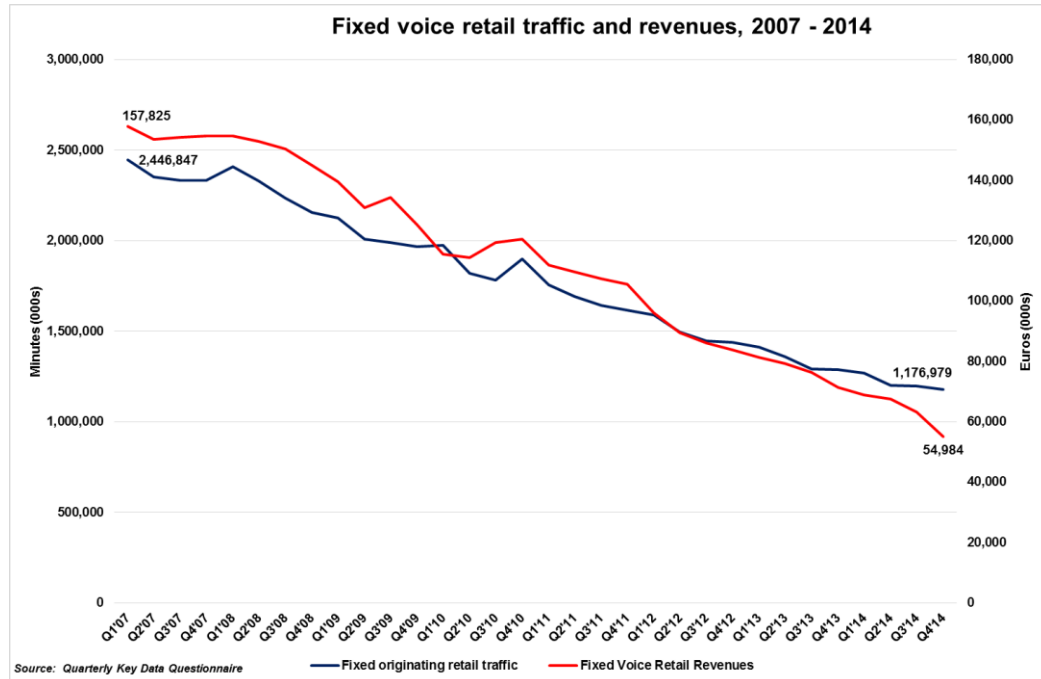
⁴⁵⁷ See, for example, paragraphs 9.246 and 9.252 of this Decision.

Appendix E Updated Retail Trends Analysis

- E.1 This Appendix provides an updated analysis, as of Q4 2014, of the main trends and developments in the RFTS market as were discussed in the Consultation and further considered in Section 3 and elsewhere throughout this Decision (**'Updated Retail Trends Analysis'**).
- E.2 In general, the Updated Retail Trends Analysis shows no major changes to those trends/developments identified in the Consultation, such that they would lead ComReg to materially alter its preliminary views set out in the Consultation. ComReg highlights the following developments since the publication of the Consultation, with these discussed further below.
- The rate of decline in RFVC traffic has slowed down during 2014;
 - Eircom's market share of RFTS subscriptions has continued to decline with Eircom having 47.2% of all RFTS subscriptions at the end of Q4 2014.
 - The rate of decline in standalone RFTS subscriptions has continued during 2014.

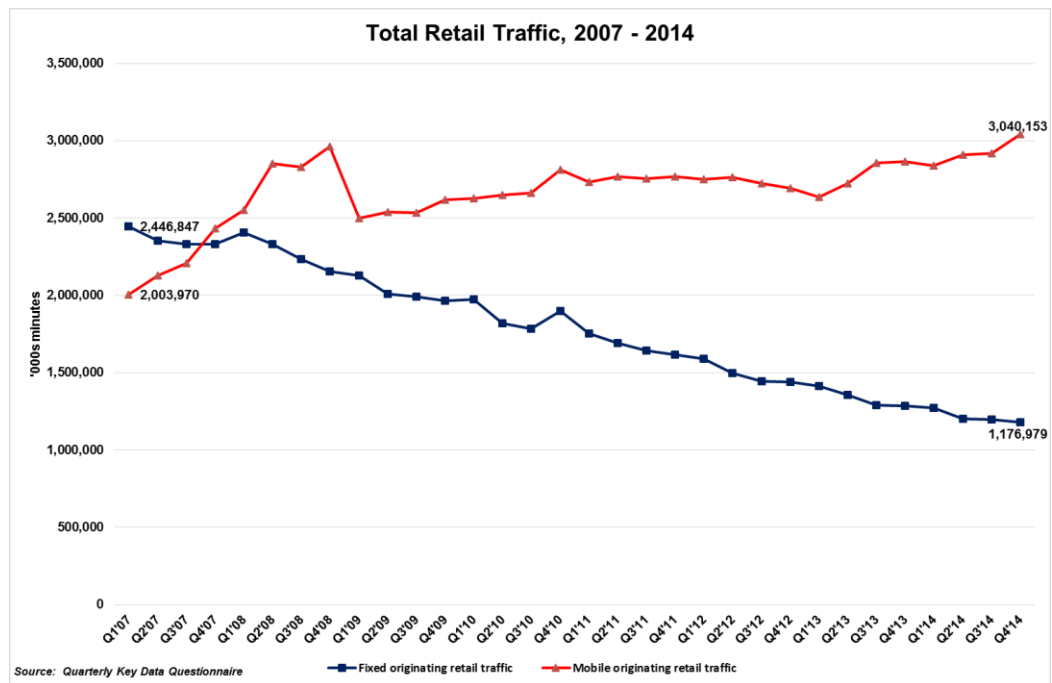
Fixed and Mobile Traffic Growth Patterns

- E.3 Figure 2 shows that an overarching trend since the 2007 Decision has been a steady decline in RFVC traffic and revenues. However, the rate of decline in RFVC traffic has slowed down in the last four quarters. In the 12 months to December 2014 the average rate of quarterly decline in RFVC traffic was 2.2%, compared to 2.7% in the same period one year ago.

Figure 2: Fixed traffic volumes and revenues, 2007-2014⁴⁵⁸

E.4 Mobile voice traffic continued to increase in recent quarters, as illustrated in Figure 3 below. Retail mobile voice traffic totalled 3.04 billion minutes in Q4 2014, an increase of 6.2% on Q4 2013.

⁴⁵⁸ Relevant categories, as reported in ComReg's Quarterly Key Data Reports, included in fixed retail voice revenues above are as follows: Advanced Voice Revenues, Basic Voice Revenues, and VOIP Revenues. Voice revenues illustrated in Figure 2 exclude installation and connection charges in order to specifically analyse revenues uniquely attributable to voice traffic.

Figure 3: Fixed and mobile voice traffic trends, 2007–2014⁴⁵⁹

Fixed Voice Call Distribution Patterns

E.5 Figure 4 and Figure 5 below illustrate a breakdown of the types of calls being made from fixed line telephones by residential and business customers⁴⁶⁰. The data indicates that fixed line telephones continue to be used most frequently for making calls to other landlines.

⁴⁵⁹ It should be noted that prior to Q1 2009 some mobile data minutes were included in mobile originating retail traffic figures. As these volumes are not based on voice calls, they were stripped out in ComReg's Quarterly Key Data Report for Q1 2009 onwards and, therefore, had a downward impact on overall mobile voice traffic in the period Q3 2008 to Q4 2008. Some of the traffic growth in Q3 2013 is attributed inclusion of data for an additional MSP (Lycamobile being a Mobile Virtual Network Operator) which were not, up to that point included in published data.

⁴⁶⁰ Data presented based on information supplied by service providers for ComReg's QKDR.

Figure 4: Monthly Fixed Voice Call Distribution % for Residential Subscribers

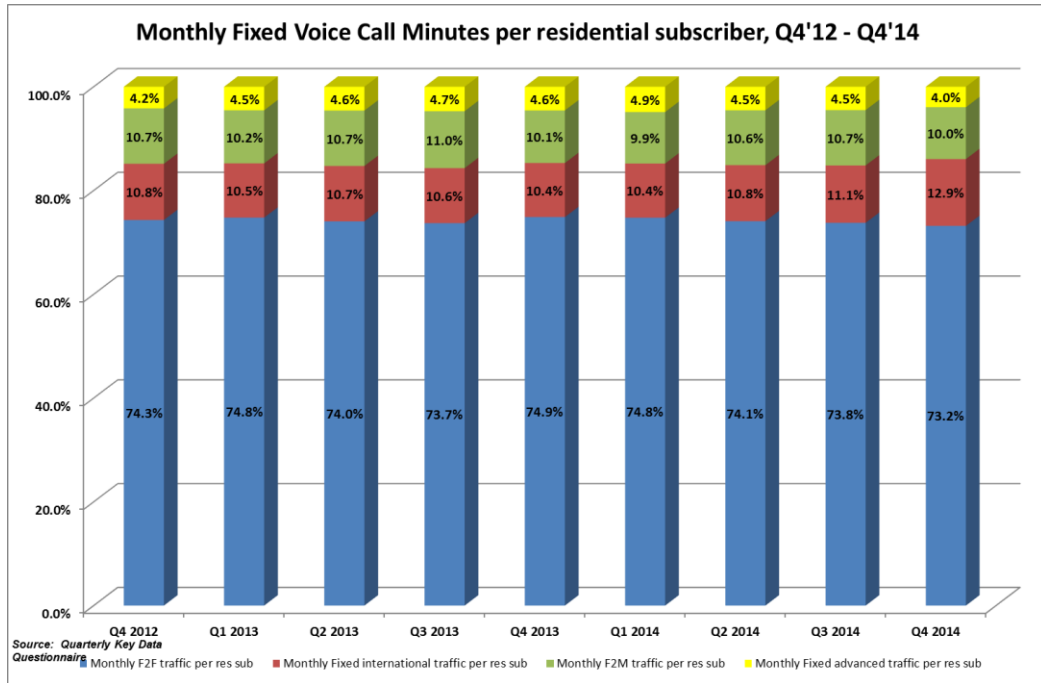
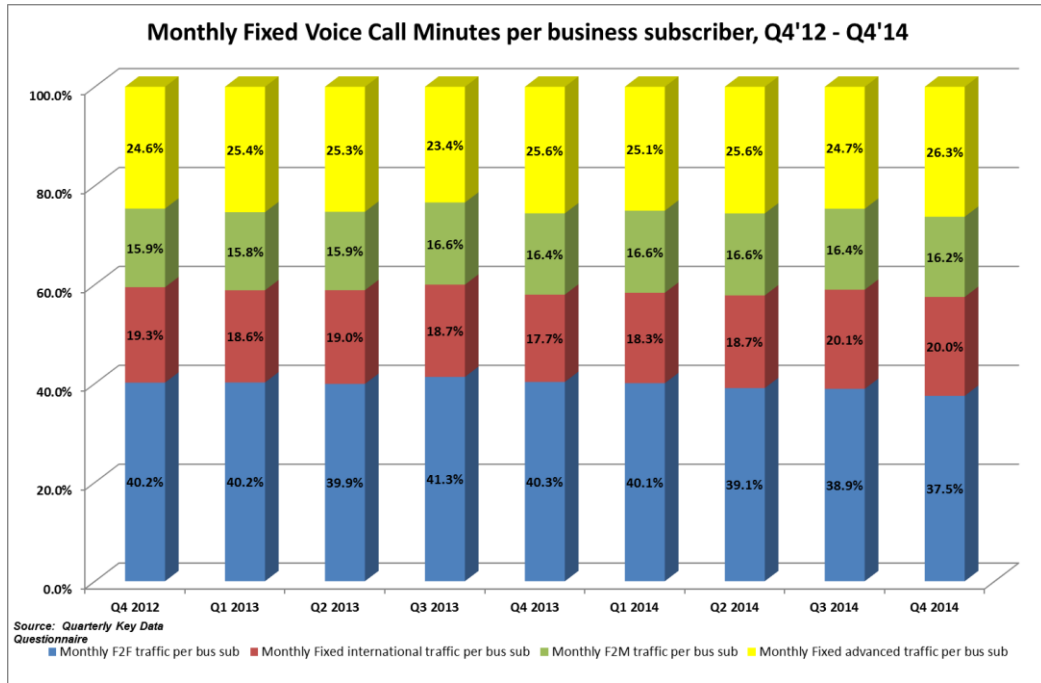


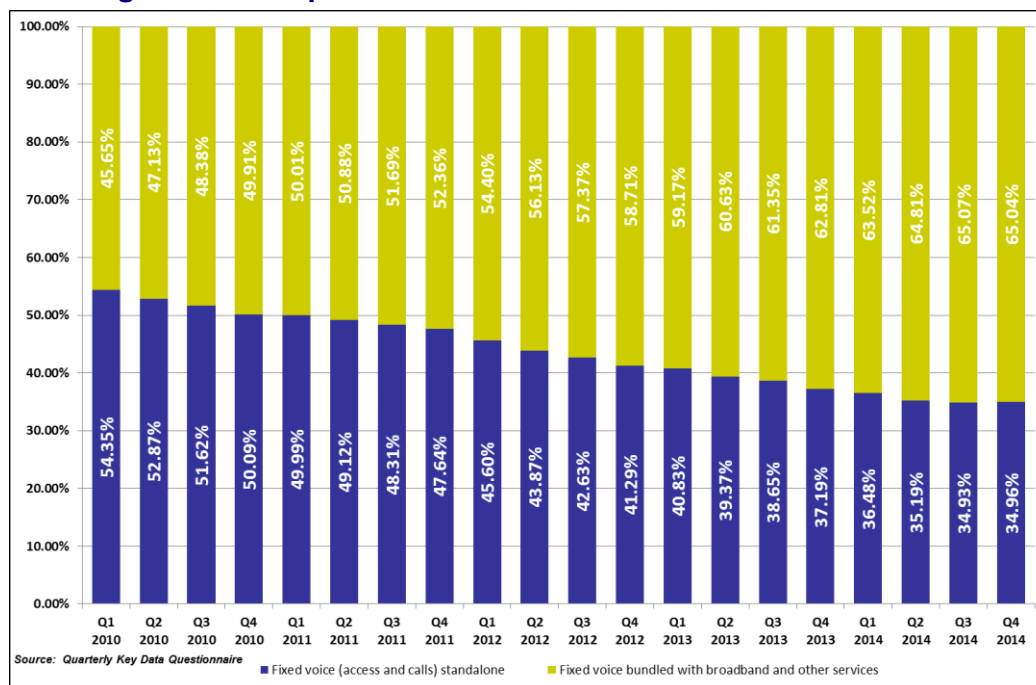
Figure 5: Monthly Fixed Voice Call Distribution % for Business Subscribers



Take-Up of Bundled Retail Services

E.6 Figure 6 shows the proportion of RFTS purchased on a standalone basis as opposed to as part of a bundle of services. Standalone RFTS subscriptions have fallen from 54.35% to 34.96% of total RFTS subscriptions in the period Q1 2010 to Q4 2014. Over the same period, RFTS purchased as part of a bundle has correspondingly increased from 45.65% to 65.04%. However, the rate of decline in standalone RFTS subscriptions has slowed in 2014.

Figure 6: RFTS purchased on a standalone basis and in a bundle



Competition in the RFTS Market⁴⁶¹

E.7 Figure 7 below illustrates both the total number of subscriptions and the market shares (in terms of subscriptions) of the main RFTS service providers over a five year period. At the end of Q4 2014 there were 1,587,261 fixed voice subscriptions (an increase of 3.8% on Q4 2013). Eircom had 47.2% of all fixed voice subscriptions followed by UPC (21.7%), Vodafone (15.8%) and Sky (6.4%).⁴⁶² In the Consultation⁴⁶³ we defined Independent FSPs⁴⁶⁴, Partially Independent FSPs⁴⁶⁵ and Resale FSPs⁴⁶⁶.

