# Replicability Test

## Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5

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# 1 Eircom Group

**eircom Group**

**Response to ComReg Consultation Paper:**

**Replicability Test**

**Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5**

**ComReg Document 14/90**

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**Executive Summary**

Consultation 14/90, in essence, proposes to move the remedy of the Net Revenue Test described in D04/13 from the retail market to the wholesale market, recasting it as a Margin Squeeze Test (MST), with very minor changes.

eircom considers the basis of the remedy is unsound, as the EU Commission has recently revised the list of recommended markets, and the old Retail market is no longer susceptible to ex-ante regulation. The test therefore should simply be discontinued. Given the presence in the market of global competitors such as Sky, UPC and Vodafone, primarily using their own or other non-eircom infrastructure to offer services often at prices far below eircom's, the ability of new entrants to replicate eircom's offers seems to be redundant.

In the event that ComReg determines that a MST of any sort is necessary, eircom considers that a national portfolio test, based on incremental cost and aligned with Competition law test, would be more appropriate. The current test is increasingly impractical due to escalating complexity, and the use of an REO/SEO approach (eircom's costs adjusted upwards to reflect supposed scale and scope economies) simply serves to price eircom out of the market.

## Response to Consultation

eircom welcomes the opportunity to comment on ComReg's proposals to update the replicability test.

## 1 The Replicability test is out of step with a dynamic market

It is disappointing that ComReg has failed to take the opportunity to undertake an in depth review of the rationale and methodological approach underpinning the Replicability Test. The existing test has evolved over a long period of time, but was substantially updated during 2012, following inputs and responses to the consultation 11/72 and the supplementary consultation 12/63. These updates culminated in the Decision D04/13 (ComReg 13/14) in February 2013. In addition to the changes considered in the current consultation (ComReg14/90), eircom considers the test, if still required, must reflect the evolution of markets since 2012.There have been many significant developments in the retail and wholesale markets since the existing test was developed.

The key developments since 2012 include:

- The launch of eircom's FttC services
- ESB/Vodafone Joint Venture deploying FttH in towns and cities not reached by UPC
- UPC quad play capability arising from capacity MVNO from ***3***
- Launch of Sky Ireland broadband offerings
- eircom/OAO national offering of "Up to 24Mb" offers supported by a mix of 8Mb/24Mb BMB, and 1,3,7,and 24Mbps Bitstream IP products
- Development of VOIP
- Evolution of Standalone Broadband (SABB) (CGA and NGA)
- Ending of WLR/LEA discount
- Ending of CGA SABB discount
- Review of Access Network Cost models
- Network remediation
- eircom's FttH plans
- Dual SSID use to deliver multiple networks using a single infrastructure
- Launch of eircom TV
- The government National Broadband Plan (NBP)

The Replicability test is grounded in the notion that eircom competes in a market for dual play bundles of voice telephony and Broadband internet services with operators who do not have their own infrastructure, and so must buy the required inputs from eircom at wholesale prices. eircom has an obligation not to cause a margin squeeze between its retail offerings and the wholesale components required to replicate them.

Recent and forthcoming SMP designations notwithstanding, this view is increasingly out of touch with the reality of the market. The fact is that the major competitors in 2015 and beyond are likely to be those with significant reliance on their own infrastructure, rather than eircom's wholesale inputs for some or all components of retail bundles.

The Electricity Supply Board's wholly state-owned subsidiary (ESB Networks), which has a monopoly in the provision of electricity distribution networks supported by an extensive access network of ducts and poles, has entered a joint venture with the largest mobile operator in Ireland (and third largest fixed broadband provider) Vodafone. We understand that the intention is that Vodafone will use its own infrastructure to deliver fixed and mobile voice and broadband services. Vodafone Group has access to content in many markets and may ultimately offer content services such as TV in Ireland as well.

UPC Ireland already offers voice telephony, broadband and TV services on its own platform. Recently it gained access to MVNO services at preferential rates in the context of the remedies offered by H3GI to gain merger approval for its acquisition of O2 Ireland. UPC can now offer dual play, triple play, and quad play services without any wholesale inputs from eircom.

We note other infrastructure investment is occurring. For example eNet is engaging in FttH build in Claremorris, Kilkenny and several other locations. These developments demonstrate that the original premise behind the Replicability test, that market entry would only occur through the use of eircom's wholesale products, is flawed.

In 2013, Sky launched voice and broadband services which are sold alongside its TV offerings. Sky has its own TV platform, and enjoys control over valuable content. Sky uses some eircom wholesale products indirectly (WLR, Line Share and ADSL bitstream). However, the rapid growth, such that Sky could gain 6% market share by July 2014 utilising only ADSL services suggests that replicating eircom ADSL services is not difficult, and replicating eircom VDSL services might not be needed.

Both Sky and Vodafone (and others) seem to primarily offer a common suite of products nationally. This is quite unlike eircom's past practice which was to offer a different product set in rural areas. eircom's proposal to match the main competitors by offering a retail "up to 24Mbs" product utilising a mix of wholesale products exposes a deficiency in the replicability test. The test is primarily designed to be operated as a one-to-one test where each retail product has a corresponding wholesale product, and vice versa. However, it is now quite a while since eircom introduced the wholesale Bitstream Managed Backhaul (BMB) product set so that operators could use a common wholesale product to offer a range of different retail offerings. As a result the D04/13 test contemplates a situation where a single wholesale product is used to underpin a range of different retail offers (which was always envisaged in D01/06). Increasingly, however, the relationship between retail and wholesale products is many-to-many, rather than the one-to-one situation originally envisaged by the test. A set of retail offers is based on a set of wholesale offers, but any one retail offer may use many wholesale inputs, while each wholesale input is used in many retail offers. This evolution needs to be fully reflected in any future replicability approach whereby the retail portfolio is tested against a weighted average of all wholesale inputs. And, where such a test was previously applied only to the mix of inputs within the LEA, it should now be applied to a single test for the national market.

eircom has begun to utilise its IMS platform to offer VoIP or Voice over Broadband in the corporate market, and the capability will be extended to the consumer market in the coming years. There may be considerable work to be done to clarify how the obligations to provide CPS and SB-WLR might apply in this context. If eircom provides the home gateway, it can offer SB-WLR call origination with call handover at either IP layer or the circuit switched layer. Similarly, if the other operator provides its own home gateway, and has its own IMS platform, there would be no need for any wholesale version of VoIP. The situation where the operator wants to provide its own gateway and have wholesale access to eircom's IMS platform, with IP or circuit switched hand-over, may also arise. It is not clear how this range of choices will be reflected in the replicability test and we request ComReg's clarification in this regard.

ComReg may consider that a future examination of market 3a or 3b may lead to an SMP designation on eircom, and that an obligation to offer or continue to offer wholesale line rental might arise in that context. ComReg might anticipate that an obligation not to cause a margin squeeze between WLR and those retail products that require it as an essential input may be imposed. Indeed, there may be some commonality between a replicability test which looks at a wholesale product underpinning retail products, and one which looks at retail products requiring wholesale inputs to support them. However, we think there is a fundamental difference in approach between a test which starts from the wholesale market and considers every wholesale product, and one which starts from a retail market and considers every retail product. The case of “a bundle containing Retail Line Rental and one or more other services” captures a range of different combinations.

The increasing take-up of stand-alone broadband (SABB), both for CGA and NGA, will lead to a situation where SABB will be bundled with VoIP, Mobile and/or TV. This was not a significant feature of a replicability test grounded in Retail Narrowband voice service, but it could become increasingly important in a test based on the old market 5. Any future test should consider the margin squeeze tests between SABB and LLU inputs, and relativity with WLR, very carefully before deciding on the rules for testing for margin squeeze between the market 5 products and downstream retail offers.

The treatment of wholesale discounts in the replicability models was sufficiently unclear that eircom and ComReg had different understandings of the implications of such discounts ending. eircom’s Wholesale arm considered that the WLR discount on Broadband lines in the LEA should not be extended beyond the timeframe originally published. eircom Wholesale therefore made a statement in July 2014 that the discount would end in December 2014 as previously published. eircom considered that this might have implications for the NRT and eircom’s retail pricing from January 2015 onwards. ComReg, on the other hand, considered that an immediate price change was required.

The CGA SABB discount was implemented – and withdrawn – in a different manner, and so was treated differently.

The treatment of any future wholesale discounts, and the implications of them being extended or discontinued, should be clear to all parties. In eircom’s view any retail changes arising from changes to the wholesale cost stack should be implemented when the cost stack changes. We consider this view is consistent with eircom’s equivalence obligations.

ComReg is currently updating the cost models used to set the LLU rental prices in 2009 and underpinning the 2013 price reduction in LLU and Line Share. The LRIC-based copper access model (CAM) and associated economic measures (Tilts, averaging costs over 2010, 2011 and 2012, etc.) will be replaced by a new Access Network Cost Model. Initial drafts of this model became available to eircom during August 2014. This model is important for any margin squeeze test or replicability test because there is currently a suite of obligations requiring that bitstream services (whether stand alone or based on line share) do not cause margin squeezes with regard to cost floors, LLU and line share prices, and WLR prices.

eircom is reviewing its plans for NGA in the light of coverage achieved, ESB/Vodafone JV build, and the evolving nature of the National Broadband Plan. In addition to exchange launched VDSL (eVDSL), another outcome is a significant build of FttH capability, perhaps including a decision to build FttH rather than copper in greenfield developments. The current circuit switched voice platforms are reaching end-of-life and will no longer be supported by the vendors within a relatively short time horizon. Within this evolving network, ComReg is encouraging remediation of the obsolescent copper, with the aim of meeting stringent fault rate targets and repair measures under the USO regime. One cannot expect investments in obsolete elements to have the same useful economic lifetime as they might have had in the past. Changing technology, changing work practices, and modified life expectancy will all have significant impacts on the wholesale and retail cost models. The Replicability test needs to keep pace with the changing evolution of eircom’s access network technologies.

We also note that the emergence of UPCs dual-SSID capability may be matched by eircom or other operators following suit, or by the launch of Femtocell technology (as used by Vodafone in certain circumstances) on a more widespread basis. Such technologies essentially allow a public access service (public WiFi or personal/public 3G/4G) to share the cost of an end-users individual broadband service. The presence of such services will complicate the calculation of costs and revenues attributable to the broadband element in any replicability test.

eVision is eircom's IPTV based TV service. The core IPTV live channel offering is based on the utilisation of the regulated wholesale multicast service, which was mandated in D03/13 as a remedy in the old market 5 (section 5.1.4 of 13/11). The price for the multicast service is regulated by ComReg. However, it is clear that the eircom multicast service is not an essential input for operators who wish to replicate eircom's bundles which contain TV services, as the operators who do so (e.g. UPC, Sky, Magnet etc. ) do not buy the multicast service and instead utilise their own infrastructure.

Alongside these developments in urban areas and provincial towns there is the imminent prospect of state funded NGA to reach the rural areas that will not be reached by commercial deployment of other NGA technologies. The NBP will, over the period covered by the remedy that ComReg is currently reviewing, provide a platform for all serious competitors in the market for retail service bundles to achieve truly national reach. In doing this it will remove any residual justification for applying to eircom bundles a test that is predicated on eircom providing an essential input in even the smallest part of the national market.

The discussion of market developments above makes it clear that the environment for the Replicability test has become very much more complex where service bundles include more components and use a range of infrastructures to deliver those components to the retail customer. The correct response to such change is to assess whether there is a remaining justification for a Replicability Test to be applied to eircom service bundles - and should there be some remaining justification how the test should be refined to remove the unnecessary complexity that will arise by testing every new wholesale input against every service bundle using some of that input.

## 2 The justification for a Replicability Test is tenuous

ComReg's Market Analysis and SMP Designation process is not keeping pace with the increasingly dynamic and competitive market place. The European Regulatory Framework recognises market dynamism and sets three years as the natural cycle for market reviews.

In ComReg Decision D05/10 (the "WPNIA Decision" 10/39, dated 20th May 2010) and ComReg Decision No. D06/11 (the "WBA Decision" 11/49, dated 8th July 2011) ComReg imposed SMP obligations for current generation and next generation WPNIA and WBA services and facilities pursuant to Regulations 8, 9, 10, 11, 12 and 13 of the Access Regulations.

In ComReg 14/26, ComReg has proposed to define the relevant markets for wholesale call origination and transit services, and to designate eircom as having SMP in those markets in which it operates. The resulting SMP designation is intended to replace the previous designations from 2007 in D04/07 (07/80) and D07/61.

The SMP designations for the old market 2 and Market 5 were each made more than three years ago and are overdue for updated analysis. In August 2014 ComReg issued its Decision in respect of the old market 1 essentially preserving the regulatory regime applicable to the retail narrowband access market on an interim basis pending the conclusion of its market 2 review.

On 9th October 2014, the EU Commission issued C(2014) 7174 **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 and an accompanying explanatory document** SWD(2014) 298.

The Recommendation identifies five relevant markets:

- Market 1: Wholesale call termination on individual public telephone networks providedat a fixed location
- Market 2: Wholesale voice call termination on individual mobile networks
- Market 3: a) Wholesale local access provided at a fixed location
- Market 3: b) Wholesale central access provided at a fixed location for mass-market products
- Market 4: Wholesale high-quality access provided at a fixed location

The explanatory note requires that NRAs should prepare in time for the new round of market analyses following the adoption of the revised Recommendation. Article 16(6) of the Framework Directive obliges NRAs to carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7 within three years from the adoption of a previous measure relating to that market. Each of the markets in the current edition of the Recommendation corresponds to a market present in the 2007 edition. Therefore, NRAs should continue to apply a three-year market review cycle if they have previously conducted a notified market analysis on the basis of the 2007 Recommendation. For the sole purpose of assessing the expiry of the three-year period mentioned in Article 16(6)(a) of the Framework Directive, NRAs should consider that the new market 1 corresponds to market 3 of the 2007 Recommendation, the new market 2 corresponds to market 7 of the 2007 Recommendation, the new market 3a corresponds to market 4 of the 2007 Recommendation, the new market 3b corresponds to market 5 of the 2007 Recommendation, and the new market 4 corresponds to market 6 of the 2007 Recommendation.

Market 1 and Market 2 in the 2007 Recommendations are considered no longer to be susceptible to ex-ante regulation except where the NRA can argue special circumstances. The Replicability test now under discussion must be grounded in one or more of the new 2014 markets, perhaps new Market 3a or new Market 3b.

eircom holds the opinion that new remedies, such as a new or updated replicability test, should only result from current Market Analysis, which would then align with the EU Recommendations currently in force and should be updated every three years. We call on ComReg to commence the relevant analysis as a matter of urgency.

As the Market Analysis must be updated every three years, eircom considers that any SMP designations must have a clear end date no more than 3 years after the designation, and all associated remedies must clearly have end dates aligned with the expiry date of the SMP designation. Open ended SMP designations or remedies have no proper legal basis.

We do not agree that any ex-ante MST or NRT is still required. This proposal seems to be based on the inclusion of Retail Line Rental in a bundle. eircom considers that Decision D12/14 (14/89) is based on an assumption that the old Market 1 is susceptible to ex-ante Regulation. This is no longer the case since 9th October 2014. The transition between editions of the Recommendation raises issues for all stakeholders. The underlying principle is that remedies that have been imposed should stay in place until a new market analysis is undertaken. Allowing a regulatory measure or remedy to run its course, without risk of it being reversed mid-term, is an important element of regulatory commitment which reinforces the predictability of regulatory intervention.

However, NRAs should prepare in time for the new round of market analyses following the adoption of the revised Recommendation. Article 16(6) of the Framework Directive obliges NRAs to carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7 within three years from the adoption of a previous measure relating to that market. On this basis, ComReg should foresee that D12/14 should be withdrawn on or before 28th August 2017. In fact, the transition arrangements are designed to give NRAs time to adopt the updated recommendations, and allow orderly withdrawal of obligations. It is unfortunate that D12/14 was enacted just a few weeks before C(2014) 7174 entered into force, especially as the draft versions of C(2014) 7174 were clearly available before D12/14 was finalised. It is notable that the European Commission commented on D12/14 (as exhibited in Appendix 3 of ComReg 14/89) urging ComReg to complete its review of call origination market as soon as possible and "*to reassess whether the presently notified markets still warrant ex ante regulation without any undue delay.*"

ComReg should proceed to withdraw D12/14 as soon as possible, and should not seek to impose new or continuing obligations based on it. The Commission concedes that "*NRAs might consider implementing alternative and more proportionate, transitional policies, not based on the SMP obligations, to protect a small and decreasing group of specific customers still dependant on the PSTN technology or consumer groups who might be particularly vulnerable. Therefore, on a forward-looking basis, NRAs should analyse the provision of services such as fixed narrowband access and the need for wholesale access regulation against the transition to all-IP networks. In such analysis, the NRAs could in particular consider the number of captive users in its defined geographical market and the potential risk of anti-competitive behaviour by the fixed network operator absent ex ante regulation but relying on general competition law."*

If ComReg consider any remedy is required on foot of an old Market 1 Analysis, it must not extend beyond 28th August 2017 at the latest and as such if the Replicability Test is to remain in the interim it should be subject to a sunset clause.

## 3 If the Replicability Test can be justified then radical change is required

The issues highlighted in the preceding sections call into question whether the replicability test is required at all, and if it is whether there are radical changes needed to reflect the changing nature of competition. For example the ATC cost standard is not appropriate where competing retail bundles are substantially comprised of elements not produced by eircom. There is a clear need to revisit the approach now as other operators extend their technical delivery platforms and market strength (and in some cases dominance) from mobile, television, and electricity markets.

The emergence of alternative infrastructure, especially for NGA type services, suggests that eircom wholesale services may not be essential for the replication of eircom's retail bundles. Increasingly, competitors at the retail level will self-provide, or purchase from other wholesalers, many of the necessary components. In some cases, such operators will only sell at the retail level where their own infrastructure is available (e.g. UPC), whereas other operators will offer national products at the retail level, supported by a wide range of wholesale alternatives (e.g. Vodafone buying services based on Line Share, Bitstream, LLU, ESB/Voda JV wholesale FTTH, VUA and maybe other services).

The concept of Weighted Average Wholesale Network Input (WAWNI) was designed to allow eircom Retail to avail of the mix of wholesale products used by its competitors. The expectation was that this mix would evolve over time with increased weighting for LLU and reduced weighting for bitstream. As the competitors reduced their cost base by “climbing the ladder of investment”, the intention was that the WAWNI would decline at the same rate. The net effect was to allow eircom’s retail arm to climb the ladder of investment at the same rate as its competitors. The emerging reality however is that competitors are increasingly utilising their own infrastructure, such that their purchases of eircom services are reducing to rural bitstream usage in a reasonably short period of time. Investment in their own infrastructure only makes sense if there is a significant cost saving compared to the alternative of buying eircom wholesale offers. In any test, the WNI should therefore decline to, or perhaps even below, the charges for the highest point on the eircom rungs of the ladder. Perversely, as the alternative infrastructure providers climb the ladder, the WNI reverts to a simple wholesale bitstream price. This is not what was originally intended.