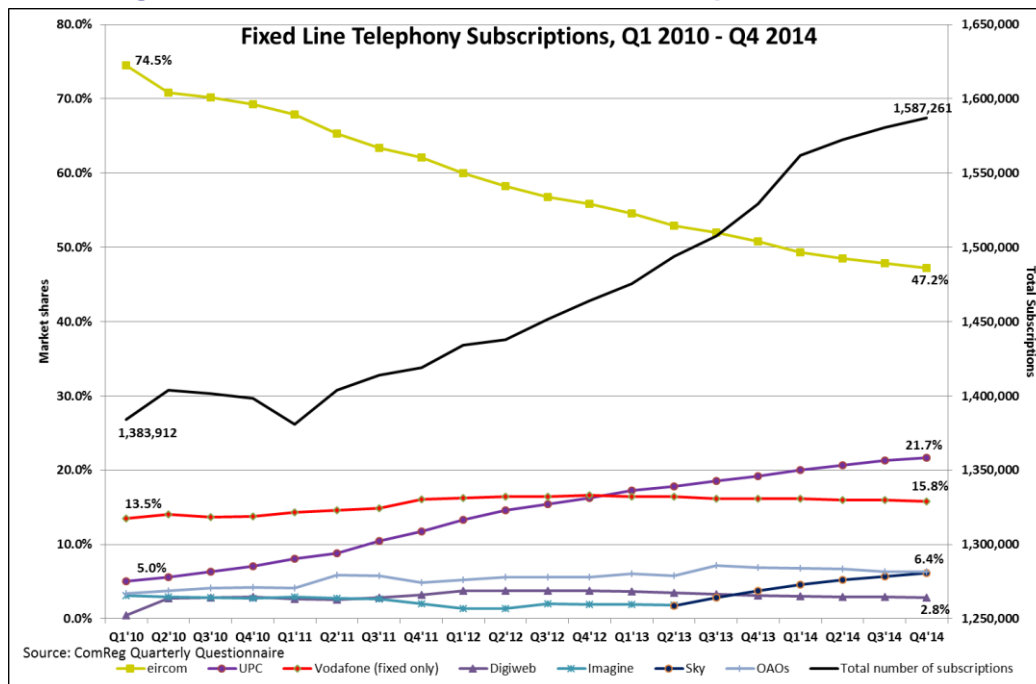
⁴⁶¹ In Q2 2013 Sky reached the 2% market share publication threshold, while Imagine's market share fell below it.

⁴⁶² In absolute terms, Eircom had [redacted] residential and [redacted] business subscriptions, UPC had [redacted] residential and [redacted] business subscriptions, Vodafone had [redacted] residential and [redacted] business subscriptions while Sky which provides services only to residential customers had [redacted] subscriptions.

⁴⁶³ See paragraph 3.2 of the Consultation.

E.8 ComReg notes that Vodafone’s and Sky’s provision of RFTS subscriptions is predominantly based on the purchase (directly or indirectly) of upstream SB-WLR based FACO services from Eircom.

Figure 7: FSP market share of retail subscriptions 2010-2014



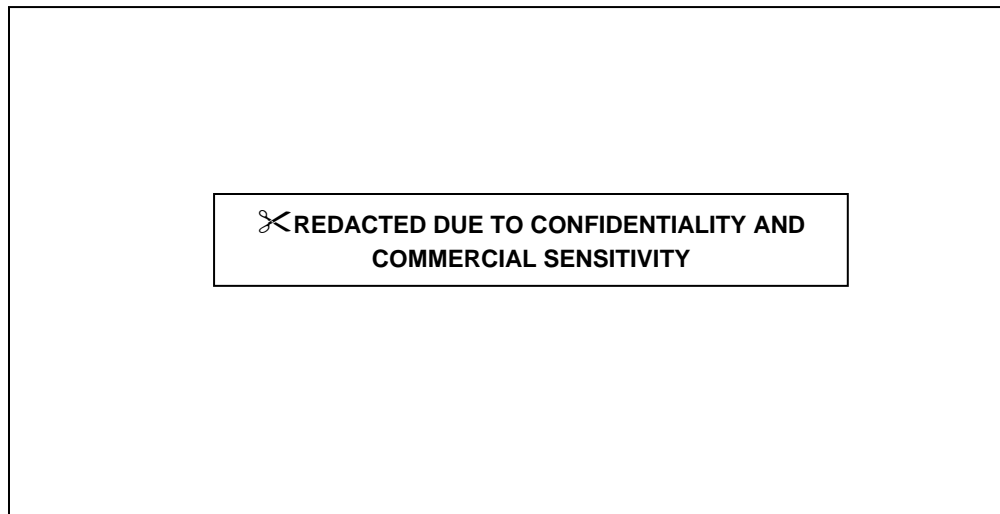
⁴⁶⁴ Independent FSPs are FSPs that provide RFTS predominantly using their own network and associated infrastructure and, hence, are not reliant on the use of wholesale inputs provided by other Service Providers when offering RFTS (except for purchasing Mobile Voice Call Termination or FVCT in order to terminate calls to subscribers on other Service Providers’ networks). Examples of such FSPs currently include Eircom and UPC.

⁴⁶⁵ Partially Independent FSPs are FSPs that may operate a physical switching platform and potentially other infrastructure of their own, but also rely (to varying degrees) on wholesale access provided by other Service Providers’ networks in order to supply RFTS to consumers. The coverage of these partially independent FSPs’ networks can differ significantly. Examples of FSPs in this category include Blue Face, BT, Colt, Digiweb, Imagine, Magnet and Vodafone.

⁴⁶⁶ Resale FSPs are FSPs whose supply of RFTS does not involve the use of their own physical network or switches. These FSPs purchase wholesale end-to-end voice calls services from a third party network operator and either resell RFTS under their own brand or re-sell it to another FSP who in turn then resells that service in the retail market under their own brand. Examples include Sky, Pure Telecom and Three.

E.9 Figure 8 below sets out market shares (in terms of fixed originating traffic) of the main RFTS service providers. As of Q4 2014⁴⁶⁷, Eircom's RFVC traffic accounted for approximately 43.7% of total market RFVC traffic volumes. As of Q4 2014, UPC's RFTS customers were generating [REDACTED] million minutes of traffic, which represents approximately [REDACTED%]⁴⁶⁸ of all RFVC minutes for that period, [REDACTED] since the same period in 2012.

Figure 8: FSPs' market share of retail call traffic 2010-2014 [REDACTED due to Confidentiality and Commercial Sensitivity]



Developments in CPS, SB-WLR and LLU services

E.10 Figure 9 below shows that as at Q4 2014 there were a total of 493,419 indirect access lines⁴⁶⁹ comprised of standalone CPS (16,602), SB-WLR (377,649) and While Label Access (99,168).

E.11 While the number of standalone CPS lines has increased slightly in recent quarters, it nonetheless represents 3.4% of the total of these indirect access lines⁴⁷⁰ and has declined significantly from the figure of 111,521 in Q1 2007. The share of standalone CPS lines when taken as a percentage of overall RFTS subscriptions⁴⁷¹ (including PSTN, ISDN and Managed VOB over CATV networks) is approximately 1%. The decline in overall standalone CPS shows the continuing trend for consumers to purchase RFA and RFVC from the same supplier.

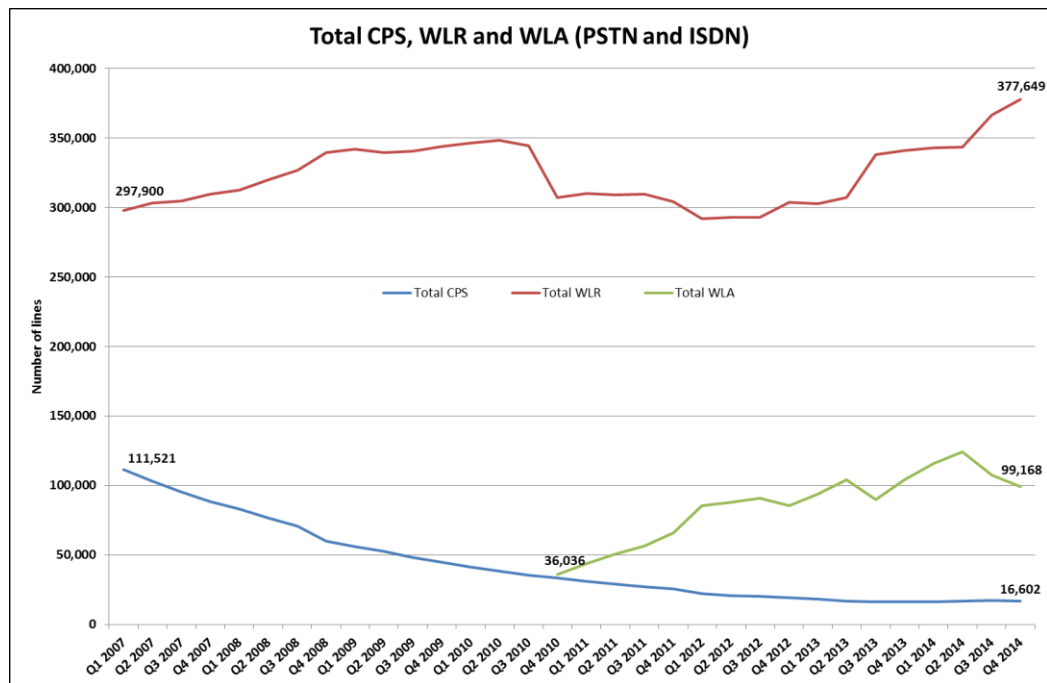
⁴⁶⁷ Calculated based on Eircom's fixed line traffic as a proportion of total (Eircom and alternative operators) fixed line traffic as published on <http://www.comstat.ie/data/data.472.data.html>

⁴⁶⁸ ComReg Quarterly Key Data Report, Q4 2014.

⁴⁶⁹ Note that Indirect access 'paths' (rather than lines) are greater given it measures voice channels and, for example, ISDN services include 2 or more channels.

⁴⁷⁰ CPS is 4.2% of total SB-WLR and standalone CPS lines.

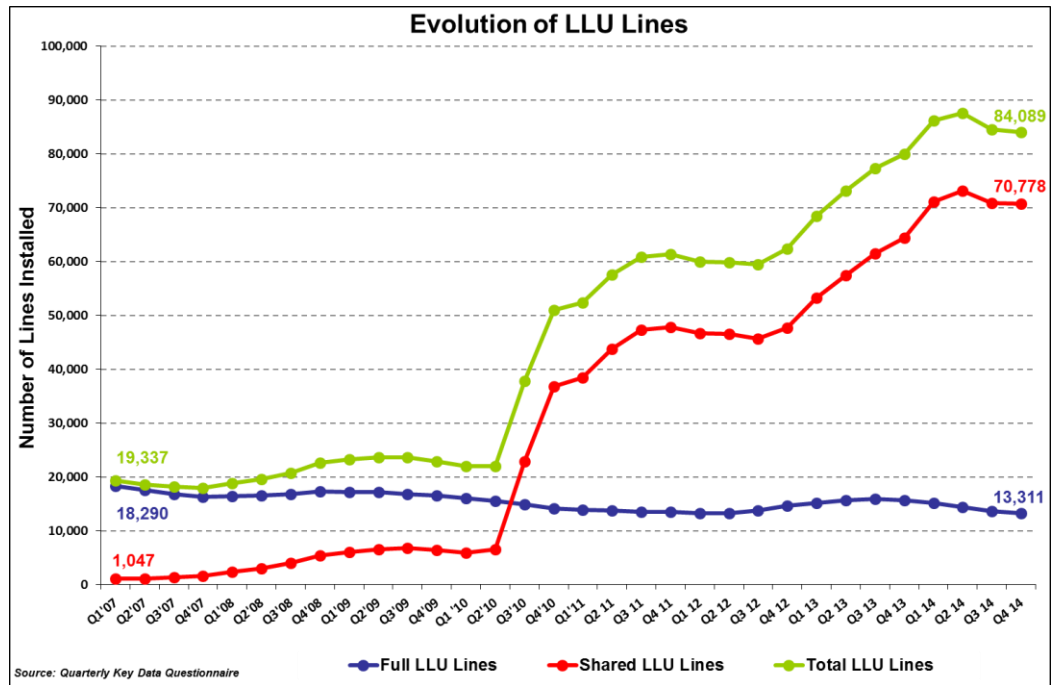
⁴⁷¹ As noted in Figure 7 above, there were 1,587,261 RFTS Subscriptions in Q4 2014.

Figure 9: Total CPS, SB-WLR and WLA indirect access lines

- E.12 The evolution of WPNIA/LLU is shown in Figure 10 below. As at Q4 2014, the total number of unbundled lines was 84,089 of which 70,778 were Line Share and 13,311 were fully unbundled lines.
- E.13 As noted in the Consultation⁴⁷², RFTS have not been offered by Access Seekers using WPNIA inputs. Instead, where Line Share has been used by Access Seekers to provide broadband, it has also involved the Access Seeker purchasing SB-WLR to provide a RFVA (and RFVC) service

⁴⁷² See paragraph 4.114 of the Consultation.

Figure 10: Evolution of LLU Lines



Appendix F Updated Transit Analysis

- F.1 This Appendix F provides an updated analysis of the main trends and developments in the Transit Market as were discussed in Section 7 of the Consultation and are further considered in Section 6, 7 and elsewhere throughout this Decision (**'Updated Transit Analysis'**).
- F.2 The data set out in this Updated Transit Analysis has been obtained from service providers via the 2014 Statutory Information Requests (and subsequent follow-up correspondence/discussions) and includes information relating to interconnection, Transit demand, traffic patterns, market shares and competition across different Transit routes.
- F.3 The Updated Transit Analysis presents information and discusses the following:
- (a) Variations in the number of Transit suppliers (discussed in paragraphs F.4 to F.12 below);
 - (b) Replication of Transit networks by service providers (discussed in paragraphs F.13 to F.17 below); and
 - (c) Demand for External Transit and evolution of Transit Market shares (discussed in paragraphs F.18 to F.25 below);

Variations in the Number of Transit Suppliers

- F.4 Table 1 is analogous to Table 14⁴⁷³ set out in the Consultation. It identifies the number of *trunk* and *pure* Transit routes, by type, where the three main External Transit⁴⁷⁴ providers are supplying Transit. There are 46 *trunk* Transit routes to Eircom exchanges⁴⁷⁵, and another 30 *pure* Transit routes to other service provider networks. Eircom is the only ubiquitous Total Transit provider. Changes in Transit routes (relative to the information that was presented in the Consultation) are highlighted in brackets in Table 1.

⁴⁷³ See page 222 of the Consultation.

⁴⁷⁴ For the purpose of the assessment, wholesale Transit minutes provided by a Transit supplier to third parties will be referred to as '*External Transit*'. The self-provision of Transit will be referred to as '*Internal Transit*'. Collectively External Transit and Internal Transit are referred to as '*Total Transit*').

⁴⁷⁵ In the Consultation ComReg then noted that there were 50 Eircom exchanges, however, Eircom has since close 4 small exchanges and there are now 46 Eircom exchanges.

Table 1: The number of Eircom exchanges and other service provider networks connected to each Transit Provider^{476 477} [X Redacted due to Confidentiality and Commercial Sensitivity]

Service Provider	Primary Exchange routes	Tandem Exchange routes	Double-Tandem Exchange routes	Routes to alternative FSPs	Routes to MSPs
Total number of routes	28 (-4)	14	4	24 (+3)	6 (+1)
Eircom (full connectivity)	✂ REDACTED DUE TO CONFIDENTIALITY AND COMMERCIAL SENSITIVITY				
BT					
UPC					

- F.5 Since 2013, Eircom has closed four small exchanges, with these being exchanges where it was previously the only Transit service provider. As a result, BT is now interconnected with [X Redacted] Eircom's exchanges. BT has also extended its degree of interconnection to other FSPs, and is now interconnected with [X Redacted] of all FSPs and [X Redacted] out of the six MSPs. UPC is also competing over an increased number of Transit routes, having interconnected with an additional [X Redacted] FSPs and [X Redacted] MSP over the same period. The number of routes on which Eircom is the sole Transit provider has, therefore, decreased to one route.
- F.6 Table 2 below is analogous with Table 15 as set out in the Consultation⁴⁷⁸ and examines the extent to which competitive conditions vary between *trunk* Transit routes (i.e., Transit between Eircom exchanges). ComReg has also supplemented the information originally presented in the Consultation to now include information on the percentage of FVCT traffic accounted for in each scenario.
- F.7 Each Eircom exchange identified in Table 2 below represents a *trunk* Transit route. The number of *trunk* Transit service providers interconnected to an exchange can be thought of as the number of competitors providing services over a given *trunk* Transit route at that exchange.

⁴⁷⁶ Information is based on responses to ComReg's 2014 Statutory Information Request and interconnection information provided by Eircom to ComReg as at March 2015.

⁴⁷⁷ As noted in paragraph 7.111 of the Consultation, information provided by Magnet for the purpose of ComReg's Quarterly Key Data Reports indicated that it provided wholesale Transit services. However, data provided by Eircom to ComReg in September 2013, and by Magnet in its response to the 2014 Statutory Information Request, suggested that Magnet is interconnected with very few of Eircom's exchanges, and is not interconnected with any other Service Provider networks.

⁴⁷⁸ See page 250 of the Consultation.