Similarly, the merger of 3 Ireland and O2, and the voluntary remedy of MVNO access at attractive wholesale rates, will allow UPC to offer mobile services in its bundles, and may allow Carphone Warehouse (CPW) to offer bundles of mobile and fixed services. If MVNO terms are more attractive than the LRIC costs of building one’s own mobile network, then an operator replicating eircom’s mobile service would choose the MVNO option, rather than climbing the ladder of investment. This is particularly the case if one chooses to compare rates set at the LRAIC cost of an operator with a 20% share of the market to MVNO rates based on the marginal cost of an operator with about 35% to 40% share. Clearly, the lower of LRAIC and the terms available from 3 (to UPC and CPW) should be used in the replicability test: that is what a competing operator will choose to pay, rather than the rates derived from the Meteor/ eMobile LRAIC.

From the radical changes described above in the nature of competition for service bundles, both in terms of the parts of the market reached with increasingly rich service offerings based on a new and extended range of inputs, it is clear that any test that is still justified must undergo radical change. Even where eircom has been designated with SMP in the market for one or more of the wholesale inputs, the new nature of downstream competition - and competitors - in the market for service bundles makes the idea of foreclosure laughable. The remaining replicability test must recognise this and move to a much simpler structure performed at the national portfolio level using the mix of wholesale inputs required to serve the whole market, as well as a measure of downstream costs that reflects those faced by the real present, and prospective, competitors.

## Response to Consultation Questions

**Q. 1 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Where Bundle means a package of services, consisting of Retail Line Rental and one or more other services.**

Where an OAO requires an essential input from eircom from a wholesale market, where eircom has been designated with SMP, then there is a strong case that eircom should be required to demonstrate that is it not causing a margin squeeze between the price for that input and the price for a retail bundle that includes that input. However, from the discussion that prefaces the eircom answers to the specific consultation questions, it is clear that any test that applies between input and downstream prices must recognise recent movements, and clear future trends, in Irish retail competition and in the EU Regulatory framework. For both these reasons the presence or absence of "Retail Line Rental" in any service bundle is increasing irrelevant.

**Q. 2 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Where Bundle means a package of services, consisting of a Retail Broadband Product and one or more other services.**

As in the answer to Q1 above, eircom finds that the requirement not to cause a margin squeeze can only arise when eircom has been appropriately designated with SMP in the relevant market for an essential wholesale input. As the old market 5 (Wholesale Broadband Access) has been replaced by the new Market 3b, the potential basis for this margin squeeze obligation (eircom's SMP designation in the new Market 3b) may be more enduring. However, ComReg's basis for the remedy seems to stem from D06/11 in July 2011. This market review is more than 3 years old and must be updated.

**Q. 3 Do you agree with ComReg's preliminary view that a further specification of the obligation not cause a margin squeeze is not currently required in Market 4?**

There a number of issues with the margin squeeze remedy arising from SMP in Market 4. The first is that the designation of eircom with SMP dates from mid-2010 whereas the remedy currently under review will apply for the period from 2015 to 2017. So at least five years will have elapsed since the designation that gives rise to the remedy, and clearly the market for competing infrastructures has developed greatly due to highly successful self-supply by UPC, and will continue to develop as the complementary investment by the Vodafone/ESB joint venture currently trialling in Cavan reaches most built up areas not currently served by UPC. In parallel with this development in the Irish market, the revised framework of markets developed by the EU has also overtaken the designation and the associated remedies. While the market 3(a) from new relevant markets recommendation includes many of the services currently sold in the WPNIA market it is clear that a broader range of services covered may lead to a different market analysis for Ireland and to a different - or no - designation of SMP. In this context eircom agrees that it would be inappropriate to specify any further obligation not to cause a margin squeeze in Market 4.

However there is one issue where clarification of the current remedy is urgently required. This is the question of the appropriate test to be applied to eircom standalone Bitstream services. The current margin squeeze test for Bitstream, when purchased on a line that also delivers telephony, uses the LLU input Line Share, on the basis that the OAO building their own Bitstream service buys WLR access to PSTN and Line Share separately - and that all of the costs of the copper pair are recovered from the WLR charges. To this point a similar treatment has been used with standalone Bitstream by taking ULMP as the appropriate input. The issue that arises is the ULMP price is based on a higher weighting of the lower costs of those copper loops that serve unbundled exchanges. eircom standalone Bitstream is available at a much wider range of exchanges than are currently - or are ever likely to be - unbundled. And, with the wider deployment planned for eircom NGA, it is likely that there will be substantial demand for standalone Bitstream in areas of even higher copper cost. On such lines there is no contribution to the copper costs other than the stand-alone Bitstream charges and any margin test must recognise this.

The charges for the current WLR service are set on a retail-minus basis, so these do not provide an appropriate input to ensure that copper costs are recovered from stand-alone Bitstream revenues. Consequently, in the context of strong demand for first line services other than telephony, ComReg should now consider the appropriate input into any MST that applies between nationally available CGA and NGA stand-alone Bitstream (and NGA VUA) and the WPNIA input. This test must allow recovery of efficiently incurred costs of delivering access network service nationally, support the appropriate level of infrastructure competition, and avoid unintended consequences such as geographic disaggregation by accident

**Q. 4 Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 if there was appropriate wholesale regulation upstream?**

In the discussion that prefaces the answers to the specific consultation questions. eircom argues that a truly forward looking analysis of the market for service bundles in Ireland would find that there are sufficient constraints on eircom to ensure that there is no motivation to cause a margin squeeze between prices for our wholesale inputs and downstream bundle prices. This conclusion would, of course remove the need for any margin squeeze test. If, however, ComReg finds that there is still a requirement for such test, eircom agrees that it should be grounded in a market for a wholesale input where eircom has been designated with SMP. The market for retail narrowband access is clearly not such a market. Notwithstanding the recent decision D12/14, eircom notes the EU list of recommended markets no longer contains any retail market.

In this context it is worth re-stating that any such test must only test the retail bundles at the portfolio level - as it is only at this level that the complex combination of wholesale inputs can be meaningfully assessed. And it is only at the portfolio level that a suite of bundle propositions, with complex interactions between downstream costs such as content, marketing, and usage across the full range of customers addressed, can viewed as a whole.

**Q. 5 ComReg is interested in receiving views from interested parties on developments in the LEA which submitters consider relevant and which have occurred since publication of the LEA criterion as set out in ComReg Decision D04/13.**

The LEA is a construct that is fundamentally based on the assumption that all competitors in the market for bundles in Ireland must use wholesale inputs from eircom. Even in the area covered by the UPC cable network there is no recognition of the implicit transfer price from UPC Network to UPC Retail – nor is there recognition that eircom and other competitors must match this input to win or retain market share. As discussed above we are now entering a phase in the Irish market where all parts will have at least two competing infrastructures - due to the roll out of the ESB/Vodafone FttP in towns not covered by UPC, and due to the NBP deployment.

**Q. 6 When do you believe it might be appropriate to use only the EEO cost standard to determine the downstream broadband retail costs in the MST for Bundles?**

If the Replicability test is to be retained then a move to EEO for all broadband retail costs should occur now, given the current, and prospective, nature of competition for service bundles both within and outside the LEA.

The original rationale for the use of the SEO cost standard in the DCF model of the retail costs for Broadband was to encourage entry at the retail level by an ISP using eircom Bitstream inputs. For this ISP retail Broadband is their anchor product and must therefore recover the fixed and common costs of running their business. This model may have been appropriate for 2005 when eircom first launched its Bitstream services on a national basis, and when Broadband started to replace dial-up Internet access as the preferred mechanism for businesses and consumers to access the internet. Ten years on, consideration of the appropriate downstream retail costs for use in a margin squeeze test in 2015 must centre on the nature of competition in the market for fixed broadband services as we find it now - and as we can reasonably anticipate it playing out into the future.

There is now mature competition in the retail market for Broadband access, and after several years characterised by the take-over of ISPs by multinational telecommunications conglomerates, the rationale for any test of eircom margins against small scale single product entrants is no longer appropriate. Indeed it is now the case that the key competitors outside the LEA are Sky and Vodafone who both enjoy economies of scale and scope unavailable to eircom. Both have strong market positions in markets for anchor services outside the fixed broadband market from which to recover their fixed and common costs. It is clear that both have developed positions in the broadband market by adding a broadband proposition to their service bundle at a price premium set to recover only avoidable costs. While they may both consolidate their positions by setting bundle prices to recover contributions to fixed and common costs from the revenues of all service elements it is clear that even such a model of downstream costs will deliver unit values below the eircom EEO level. The table below illustrates that the major competitors were pricing far below eircom's nearest equivalent offering even before eircom adjusted its prices on 1st August 2014 to avoid an emerging margin squeeze. Note the Vodafone €60 product includes unlimited calls to all Irish Mobiles. eircom could only replicate this at a much higher price.

| Bundle | Previous eircom | New eircom 1st Aug | UPC | Sky | Vodafone |
|---|---|---|---|---|---|
| NGB Voice + BB Capped | €45 | €48 | €30 | €30 | - |
| Fibre/NGB Voice + BB Unlim | €50 | €53 | €37 | €40 | €45 |
| Fibre Voice + BB Capped | €45 | €48 | €37 | TBC | - |
| Fibre Voice Unlim + BB Unlim | €55 | €58 | €44 | TBC | €60 |

For these reasons there is no longer any meaningful regulatory objective that will be served by requiring eircom to pass a test that uses an SEO model of downstream costs in any geographic market in Ireland. In conclusion the appropriate time for the move from the SEO to EEO model of downstream costs is already past. Indeed the current consultation should be considering when it is appropriate to move to an avoidable cost standard, particularly in the context of encouraging investment in Next Generation infrastructure.