Table 2: Competition on *trunk* Transit routes⁴⁷⁹ [Redacted] Partially redacted due to Confidentiality and Commercial Sensitivity]

Number of wholesale <i>trunk</i> Transit Providers Present	Number of Exchanges	% of total Eircom Exchanges	% of FVCT Traffic
Eircom only	1	2%	[Redacted]
Eircom + 1 alternative Transit provider	23	50%	[Redacted]
Eircom + 2 alternative Transit providers	5	11%	[Redacted]
Eircom + 3 or more alternative Transit providers	17	37%	[Redacted]
Total number of Eircom exchanges	46	100%	100

- F.8 Relative to the data presented in Table 15 in the Consultation, it can be observed that Eircom is now the sole *trunk* Transit service provider at one exchange (compared with five exchanges in 2013, although as noted above this is due to Eircom closing 4 small exchanges). This one exchange⁴⁸⁰ is an uncontested *trunk* Transit route, but accounts for [Redacted] (less than 1%) of total FVCT traffic on Eircom's network.
- F.9 There are a further 23 *trunk* Transit routes where Eircom and one other competing service provider (BT) are supplying *trunk* Transit. Such routes account for [Redacted] (over half) of total FVCT traffic on Eircom's network.
- F.10 On the remaining 22 *trunk* Transit routes there are at least 3 competing *trunk* Transit providers (BT and Eircom and UPC). Such *trunk* routes account for [Redacted] (over a third) of total FVCT traffic.

⁴⁷⁹ This table is based on information provided by Eircom in March 2015. Note that it only includes Transit providers interconnected to Eircom exchange levels. There may be other networks interconnected to each network that do not offer wholesale transit to third parties (i.e. an interconnect for the purpose of termination only)

⁴⁸⁰ This is the [Redacted].

F.11 Table 3 below is analogous to Table 16 in the Consultation⁴⁸¹, and examines the extent to which competitive conditions vary between *pure* Transit routes (Transit between independent service provider networks). Changes in figures for *pure* Transit routes relative to the figures presented in the Consultation are highlighted in brackets. In this assessment, ComReg has assumed that Transit to each service provider's network represents a *pure* Transit route (there being 30 *pure* Transit routes in total). Table 3 below groups service provider networks according to how many wholesale *pure* Transit providers are interconnected with other service providers, with the number of *pure* Transit providers being indicative of the number of competitors present on a given route.

Table 3: Competition on *pure* Transit routes⁴⁸²

Number of Transit Providers directly interconnected	No. of Service Providers	% of Service Provider networks
Eircom only	12	40% (-4.4%)
Eircom + 1 Transit provider	7 (-5)	23% (-21.4%)
Eircom + 2 or more Transit providers	11 (+8)	37% (+25.9%)
Total number of FSPs and MSPs	30	100%

F.12 Table 3 shows that Eircom is the only supplier of *pure* Transit on 40% of routes. i.e., 40% of service providers only interconnect with Eircom, and therefore rely entirely on Eircom for the supply of Transit. Eircom faces competition from one other Transit provider on 23% of *pure* Transit routes, and faces competition from at least two alternative *pure* Transit suppliers on 37% of routes.

Replication of Transit networks by service providers

F.13 In Section 7 of the Consultation, ComReg presented data setting out the extent to which Eircom's Transit network had been replicated by other FSPs and MSPs⁴⁸³. ComReg noted that significant parts of Eircom's *trunk* Transit network had been replicated.

F.14 Table 4 below shows the degree to which Eircom's *trunk* Transit network/routes have been replicated by other service providers either for the purpose of supplying External Transit (i.e. wholesale supply) or for Internal Transit (self-supply).⁴⁸⁴ In this context, it shows that all of Eircom's *trunk* Transit routes have now been replicated since at least one service provider other than Eircom is present at every Eircom exchange).

⁴⁸¹ See page 251 of the Consultation.

⁴⁸² Information is based on responses to ComReg's 2014 Statutory Information Request and interconnection information provided by Eircom to ComReg as at March 2015.

⁴⁸³ See paragraphs 7.155 to 7.177 of the Consultation.


⁴⁸⁴ This table captures the information that was presented in Table 18 of the Consultation (redacted), but is presented in a different format, largely to overcome confidentiality concerns.

Table 4: Interconnection with Eircom exchanges

Number of alternative service providers interconnected	Number of exchanges in 2013	Number of exchanges in 2015
0	4	0 ⁴⁸⁵
1	2	2
2	12	12
3	6	6
4	12	12
5+	14	14
Total	50	46

F.15 Table 5 below provides a further breakdown, for the main service providers, of the details set out in Table 4 above, in particular, the number of *trunk* Transit routes to which each individual service provider is interconnected either for the purpose of External Transit or for Internal Transit.

Table 5: Interconnection with Eircom exchanges by service provider [Redacted due to Confidentiality and Commercial Sensitivity]

Service Provider ⁴⁸⁶	Number of <i>trunk</i> Transit routes	
	September 2013	March 2015
BT	 REDACTED DUE TO CONFIDENTIALITY AND COMMERCIAL SENSITIVITY	
Colt		
Eircom		
Energis		
Imagine		
Meteor		
Telefonica		
UPC		
Verizon		
Vodafone		

⁴⁸⁵ As noted above, Eircom has closed four exchanges since 2009, which accounts for the reduction in the total number of Eircom exchanges. There were no service providers interconnected with these exchanges in 2013

⁴⁸⁶ A number of other service providers are interconnected with Eircom at its two double-tandem exchanges and in some cases with other operators.

- F.16 At the time of the publication of the 2007 Decision, BT had already interconnected with a large number of Eircom exchanges. However, since then, BT has expanded its depth of interconnection further, with several other service providers having also replicated parts of Eircom's *trunk* Transit network.⁴⁸⁷ This replication of Eircom's *trunk* Transit network has been driven by investment by UPC, Vodafone, and several other FSPs and MSPs with increased interconnection with Eircom's tandem and primary exchanges. For example, in 2009 Vodafone was interconnected with [redacted] of Eircom exchanges, and is now interconnected with [redacted]⁴⁸⁸ of Eircom's forty six exchanges ([redacted]). Similarly, in 2009 UPC was interconnected with [redacted] of Eircom's exchanges, but is now interconnected with [redacted] of Eircom's exchanges.
- F.17 The degree of interconnection by alternative service providers at Eircom tandem and primary exchanges means that almost [redacted] (less than 80%) of traffic terminated on Eircom's network (FVCT) is handed over at Eircom's primary exchanges (versus [redacted] in 2009), with [redacted] (less than 25%) handed over at tandem exchanges and only [redacted] (less than 5%) of FVCT traffic terminated at double-tandem exchanges. Although a sizeable number of service providers (twelve) are only interconnected with Eircom, and therefore use only Eircom for *trunk* Transit, such service providers account for a smaller proportion of call traffic (less than 5%).

Demand for External Transit and evolution of Transit Market shares

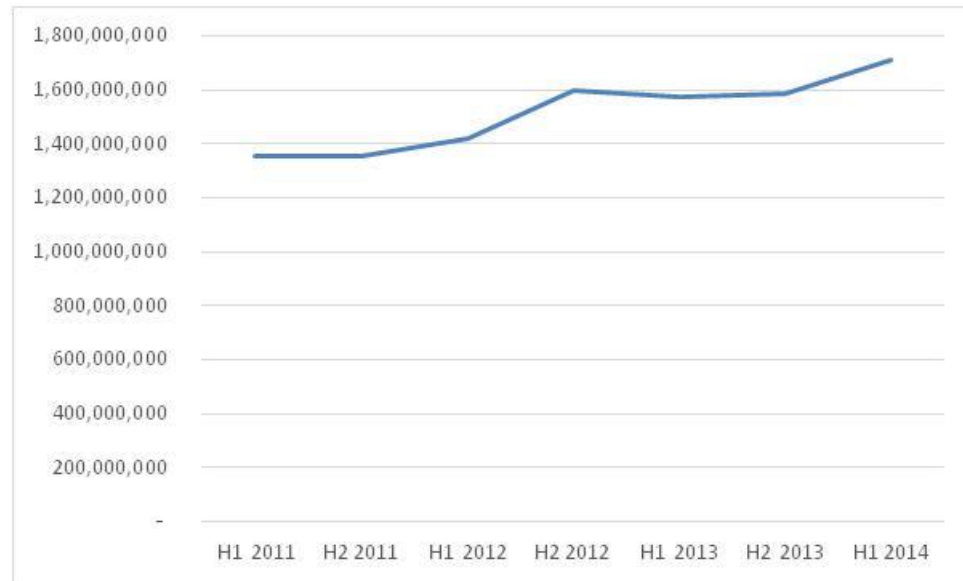
- F.18 As noted above⁴⁸⁹, External Transit is the provision of Transit to a third party. i.e., external wholesale market supply. Figure 11 below shows that since 2011, demand for External Transit has grown by 27%. This followed a 13% decline in demand for External Transit in the period 2008 to 2011.

⁴⁸⁷ See paragraphs 7.83 to 7.93 of the Consultation.

⁴⁸⁸ [redacted]

⁴⁸⁹ See footnote 474 above.

Figure 11: Demand for External Transit minutes H1 2011 – H1 2014 (in '000s minutes)



F.19 In the Consultation⁴⁹⁰, ComReg noted that it would be useful when assessing Transit market shares to observe:

- Market share trends over time based on the volume of External Transit minutes provided by each Transit supplier to third parties; and
- Market share trends over time based on the volume of Total Transit minutes provided by a service provider (including External Transit and Internal Transit).

F.20 As ComReg noted in the Consultation, it is more practical to obtain and present data on External Transit volumes than it is to obtain and present data on Total Transit volumes.⁴⁹¹ Consistent with the approach taken by ComReg in the Consultation⁴⁹², ComReg has presented market share data for the supply of External Transit.

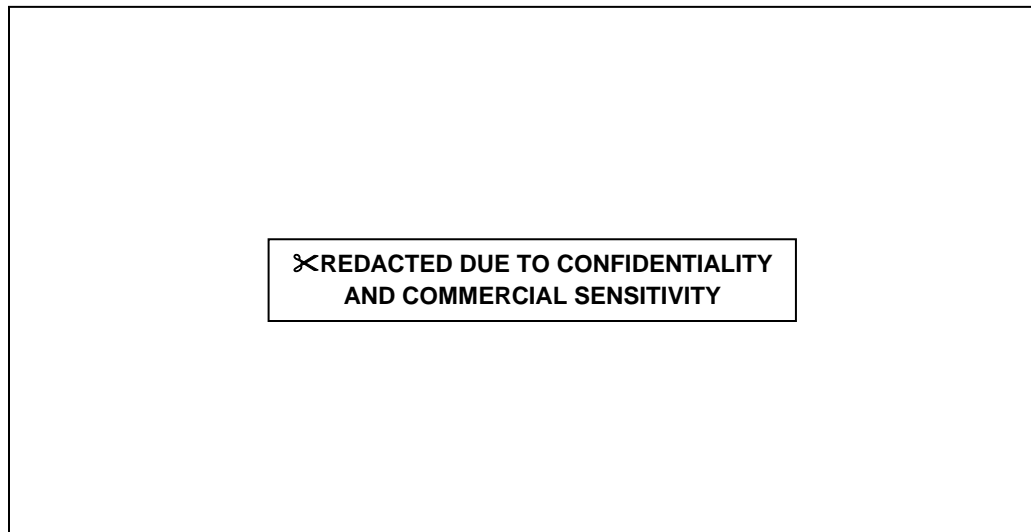
⁴⁹⁰ See paragraphs 7.209 to 7.241 of the Consultation.

⁴⁹¹ Calculating shares based on Total Transit is difficult because ComReg's definition of the Transit Market (set out in Section 6 of this Decision) would exclude on-net trunk traffic generated, or received, by networks that only have a single switch or a non-hierarchical network. This would mean that, while Eircom would have a significant volume of internal 'on-net' traffic included within the analysis, the analogous traffic generated on flat networks such as that operated by UPC, would be excluded. This could potentially produce a skewed assessment of market share.

⁴⁹² See paragraphs 7.209 to 7.221 of the Consultation.

F.21 Figure 12 below presents demand for External Transit minutes in the period between H1 2011 and H1 2014.⁴⁹³ Figure 12 replicates Figure 28 set out in the Consultation.⁴⁹⁴

Figure 12: Supply of External Transit Minutes H1 2011 – H1 2014 (in '000s minutes)
 [REDACTED DUE TO CONFIDENTIALITY AND COMMERCIAL SENSITIVITY]



F.22 Figure 12 shows that overall demand for External Transit has steadily increased since Q3 2011. In particular, demand for BT's External Transit has increased by approximately [REDACTED] over the period H1 2011 and H1 2014, with demand for Eircom's External Transit having increased to a lesser extent by [REDACTED].⁴⁹⁵

F.23 Figure 13 below sets out External Transit market shares as at H1 2014 and it replicates Figure 29 as set out in the Consultation.⁴⁹⁶

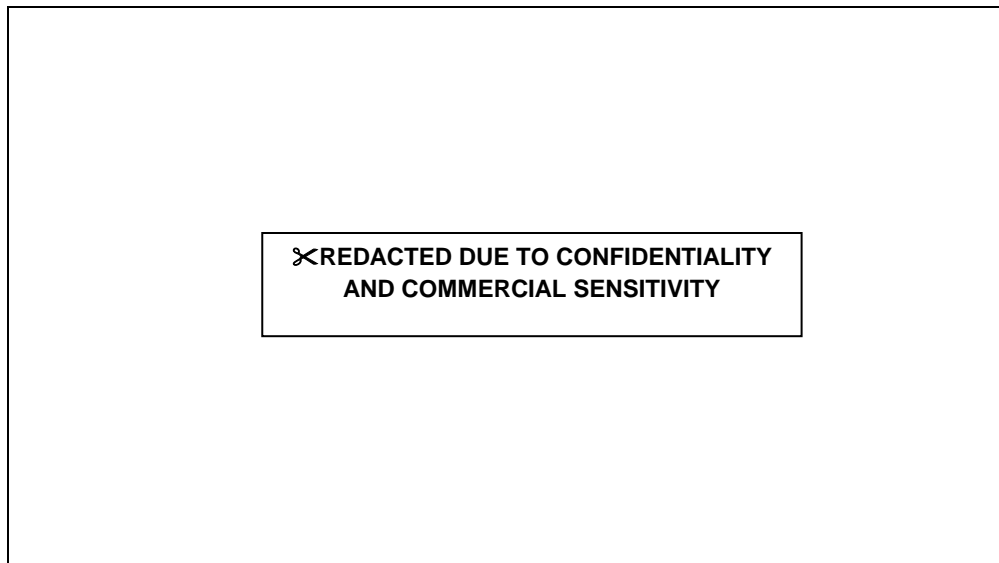
⁴⁹³ This graph is based on data provided by service providers to ComReg in their responses to the 2014 Statutory Information Request. Transit includes *pure* Transit and *trunk* Transit.

⁴⁹⁴ See page 242 of the Consultation.

⁴⁹⁵ Note that this growth in Eircom's supply of Transit is being driven by its supply of *pure* Transit. Over this period there has been a decline in Eircom's supply of *trunk* Transit.

⁴⁹⁶ See page 243 of the Consultation.

Figure 13: External Transit market shares as at H1 2014 [Redacted due to Confidentiality and Commercial Sensitivity]



- F.24 Figure 13 shows that in the period ending H1 2014 the supply of External Transit continues to be characterised by two large wholesale Transit providers, namely Eircom and BT. BT is now the largest supplier of External Transit, albeit by a narrow margin.⁴⁹⁷ UPC's External Transit traffic volumes have grown in proportion to overall External Transit demand. UPC's market share of [Redacted] is therefore relatively unchanged since 2011.⁴⁹⁸
- F.25 It is useful to note that, when the self-supply of Transit by Eircom is included, Eircom reports higher overall Transit volumes than BT (and therefore has a higher 'market share' than BT)⁴⁹⁹.

⁴⁹⁷ Note, while ComReg has redacted this figure for reasons of commercial sensitivity and confidentiality, it shows that neither BT nor Eircom have respective market shares of above 50%. Together, Eircom and BT make up account for a significant proportion of overall External Transit supply.

⁴⁹⁸ See Figure 29 on page 243 of the Consultation

⁴⁹⁹ Under that scenario, Eircom and BT have [Redacted] and [Redacted] market shares respectively. Notably, Eircom's market share under that scenario has decreased from [Redacted%] in H1 2011 to [Redacted] in H1 2014.

Appendix G Regulatory Impact Assessment

- G.1 The Regulatory Impact Assessment ('**RIA**') is an analysis of the likely effect of proposed new regulation or regulatory change. 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. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. It is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders. Appropriate use of the RIA should ensure that the most effective approach to regulation is adopted.
- G.2 ComReg's approach to RIA follows the RIA Guidelines⁵⁰⁰ published by ComReg in August 2007 and takes into account the "Better Regulation" programme⁵⁰¹ and international best practice (for example, considering developments involving RIA published by the European Commission and the OECD).
- G.3 Section 13(1) of the Communications Regulation Act 2002 (as amended) requires ComReg to comply with Ministerial Policy Directions. In this regard, Ministerial Policy Direction 6 of February 2003⁵⁰² 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.
- G.4 In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions, e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. Our ultimate aim in conducting a RIA is to ensure that all measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach is taken. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact, ComReg may carry out a lighter RIA in respect of those decisions.
- G.5 ComReg's approach to RIA follows five steps:

⁵⁰⁰ [ComReg Document 07/56a](#), ComReg, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", 10 August 2007 (the '**RIA Guidelines**').

⁵⁰¹ 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

⁵⁰² Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

Step 1: Describe the policy issue and identify the objectives.

Step 2: Identify and describe the regulatory options.

Step 3: Determine the impacts on stakeholders.

Step 4: Determine the impacts on competition.

Step 5: Assess the impacts and choose the best option.

G.6 The purpose of carrying out a RIA is to aid decision making through identifying regulatory options and analysing the impact of those options in a structured manner. The Department of An Taoiseach's Revised RIA Guidelines state that

*"RIA should be conducted at an early stage and before a decision to regulate has been taken"*⁵⁰³.

G.7 The European Commission, in reviewing its own use of impact assessments, also notes that:

*"Impact assessments need to be conducted earlier in the policy development process so that alternative courses of action can be thoroughly examined before a proposal is tabled"*⁵⁰⁴.

G.8 In determining the impacts of the various regulatory options, current best practice appears to recognise that full cost benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review may be undertaken by ComReg when necessary and appropriate.

G.9 Having regard to the various sets of guidelines, it is clear that the RIA should be introduced as early as possible in the assessment of potential regulatory options, where appropriate and feasible. A preliminary RIA was incorporated within the Consultation. This RIA takes into account all the responses to the Consultation, as well as any comments from the European Commission and the CCPC.

G.10 As noted in paragraph 2.24 The CCPC Response indicates that the CCPC is satisfied that there are no grounds for altering the market definitions proposed by ComReg and that the CCPC 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 FACO Markets identified.

G.11 Similarly, the EC has not raised any substantive issues regarding ComReg's market definition or SMP analysis for each of the Relevant Markets. ComReg has considered and taken utmost account of the European Commission's Response in Appendix D and elsewhere in this Decision.

⁵⁰³ See paragraph 2.1.

⁵⁰⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Second strategic review of Better Regulation in the European Union", COM(2008) 32 final 30.01.2008, p. 6.

G.12 ComReg now conducts its RIA having regard to its proposed approach to impose (or not) regulatory remedies identified in Sections 9 and 10, along with a consideration of other options. The following sections, in conjunction with the rest of the analysis and discussion set out elsewhere in the Consultation and Decision, represent a RIA. It sets out an assessment of the potential impact of the imposition and/or removal of regulatory obligations on Eircom in the FACO Markets as set out in Section 9 and the proposed removal of regulatory obligations in the Transit Market in Section 10.

Principles in Selecting Remedies

G.13 In paragraphs 9.2 to 9.6 of the Consultation and noted in Section 9 of this Decision we previously set out the legislative basis upon which ComReg must consider the imposition of remedies. In choosing remedies ComReg is obliged, pursuant to Regulation 8(6) of the Access Regulations, to ensure that they are:

- Based on the nature of the problem identified;
- Proportionate and justified in the light of the objectives laid down in Section 12 of the Communications Regulation Act 2002 (as amended), and Regulation 16 of the Framework Regulations; and
- Only imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.

G.14 Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) 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:

- to promote competition;
- to contribute to the development of the internal market; and
- to promote the interests of users within the European Union.

Describe the Policy Issue and Identify the Objectives

G.15 In general, the European Commission acknowledges that once SMP is identified in markets, which are defined as susceptible to *ex ante* regulation, then the regulatory framework foresees that at least one regulatory obligation would be imposed to mitigate against the potential exercise of anti-competitive behaviours associated with the ability and incentives of an undertaking designated with SMP and to ensure the development of effective competition within and across communications markets. ComReg has identified the Relevant Markets within the preceding analysis in this Decision:

- (a) The FACO Markets; and
- (b) The Transit Market.

- G.16 ComReg has found that the 3CT test is met in The FACO Markets. ComReg has designated Eircom with SMP in each of the FACO Markets. In Section 8, ComReg found that competition problems are likely to arise in the FACO Markets. As noted above, in order to address those competition problems, ComReg is required to impose on an operator with SMP one or more (as appropriate) of the obligations (or remedies) set out below:
- (a) Access;
 - (b) Transparency;
 - (c) Non-Discrimination;
 - (d) Price Control and Cost Accounting; and
 - (e) Accounting Separation.
- G.17 Given the competition problems identified in Section 8, ComReg's objectives when imposing obligations upon Eircom (as the designated SMP operator) in the FACO Markets are to enhance the development of effective competition in downstream markets, and ultimately to help ensure that consumers can reap maximum benefits in terms of price, choice and quality of service. In so doing, ComReg is seeking to prevent exploitative/exclusionary behaviours and/or restrictions or distortions in competition amongst Service Providers. ComReg is also seeking to provide regulatory certainty to all Service Providers through the development of an effective and efficient forward-looking regulatory regime that serves to promote competition.
- G.18 In pursuing these objectives, ComReg has considered the impact of specific forms of regulation in the FACO Markets. As a result, ComReg is of the view that the remedies specified in Section 9 are both appropriate and justified in light of the market analysis and the identified competition problems. The regulatory options are further considered below.
- G.19 Given that ComReg has identified in Section 7 that the Transit Market fails the 3CT, ComReg cannot, as a matter of law, impose any regulatory obligations. However, as noted in Section 10, ComReg has imposed a sunset period of six months for the withdrawal of existing remedies imposed upon Eircom in the Transit Market.

Identify and Describe the Potential Regulatory Options

- G.20 ComReg recognises that regulatory measures should be kept to the minimum necessary to address the identified market failures in an effective, efficient and proportionate manner. There are a range of potential regulatory options available to ComReg to address the potential competition problems in the FACO Markets.

- G.21 In this regard, regulation can be considered to be incremental, such that only obligations are imposed which are necessary and proportionate to address the competition problems which have been identified. The lightest measure that can be imposed is the obligation of transparency⁵⁰⁵. Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation⁵⁰⁶. If this is still not sufficient, ComReg may next consider the imposition of an access obligation⁵⁰⁷, or accounting separation obligations⁵⁰⁸. The final measure to be considered is the imposition of a price control and cost accounting remedy⁵⁰⁹.
- G.22 The question of regulatory forbearance and the incremental imposition of one or more of the above obligations in the FACO Markets are considered below.
- G.23 As noted above, ComReg considers is that the Transit Market does not satisfy the 3CT, including given that high and non-transitory barriers to entry are no longer present. Failure to meet the 3CT implies that the Transit Market is no longer susceptible to ex ante regulation and, therefore, regulation is not warranted.
- G.24 On that basis, ComReg is removing regulation from the Transit Market. Therefore, ComReg's regulatory options in the Transit Market are limited to the timing of the withdrawal of existing regulation.
- G.25 As set out in Section 10, ComReg has imposed a six month sunset period for the removal of existing regulatory obligations imposed upon Eircom in the Transit Market. This will, amongst other things, allow Access Seekers sufficient time to seek alternative forms of Transit supply, if required, and thereby preserve continuity in the supply of retail/wholesale services (were Eircom to withdraw, or significantly alter, its Transit terms and conditions following deregulation)⁵¹⁰. To ensure the protection of consumer interests, ComReg plans to continue to monitor the effectiveness of competition within the Transit Market, notwithstanding the proposed removal of regulation. In this respect, ComReg reserves its right to re-examine competitive conditions within the Transit Market and, if appropriate, to intervene accordingly.
- G.26 ComReg notes that, from the effective date of this Decision, Eircom will no longer have to meet new requests for access in the Transit Market in the context of regulatory requirements (although it is free to do so commercially).
- G.27 This ultimately results in a reduction in Eircom's regulatory burden.

⁵⁰⁵ Regulation 9 of the Access Regulations.

⁵⁰⁶ Regulation 10 of the Access Regulations.

⁵⁰⁷ Regulation 12 of the Access Regulations.

⁵⁰⁸ Regulation 11 of the Access Regulations.

⁵⁰⁹ Regulation 13 of the Access Regulations.

⁵¹⁰ ComReg would not expect Eircom to significantly alter its terms and conditions given the presence of competition.

G.28 Given regulatory obligations cannot be imposed in the Transit Market (aside from the limited obligations regarding the proposed sunset period), the remainder of this RIA does not consider regulatory options with respect to the Transit Market.

Forbearance

- G.29 In the case of the current analysis of the FACO Markets, ComReg is required⁵¹¹ to impose at least some level of regulation on an undertaking(s) designated with SMP. Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations require ComReg to impose at least some level of regulation on Eircom, having been designated as having SMP. In Section 5, ComReg set out its view that the FACO Markets are not effectively competitive (or likely to become effectively competitive within the timeframe covered by this review). In Section 8, ComReg identified a range of competition problems that could occur in these or related markets, absent regulation.
- G.30 In Section 8, ComReg set out its view that, absent regulation, Eircom has the ability and incentive to engage in a range of exploitative and/or exclusionary behaviours. In view of this, absent the imposition of any remedies within the Relevant FACO Markets, it is ComReg's view that such markets (and impacted adjacent markets) would not be likely to function effectively. As highlighted in paragraphs 9.30 to 9.33 of the Consultation, it is ComReg's view that the option of regulatory forbearance in the FACO Markets is not, therefore, appropriate or justified.
- G.31 By not imposing any regulatory obligations on an undertaking designated with SMP, ComReg would be acting contrary to its regulatory obligations. Per Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations, once an undertaking has been designated as having SMP, ComReg is obliged to impose at least one regulatory remedy. The question is, therefore, which regulatory obligations are appropriate. ComReg examines this question below, with this analysis to be considered alongside the analysis elsewhere in both this Decision, and (where appropriate) in the Consultation.
- G.32 In Section 9 ComReg also decided not to impose any regulatory obligations upon Eircom with respect to Next Generation FACO. This takes into account proportionality considerations, and the need to incentivise OAOs to develop their own VOB capabilities. This is intended to create conditions that are conducive to sustainable competition in the longer term. In this respect, the discussion below on various obligations imposed relates to Current Generation FACO only (and the related associated facilities).

Transparency Obligations

G.33 As noted in paragraphs 9.7 to 9.28 of the Consultation, Eircom was designated as having SMP under the 2007 Decision and is currently subject to a range of transparency obligations.

⁵¹¹ In accordance with Regulation 8(1) of the Access Regulations.

- G.34 ComReg's view in Section 9 is that Eircom, as the designated undertaking with SMP should be required to comply with transparency obligations in order to minimise information asymmetries and, therefore, facilitate effective access to FACO and promote effective competition in downstream markets. In Section 8, ComReg identified competition problems which, absent regulation, could arise in the FACO Markets (and related markets). The competition problems identified included *inter alia* potentially excessive and/or discriminatory pricing, as well as a potential for outright or constructive (e.g. through protracted negotiations on terms and conditions) refusal to supply with a view to extracting rents above efficient cost and/or distorting competition in related markets. In this regard, ComReg requires that, as part of a general transparency obligation pursuant to Regulation 9 of the Access Regulations, Eircom should publish and maintain a RIO (including terms and conditions with respect to Wholesale SV); follow a RIO change management process; publish KPIs, performance metrics and SLAs; and facilitate the legitimate sharing of confidential and/or commercial information through a non-disclosure agreement. The justification for these obligations has been set out in Section 9.
- G.35 ComReg has considered whether transparency obligations alone would be sufficient to address the competition problems identified in Section 8 and does not consider this to be the case. For example, problems *inter alia* associated with excessive pricing, price/margin squeeze, discriminatory behaviour (on price or non-price grounds) and/or impeded, delayed or refused access could not be adequately addressed through transparency obligations alone.

Non-Discrimination Obligations

- G.36 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. As discussed in Section 8, there is potential for competition problems to arise when an integrated operator has SMP in one market which has links with other adjacent markets either at a similar (horizontal) or different (vertical) level in the production or distribution chain. In such circumstances, the SMP operator may attempt to transfer (leverage) its market power to such horizontally or vertically related markets. This could enable the SMP operator to strengthen its position in those related markets and potentially also reinforce its existing market power in the SMP market in question.
- G.37 As noted in paragraphs 9.7 to 9.28 of the Consultation, Eircom currently has an obligation of non-discrimination with respect to the provision of similar terms and conditions to undertakings that obtain, or seek to obtain from them, FVCO products, services and facilities.

- G.38 In Section 8 ComReg identified that, absent regulation, Eircom has the ability and incentive to engage in behaviours which can impact upon downstream competition and ultimately consumers. For example, Eircom could offer different prices or other terms and conditions and service quality to different wholesale buyers. As a consequence, ComReg has required in Section 9 that Eircom (as the FSP designated with SMP) apply the same conditions, to all other undertakings as those that Eircom provides to itself or to its subsidiaries, including in respect of FACO charges and information provided. Apart from these general obligations ComReg has applied, *inter alia*, an EOO non-discrimination standard (except in cases where SB-WLR is provided with an NGA WBA product, in which case an Eol non-discrimination standard is to be applied); and that a SoC should be provided according to specified terms, conditions and timelines, in particular, in order for Eircom to demonstrate its compliance with its non-discrimination obligations.
- G.39 ComReg considers that non-discrimination obligations alone would not be sufficient to address the competition problems identified in Section 8. For example, excessive pricing, outright or constructive denial of access problems, delaying tactics or poor service quality issues could persist in the presence of non-discrimination and transparency obligations. Therefore, the imposition of obligations other than transparency and non-discrimination obligations is both proportionate and justified having regard to the competition problems identified.

Access Obligations

- G.40 An access obligation gives Service Providers the right to request and receive access to FACO and associated facilities and establishes the principles on which the relevant products and services should be made available. Eircom has a range of access obligations currently imposed upon it by virtue of its existing designations with SMP. These include obligations to provide standalone CPS, CA, CS and SB-WLR; to negotiate in good faith with undertakings requesting access; not withdraw access to facilities already granted and continue to provide such facilities in accordance with existing terms and conditions and specifications; and meet reasonable requests for access to specified network elements, facilities or both such elements and facilities.
- G.41 In Section 8 ComReg identified that, absent regulation, Eircom has the ability and incentive to engage in behaviour which can impact upon downstream competition and consumers. For example, Eircom could actually or constructively refuse to provide access to other undertakings, including those with which it competed in downstream or related markets.

- G.42 In view of this, ComReg's position in Section 9 is that obligations to provide access to FACO products, services and facilities are both proportionate and justified. In this respect, ComReg has maintained the requirement that Eircom must meet reasonable requests for access and, in doing so, to provide specific products, service and facilities, including SB-WLR, Ancillary Services on SB-WLR, Interconnection Services and the PAC; to negotiate with undertakings requesting access; not to withdraw Access to facilities already granted without the prior approval of ComReg; to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of products, services or facilities; to provide access to co-location or other forms of associated facilities sharing insofar as it relates to interconnection services necessary to support access to FACO, products, services and facilities; to provide access to services needed to ensure interoperability of end-to-end services to End-Users, including facilities for intelligent network services; to provide access to OSS or similar software systems necessary to ensure fair competition in the provision of services; to interconnect networks or network facilities; and to provide access subject to conditions associated with fairness, reasonableness and timeliness, including various requirements concerning SLAs (including that SLA negotiations must be completed within a six month time period (unless otherwise agreed with ComReg)).
- G.43 ComReg considers that these access remedies are required in order to resolve the competition problems identified. However, ComReg considers that the imposition of access obligations by themselves would not likely prevent all possible forms of exploitative/exclusionary behaviour in the FACO Markets (and related markets). For example, additional measures may be required to prevent behaviours such as excessive pricing, discrimination (on price or quality grounds), or to ensure transparency of terms and conditions of access.

Price Control and Cost Accounting Obligations

- G.44 The purpose of price control and cost accounting obligations is to ensure that prices charged are not set above efficient cost, do not cause a margin squeeze, and promote efficiency and sustainable retail competition while maximising consumer benefits. As noted in paragraphs 9.7 to 9.28 of the Consultation, Eircom is currently subject to a price control obligation of cost orientation and cost accounting pursuant to the 2007 RNA Decision (now replaced by the 2014 Retail Access Markets Decision) and the 2007 Decision.
- G.45 In the review of competition problems in Section 8, ComReg considered, on a forward looking basis, the scope for competition problems to arise absent price control and cost accounting obligations. ComReg identified a significant and persistent risk of price-related competition problems deriving from a position of SMP in the FACO Markets including excessive pricing or the imposition of a margin squeeze which would allow Eircom to leverage its SMP position from the FACO Markets into adjacent or downstream markets.