A recent submission by eircom to ComReg on the appropriate MST to apply to both service bundles and to the Broadband service sold outside a bundle in the market outside the LEA indicates a further problem with the application of cost standards. As discussed above the key competitors in this part of the market are not just national, but international, in reach. As such they buy in a portfolio of wholesale inputs to deliver a portfolio of retail bundles. With a simple national broadband offer that does not distinguish between LEA and non-LEA areas, nor between BMB and Bitstream IP (or LLU-based) inputs, they simply test the average of national inputs with the average of national revenues in pricing their portfolio. When the Broadband to Bitstream test that has been informed by the DCF model was first developed it did envisage multiple retail outputs based on one wholesale input. However as certain access seekers have moved to simple "as fast as your line can go" retail portfolios, based on a blend of multiple Bitstream inputs to support a single retail proposition, this test is out of step with market reality. ComReg must now move to recognise the market reality where a small number of operators of considerable scale and scope have simple national offers based on a blend of wholesale inputs and highly efficient retail cost. So the MST that will now apply to eircom bundles - and to Broadband sold outside a bundle - must use as an input the observed wholesale mix (rather than test against each input in turn). Where this has been specified in an inappropriate way in ComReg D11/14 for Broadband sold outside a bundle, it must immediately be rectified for the MST that applies to bundles including Broadband, to ensure that consumers benefit from the effects of national competition when using eircom rural bundles.

**Q. 7 ComReg is interested in receiving views from interested parties as to whether it would be more appropriate to apportion "approximated" (where the data is not actually quantifiable by Eircom) wholesale bandwidth at peak hour for different portfolios or bundles of retail bundles offers (e.g., whether a separate usage profile is used to assess Bundles including "Unlimited" broadband which may be more reflective of the type of average customer usage on such packages compared to the portfolio of all packages).**

There are a range of reasons of principle and of practicality why the correct treatment of Bitstream usage in the MST is to apply the charge at the average of portfolio usage to the portfolio margin before usage. As the MST is a remedy for a finding of SMP in a wholesale market - in the case of treating the broadband usage costs the relevant market is the WBA market - the test should be grounded on the wholesale market. Any proposal to attempt to test retail services individually is against this principle and is, in effect, an unjustifiable move to regulate individual retail prices. It is a matter for the SMP operator to ensure that the retail portfolio based on the essential inputs from the wholesale market passes the ex ante MST when the total of relevant wholesale charges and of downstream costs are tested against the total of service revenues.

There are two main factors that should be considered when assessing how the issue of broadband traffic should be treated in a margin test applied to eircom service bundles that include broadband access. The first is the nature of cost faced by downstream competitors arising from the price structure of the eircom Wholesale bitstream service. The second is the nature of the downstream cost faced by eircom - and by bitstream access seekers - that is driven by the level of broadband traffic generated by their retail customers and the content they consume.

For both the key inputs - eircom ADSL Bitstream Managed Backhaul (BMB) and the VDSL Bitstream (NGA) - the eircom monthly price structure has had two parts. A fixed monthly rental per bitstream port has been supplemented by a linear charge per Mbps handed over at the national interconnect point(s) measured at the 95th percentile of the traffic readings throughout the calendar month. This structure has allowed the access seekers to aggregate the demands over time of a range of customers with different traffic characteristics and only to pay at the level that drives incremental costs in the eircom network. The access seeker incurs input costs at the level driven by the busy hour usage of the portfolio of services sold to their broadband customer base. This indicates that the appropriate level to apply the measurement of usage costs in the MST that applies to eircom broadband offers and retail bundles is also at the portfolio level. Any proposal to apply the cost caused by (the users of) an individual would necessarily require the analysis of the traffic generated by that bundle. While this is technically feasible for users of eircom bundles it is not possible for eircom to observe the traffic generated by particular groups of the access seeker's retail customers based on the retail service package they consume. Analysis of eircom retail traffic indicates that different bundles generate different levels of traffic and have busy hours at different times. So there is an incentive for the access seeker to make efficient use of the eircom network and to add customers that drive usage at times other than the time of peak demand. No application of MST to eircom downstream offers should remove this incentive.

Another input cost for the Bitstream access seeker is the cost of backhaul capacity both from the eircom Bitstream network and to the internet whether by transit or by peering. In the first case the cost is driven by peak usage across the combination of users of retail offerings marketed by the access seeker, or by their re-sellers. In the case of access to the web, ISPs generally peak at the 95th percentile of their monthly traffic on any particular route – so, once again, this cost is driven by the aggregate usage across the population of retail users. And, once again, there are economies of scope available to efficient ISPs that construct portfolios of retail offerings that include some that exhibit peak demand at times other than when the 95th percentile reading occurs. The structure of this downstream cost underlines that the appropriate measure of traffic cost for use in the MST is the level measured at the portfolio rather than the service bundle.

The structure of usage charge implemented by eircom for CGA and NGA will shortly change for reasons of giving predictability to access seekers over a period where the traffic per user is likely to increase by more than 50% per annum due to migrations from CGA to NGA and by increasing household demand for OTT content. This structure will see the charge per Mbps at the 95th percentile fall as the traffic per user (that is per Bitstream port) rises - in line with a natural logarithmic curve. As discussed previously with ComReg, the move to this price structure will be accompanied by an offer for the access seeker to disaggregate their Bitstream traffic into two or more streams so as to minimise their total traffic charge. If the appropriate input to the MST for Bitstream usage is determined by ComReg to be the usage for each bundle in isolation, then the disaggregation construct must apply to the eircom traffic for each individual bundle. Aside from the impractical nature of this complexity of calculation for the MST this treatment again views every bundle sold by eircom Retail as being offered by a separate OAO. This is tantamount to regulating individual retail offerings in isolation and is inconsistent with the EU framework drive to regulate only at the wholesale level.

**Q. 8 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the LEA?**

eircom continues to question the need for, and the proportionality of, an *ex ante* margin squeeze test for bundles. If such a test can be justified in the current environment, then a far more flexible approach is needed to accommodate the current dynamic and uncertain environment. eircom's proposed approach is outlined in the preceding sections of this response. eircom urges ComReg to reconsider those elements of its proposal over which eircom has raised concerns in the previous sections.

**Q. 9 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented Outside the LEA?**

eircom continues to question the need for, and the proportionality of, an *ex ante* margin squeeze test for bundles. If such a test can be justified in the current environment, then a far more flexible approach is needed to accommodate the current dynamic and uncertain environment. eircom faces intense competition within and outside the LEA, albeit that the market conditions for wholesale supply of line rental, calls and broadband inputs differ. Outside the LEA eircom competes with well-resourced players such as Vodafone and Sky who benefit from the economies of being part of large international groups. As such, all OAO modelled inputs should be based on EEO principles and should be assessed on a portfolio basis using the range of wholesale inputs to deliver the suite of retail bundles.

**Q. 10 Do you agree or disagree with the ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness as detailed in section 5.6?**

eircom agrees that it is appropriate to undertake a case by case assessment of a bundle's reasonableness and that such analysis should consider retail efficiencies, increased customer lifetimes and competitive assessments. This test should, of course, be applied not at the individual bundle level, but across a portfolio of service bundles containing the appropriate variants of similar services.

**Q. 11 Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.7) to the MST?**

ComReg has reprised the 'other options' previously considered in 2013 and has maintained its position regarding each option. Unfortunately ComReg has not updated its thinking regarding the nature of retail competition and how that should be reflected in a revised replicability test regime. For example, when a bundle is in response to a competitor's bundle, ComReg states its position that "*The MST has a clear underlying logic: if Eircom's pricing does not cover its ATC (at the portfolio level in the LEA and at the bundle-by-bundle level Outside the LEA) it is reasonable to assume, subject to the outcome of the complementary competitive assessment, that an efficient rival would also not be covering its full costs — since Eircom has economies of scale and scope within the fixed sector that others are unlikely to be able to match*." ComReg has entirely ignored the fact (recognised in its assessment of old market 1) that competition is increasingly driven by bundling, and that eircom's competitors typically leverage one or more components of the bundle that they produce themselves (such as mobile services and TV services), or source from a supplier other than eircom (such as mobile services). eircom does not have economies of scale and scope across the components of bundles that others are unlikely to be able to match, and ComReg must revise its approach accordingly.

**Q. 12 Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised Bundle?ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance.**

eircom is agnostic as to whether there should be a pre-clearance or self-certification regime. In either case eircom will be required to undertake the same burden of work. A move to self-certification may result in a reduction in the resource requirements of ComReg but there will still need to be an avenue for engagement to agree appropriate treatment for new and novel issues as they arise.

**Q. 13 Do you agree or disagree with ComReg's proposed approach where an Eircom Bundle is considered to be non-compliant with its obligation not to cause a margin squeeze?**

ComReg proposes to maintain the regime established in 2013. It could be argued that a period longer much than ten days should be specified. Experience has demonstrated that the flexible application of the regime can be effective. For example, in some circumstances, it may simply not be practical for the necessary analysis to be completed in a ten day period to inform the "modify or withdraw" decision.