- G.46 To address these concerns, ComReg required in Section 9 that Eircom is to be subject to a range of price control and cost accounting obligations, for some of which the details are subject to further consideration in a number of ongoing or upcoming related consultations and decisions on price control methodologies. These include a price control obligation of cost orientation relating to the FVCO component of SB-WLR, Interconnection Services, PAC, order handling process costs associated with SB-WLR, co-location and Ancillary Services on SB-WLR. A price control obligation of 'retail minus' has been applied with respect to the WLR element of SB-WLR and Low Value CPE Rental. ComReg has also imposed an obligation not to Margin Squeeze, including an obligation not to cause a margin squeeze with respect to Wholesale SV. Lastly, ComReg imposed an obligation to maintain appropriate cost accounting systems to justify its prices/costs of FACO products, services and facilities.
- G.47 ComReg considers that the price control and cost accounting obligations alone would not be sufficient to address the competition problems identified in Section 8. For example, absent sufficient granularity of Eircom's costs, including internal transfer costs, ComReg would not be in a position to ensure proper application of non-discrimination obligations and the effective operation of price control obligations.

Accounting Separation Obligations

- G.48 The purpose⁵¹² of an accounting separation obligation is generally 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. In the case of vertically-integrated undertakings, it can support non-discrimination and price control obligations and prevent unfair cross-subsidies between non-regulated and regulated services.
- G.49 As noted in paragraphs 9.7 to 9.28 of the Consultation, Eircom currently has an obligation to maintain separated accounts. In Section 8, ComReg identified competition problems that could arise, absent regulation, associated with price-related leveraging. These potential competition problems highlight the importance of continuing to ensure a transparent and effective mechanism of accounting separation.

⁵¹² See Article 1 of the 2005 Accounting Separation and Cost Accounting Recommendation.

G.50 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), ComReg has imposed accounting separation obligations to ensure transparency in relation to how Eircom allocates costs across regulated and unregulated services. This is important for ensuring that ComReg's proposed price control is effective – in particular, that cost oriented regulated prices are not being artificially inflated by the misallocation of costs to regulated products. For these reasons, ComReg considers that an obligation on Eircom to maintain separated accounts is justified, and is proportionate.

Determine the Impacts on Stakeholders

- G.51 Given that ComReg has designated Eircom with SMP in the FACO Markets, it is ComReg's position that the option of regulatory forbearance is not appropriate or justified and can therefore be discounted when assessing the regulatory options.
- G.52 Having regard to the SMP designation in Section 5 (which requires ComReg to impose at least some level of regulation⁵¹³) as well as the review of competition problems and remedies in Sections 8 and 9 respectively, ComReg has, on an incremental basis, identified why a range of appropriate remedies are necessary, proportionate and justified, while at the same time discounting other remedies where appropriate. Having regard to the analysis and assessment of the Relevant FACO Markets, ComReg has now grouped remedies into 4 options below for the purpose of considering the incremental impact of each option on stakeholders.

Options for the Relevant Market

- (a) Option 1: Impose Access obligations only;
- (b) Option 2: Impose Access, Transparency and Non-Discrimination obligations
- (c) Option 3: Impose Access, Transparency, Non-Discrimination and Price Control and Cost Accounting obligations
- (d) Option 4: Impose Access, Transparency, Non-Discrimination, Price Control & Cost Accounting and Accounting Separation obligations.

Option 1: Impose Access Obligations only		
Impact on Eircom	Impact on Competition	Impact on Consumers
Eircom would benefit from a reduced regulatory burden relative to 2007 Decision (and the 2014 Retail Access Markets Decision). There would be increased flexibility for Eircom to use	High risk that, even though access is mandated in principle, there would be significant scope for it to be effectively undermined through such practices as excessive or discriminatory pricing, unreasonable terms and	Availability of FACO, if ineffective, would ultimately undermine the ability of retail subscribers of Access Seekers to avail of retail services either at all or in an effective manner. High risk that, even though

⁵¹³ Pursuant to Regulation 8(1) of the Access Regulations and Regulation 27(4) of the Framework Regulations.

Option 1: Impose Access Obligations only		
<p>its market power at wholesale level to engage in exploitative or leveraging behaviours and negatively influence developments at the retail level or in adjacent wholesale markets. Could also facilitate extraction of excessive rents from FACO and related markets and ultimately consumers.</p> <p>Eircom's incentives to innovate and increase efficiency may be reduced where prices set above efficient cost are paid for by competitors and, in turn, by their customers.</p> <p>Increased risk of disputes and legal challenges involving the terms and other conditions associated with Eircom's FACO service arising from ineffective transparency and other preventative measures to protect against non-discrimination. Disputes could increase legal and regulatory costs faced by Eircom.</p> <p>Non-imposition of access obligations on Eircom with respect to Next Generation FACO does not add to existing regulatory burden.</p> <p>Obligation to conclude SLA negotiations within 6 months being imposed arguably increases burden on Eircom, considered to be minimal in context of what should be good practice.</p>	<p>conditions, delaying tactics, poor service quality, etc, ultimately resulting in foreclosure from downstream or adjacent markets.</p> <p>Where access is provided to downstream competitors on exploitative or discriminatory terms (relative to that provided to Eircom's own retail arm) this could significantly disadvantage existing rivals and distort, restrict or eliminate existing competition in downstream or adjacent markets.</p> <p>Ineffective access to FACO could also raise barriers to entry and expansion for new entrants in downstream or adjacent markets due to inability to guarantee RFTS provision to existing or potential customers.</p> <p>The non-availability of access to Next Generation FACO, is mitigated through access to Current Generation FACO.</p> <p>Encourages Access Seekers to develop their own Managed VOB capabilities thereby seeking to ensure sustainable long-term competition.</p> <p>Prices set above efficient cost would raise financial barriers to entry and/or expansion for undertakings operating in downstream retail or adjacent markets.</p> <p>Where prices are set</p>	<p>access mandated in principle, there would be significant scope for it to be effectively undermined through such practices as high or discriminatory pricing, unreasonable terms and conditions, delaying tactics, poor service quality, etc.</p> <p>If downstream competition is restricted, distorted or foreclosed, or investments discouraged due to ineffective FACO, consumers would potentially have reduced service choice, quality and innovation. Given the current tendency for RFTS to be bundled with broadband and other services (at least for a significant number of end-users), these issues could have broader consequences across such bundled services.</p> <p>Above-cost FACO prices, if applied, could put upward pressure (or slow the rate of any decline) on prices for RFTS either across the board or for certain customers (such as those who purchase standalone RFTS). Above-cost prices would also limit scope for retail pricing innovations thereby potentially depriving consumers of new and innovative bundles/packages involving fixed voice access and calls.</p>

Option 1: Impose Access Obligations only		
	<p>above efficient cost, this could limit scope for retail pricing innovations (such as flat rate pricing or large inclusive bundles of minutes to fixed phone numbers) by Eircom’s downstream rivals.</p> <p>Scope would persist for Eircom to squeeze competitors across related wholesale/retail markets through its relative pricing of FACO vis-à-vis other wholesale and retail services.</p> <p>Regulatory certainty is reduced given wholesale access and pricing uncertainty.</p> <p>A potentially increased incidence of disputes could also raise legal and regulatory costs for Eircom’s rivals.</p> <p>Differences in regulatory approach between Ireland and other EU countries (broader set of obligations are generally envisaged by other NRAs) and deviations from European Commission guidance could also generate legal uncertainty for pan-European operators considering investments in Ireland.</p>	

Option 2: Impose Access, Transparency and Non-Discrimination Obligations		
Impact on Eircom	Impact on Competition	Impact on Consumers
<p>Eircom would benefit from reduced regulatory burden relative to 2007 Decision and 2014 Retail Access Markets Decision.</p> <p>There would be increased flexibility for Eircom to use its market power at wholesale level to engage in exploitative or leveraging behaviours and negatively influence developments at the retail level or in adjacent wholesale markets. Could also facilitate extraction of excessive rents from FACO and related markets and ultimately consumers.</p> <p>Eircom's incentives to innovate and increase efficiency may be reduced where prices set above efficient cost are paid for by competitors and, in turn, by their customers.</p> <p>Increased risk of disputes and legal challenges involving Eircom's FACO service arising from ineffective transparency and other preventative measures to protect against non-discrimination. Disputes could increase legal and regulatory costs faced by Eircom.</p> <p>While EoI is imposed in certain circumstances,</p>	<p>While risk of impeding access to FACO may be moderated somewhat relative to Option 1, effective FACO may still be undermined through high or inefficient FACO pricing.</p> <p>Where access is provided to downstream competitors on exploitative or exclusionary terms, this could significantly disadvantage existing rivals and distort, restrict or eliminate existing competition in downstream or adjacent markets.</p> <p>Ineffective access to FACO (through exploitative or exclusionary pricing) could also raise barriers to entry and expansion for new entrants or existing participants.</p> <p>Pricing above efficient cost would raise financial barriers to entry and expansion for smaller or newer entrants and existing participants in downstream or adjacent retail markets.</p> <p>Scope would persist for Eircom to squeeze competitors across related wholesale/retail markets through its relative pricing of FACO vis-à-vis other wholesale and retail services.</p>	<p>Availability of FACO would enable subscribers of other networks to contact Eircom's subscribers. However, high risk that, even though access mandated in principle, there would be significant scope for such access to be effectively undermined through excessive pricing.</p> <p>If downstream competition is distorted or investments discouraged due to ineffective FACO, consumers would potentially have reduced service choice, quality and innovation.</p> <p>Above-cost FACO prices, if applied, could put upward pressure (or slow the rate of any decline) on retail voice prices. Above-cost prices would also limit scope for retail pricing innovations thereby potentially depriving consumers of new and innovative bundles/packages involving fixed voice calls.</p>

Option 2: Impose Access, Transparency and Non-Discrimination Obligations		
<p>the increased regulatory burden on Eircom is minimised as it is effectively already doing this.</p>	<p>Regulatory certainty is reduced given wholesale access and pricing uncertainty.</p> <p>A potentially increased incidence of disputes could also raise legal and regulatory costs for Eircom's rivals.</p> <p>Differences in regulatory approach between Ireland and other EU countries (broader set of obligations are generally envisaged by other NRAs) and deviations from European Commission guidance could also generate legal uncertainty for pan-European operators considering investments in Ireland.</p>	

Option 3: Impose Access, Transparency, Non-Discrimination and Price Control & Cost Accounting Obligations		
Impact on Eircom	Impact on Competition	Impact on Consumers
<p>As Eircom is currently subject to price control and cost accounting obligations, incremental burden of such obligations is not likely to be significant.</p> <p>Eircom's regulatory burden under Option 3 would not be significantly less than under Option 4 as Eircom is already subject to accounting separation obligations in other SMP markets. Under Option 3 there would be increased flexibility for Eircom to obscure internal transfer prices and the real costs of FACO if no accounting separation obligation was imposed. There would thus be an increased opportunity for Eircom's non-discrimination and/or price control obligations to be undermined.</p> <p>Risk of disputes and legal challenges involving Eircom's FACO prices may be eased relative to Options 1 and 2 due to price control obligation. However, lack of accounting separation may generate uncertainty regarding Eircom's compliance with non-discrimination and price control obligations, thus also contributing to risk of disputes.</p>	<p>Regulating FACO prices at efficient cost and/or retail minus (where an appropriate degree of competitive constraint exists at the retail level) would reinforce the effectiveness of the access, transparency and non discrimination obligations thus reducing risk of competitive distortions or restrictions Including foreclosure) in downstream retail or adjacent markets and potentially lowering barriers to entry/expansion for smaller Service Providers and existing participants.</p> <p>Setting FACO prices at efficient cost and/or retail minus (where an appropriate degree of competitive constraint at the retail level) would contribute to reducing the impact of any inefficient financial transfers or cross subsidies from Access Seekers to Eircom and thereby contribute to a level playing field between all FSPs.</p> <p>Regulating FACO prices at efficient cost would potentially provide greater scope for retail pricing innovations (such as flat rate pricing or large inclusive bundles of minutes to fixed phone numbers) by Eircom's downstream rivals.</p> <p>Greater consistency with EU guidance and other regulatory decisions would promote legal certainty and a more predictable</p>	<p>Reduced risk of competitive distortions or restrictions and a more level playing field in downstream and adjacent markets and greater wholesale pricing certainty helps facilitate retail price and service innovations (e.g. in terms of packages/bundles offered).</p> <p>Reduced risk of high FACO prices being passed through to end-users in the form of higher prices relative to Options 1 and 2 above.</p> <p>Potential for undetectable discriminatory behaviour due to lack of accounting separation may impact on downstream competition and investment with consequent negative implications in terms of price and service choice over time.</p>

Option 3: Impose Access, Transparency, Non-Discrimination and Price Control & Cost Accounting Obligations		
	<p>environment for potential investors although lack of accounting separation obligation may render monitoring of potential exclusionary behaviour less transparent further impacting on investment incentives for new entrants.</p> <p>While greater certainty that FACO prices would be set at efficient cost potentially moderates risk of disputes relative to Options 1 and 2, the lack of transparency of Eircom's internal transfer prices due to absence of an accounting separation obligation may still contribute to scope for discrimination (relative to its own retail arm) and consequent risk of disputes.</p>	

Option 4: Impose Access, Transparency, Non-Discrimination, Price Control & Cost Accounting and Accounting Separation Obligations		
Impact on Eircom	Impact on Competition	Impact on Consumers
<p>Existing regulatory burden on Eircom (per 2007 Decision and 2014 Retail Access Markets Decision) would remain.</p> <p>Risk of disputes and legal challenges involving Eircom's FACO prices would be eased relative to Options 1, 2 and 3.</p>	<p>General impacts associated with proposed price control are as set out for Option 3 above.</p> <p>As set out for Option 3 above, greater consistency with EU guidance and other regulatory decisions would promote legal certainty and a more predictable environment for potential investors.</p> <p>Greater certainty that FACO prices would be set at efficient cost, complemented by greater visibility of internal transfers to support non</p>	<p>Reduced risk of competitive distortions, restrictions and more level playing field in downstream markets and greater wholesale pricing certainty helps facilitate retail price and service innovations (e.g. in terms of packages/bundles offered).</p> <p>Reduced risk of above-cost inefficient FACO prices being passed through to end-users in form of higher prices relative to Options 1 and 2 above.</p> <p>Dynamic competition from alternative Service Providers (facilitated by</p>

Option 4: Impose Access, Transparency, Non-Discrimination, Price Control & Cost Accounting and Accounting Separation Obligations		
	discrimination obligation, moderates risk of disputes relative to Options 1, 2 and 3.	effective price control and appropriate preventative measures for discriminatory behaviour in respect of Eircom's FACO) should help facilitate ongoing delivery of price and service innovations and choice to end users over time.

Assess the Likely Impacts and Choose the Best Option

- G.53 In making this decision, ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations (including that any proposed remedies are to be based on the nature of the problem identified), as well as its relevant objectives as set out under Section 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations.
- G.54 ComReg considers that, absent regulation, there is the potential and incentive for Eircom, as an SMP FSP in the FACO Markets, to engage in exploitative and exclusionary behaviours which would impact on competition and consumers. In Section 8 ComReg provided examples of potential competition problems and the impact of these on competition and consumers. ComReg has also highlighted its objectives in regulating the FACO Markets in the paragraphs above, in particular, to prevent restrictions or distortions of competition in affected retail and wholesale markets and help to ensure that consumers can achieve maximum benefits in terms of price, choice and quality of service.
- G.55 The imposition of appropriate *ex ante* remedies to address such competition problems was discussed, and justified, in Section 9. Each of the specific remedies is designed to promote effective competition and to protect end users. These remedies should have the effect of mitigating, or eliminating, the competition problems that might otherwise result from Eircom's SMP in the FACO Markets. This will ultimately be to the benefit of end users of downstream retail and wholesale services.
- G.56 ComReg considers that implementing **Option 4** is justified because it incorporates the set of remedies that will be required to prevent Eircom from exploiting its SMP in the FACO Markets (and related markets).
- G.57 Eircom's strong position on downstream RFTS markets implies that Eircom not only has the ability, but also an incentive to engage in vertical leveraging and foreclosure of downstream markets, either through price (e.g. excessive/discriminatory pricing) and/or non-price means.

- G.58 The regulatory obligations chosen do not unduly discriminate against Eircom in that, while the obligations specifically only apply to Eircom, the obligations are proposed in order to specifically address the competition problems and are proportionate in that they are the least burdensome means of achieving this objective.
- G.59 ComReg considers that it has met the condition of transparency by setting out the potential requirements on Eircom, outlining the justification for the proposed obligations, and issuing a detailed and reasoned Consultation and Decision on these matters.

Appendix H Decision Instrument

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 market for call origination on the public telephone network provided at a fixed location, as defined by ComReg in ComReg Decision D05/15 which satisfies the Three Criteria Test as set out in ComReg Decision D05/15, as required by the European Commission in the 2014 Recommendation. This Decision Instrument further relates to the market for wholesale national call transit services on the public telephone network at a fixed location, as defined by ComReg in ComReg Decision D05/15.
- 1.2 This Decision Instrument is made:
- (i) Pursuant to and having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended); Regulation 6(1) of the Access Regulations and Regulation 16 of the Framework Regulations;
 - (ii) Having taken the utmost account of the 2014 Recommendation, the Explanatory Note and the SMP Guidelines;
 - (iii) Having, where applicable, pursuant to Section 13 of the Communications Regulation Act 2002 (as amended) complied with Ministerial Policy Directions;
 - (iv) Having had regard to the analysis and reasoning set out in ComReg Document No. 14/26 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations;
 - (v) Having consulted with the Competition and Consumer Protection Commission, further to Regulation 27 of the Framework Regulations;
 - (vi) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken account of any comments made by these parties;
 - (vii) Pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations; and
 - (viii) Having regard to the analysis and reasoning set out in ComReg Decision D05/15.

- 1.3 The provisions of ComReg Document No. 14/26 and ComReg Decision D05/15 shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2 DEFINITIONS

- 2.1 In this Decision Instrument, unless the context otherwise suggests:

“Access” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“Access Path” means the Physical Transmission Path(s) between the line-card or equivalent in the Exchange or RSU to the NTP or NTU;

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

“Ancillary Services on SB-WLR” means the ancillary services set out in sections 4.2 and 4.3 of the document entitled “Single Billing through Wholesale Line Rental Product Description” (issue 2.2, dated 5 December 2007) as may be amended from time to time and published on Eircom’s wholesale website, insofar as they relate to the Relevant Markets in accordance with the obligations set out in this Decision Instrument and also include Wholesale Low Value CPE Rental and Connection Charges;

“Associated Facilities” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

“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;

“Carrier Pre-Selection” or **“CPS”** is defined as an FVCO product, service or facility (whether provided standalone or as part of SB-WLR) that permits an End User to decide, in advance, to nominate and use an Undertaking of its choice to provide certain voice call services over Eircom’s fixed network, with such voice calls currently described in the “Carrier Pre-Selection All Calls Inclusion and Exclusion List, Version 5.0” (dated January 2014) and as published on Eircom’s wholesale website;

“Combined SB-WLR and NGA Order” means a provisioning order for both SB-WLR and either Next Generation Bitstream or VUA;

“Communications Regulation Act 2002 (as amended)” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

“ComReg” means the Commission for Communications Regulation, established under Section 6 of the Communications Regulation Act 2002 (as amended);

“ComReg Decision D10/02” means ComReg Document No. 02/55 entitled “Decision Notice - Eircom’s Reference Interconnect Offer”, dated 26 June 2002;

“ComReg Decision D10/04” means ComReg Document No. 04/84a entitled “Decision Notice - ComReg’s Review of the Text of Eircom’s Reference Interconnect Offer”, dated 3 August 2004;

“ComReg Decision D07/61” means ComReg Document No. 07/61 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 D04/07” means ComReg Document No. 07/80 entitled “Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations, Market Analysis - Interconnection Market Review Wholesale Call Origination and Transit Services”, dated 5 October 2007;

“ComReg Decision D06/07” means ComReg Document No. 07/109 entitled “Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations, Market Analysis – Interconnection Market Review Fixed Wholesale Call Termination Services”, dated 21 December 2007;

“ComReg Decision D08/10” means ComReg Document No. 10/67 entitled “Response to Consultation Document and Final Direction and Decision, Response to Consultation Document No. 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 No. 11/45 entitled “Response to Consultation and Decision on the Introduction of Key Performance Indicators for Regulated Markets”, dated 29 June 2011;

“ComReg Decision D06/11” means ComReg Document No. 11/49 entitled “Response to Consultation and Decision; Market Review: Wholesale Broadband Access (Market 5)” dated 8 July 2011;

“ComReg Decision D07/11” means ComReg Document No. 11/67 entitled “Response to Consultation and Decisions, Wholesale Call Origination and Wholesale Call Termination Markets, Response to Consultation Document No. 10/76 and decisions amending price control obligations and withdrawing and further specifying transparency obligations”, dated 15 September 2011;

“ComReg Decision D12/14” means ComReg Document No. 14/89 entitled “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers” dated 28 August 2014;

“ComReg Decision D05/15” means ComReg Document No. 15/82 entitled “Market Review, Wholesale Fixed Voice Call Origination and Transit Markets, Response to Consultation and Decision”, dated 24 July 2015;

“ComReg Document No. 05/24” means ComReg Document No. 05/24 entitled “Response to Consultation, Guidelines on the treatment of confidential information, Final text of Guidelines”, dated 22 March 2005;

“ComReg Document No. D07/51” means ComReg Document No. D07/51 entitled “Response to Consultation and Consultation on Draft Decision, Market Analysis – Interconnection Market Review Wholesale Call Origination & Transit Services” dated 31 July 2007;

“ComReg Document No. 08/19 and associated Directions” means ComReg Document No. 08/19 entitled “Information Notice, Single Billing Wholesale Line Rental, Directions to Eircom regarding retail minus %”, dated 22 February 2008 and Annex 1 of letter from ComReg to Eircom dated 22 February 2008;

ComReg Document No. 12/117” means ComReg Document No. 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 No. 14/26” means ComReg Document No. 14/26 entitled “Market Review Wholesale Fixed Voice Call Origination and Transit Markets” dated 4 April 2014;

“Co-Location” shall have the same meaning and description as under Part B “Co-location services” of the Schedule to the Access Regulations (as may be amended from time to time);

“Competition and Consumer Protection Commission” formerly the Competition Authority and the National Consumer Agency;

“Connection Charge(s)” means a charge associated with a connection to, disconnection from, upgrade, downgrade, migration or removal of an existing service or a similar one-off charge listed in Table 2 of Schedule 401 of Eircom’s RIO Price List (version 2.82 as may be amended from time to time);

“CPE” means customer premises equipment;

“Customer-Sited Interconnection or Handover” or **“CSI/H”** means the physical connection from the Eircom network to the Undertaking’s equipment, within the Undertaking’s premises;

“Effective Date” means the date set out in Section 17 of this Decision Instrument;

“Eircom” means Eircom Limited, and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Decision Instrument, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014 (as may be amended from time to time);

“Electronic Communications Network(s)” or **“ECN(s)”** shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Electronic Communications Service(s)” or **“ECS”** shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“End User” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time. 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 Undertaking;

“Equally Efficient Operator Cost Base” or **“EEO Cost Base”** is a cost base which is derived from Eircom’s costs and is based on Eircom’s scale of operations;

“Equivalence of Inputs” means the provision of products, services, facilities, and information by the SMP Undertaking to OAOs such that such products, services, facilities, and information are provided to OAOs within the same timescales, at the same price, functionality, service and quality levels and on the same terms and conditions and by means of the same systems and processes as the SMP Undertaking provides to itself. The systems and processes shall operate in the same way and with the same degree of reliability and performance as between OAOs and the SMP Undertaking’s provision to itself;

“Equivalence of Outputs” means the provision of products, services, facilities, and information by the SMP Undertaking to OAOs such that such products, services, facilities, and information are provided to OAOs in a manner which achieves the same standards in terms of functionality, price, terms and conditions, service and quality levels as the SMP Undertaking provides to itself, albeit potentially using different systems and processes;

“Exchange” means an Eircom premises or equivalent facility used to house network and associated equipment, and includes a Remote Subscriber Unit (RSU);

“(the) Explanatory Note” means the Commission Staff Working Document: Explanatory Note accompanying the 2014 Recommendation (9 October 2014, SWD (2014) 298;

“Fixed Voice Call Origination” or “FVCO” means a service whereby voice calls originating at a fixed location of an End User are conveyed and routed through any switching stages (or equivalent, regardless of underlying technology) up to a Point of Handover nominated by an OAO seeking access to this service. The nominated Point of Handover can be the primary, tandem, or double tandem Exchange associated with the Access Path on which the voice call was originated;

“(Current Generation) Fixed Voice Call Origination” or “CG-FVCO” means FVCO provided over circuit switched network infrastructure;

“(Next Generation) Fixed Voice Call Origination” or “NG-FVCO” means FVCO provided over internet protocol based packet switched network infrastructure;

“Former Transit Market” means the market for wholesale national call transit services on the public telephone network at a fixed location as defined in Section 2 of the Decision Instrument set out in Annex B (“Decision Instrument Wholesale Call Transit”) of ComReg Decision D04/07;

“FVCO Top-Down LRAIC+ Model” means the model, as amended from time to time, used by ComReg and Eircom to assess Eircom’s compliance with the obligations contained in Section 12.4 of this Decision Instrument;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“Historical Cost Accounts” or “HCAs” means the historical cost accounts which Eircom is required to publish in accordance with ComReg Decision D08/10, as may be amended from time to time;

“Higher-Level Fixed Access and Call Origination” or “HL-FACO” means (a) wholesale fixed access to the public telephone network for the provision of voice telephony services by means of (i) ISDN FRA; or (ii) ISDN PRA; and (b) FVCO;

“(Current Generation) HL-FACO” means HL-FACO provided over circuit switched network infrastructure;

“(Next Generation) HL-FACO” means HL-FACO provided over internet protocol based packet switched network infrastructure;

“Higher-Level Fixed Access and Call Origination Market” or “HL-FACO Market” means the market as identified in Section 4.2.2 below;

“In-Building Interconnection or Handover” or “IBI/H” means the physical connection from the Eircom network to the Undertaking’s equipment within the Exchange;

“In-Span Interconnection/Handover” or **“ISI/H”** means the physical connection between an Eircom Exchange and the Point of Handover that has been agreed between the interconnecting parties;

“Interconnection” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“Interconnection Path(s)” means (Current Generation) Interconnection Path(s) and (Next Generation) Interconnection Path(s);

“(Current Generation) Interconnection Path(s)” means the physical and logical transmission path(s) between the ECNs of two Undertakings to facilitate Interconnection based on circuit switched infrastructure;

“(Next Generation) Interconnection Path(s)” means the physical and logical transmission path(s) between the ECNs of two Undertakings to facilitate Interconnection based on packet switched infrastructure;

“Interconnection Service(s)” includes CSI/H, IBI/H, ISI/H, and Interconnection Paths;

“(Current Generation) Interconnection Services” means circuit switched based interconnection used for the conveyance of FVCO and includes CSI/H, IBI/H ISI/H, and Current Generation Interconnection Paths;

“(Next Generation) Interconnection Services” means packet switched based interconnection used for the conveyance of FVCO and includes CSI/H, IBI/H ISI/H, and Next Generation Interconnection Paths;

“IP” means internet protocol;

“ISDN” means Integrated Services Digital Network;

“ISDN BRA” means ISDN basic rate access;

“ISDN FRA” means ISDN fractional primary rate access;

“ISDN PRA” means ISDN primary rate access;

“Key Performance Indicator(s)” or **“KPI(s)”** means a measure(s) of the standard(s) of product, service or facility provided by Eircom to Undertakings and by Eircom to itself;

“Local Loop” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“Long Run Average Incremental Cost plus” or **“LRAIC+”** means the average efficiently incurred directly attributable variable and fixed costs, plus an appropriate apportionment of joint and common costs;

“Lower-Level Fixed Access and Call Origination” or **“LL-FACO”** means (a) wholesale fixed access to the public telephone network for the provision of voice telephony services by means of (i) PSTN, or (ii) ISDN BRA; and (b) FVCO;

"Lower-Level Fixed Access and Call Origination Market" or "LL-FACO Market" means the market as identified in Section 4.2.1 below;

"(Current Generation) LL-FACO" means LL-FACO provided over circuit switched network infrastructure;

"(Next Generation) LL-FACO" means LL-FACO provided over internet protocol based packet switched network infrastructure;

"Margin Squeeze in respect of SV Services" means the setting of a wholesale price by Eircom for the FVCO component of a SV Service below the minimum price floor set by the Margin Squeeze Test Model for SV;

"Margin Squeeze Test Model for SV" is a model used to calculate the appropriate minimum price floor for a FVCO wholesale product in a SV Service. The test will be (i) based on a Similarly Efficient Operator ('SEO') at the weighted average level, as specified in Section 12.10 of this Decision Instrument that uses Eircom's cost-oriented FVCO rates (ii) assessed at a static point in time (iii) assessed by time of day gradient (i.e. day, evening or weekend) and (iv) use a LRAIC + standard. The detail of the Margin Squeeze Test Model for SV is set out in ComReg Decision D07/11;

"Ministerial Policy Directions" for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004;

"Near End Handover" means a charging practice which arises from routing restrictions or limitations on Eircom's network. In such circumstances certain types of voice calls are handed over by Eircom to an OAO (where that OAO is interconnected at a primary Exchange level) at the double tandem Exchange level (or its equivalent). Such calls are charged by Eircom at a rate equivalent to the rate that applies to calls handed over at a primary Exchange level (or its equivalent);

"Network Termination Point" or "Network Termination Unit" or "NTP" or "NTU" means the physical interface which provides the service demarcation point or point of handover of a wholesale service(s) within the End User's premises;

"Next Generation Bitstream" means a Next Generation WBA product provided by Eircom in the wholesale broadband access market i.e. a WBA product provided using NGA;

"Number Translation Code(s)" or "NTC(s)" means certain non-geographic numbers, which have no physical destination address of their own but can reach real destinations and/or real services once they are translated into other number types;

“Order Handling Charge” means the wholesale charge payable by an Undertaking to the service provider for the cost associated with processing an order for Access and shall include the services listed in Table 3 of Schedule 401 of Eircom’s RIO Price List (version 2.82 as may be amended from time to time);

“OSS” means operational support systems;

“Other Authorised Operator(s)” or **“OAO(s)”** means an Undertaking that is not Eircom, providing or intending to provide an ECN or an ECS pursuant to Regulation 4 of the Authorisation Regulations;

“Payphone Access Charge” or **“PAC”** means a wholesale charge payable by an Undertaking to a payphone service provider for calls made by an End User from a payphone that do not involve a direct retail charge, including, but not limited to, freephone calls to “1800” numbers;

“PAC Service” means the service whereby Eircom levies and administers the PAC on behalf of payphone operators;

“Performance Metric(s)” means the aggregate performance levels achieved by Eircom within a specified period, as calculated in accordance with the methodology and service parameter definitions set out in its Service Level Agreements;

“Physical Transmission Path(s)” means a form of copper, fibre or wireless physical infrastructure (including and any combination of these) or its nearest equivalent which may be used to transmit Electronic Communications Services;

“Point of Handover” means the physical point at which two networks are interconnected to allow traffic between these networks;

“PSTN” means Public Switched Telephone Network;

“Reference Interconnect Offer” or **“RIO”** is the offer of contract by Eircom to Undertakings in respect of the provision of Access in accordance with the requirements of this Decision Instrument. The RIO sets out products, services and facilities including, but not limited to, service descriptions, associated terms and conditions and standards to be offered in accordance with the requirements set out in this Decision Instrument;

“Retail Line Rental” means an Eircom retail line rental product on offer or on sale by Eircom, the upstream inputs of which is WLR;

“Retail Minus” means a pricing methodology used to set wholesale access prices under which the access price is explicitly set on the basis of the retail price of the corresponding retail services. The discount off retail prices is usually set as a fixed percentage of the retail price. This fixed percentage is the X-Parameter;

“Retention Rate” means the administrative costs associated with the provision of calls to NTCs and comprises of billing, credit control, cash collection and management of bad debt;

“(the) Relevant Markets” means the markets described in Section 4 of this Decision Instrument;

“Remote Subscriber Unit” or **“RSU”** means a subordinate type of Exchange that is attached to an upstream primary Exchange;

“RIO Change Matrix” means the table of information collated by Eircom which specifies the non-price related amendments made to its RIO, including the date(s) on which such amendments come into effect;

“RIO Price List Change Matrix” means the table of information collated by Eircom which specifies the amendments made to the RIO Price List(s) which are contained in its RIO, including the date(s) on which such amendments come into effect;

“RIO Price List(s)” means the list of charges collated by Eircom for products, services and facilities which are to be provided and specified in its RIO in accordance with the requirements of this Decision Instrument;

“Service Credit(s)” means a financial credit which is provided by Eircom to an OAO where Eircom has failed to meet a Performance Metric in an SLA;

“Service Level Agreement(s)” or **“SLA(s)”** mean legally binding contracts between Eircom and OAOs in relation to the service levels which Eircom commits to from time to time, as more particularly set out in the RIO. For the avoidance of doubt, however, to the extent that there is any conflict between the SLAs and Eircom’s obligations set out in this Decision Instrument, it is the latter which shall prevail;

“Significant Market Power obligation(s)” or **“SMP obligation(s)”** are those obligations as more particularly described in Part II below, as may be amended from time to time;

“SLA Negotiation Period” means the number of working days, as determined by Eircom, required to conclude negotiations between it and an Undertaking in respect of a request from the Undertaking for a new SLA or an amendment to an existing SLA. For the avoidance of doubt, the SLA Negotiation Period relates only to the conclusion of negotiations in respect of the SLA;

“(the) 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, 11.7.2002, p.6);

“Significant Market Power Undertaking” or **“SMP Undertaking”** means the Undertaking designated in Section 5 of this Decision Instrument as having Significant Market Power;

“Similarly Efficient Operator” or **“SEO”** means a hypothetical operator which shares the same basic cost function as Eircom but does not enjoy the same economies of scale and scope as Eircom including in respect of Interconnection;

“Single Billing - Wholesale Line Rental” or **“SB-WLR”** means a wholesale service comprised of both CPS and WLR;

“Switchless Voice Service(s)” or **“SV Service(s)”** means a switchless voice service which allows an operator to purchase end-to-end call conveyance services without the need to have its own Interconnection infrastructure;

“(the) Three Criteria Test” means the test set out in paragraph 2 of the 2014 Recommendation used to identify markets other than those set out in the Annex to the 2014 Recommendation as being susceptible to *ex ante* regulation. ComReg must demonstrate and the European Commission must verify that the following three criteria are cumulatively met:

- (i) the presence of high and non-transitory structural, legal or regulatory barriers to entry;
- (ii) a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure based and other competition behind the barriers to entry; and
- (iii) competition law alone is insufficient to adequately address the identified market failure(s).