**Q. 14 Do you believe that the draft text of the proposed Decision Instrument for Market 2 is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed?**

As we do not consider that the text should be maintained in the form proposed by ComReg, we have not reviewed the text in detail.

**Q. 15 Do you believe that the draft text of the proposed Decision Instrument for Market 5 is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed?**

As we do not consider that the text should be maintained in the form proposed by ComReg, we have not reviewed the text in detail.

**Q. 16 Do you have any views on the Regulatory Impact Assessment above and are there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment?**

eircom believes that the draft RIA ignores the very high costs to eircom and to consumers of continuing the highly interventionist approach that applies to the pricing of retail bundles The costs and risks associated with applying a highly complex *ex ante* NRT have actually increased dramatically since 2013, due to the launch of NGA and the introduction in eircom of new billing platforms. Forthcoming changes to bitstream usage charges will further increase complexity and cost.

ComReg should carefully reassess the need for such an *ex ante* test going forward by comparison with expeditious application of the competition rules to any issues that may arise in relation to the pricing of bundles or the wholesale price stack.

# 2 Magnet Networks Limited

**Q. 1 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Where Bundle means a package of services, consisting of Retail Line Rental and one or more other services. Please provide cogent reasoning to justify your views. ................ 25**

Magnet believe that it is a requisite that a monopoly or company deemed to have SMP should have to demonstrate that their actions do not cause a margin squeeze. Magnet agrees with the concept proposed by ComReg however, Magnet does not agree with the model that ComReg are proposing especially the models outlined in Paragraph 31 and 33 in relation to LEA and outside LEA areas.

Magnet believe that there is no longer a requirement to for the LEA distinction as firstly, it is seemingly being abused based on the fact at of the 251 exchanges deemed to be LEA 155 come within criteria 1-3 excluding criteria 4. Secondly, the concept is now redundant as the incentive for LEA is being removed and the end user is agnostic to their geographic location, especially, whether they are within LEA or not. Magnet believe these LEA are now a disincentive to investment as due to suggested ability by Eircom retail to cross subsidise regulated services means companies like Magnet can no longer recover costs versus eircom's offering. Magnet must highlight that it does not agree with the inclusion and continued inclusion of criteria 4 of LEA as set out in D 04/13. The reason why Magnet now disagree with the inclusion of Criteria 4 is that with the proposed changed to the MST, this criteria 4 gives Eircom retail 1.2million homes where they can cross subsidise products. This in turn leads to the isolating and disincentivising other operators such as Magnet from offering competing products. Magnet already does not offer a price equivalent product in the NGA environment offering a product at €55 as opposed to eircom's €24.

**Q. 2 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself.? Where Bundle means a package of services, consisting of a Retail Broadband Product and one or more other services. Please provide cogent reasoning to justify your views. ...27**

Magnet reiterates what it outlines above. It is imperative that a company with a ubiquitous, country wide network should be required to demonstrate that they are not causing a margin squeeze between wholesale inputs and price when an OAO is attempting to replicate an Eircom retails bundle

**Q. 3 Do you agree with ComReg's preliminary view that a further specification of the obligation not cause a margin squeeze is not currently required in Market 4? Please provide cogent reasoning to justify your views. ........................................ 28**

Magnet believes that an obligation not to cause a margin squeeze in Market 4 is important. Magnet does not agree with the statement set out in paragraph 68, Magnet as an LLUO is not "better able to offer differentiated products and set prices independently". Historically, that may have been the case when Eircom did not offer uncongested 24MB products. However, Eircom now offer equivalent products to Magnet's LLU broadband only products at equivalent prices based on wholesale inputs. Thus, Magnet rejects ComReg's generic and untrue statement at paragraph 68. However, it is imperative that a margin squeeze test remains to protect the investment albeit a much devalued investment made by OAO's to date.

**Q. 4 Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 if there was appropriate wholesale regulation upstream? Please provide cogent reasoning to justify your views. ...................... 30**

Magnet agrees that the NRT could be removed in Market 1 if there was appropriate wholesale regulation upstream. However, Magnet does not agree that the MST suggested by Comreg is appropriate. Firstly, it distinguishes between two areas and allows two different tests, this allows cross subsidisation in one and not in the other, however, the cross subsidisation price will become the headline price and the other test will become irrelevant. Customers will not and do not understand the geographical distinction and will want the service at the headline price advertised. Magnet asks ComReg how it sees Eircom retail advertising of these products in LEA and non LEA areas. Thus, moving to a flawed MST is not an appropriate wholesale remedy and thus, the NRT is Market 1 should not be removed if the MST as it stands is the one being implemented. Though ComReg will state that Eircom have to adhere to the outlined MST.

Is there a timeline when ComReg say to Eircom that the input costs are now higher than at time of launch because:

1. Eircom have not obtained the customers they had forecast
2. The lifespan of the customer being obtained is far lower than what used in initial calculation

Thus, the question Magnet is asking is, is ComReg proactively monitoring a product or bundle post launch to ensure the guestimates, timelines, lifespans provided are being met or are appropriate? Magnet suggests and assumes that ComReg are retesting or requiring Eircom to retest monthly using up to date statistics modelled out based on uptake, churn rates etc and compared this with original expectations and if the product is not on trend then there is a difficulty with that product and it should be suspended. This obligation should fall on Eircom to have a monthly obligation to:

1) reprove the MST is being complied with
2) model current data set out versus the original propose data set

Magnet believe that once real data flows through the model should be continuously examined for any potential gaming of the model.

**Q. 5 ComReg is interested in receiving views from interested parties on developments in the LEA which submitters consider relevant and which have occurred since publication of the LEA criterion as set out in ComReg Decision D04/13. Please provide detailed reasoning and supporting information (where available) to support your views. ........................................................................... 36**

Magnet does not believe that the LEA decision has made any difference to the market and think that now is a good time to get rid of the LEA distinction or re-evaluate its criteria. Magnet has a particular issue with Criteria 4, that the area/exchange must just be NGA enabled. This means that there are areas that have technically one infrastructure provider to provide them services whether current or next generation e.g. Carrigtwohill, Co. Cork. This does not make the area competitive and does not enhance the area's broadband. The WLR discount associated with LEA areas has not made a huge significance to Magnet due to Magnet's customer demographic i.e. broadband only subscribers and with the removal of that discount means the LEA area definition has become redundant as the only operator who obtains any benefit from its continuation is Eircom within ComReg's MST decision to allow Eircom subsidisation within LEA from unregulated products. Going forward by distinguishing a location based on competition on Eircom retail is overarching regulation and not allowing competition take place and also styming the investment in infrastructure. An operator may chose not to invest in a location because it will move that location from non LEA to LEA and therefore a different MST as proposed herein by ComReg. This LEA MST test leads to Eircom retail being able to cross subsidises between regulated and unregulated products.

Overall Magnet does not agree with the continuation of the LEA distinction. It is allowing the national marketplace be distorted as customers are only interested in the headline prices and are unconcerned about their geographical location. By allowing cross subsidisation on MST in LEA areas, only Eircom retail will benefit and it will become a race to the bottom .

Magnet have an issue with the LEA list, as it seems that the only reason a majority of these areas fall within this LEA list is because they have NGA not because there is another retail operators with an alternative network or an LLU provider. To Magnet it seems that the "intention" of the LEA has been abandoned and makes no sense. After a review of all 251 exchanges on the updated LEA list provided by ComReg on 22nd of October 2014, only 155 number are within criteria 1-3 the remaining all come within criteria 4. This shows that over 40 percentage of LEA locations only have one fixed infrastructure provider on which all other OAO's resell their services. Thus, this is not competition especially as Eircom retail now get the benefit of cross subsidising products in this location and there is no infrastructure competition to give residents and businesses as true effective alternative. Looking at this LEA list does Sandyford and Dundrum have the same market conditions and competitive conditions as Carrigtwohill, Little Island, Cobh etc. It is evident it does not and thus, this is all down to the inclusion of Criteria 4 in LEA approval process. There is no alternative wholesale infrastructure providers in these areas and thus, they can and will be foreclosed by Eircom with a more flexible MST.

**Q. 6 When do you believe it might be appropriate to use only the EEO cost standard to determine the downstream broadband retail costs in the MST for Bundles? Please support your view with relevant data and evidence. ................. 43**

Magnet does not agree with EEO cost standard to determine the downstream broadband retail sots. Magnet believes that it should be SEO across bundles that should. Magnet believes that SEO is more appropriate due to economies of scale and ubiquity of Eircom. No OAO has been able to come close to this level of ubiquity and presence and this inability to be an equally efficient operator. Magnet would, also like SEO for advertising product development and billing as the lower unit cost affects small companies like Magnet. The market is being distorted to the benefit of the larger operator and preventing smaller operators compete. Magnet would like SEO for advertising as though ComReg state that there are some large international suppliers in the market such as Vodafone and Sky who potentially leverage their infrastructure, there are also smaller operators such as Magnet who do not benefit from that scale. Magnet believes that the costs outlined in Paragraph 116 should be cross checked with OAO. Magnet disagrees with the presumptions set out in Paragraph 117 because very different products from Vodafone and Sky, and neither do IPTV. Also reason very few small operators is the tough regulatory environment ComReg is creating for small operators

**Q. 7 ComReg is interested in receiving views from interested parties as to whether it would be more appropriate to apportion "approximated" (where the data is not actually quantifiable by Eircom) wholesale bandwidth at peak hour for different portfolios or bundles of retail bundles offers (e.g., whether a separate usage profile is used to assess Bundles including "Unlimited" broadband which may be more reflective of the type of average customer usage on such packages compared to the portfolio of all packages). Please support your views with cogent reasoning. 57**

Magnet wonders has Comreg considered alternative if WNI moved to 100% SB WLR and BMB as LLU becomes unattractive

Magnet disagrees with paragraph 178 and believe it is imperative that WNI is published. You don't need WNI to price follow and also no OAO has enough market share to influence prices.