“Transit Market” means the market for wholesale national call transit services on the public telephone network at a fixed location as defined in Section 6 of ComReg Decision D05/15;

“Undertaking(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Virtual Unbundled Access” or **“VUA”** means the wholesale active access product provided or offered by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users’ connections at the local exchange. It allows a level of control to the Undertaking similar to that afforded to the Undertaking connecting their own equipment to a fully unbundled Local Loop;

“WBA” means wholesale broadband access comprising non-physical or active network access including “Bitstream” access at a fixed location as currently described in ComReg Decision D06/11 but as may be amended from time to time. It includes Current Generation WBA and Next Generation WBA;

“(Current Generation) WBA” means WBA provided over Eircom’s current generation copper access network infrastructure and its Associated Facilities (including self-supply by Eircom for the purpose of serving its downstream markets) that is copper based;

“(Next Generation) WBA” means WBA provided over Eircom’s next generation access network infrastructure and its Associated Facilities (including self-supply by Eircom for the purpose of serving its downstream markets). Eircom’s next generation access network infrastructure includes access paths that are either exclusively fibre or a combination of fibre and copper;

“Wholesale Line Rental” or **“WLR”** means the wholesale service that allows an OAO to rent an Access Path(s) from Eircom which in turn enables that OAO to offer or provide services over such an Access Path(s) to either an End User or another OAO. Eircom’s WLR wholesale service is described in the document entitled “Single Billing through Wholesale Line Rental Product Description” (issue 2.3, dated 1 July 2015) as may be amended from time to time and published on Eircom’s wholesale website.

“Wholesale Low Value CPE Rental” means Eircom’s low value End User premises equipment which is associated with an Access Path(s) that is currently billed on Eircom’s retail telephony bills; typically Wholesale Low Value CPE Rental consists of telephone and on-site wiring;

“X-Parameter” means the percentage point applied in the context of the Retail Minus pricing methodology. The X-Parameter is used to determine the appropriate margin between the monthly rental price for Retail Line Rental and the monthly rental price for WLR;

“X-Parameter Methodology” means the methodology used to calculate the X-Parameter and is derived from the retail costs contained in Eircom’s HCAs, adjusted for efficiencies, using an Equally Efficient Operator Cost Base, plus a reasonable rate of return on the investment;

“(the) 2003 Recommendation” means the European Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L114, 8.5.2003, p. 45);

“(the) 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, p. 65); and

“(the) 2014 Recommendation” means the European Commission Recommendation of 9 October 2014 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 295, 11.10.2014, p. 79).

3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.2 This Decision Instrument applies to Eircom in respect of activities falling within the scope of the Relevant Markets defined in Section 4 of this Decision Instrument.
- 3.3 This Decision Instrument, pursuant to Regulation 8 of the Access Regulations, withdraws certain obligations previously imposed upon Eircom, as more particularly set out in Section 16 of this Decision Instrument.

4 MARKET DEFINITION

- 4.1 This Decision Instrument relates to the wholesale market for call origination on the public telephone network provided at a fixed location as identified by the European Commission in the 2007 Recommendation and as identified by ComReg using the Three Criteria Test and as analysed by ComReg in this Decision D05/15. For the purposes of this Decision Instrument, ComReg identifies two separate markets as more particularly defined in Section 4.2 below (referred to in this Decision Instrument singularly as the Relevant Market and together as the Relevant Markets).
- 4.2 Pursuant to Regulation 26 of the Framework Regulations and in accordance with the 2014 Recommendation, the Explanatory Note and taking the utmost account of the SMP Guidelines, in accordance with the principles of competition law, the Relevant Markets defined in this Decision Instrument are:-
- 4.2.1 the wholesale market for access and call origination on the public telephone network at a fixed location whereby:
- (i) access is provided by means of PSTN or ISDN BRA or WBA and
 - (ii) call origination is provided by means of CG-FVCO or NG-FVCO,
- which market is referred to in this Decision Instrument as the 'Lower-Level Fixed Access and Call Origination Market' or the 'LL-FACO Market'.
- 4.2.2 the wholesale market for access and call origination on the public telephone network provided at a fixed location whereby:
- (i) access is provided by means of ISDN FRA or ISDN PRA or WBA and
 - (ii) call origination is provided by means of CG-FVCO or NG-FVCO,
- which market is referred to in this Decision Instrument as the 'Higher-Level Fixed Access and Call Origination Market' or the 'HL-FACO Market'.

- 4.3 It is hereby decided that the Relevant Markets are susceptible to *ex ante* regulation as these markets fulfil the Three Criteria Test. The Relevant Markets are more particularly described in Section 4 of ComReg Decision D05/15.

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 Relevant Markets are not effectively competitive, Eircom is designated as having SMP in the Relevant Markets in which it operates.

PART II - SMP OBLIGATIONS (SECTIONS 6 TO 12 OF THE DECISION INSTRUMENT) IN RELATION TO CURRENT GENERATION LL-FACO AND HL-FACO

6 SMP OBLIGATIONS IN RELATION TO CURRENT GENERATION PRODUCTS, SERVICES AND FACILITIES

- 6.1 ComReg is imposing certain SMP obligations on Eircom in accordance with and pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, as detailed further in Sections 7 to 12 below in respect of Current Generation LL-FACO and Current Generation HL-FACO.

7 OBLIGATIONS TO PROVIDE ACCESS

- 7.1 Pursuant to Regulation 12(1) of the Access Regulations, Eircom shall meet all reasonable requests from Undertakings for the provision of Access to Current Generation LL-FACO and Current Generation HL-FACO including Associated Facilities.
- 7.2 Without prejudice to the generality of Section 7.1 of this Decision Instrument and pursuant to Regulation 12(2) of the Access Regulations, Eircom shall provide and grant Access to Undertakings for the following particular products, services and Associated Facilities:-
- (i) SB-WLR;
 - (ii) Ancillary Services on SB-WLR;
 - (iii) PAC Service;
 - (iv) Current Generation Interconnection Services; and
 - (v) Co-Location.

- 7.3 Without prejudice to the generality of Sections 7.1 and 7.2 of this Decision Instrument Eircom shall offer and continue to offer and provide Access to the products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument in accordance with the product descriptions and terms and conditions of supply or use, as specified in the current version of the RIO (i.e. RIO version 3.24 dated 1 July 2015 as published on Eircom's wholesale website) as may be amended from time to time, and, in addition, in accordance with Eircom's obligations under this Decision Instrument.
- 7.4 Pursuant to Regulation 12(1) of the Access Regulations, Eircom shall meet all reasonable requests from Undertakings for the provision of Next Generation Interconnection Services.
- 7.5 Without prejudice to the general obligations set out in Sections 7.1 to 7.4, of this Decision Instrument, Eircom shall:
- (i) pursuant to Regulation 12(2)(b) of the Access Regulations, negotiate in good faith with Undertakings requesting Access;
 - (ii) pursuant to Regulation 12(2)(c) of the Access Regulations, not withdraw Access to facilities already granted without the prior approval of ComReg and in accordance with terms and conditions as may be determined by ComReg;
 - (iii) pursuant to Regulation 12(2)(e) of the Access Regulations, grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of products, services or facilities;
 - (iv) pursuant to Regulation 12(2)(g) of the Access Regulations, provide Access to services needed to ensure interoperability of end-to-end services to End Users, including facilities for intelligent network services;
 - (v) pursuant to Regulation 12(2)(h) of the Access Regulations, provide Access to OSS or similar software systems necessary to ensure fair competition in the provision of services (including those products, services and facilities described in this Section 7); and
 - (vi) pursuant to Regulation 12(2)(i) of the Access Regulations, interconnect networks or network facilities.

8 CONDITIONS ATTACHED TO THE ACCESS OBLIGATION

- 8.1 Pursuant to Regulation 12(3) of the Access Regulations, Eircom shall, in relation to the obligations set out in Section 7 above, grant Undertakings Access in a fair, reasonable and timely manner.

- 8.2 Without prejudice to the generality of Section 8.1 above and pursuant to Regulation 12(3) of the Access Regulations, where Eircom receives a request for Access (including Access to those products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument) in accordance with the requirements of this Decision Instrument at the same point in time as a request for another wholesale access product, service or facility, on foot of another Decision Instrument issued by ComReg, Eircom shall ensure that both access requests are met concurrently.
- 8.3 Without prejudice to the generality of Section 8.1 above, pursuant to Regulation 12(3) of the Access Regulations, Eircom shall:
- (i) conclude, maintain or update, as appropriate, legally binding SLAs with Undertakings, which shall include provisions for Performance Metrics;
 - (ii) negotiate in good faith with Undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs (either in the case of a new SLA or an amendment to an existing SLA). Following a request from an Undertaking for a new SLA or an amendment to an existing SLA Eircom shall within one (1) month of the receipt of such a request provide the Undertaking with details of the SLA Negotiation Period. Negotiations in respect of a new SLA or an amendment to an existing SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Undertaking makes such a request. Within one (1) month of the date the Undertaking makes such a request Eircom may seek an extension to the six (6) month period from ComReg;
 - (iii) ensure that all SLAs include provision for Service Credits arising from any breach of an SLA;
 - (iv) ensure that the level of the Service Credits are fair and reasonable;
 - (v) ensure that SLAs detail how Service Credits are calculated and shall include the provision of an example calculation; and
 - (vi) ensure that application of Service Credits, where they occur, shall be applied automatically, and in a timely and efficient manner.
- 8.4 Where a request by an Undertaking for provision of Access (including Access to those products, services and facilities described in Sections 7 and 8 of this Decision Instrument), or a request by an Undertaking for provision of information is refused or met only in part, Eircom shall, at the time of the refusal or partial grant, provide in detail to the Undertaking each of the objective reasons for such refusal or partial grant. Eircom's response shall be provided in a fair, reasonable and timely manner.

9 OBLIGATION OF NON-DISCRIMINATION

- 9.1 Pursuant to Regulation 10 of the Access Regulations, Eircom shall have an obligation of non-discrimination in respect of the provision of Access, including Access as regards those services, products and facilities described in Sections 7 and 8 of this Decision Instrument. Without prejudice to the generality of the foregoing, Eircom shall:
- (i) Apply equivalent conditions in equivalent circumstances to other Undertakings requesting, or being provided with Access (including Access to those products, services and facilities described in Sections 7 and 8 of this Decision Instrument) or requesting or being provided with information in relation to such Access; and
 - (ii) Provide Access (including Access to those products, services and facilities described in Sections 7 and 8 of this Decision Instrument) and information in relation to such Access to all other Undertakings under the same conditions and of the same quality as Eircom provides to itself or to its subsidiaries, affiliates or partners.
- 9.2 Without prejudice to the generality of Section 9.1 above, Eircom shall (unless otherwise specified in this Decision Instrument) provide Access, including Associated Facilities, to those products, services and facilities required in accordance with Sections 7 and 8 of this Decision Instrument on, at least, an Equivalence of Outputs basis.
- 9.3 Without prejudice to the generality of Section 9.1, Eircom shall provide ordering and provisioning for SB-WLR on an Equivalence of Inputs basis, when SB-WLR is ordered using a Combined SB-WLR and NGA Order. For the avoidance of doubt, if SB-WLR is ordered and provisioned separately to Next Generation Bitstream or VUA, Eircom shall provide ordering and provisioning for SB-WLR on an Equivalence of Outputs basis.
- 9.4 Without prejudice to the generality of Section 9.1, Eircom shall provide fault reporting and fault repair for SB-WLR on an Equivalence of Inputs basis in all cases where SB-WLR, in conjunction with either Next Generation Bitstream or VUA, is used by an Undertaking to provide services to an End User. For the avoidance of doubt, this obligation shall apply irrespective of whether SB-WLR was ordered using a Combined SB-WLR and NGA Order or ordered separately to Next Generation Bitstream or VUA.
- 9.5 Eircom shall submit to ComReg a written statement of compliance that demonstrates its compliance with its non-discrimination obligations set out in this Section 9, in accordance with the following timescales, unless otherwise agreed with ComReg:

- (i) in the case of any offer of a new product, service or facility, seven (7) months in advance of its being made available;
- (ii) in the case of any change to an existing product, service or facility, three (3) months in advance of its being made available;
- (iii) in the case of an existing product, service or facility, within three (3) months of the Effective Date of this Decision Instrument; or
- (iv) as otherwise may be required by ComReg.

9.6 The statement of compliance referred to in Section 9.5 above shall include the following:

- (i) a full and true written statement, signed by a person(s) of appropriate expertise and authority within Eircom, acknowledging that Eircom is responsible for securing compliance with its obligations and confirming to the best of its knowledge that Eircom is in compliance with the obligations set out in this Section 9; and
- (ii) documentation which demonstrates how compliance has been achieved by Eircom with its non-discrimination obligations, which shall include, at least, the following:
 - (a) a description of the material differences between the systems and processes that are used by Eircom to offer or provide those products, services or facilities falling within the scope of this Decision Instrument to Eircom's downstream operations and the systems and processes that are used by Eircom to offer or provide products, services or facilities falling within the scope of this Decision Instrument to Undertakings;
 - (b) a risk assessment to identify the potential risk of non compliance with the obligations set out in this Section 9.

Such an assessment shall include, in particular, a description of (i) the risks identified; (ii) the measures that Eircom has implemented to control and govern those risks; and (iii) an explanation of how such measures are maintained.

9.7 The documentation referred to in Section 9.6 (ii) above shall include a list of any other documentation and information relied upon, an overview of the method of analysis applied and a description of the expertise employed by Eircom in its identification of the material differences and risks identified. ComReg may require Eircom to supplement the documentation where, in ComReg's view, it is insufficient or inadequate.

- 9.8 The documentation and information required under Sections 9.6 and 9.7 of this Decision Instrument above shall be of sufficient clarity and detail to enable ComReg, or a third party as determined by ComReg, to review the statement of compliance for completeness and accuracy. Such documentation and information shall also enable ComReg, or a third party as determined by ComReg, to assess whether Eircom has taken all reasonable steps to ensure that the risk assessment and control and governance measures referred to in Section 9.6 above provide reasonable assurance to ComReg that Eircom is compliant with the obligations set out in this Section 9.
- 9.9 For the avoidance of doubt, the obligations set out in this Section 9 apply irrespective of whether or not a specific request for products, services, facilities or information has been made by an Undertaking to Eircom.