**Q. 8 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the LEA? Please give a detailed response with supporting data where appropriate to support your view. ............................................................. 70**

Magnet does not agree with cross subsidisation within LEA.

**Q. 9 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented Outside the LEA? Please give a detailed response with supporting data where appropriate to support your view. ..................................................... 75**

Magnet agrees with the MST test for outside LEA areas but believe that this should be rolled out nationally.

**Q. 10 Do you agree or disagree with the ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness as detailed in section 5.6? Please give a detailed response with supporting data where appropriate to support your view. ........................................................................................................ 79**

Magnet doesn't agree with the 42 month lifespan of a customer.

**Q. 11 Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.7) to the MST? Please give a detailed response with supporting data where appropriate to support your view. ............. 82**

Overall Magnet agrees with all the proposals that ComReg outline in the position relating to adjustments. Having such adjustments based on banking credits, competitors promotions etc is giving Eircom retail an unfair second bite of the cherry. However, as outlined in Magnet's answer in question 10 it does not agree with the 42 month lifespan of a customer being utilised in the test calculations.

**Q. 12 Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised Bundle? Please provide detailed reasoning to**

**support your view. ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance. ............................................... 86**

Magnet agrees that preclearance is an imperative as otherwise Eircom retail will have a free reign and having a test would become redundant. Eircom would be self-policing and due to the sensitivity of the market and the numerous opportunities for Eircom to leverage vertically and abuse their dominant position having a pre clearance is essential.

Magnet believes that self-certifying is not an option as it is open to abuse. As Eircom is vertically and horizontally integrated, self-certifying allows abuse to take place.

**Q. 13 Do you agree or disagree with ComReg's proposed approach where an Eircom Bundle is considered to be non-compliant with its obligation not to cause a margin squeeze? Please explain your response and provide detailed information to support your view. ........................................................................................ 88**

Overall Magnet agrees but to some extent ComReg's hands are tied in relation to time lines. Obviously Magnet would like to see tighter time lines to ensure that an abuse is not allowed to become an extended abuse and the industry is exposed and is brought into disrepute.

**Q. 14 Do you believe that the draft text of the proposed Decision Instrument for Market 2 is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required. 102**

Magnet believe now is an appropriate time to remove the LEA differential as Magnet does not believe that it is helping competition as areas in LEA are only qualifying based on the fact and only reason is the fact that NGA has been rolled out in that are e.g. Carrigtwohill Co Cork. This small village has no alternative infrastructure provider, it has not had its exchange unbundled, its only inputs are all Eircom wholesale inputs e.g. Eircom current and next generation access. Magnet fails to understand how this promotes or enhances competition and allows Eircom cross subsidise when their customer base has no alternative but to buy a Eircom product whether directly with Eircom or resold via alternative operators. Magnet propose if LEA is not being removed that criteria 4 that the exchange is NGA enabled is removed as there is no logical reason to introduce it as it is capturing locations that are not competitive and that there is no real alternative available to its residents.

**Q. 15 Do you believe that the draft text of the proposed Decision Instrument for Market 5 is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required. 117**

Magnet reiterates it statements in answer to question 14 above. Magnet believes that it is necessary to amend the LEA criteria and more particularly criteria 4 as this criteria is distorting the marketplace and will give Eircom retail a captured market of 40% of LEA areas with no infrastructure competition and thus can foreclose this segment.

**Q. 16 Do you have any views on the Regulatory Impact Assessment above and are there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.......... 139**

Magnet doesn't believe that the MST especially within the LEA will encourage investment and aligns with ComReg's objectives as outlined in Section 12 of Communications Regulations Act. Firstly, the LEA MST does not encourage competition as it is in 40% with no infrastructure competition, leaving Eircom foreclose these communities. Secondly, it does not encourage investment by OAO's, why would OAO invest in an area that the incumbent can cross subsidise and have foreclosed. Thirdly, in the short term benefit to end user with lower prices but by doing so it will stifle competition as operators will be unable to replicate the product offerings. In the longer term the market will be foreclosed.

Magnet disagrees with ComReg's statement 315 that the LEA area is where the OAO's infrastructure is present. As outlined above about 40% of the LEA exchanges have no alternative infrastructure provider and thus, ComReg's statement is untrue.

Magnet disagrees with point 2 in paragraph 9.7 as providing a more flexible MST in the LEA area. As Magnet have already said 40% of these LEA areas have no alternative infrastructure provider and thus this flexibility being given to a retail entity will foreclose that market.

Magnet does not agree that Eircom are not established in mobile voice, and that TV is competitive. Firstly, only Vodafone is Eircom's mobile contender. Whilst in TV outside UPC DOCSIS 3.0 locations SKY is a customers' only option due to its satellite nature, thus, TV is only competitive in urban areas. It must be noted that there is a big difference between urban areas that have competitive TV and the LEA areas outlined by ComReg. ComReg's LEA areas are not based on alternative infrastructure being present with the inclusion of Criteria 4 and this distorts competition and the MST.

Overall Magnet does not believe that ComReg have considered fully the affects this MST changes will have on competitors. Magnet believe that by removing Criteria 4 of the LEA test then a lot of Magnet's concerns and fears will be addressed.

# 3 Sky Ireland

**SKY IRELAND RESPONSE TO**

**"REPLICABILITY TEST–FURTHER SPECIFICATION OF THE PRICE CONTROL OBLIGATION NOT TO CAUSE A MARGIN SQUEEZE: MARKET 2 AND MARKET 5"**

## 1. Introduction

1.1 This is the response of Sky Ireland ("Sky") to the consultation published by the Commission for Communications Regulation ("ComReg") entitled: *"Replicability Test–Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5"* ("the Consultation"[1]).

1.2 Sky agrees with ComReg's preliminary view that eircom should be required to demonstrate that it is not causing a margin squeeze between the prices/costs of the wholesale components required by a Other Authorised Operator ("OAO") to replicate an eircom Retail bundle offer.[2] While ComReg proposes to replace the existing Net Revenue Test ("NRT") in Market 1[3] with a Margin Squeeze Test ("MST") in Markets 2 and 5,[4] Sky notes that both tests have essentially the same purpose which, ComReg states, is to act as a "price control" on eircom.

1.3 Sky's response to the Consultation focuses on the following issues, which we consider ComReg needs to address in order for the MST to function properly and achieve its stated purpose:

(i) ComReg should review the definition of Large Exchange Areas ("LEAs") to ensure the effective application of the MST;

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1 ComReg Document No. 14/90, published on 28 August 2014.

2 Where a "bundle" means a package of services, consisting of retail line rental and/or a retail broadband product and/or one more other services.

3 Market 1 is *"access to the public telephone network at a fixed location for residential and non-residential customers."* See 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 (the "Recommendation"). Sky notes that on 9 October 2014, the European Commission (the "EC") adopted a new recommendation that lists the markets susceptible to *ex ante* regulation. See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0710&from=EN The EC has removed access to the public telephone network at a fixed location (Market 1) and call origination on the public telephone network provided at a fixed location (Market 2) from the list and this will have implications for which market(s) ComReg decides to impose the MST on, e.g. the newly defined Markets 3 (a) and 4.

4 In the Recommendation, Market 2 is *"call origination on the public telephone network provided at a fixed location"* and Market 5 is *"wholesale broadband access."*

(ii) ComReg should require eircom to more accurately measure bandwidth usage so that ComReg can use these data to determine if eircom passes the MST bundle by bundle analysis;

(iii) ComReg should publish the Wholesale Network Input ("WNI") for transparency and to facilitate OAO decision making;

(iv) ComReg should include all relevant wholesale inputs in the WNI calculation; and

(v) ComReg should clarify specific line items under retail costs in the proxy NRT model.

**2. ComReg should review the definition of LEA to ensure the effective application of the MST**

(i) The number of LEAs has increased rapidly

2.1 The number and extent of LEAs is fundamental for determining the nature and extent of *ex ante* regulation that ComReg applies to eircom. eircom has been found to have Significant Market Power ("SMP") nationally in what was previously known as Market 5. Notwithstanding this, ComReg has decided to impose geographically differentiated SMP remedies on eircom. In simple terms, this means that in certain exchange areas where ComReg regards eircom as facing greater competition—i.e. in the LEAs—SMP remedies will be less stringent than outside the LEAs. In practice, this will result in it being easier for eircom to pass the MST when it is applied to eircom bundles sold in LEAs. Accordingly, the criteria for determining when exchange areas qualify as LEAs are of great importance, given the implications that a less stringent MST may have for effective competition in the retail broadband market and for consumer welfare, in terms of price, choice and quality.

2.2 ComReg needs to base SMP remedies on the nature of the problems it has identified and those remedies need to be proportionate and justified.[5] Given that ComReg's starting position is that it has designated eircom as having SMP nationally, any decisions to apply less stringent regulation on eircom in any part of the country need to be carefully taken. However, in practice, the application of the criteria in ComReg Document No. D04/13 (which has resulted in the rapid proliferation of LEAs) gives Sky cause for concern that this may not be happening.