10 OBLIGATION OF TRANSPARENCY

- 10.1 Pursuant to Regulation 9 of the Access Regulations, Eircom shall be subject to an obligation of transparency in relation to Access (including Access to those products, services and facilities described in Sections 7 and 8 of this Decision Instrument).
- 10.2 Without prejudice to the generality of Section 10.1 of this Decision Instrument, pursuant to Regulation 9(2) of the Access Regulations, Eircom shall make publicly available and keep updated on its website, a RIO.
- 10.3 The RIO shall be sufficiently unbundled so as to ensure that Undertakings availing of Access (including Access to those products, services and facilities described in Sections 7 and 8 of this Decision Instrument) are not required to pay for products, services or facilities which are not necessary for the Access requested.
- 10.4 Without prejudice to the generality of Section 10.3 of this Decision Instrument, and in accordance with the obligations specified elsewhere in this Decision Instrument, Eircom shall ensure that its RIO includes at least the following:
- (i) a description of the offer of contract for Access (including Access to those products, services and facilities described in Section 7 and Section 8 of this Decision Instrument) broken down into components according to market needs;
 - (ii) a description of any associated contractual or other terms and conditions for supply of Access (including Access to those products, services and facilities described in Sections 7 and Section 8 of this Decision Instrument) and use, including prices;

- (iii) a description of the technical specifications and network characteristics of the Access (including Access to those products, services and facilities described in Section 7 and Section 8 of this Decision Instrument) being offered; and
 - (iv) the terms, conditions, service level agreements, guarantees and other product related assurances associated with the FVCO component part of any SV Services that it provides.
- 10.5 In the event of any conflict between the RIO and associated documentation such as the RIO Price List (including where represented as updated for the purposes of this Decision Instrument), and Eircom's obligations as set out under this Decision Instrument, it is the latter which shall prevail.
- 10.6 Without prejudice to the generality of Sections 10.1 and 10.2 above and pursuant to Regulation 9 of the Access Regulations Eircom shall:
- (i) continue to publish and keep updated on its publicly available website, its RIO in the same form and format as version 3.24, as may be amended from time to time, insofar as those products, services or facilities contained therein relate to the obligations set out in this Decision Instrument;
 - (ii) publish and keep updated on its publicly available website both clean (or unmarked) and tracked changed (or marked) versions of its RIO (insofar as it relates to the products, services and facilities to be provided in accordance with the requirements of this Decision Instrument). The tracked change version of the RIO shall be sufficiently clear to allow Undertakings to clearly identify all actual and proposed amendments from the preceding version of its RIO;
 - (iii) publish and keep updated on its publicly available website an accompanying RIO Change Matrix which lists all of the amendments incorporated or to be incorporated in any amended RIO;
 - (iv) publish and keep updated on its publicly available website both clean (unmarked) and tracked changed (marked) versions of the RIO Price List(s) (insofar as it relates to the products, services and facilities to be provided in accordance with the requirements of this Decision Instrument). The tracked change version of the RIO Price List shall be sufficiently clear to allow Undertakings to clearly identify all actual and proposed amendments from the preceding version of its RIO Price List;
 - (v) publish and keep updated on its publicly available website a RIO Price List Change Matrix; and

- (vi) maintain and make publicly available on its wholesale website a copy of historic versions of its RIO, RIO Price List, RIO Change Matrix and RIO Price List Change Matrix.
- 10.7 Eircom shall ensure that its wholesale invoices are sufficiently disaggregated, detailed and clearly presented such that an Undertaking can reconcile invoices to Eircom's RIO and RIO Price Lists.
- 10.8 In respect of non-pricing amendments or changes to the RIO resulting from the offer of a new product, service or facility which falls within the scope of the Relevant Markets, the following obligations will apply:
- (i) Eircom shall, unless otherwise agreed by ComReg, make publicly available and publish on Eircom's publicly available wholesale website at least six (6) months in advance of coming into effect, any proposed amendments or changes to the RIO or the making available of any product, service or facility, pertaining to non-price information in respect of product specification, services, facilities and processes resulting from the offer of a new product, service or facility.
 - (ii) Eircom shall notify ComReg in writing with the information to be published at least one (1) month in advance of any such publication taking place, that is, seven (7) months prior to any amendments or changes coming into effect. The periods referred to in this Section may be varied with the agreement of ComReg or at ComReg's discretion.
- 10.9 In respect of non-pricing amendments or changes to the RIO resulting from an amendment or change to an existing product, service or facility which falls within the scope of the Relevant Markets, the following obligations will apply:
- (i) Eircom shall, unless otherwise agreed by ComReg, make publicly available and publish on Eircom's publicly available wholesale website at least two (2) months in advance of coming into effect, any proposed amendments or changes to the RIO pertaining to non-price information in respect of product specification, services, facilities and processes resulting from an amendment or change to an existing product, service or facility (including details of any amendment or change in the functional characteristics of an existing product, service or facility).

- (ii) Eircom shall notify ComReg in writing with the information to be published at least one (1) month in advance of any such publication taking place, that is, three (3) months prior to any amendments or changes coming into effect. The periods referred to in this Section may be varied with the agreement of ComReg or at ComReg's discretion. Notwithstanding this Section 10.9, material changes or material amendments shall, however, be notified and published in accordance with Section 10.8 above or as otherwise agreed with ComReg or at ComReg's discretion.
- 10.10 In respect of pricing amendments or changes pertaining to prices in the RIO and/or RIO Price List, Eircom shall make publicly available and publish on its publicly available wholesale website information relating to:
- (i) proposed changes to the prices of existing products, services or facilities set out in the RIO Price Lists and which are offered or provided in accordance with the obligations set out in this Decision Instrument, at least one (1) month in advance of such changes coming into effect, unless otherwise determined by ComReg; and
 - (ii) the pricing of a new product, service, or facility that will be offered or provided in accordance with the obligations set out in this Decision Instrument at least two (2) months in advance of the commercial launch of a new retail service by Eircom, unless otherwise determined by ComReg.
- 10.11 For the purpose of Section 10.10 above, Eircom shall, unless otherwise agreed with ComReg, notify ComReg in writing with the information to be published at least one (1) month in advance of any such publication taking place.
- 10.12 At the same time and in accordance with the appropriate timelines set out under Section 9.5 of this Decision Instrument, Eircom shall, on its publicly available wholesale website in respect of products, services, facilities and processes in the Relevant Markets, identify, explain, document and demonstrate any permissible differences (in accordance with Sections 9.1 to 9.4 of this Decision Instrument) between the products, services, facilities and processes as set out in the RIO and the comparable products, services, facilities and processes which Eircom provides to itself. For the avoidance of doubt, Eircom shall keep this information updated as new products, services or facilities are developed or deployed, or existing products, services or facilities are amended.
- 10.13 Eircom shall, as specified by ComReg in writing from time to time, make publicly available on its wholesale website, information such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the products, services and facilities referred to in Sections 7 and 8 above.

- 10.14 Pursuant to Regulation 9(3) of the Access Regulations, ComReg may issue directions requiring Eircom to make changes or amendments to its SLAs, the RIO (and its associated documents), RIO Price List, RIO Change Matrix or RIO Price List Change Matrix to give effect to obligations imposed by this Decision Instrument and to publish such documents with such changes. In accordance with Regulation 18 of the Access Regulations, ComReg may issue directions to Eircom from time to time requiring it to publish information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.
- 10.15 Eircom shall publish Key Performance Indicators (KPIs) on its publicly available wholesale website. The specification of the content of the KPIs shall be in accordance with the obligations set out in ComReg Decision D05/11 (as may be amended from time to time). Pursuant to Regulations 8, 9 and 18 of the Access Regulations, the Decision Instrument contained in ComReg Decision D05/11 is hereby amended and a new Section 5.1 (X) (e) is inserted as follows:-
- (e) ComReg Decision D05/15, ComReg Document 15/82 entitled "Market Review, Wholesale Fixed Voice Call Origination and Transit Markets, Response to Consultation and Decision", dated 24 July 2015.*
- For the avoidance of doubt, "Eircom" in the Decision Instrument contained in ComReg Decision D05/11 has the same meaning as in this Decision Instrument.
- 10.16 Eircom shall publish Performance Metrics for the products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument on its publicly available wholesale website.
- 10.17 Eircom shall make publicly available on its wholesale website all SLAs (and any updates thereto) relating to the provision of the products, services and facilities that are to be provided in accordance with Sections 7 and 8 of this Decision Instrument.
- 10.18 Where Eircom considers certain aspects of information to be provided under the obligations set out in this Section 10 to be of a confidential and/or commercially sensitive nature, Eircom shall, without delay, provide ComReg with complete details of such information along with objective reasons justifying why it considers it is confidential and/or commercially sensitive. ComReg will consider the information in accordance with ComReg Document No. 05/24, so far as relevant or otherwise. If ComReg considers that the information is not confidential and/or commercially sensitive, it shall be published by Eircom in accordance with its obligations under this Section.

- 10.19 If ComReg concludes that the information is confidential and/or commercially sensitive, Eircom shall publish general details as to the nature of such information and shall make it available to an OAO that has signed a Non-Disclosure Agreement (“NDA”), the terms and conditions of which shall be fair, reasonable and non-discriminatory. The NDA shall also be published on Eircom’s publicly available website. Any confidential and/or commercially sensitive information referred to in Section 10.18 above shall not be made available by Eircom to its downstream operations until such time as it is made available to an OAO, or as otherwise agreed with ComReg.
- 10.20 If and when the commercially sensitive and/or confidential information referred to in Section 10.18 above ceases to be commercially sensitive and/or confidential, it shall be made available by Eircom on its publicly available wholesale website without undue delay and without the need for an NDA to be signed.

11 OBLIGATION OF ACCOUNTING SEPARATION

- 11.1 Pursuant to Regulation 11 of the Access Regulations, Eircom shall have an obligation to maintain separated accounts in respect of the products, services and facilities falling within the scope of this Decision Instrument and the Relevant Markets. All of the obligations in relation to accounting separation, set out at Annexes 1 and 2 of ComReg Decision D08/10, applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, and relating to products, services and facilities falling within the scope of this Decision Instrument and the Relevant Markets shall be maintained in their entirety.

12 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

- 12.1 Pursuant to Regulation 13(1) of the Access Regulations, Eircom shall maintain appropriate cost accounting systems in respect of products, services or facilities in the Relevant Markets.
- 12.2 Pursuant to Regulation 13(1) of the Access Regulations the prices offered or charged by Eircom to any Undertaking for Access to, or use of, the products, services or facilities referred to in Section 7 of this Decision Instrument (except in the case of the WLR element of SB-WLR or as otherwise set out in this Decision Instrument) shall be cost orientated.
- 12.3 Pursuant to and in accordance with Regulation 13 of the Access Regulations, the prices offered or charged by Eircom to any Undertaking for the CPS element of SB-WLR shall be set in accordance with a LRAIC+ costing methodology.

- 12.4 Without prejudice to the generality of Sections 12.2 and 12.3 of this Decision Instrument and pursuant to Regulation 13 of the Access Regulations, the prices offered or charged by Eircom to any Undertaking for the CPS element of SB-WLR shall be based on the FVCO Top-Down LRAIC+ Model.
- 12.5 Without prejudice to the generality of Section 12.2 of this Decision Instrument and pursuant to Regulation 13 of the Access Regulations, Eircom shall ensure that it recovers no more than its actual incurred costs adjusted for efficiencies (plus a reasonable rate of return) for the following:-
- (i) Ancillary Services on SB-WLR;
 - (ii) Current Generation Interconnection Services;
 - (iii) Co-Location;
 - (iv) Retention Rate associated with the provision of FVCO for Number Translation Codes; and
 - (v) Order Handling Charge associated with the provision of FVCO and SB-WLR.
- 12.6 Pursuant to Regulation 13(1) of the Access Regulations, the price offered or charged by Eircom to any other Undertaking in relation to the WLR element of SB-WLR shall be subject to a Retail Minus price control.
- 12.7 Without prejudice to the generality of Section 12.6 of this Decision Instrument, the X-Parameter to be applied in respect of the Retail Minus price control of the WLR element of SB-WLR is 14% but may be amended by ComReg from time-to-time using the X-Parameter Methodology.
- 12.8 Pursuant to Regulation 13(1) of the Access Regulations, Eircom shall have an obligation not to cause a margin squeeze.
- 12.9 Notwithstanding the generality of Section 12.8 of this Decision Instrument, Eircom shall ensure that it does not create a margin squeeze between FVCO and SV Services, that is between:- (i) the price offered or charged for FVCO; and (ii) the price offered or charged for SV Services, in accordance with the Margin Squeeze Test Model for SV.
- 12.10 The weighted average level used on the Margin Squeeze Test Model for SV shall allocate interconnection at a level of 66% at primary level, 24% at single tandem level and 10% at double tandem level, as may be amended by ComReg from time to time. ComReg will keep the apportionment of the levels of interconnection under review and will update the apportionment where it considers that competitive conditions warrant it. Any material update to the apportionment levels will be communicated or consulted upon by ComReg.

- 12.11 Without prejudice to the generality of Sections 12.9 and 12.10 of this Decision Instrument, following a request by ComReg, Eircom shall submit to ComReg in confidence its minimum prices and other relevant pricing information for the FVCO component of a SV Service where there have been changes to existing products that include a SV Service, or new contracts offered or entered into by Eircom that include a SV Service. This requirement is intended as a means for Eircom to demonstrate compliance with its obligation not to cause a Margin Squeeze in respect of SV Services.
- 12.12 In accordance with its transparency obligations set out in Section 10 of this Decision Instrument, Eircom shall notify ComReg of all amendments or changes resulting from an amendment or change to an existing FVCO product, service or facility or offer of a new FVCO product service or facility.

PART IV – THE TRANSIT MARKET (SECTION 13)

13 THREE CRITERIA TEST

- 13.1 It is hereby decided that the Transit Market is not susceptible to *ex ante* regulation as this market does not satisfy the Three Criteria Test.
- 13.2 Pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations and as set out in Section 16.2 of this Decision Instrument, all SMP obligations imposed on the Former Transit Market that were set out in the Decision Instrument at Annex B (“Decision Instrument Wholesale Call Transit”) of ComReg Decision D04/07 shall be withdrawn with effect from six months from the Effective Date, or six months from the date on which all of Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Decision Instrument take effect, whichever is the later. The finding of SMP contained in Annex B of ComReg Decision D04/07 in relation to the Former Transit Market is hereby withdrawn.

PART V - OPERATION AND EFFECTIVE DATE (SECTIONS 14 TO 17 OF THE DECISION INSTRUMENT)

14 STATUTORY POWERS NOT AFFECTED

- 14.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

15 MAINTENANCE OF OBLIGATIONS

- 15.1 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, continue in force and Eircom shall comply with the same.
- 15.2 For the avoidance of doubt, to the extent that there is any conflict between a Decision Instrument dated prior to the Effective Date and Eircom's obligations set out herein, it is the latter which shall prevail.
- 15.3 If any Section(s), clause(s), or provision(s), or portion(s) thereof, contained in this Decision Instrument is(are) 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(those) Section(s), clause(s), or provision(s), or portion(s) 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(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

16 WITHDRAWAL OF SMP OBLIGATIONS

- 16.1 Pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations, the following Decision Instruments, and/or ComReg Documents and/or Decisions are hereby withdrawn at the Effective Date:
- (i) ComReg Decision D10/02;
 - (ii) ComReg Decision D10/04;
 - (iii) Save as provided for in Section 13 above, Annex A (Decision Instrument in relation to Call Origination) of ComReg Decision D04/07;
 - (iv) The Decision Instrument entitled "Decision Instrument (Wholesale Call Origination)" annexed to ComReg Decision D07/11;
 - (v) Section 7.1 (as it relates to Section 6 "Wholesale Obligations (2) Single Billing Wholesale Line Rental" of the Decision Instrument annexed to ComReg Decision D07/61) and Section 7.2 of the Decision Instrument contained in Appendix 6 (Market 1a: Standalone LLVA) of ComReg Decision D12/14;

- (vi) Section 7.1 (as it relates to Section 6 “Wholesale Obligations (2) Single Billing Wholesale Line Rental” of the Decision Instrument annexed to ComReg Decision D07/61) and Section 7.2 of the Decision Instrument contained in Appendix 7 (Market 1b: Bundled LLVA) of ComReg Decision D12/14;
 - (vii) Section 7.1 (as it relates to Section 6 “Wholesale Obligations (2) Single Billing Wholesale Line Rental” of the Decision Instrument annexed to ComReg Decision D07/61) and Section 7.2 of the Decision Instrument contained in Appendix 8 (Market 1c: HLVA) of ComReg Decision D12/14;
 - (viii) As a consequence of (v), (vi) and (vii) above, Section 6 of the Decision Instrument annexed to ComReg Decision D07/61;
 - (ix) ComReg Document No. 08/19 and associated Directions;
 - (x) Obligations pertaining to new access requests under Annex B (“Decision Instrument Wholesale Call Transit”) of ComReg Decision D04/07.
- 16.2 Save as provided for in Section 16.1(x) above Annex B (“Decision Instrument Wholesale Call Transit”) of ComReg Decision D04/07 is withdrawn with effect from six months from the Effective Date or six months from the date on which all of Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Decision Instrument take effect, whichever is the later.
- 16.3 The following sections:
- a) Section 7.1 (as it relates to Section 5 “Wholesale Obligations (1) Carrier Selection and Pre-Selection” of the Decision Instrument annexed to ComReg Decision D07/61) of the Decision Instrument contained in Appendix 6 (Market 1a: Standalone LLVA) of ComReg Decision D12/14;
 - b) Section 7.1 (as it relates to Section 5 “Wholesale Obligations (1) Carrier Selection and Pre-Selection” of the Decision Instrument annexed to ComReg Decision D07/61) of the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA of ComReg Decision D12/14;
 - c) Section 7.1 (as it relates to Section 5 “Wholesale Obligations (1) Carrier Selection and Pre-Selection” of the Decision Instrument annexed to ComReg Decision D07/61) of the Decision Instrument contained in Appendix 8 Market 1c: HLVA of ComReg Decision D12/14; and
 - d) As a consequence of a), b) and c) above, Section 5 of the Decision Instrument annexed to ComReg Decision D07/61;
- are withdrawn with effect from six months from the Effective Date, or six months from the date on which all of Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Decision Instrument take effect, whichever is the later.

17 EFFECTIVE DATE

17.1 The Effective Date of this Decision Instrument shall be the date of its notification to Eircom and it shall remain in force until further notice by ComReg.

**KEVIN O'BRIEN
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 24 DAY OF JULY 2015**