2.3 ComReg indicates at paragraph 82 of the Consultation that since the publication of ComReg Document No. D04/13 in February 2013, the number of LEAs has increased from an initial 126 to 201. When ComReg circulated its latest list of LEAs on 10 October 2014, it included 259 LEAs. Sky notes that the list of LEAs was in fact subsequently reduced from 259 to 251 in a further update circulated to industry by ComReg on 22 October 2014. Notwithstanding this, the current number of LEAs is a significant increase on the number that existed when the Consultation was published in August 2014 and is more than double the initial number in February 2013.

2.4 In order to qualify as a LEA, an exchange area must qualify as such, applying one of the criteria set out in ComReg Document No. D04/13.[6] There are five different criteria, the two most relevant of which are **Criterion 1** and **Criterion 4**.

2.5 According to ComReg, Criterion 1 is:

5 Regulation 8 (6) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

6 The criteria are set out in the definition of "LEA" in the Decision Instrument at page 145 of ComReg Document No. D04/13.

*"An exchange area in which: (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA), subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area."*[7]

2.6 According to ComReg, Criterion 4 is:

*"An exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available Wholesale website (in accordance with Section 9.13(i) of the Decision Instrument contained in Annex 1 of ComReg Decision D03/13 and/or Section 9.13(i) of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13) regarding the launch of NGA services by Eircom in cabinets in the relevant exchange area, subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that exchange area."*[8]

2.7 ComReg had previously indicated that it would keep the LEA definition/criteria under review.[9] It is important that the LEA definition is appropriate and carefully applied, as otherwise, there is a risk that eircom will be allowed too much flexibility in relation to the MST. Sky considers that ComReg should now review the definition of what constitutes a LEA, as it is no longer appropriate, particularly with respect to Criterion 4. A review by ComReg should in particular take account of the need for the presence of sufficient infrastructural competition in an exchange area, before it can qualify as a LEA.

2.8 It appeared clear from ComReg Document No. D04/13 that Criterion 1 would in practice be the primary criterion for assessing competitive conditions in an exchange area that might qualify as a LEA. This view is supported by the fact that almost 90% of the premises included in the first 126 LEAs, qualified using Criterion 1. In summarising the 'impact' of the other criteria used to define a LEA, ComReg noted that these "…*were not very material…as approximately 759k (87%) premises fall within the criterion outlined in paragraph 4.81.1* [i.e. Criterion 1]."[10]

2.9 With respect to Criterion to 4, ComReg had considered that the relative competitive dynamics of these exchanges would not be dissimilar to Criterion 1 and that they would "*typically*" be exchanges where an Alternative Infrastructure Provider ("AIP") was present and where exchanges had already been unbundled.[11] For a large proportion of Criterion 4 exchanges however, it is evident that these characteristics do not apply.

2.10 Since the publication of ComReg Document No. D04/13, 60% of premises passed now qualify under Criterion 1, while more than 30% of premises passed by the 251 LEA

7 *Ibid.*

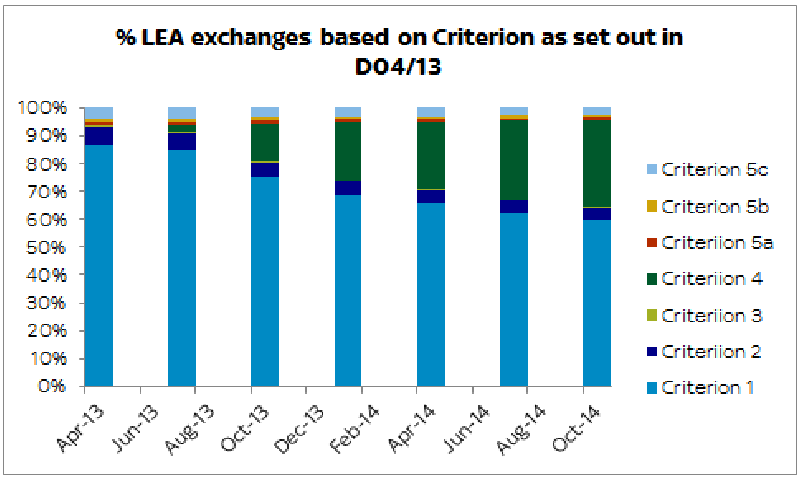
8 *Ibid.*

9 See paragraph 4.94 of ComReg Document No. D04/13, which stated that: *"ComReg will continue to monitor the competitive conditions within such exchanges [Criterion 4] as the use of NGA services evolves over time."*

10 Paragraph 4.82 of ComReg Document No. D04/13.

11 Paragraph 4.94 of ComReg Document No. D04/13.

exchanges now qualify on the basis of Criterion 4[12]—a criterion that was previously described by ComReg as *"not very material."* The **graph below** illustrates the increase in the percentage of LEAs qualified on the basis of Criterion 4 and the decrease in LEAs qualified on the basis of Criterion 1, during the period April 2013 – October 2014.




2.11 Sky considers that ComReg should in particular review the continued appropriateness of Criterion 4 as a LEA 'qualifier', given the proliferation of NGA exchanges that meet neither of the sub-criteria of Criterion 1, i.e. there is no AIP operating in the exchange area <u>and/or</u> no OAO providing a service using Virtually Unbundled Access ("VUA") or Local Loop Unbundling ("LLU"). ComReg noted in ComReg Document No. D04/13 that:

> *"The over-riding competitive assessment of each exchange to qualify for inclusion into the LEA (i.e., the reasonable coverage and market share), ensures that the competitive conditions within such exchanges is such that the proposed flexibility within the revised NRT is appropriate. "*[13]

2.12 Against this statement, one can for example compare the Barna exchange in Galway and the Dundrum exchange in Dublin. Both are qualifying LEAs, yet the competitive conditions are in reality, very different. In Dundrum, there are multiple operators providing retail broadband services over VUA and/or LLU and there is at least one AIP providing services in the area. By comparison, Sky is not aware of any OAO providing services in Barna over LLU and/or VUA and there is no AIP providing retail services. It is difficult to distinguish the competitive conditions in the Barna exchange area from any exchanges that are not yet in the current list of LEAs, except that eircom (and only eircom) is providing NGA bitstream,[14] as well as Current Generation Access ("CGA") bitstream. Sky does not however consider it appropriate for ComReg to use this feature alone as a basis to justify giving eircom greater retail pricing flexibility in these areas, where it does not indicate more competitive conditions in the exchange area. In the areas concerned, eircom faces no competitive pressure at the wholesale level and considerably less at the retail level, compared to the LEAs that ComReg has defined under Criterion 1. The combination of these factors may

[12] Which essentially requires that an exchange is a Next Generation Access ("NGA") exchange that has been launched and that serves a reasonable number of people in that exchange area. ComReg has determined that in this context "reasonable" is 20%. Given that industry has agreed (with eircom) that a NGA exchange should not be launched until at least <u>40%</u> of cabinets in an exchange area have been NGA enabled, in practical terms all NGA exchanges will qualify as LEAs upon launch.

[13] At paragraph 4.82.

[14] Bitstream is the eircom non-physical, wholesale broadband product used by OAOs to provide a competing retail broadband product.

give eircom more incentive to engage in a margin squeeze, than would be the case in exchanges under Criterion 1.

2.13 If for example a prospective subscriber was able to choose between either eircom Retail, an AIP, or a OAO using eircom Wholesale services, we can reasonably assume that eircom's preference is that eircom Retail would acquire the customer. Failing that, eircom's next best outcome is for a OAO (using eircom's wholesale service) to acquire the customer, given that eircom Wholesale will still earn the wholesale revenues associated with that customer. Therefore, the potential loss of this wholesale revenue somewhat weakens eircom's incentive to engage in a margin squeeze, if doing so could deter a OAO from competing in that exchange area. However, in the example of Barna exchange given above, there is no AIP and without an AIP, the factor that weakens eircom's incentive to engage in a margin squeeze does not exist. Barna and Dundrum exchanges show very different competitive conditions and incentives for eircom, yet anomalously, both qualify as LEAs (supposedly exhibiting similar competitive conditions under the existing qualifying criteria).

(ii) <u>An inappropriate increase in LEAs could exacerbate the rural/urban divide in Ireland</u>

2.14 As the number of exchanges in the LEA increases, the cost ceiling for wholesale broadband access ("WBA") costs outside the LEA[15] increases. ComReg therefore needs to consider carefully the implications of this dynamic and in particular, how it might contribute to exacerbating the rural/urban digital divide in Ireland. Where it has been given the regulatory flexibility to do so, eircom has previously increased wholesale prices e.g. the removal of the €3.00 per month wholesale line rental ("WLR") discount outside LEAs was effectively a price increase.

2.15 As the LEA widens, eircom's unit costs outside the LEA will increase and eircom will be permitted to charge more for WBA outside the LEA, thus potentially exacerbating the rural-urban digital divide. It is therefore important that ComReg does not permit the proliferation of the LEA footprint where that is driven, not by increased competition in these areas, but instead by a legacy LEA criterion, that may no longer properly identify more competitive areas. Just because NGA is available in an exchange area, does not mean that there are '*prospectively varying competitive conditions*' in that exchange area, when compared to exchanges outside the LEA—where there is no NGA.

2.16 Notwithstanding that VUA is offered at all NGA exchanges, the practical cost consideration for OAOs considering availing of VUA, is not dissimilar to making a business case for LLU. The business case for taking VUA at an exchange is driven largely by the scale economies achievable at the exchange, in order to justify the purchase/building of backhaul from the exchange and the Wholesale Ethernet Interconnection Link ("WEIL") rental costs at each exchange.

2.17 ✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂✂
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*[The above part of Sky's response is confidential].*

2.18 Sky considers therefore that ComReg should review the appropriateness of the current criteria used to define LEAs in ComReg Document No. D04/13, in particular Criterion 4.

15 Imposed under eircom's separate regulatory obligation to recover no more than its actual incurred costs (adjusted for efficiency).

## 3. ComReg should require eircom to more accurately measure bandwidth usage so that ComReg can use these data to determine if eircom passes the MST bundle by bundle analysis

3.1 ComReg recognises that backhaul/throughput charges are an important element in assessing whether an eircom Retail bundle is profitably replicable.[16] ComReg notes that for bundle by bundle assessments inside and outside the LEA, eircom claims that it is "unable" to measure or apportion with a reasonable degree of comfort the wholesale bandwidth at peak hour for different individual bundles. While no reason is given for this, ComReg should determine if this deficiency in eircom's reporting is acceptable for the purposes of the MST.

3.2 ComReg understands from eircom that the usage charge is only quantifiable on an aggregate/portfolio basis and it recognises the drawbacks of this. ComReg acknowledges that while bundle by bundle analysis may result in a negative margin "*…as a result of this calculation* [i.e. using the aggregate usage]"[17] it will not necessarily fail the MST. Sky does not however follow the logic of this proposition. The question arises as to how ComReg can determine that a negative margin would be attributable to the usage element of the bundle. Reaching a conclusion about this assumes knowledge of the actual usage, but the true value of this variable will remain unknown.

3.3 Sky considers that using the proxy of the aggregate usage charge for the actual usage charge in the bundle by bundle analysis carries an equal risk of <u>under</u> as well as over-estimating actual usage. However, ComReg appears only to have considered over-estimation of usage and uses this as the basis for placing less onerous demands on eircom in *either* scenario. In the example ComReg gives i.e. where there is a negative margin in the bundle, it may be the case that had the actual instead of the aggregate usage charge been applied, the margin might have been negative by a larger amount and would have failed the MST. It is unclear why ComReg can suggest that in any scenario, the bundle by bundle margin could be negative, but does not necessarily fail the MST.

3.4 Sky considers that this ambiguity undermines the aim of the bundle by bundle analysis. If the SMP operator has an incentive to margin squeeze (which the market analysis previously concluded it has[18]) then it may also have the incentive to exploit regulatory ambiguities to its advantage. However, if eircom has an incentive to[19] provide ComReg with accurate usage data on a bundle by bundle basis, ambiguity in the MST may be removed i.e. if the bundle by bundle margin is clearly negative, then it fails the MST. If eircom believes that the aggregate usage over-estimates the actual usage for a particular bundle, then it will be in eircom's interests to demonstrate what that actual usage is.

3.5 Sky notes that previous ComReg decisions have underestimated future growth in bandwidth demands.[20] If ComReg's current forecasts for the MST are too conservative, then this (coupled with an aggregate usage input charge to the MST) could compromise

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16 Paragraph 186 of the Consultation.

17 Paragraph 188 of the Consultation.

18 See ComReg Document No. 11/49, dated 8 July 2011 entitled: *"Response to Consultation and Decision–Market Review: Wholesale Broadband Access (Market 5)."*

19 Sky considers that a small amount of data warehouse work on radius logs is all that is required by eircom to provide accurate data.

20 At paragraph 10.569 of ComReg Document No. 13/11, ComReg estimated that over the following 3 years, NGA broadband throughput would reach 230kbps. However, since then, even copper based usage (let alone fibre based) has significantly exceeded this, with NGA usage already more than double that forecast.

the MST's objective which is to determine if eircom's pricing is in breach of its obligation not to cause a margin squeeze.

## 4. ComReg should publish the WNI for transparency and to facilitate OAO decision making

4.1 ComReg's preliminary view is that it is not appropriate or necessary to publish the WNI's monetary value *"…as this could encourage price following and reduce the dynamism of the market."*[21] ComReg suggests that making the WNI transparent could risk retail market failure through co-ordinated pricing activity. Sky does not agree with ComReg's justifications for not publishing the WNI. In Sky's view the risk of co-ordinated pricing activity is extremely low to non-existent and ComReg should publish the WNI in the interests of transparency and to facilitate OAOs' commercial decision making.

4.2 The WNI that is used in the MST is not an internal cost to eircom that is commercially sensitive. Rather, it is a derived/notional cost of an efficient operator that is a function of how a number of operators are at any point in time using various wholesale inputs provided by eircom to sell their retail services. Sky considers that is not appropriate for eircom Retail to have sight of the monetary value of the WNI (which it does) if OAOs using eircom's wholesale inputs cannot also have access.

4.3 For illustrative purposes, one can assume a OAO with an internal WNI on a dual-play bundle equal to €25.00 per month while eircom Retail has a WNI (for the purposes of the MST) equal to €22.00 per month. If the eircom WNI figure was published, the OAO could identify important pricing signals, which could inform market entry decisions or efficient deployment of resources on an exchange by exchange basis.[22] Equally, this could prompt a OAO to re-examine its wholesale product mix, or highlight a need to achieve efficiencies elsewhere in its cost stack (in order to compete with the SMP operator). This information is not commercially sensitive to eircom and consumers do not gain by ComReg withholding it from OAOs.

4.4 In order for ComReg's suggestion that publication of the WNI could encourage price following to be well-founded, one or more OAOs would need to be jointly dominant with eircom in the relevant market, such that pricing decisions could be made independent of consumers. However, the market has not been found to have the characteristics of oligopoly, nor has it been found that the requirements for joint SMP have been met. Moreover, the risk of tacit collusion is further lessened, as the 'own equivalent' WNI charge will not give a sufficient understanding of costs, given that it is only one component of a OAO's cost stack used to provide a stand-alone service, or a bundle of services.

4.5 Under ComReg's proposal, OAOs will not have visibility of eircom's WNI. By contrast, eircom will be able to calculate precisely the actual WNI cost experienced by many of its OAO competitors.[23] eircom will therefore benefit from an asymmetry of information. If ComReg's concern about price following is valid, then the same concern should arise with respect to eircom's knowledge of OAOs' actual WNI costs. Not only does eircom have SMP, but it is also the only operator with simultaneous access to its own notional WNI and the <u>actual WNI</u> of its competitors. Where it is competing with triple-play offers for example, eircom

21 Paragraph 178 of the Consultation.

22 For example, if a OAO has considerably higher costs than eircom's WNI in a particular exchange area, then it might be more prudent for it to redeploy marketing spend to areas where it faced better exchange economics. Therefore, publication of the WNI could help to produce a better outcome in terms of allocative efficiency.

23 Because it will know precisely the volumes and costs of those competitors e.g. eircom would have full visibility of Sky's WNI outside the LEA and for many OAOs it would know their WNIs, both inside and outside the LEA.

will have an advantage when it comes to its pricing strategy if it knows its own WNI is €x better or worse than its competitor (s). This asymmetry of information can be corrected by ComReg publishing eircom's WNI.

## 5. ComReg should include all relevant wholesale inputs in the WNI calculation

5.1 It is important that ComReg incudes all relevant wholesale inputs in the WNI, given that the WNI is intended to reflect some of the key cost components faced by a OAO to replicate an eircom bundle. There are a number of miscellaneous connection charges included in the calculation of the WNI, some of which are self-explanatory, while others are less clear. For example, Sky is unable to ascertain whether or not the following connection/disconnection charges are included in the WNI:

- *SB-WLR* [24]*Sign up Single Line Account Order Acceptance Validation and Notification charge*–€2.75 per connection.
- *CPS*[25] *Order Acceptance and Validation Notification charge*–€0.61 per connection.
- *eircom minimum term port commitment charges/penalties*, as per eircom's Wholesale Bitstream Access Reference Offer ("WBARO").
- *Broadband port transfer charges*, as per eircom's WBARO.

5.2 If relevant, ComReg should ensure and confirm that these charges will be included in the WNI and ultimately, any MST that replaces the current NRT.

## 6. ComReg should clarify specific line items under retail costs in the proxy NRT model

6.1 Sky has reviewed ComReg's non-confidential, proxy NRT model. While Sky broadly agrees with the line items included in the various cost stacks, we would make the following additional comments.

(i) Install Data Port Extension ("DPE") in % of Homes

6.2 There are a number of important issues associated with this line item. It is important that ComReg audits eircom's systems data to quantify the number of DPEs ordered at point-of-sale, as opposed to relying on the provision of information by eircom as to the actual numbers of DPEs installed. OAOs that order a DPE at point-of-sale are automatically charged €55.00 by eircom Wholesale for a DPE, whether or not the customer ultimately requires it or not. Establishing whether a customer requires a DPE, results in a significant increase in average call handling times if OAOs are to ensure inappropriate ordering is to be avoided. However, in the case of eircom Retail, such complexities can be avoided if its agents automatically order ("tick") a DPE installation for all customers at the point-of-sale and thereafter, allow the customer to decide whether they require a DPE while the eircom Wholesale engineer is on site.[26] However, where a DPE is ordered on site, as opposed to the point-of-sale, eircom Wholesale charges OAOs €85.00 for the DPE installation, as opposed to the standard €55.00. At an industry forum meeting on 3 September 2014, eircom Wholesale advised that approximately 10% of installs involved an on-site request

24 Single Billing Wholesale Line Rental.

25 Carrier pre-selection.

26 ComReg will be aware that eircom Retail had indicated that it intended to order DPEs for 100% of customers at an industry forum prior the launch of eircom NGA. While it is entirely eircom Retail's prerogative to do so, an appropriate margin squeeze test will reflect 100% of DPE install charges in these circumstances, as these are the charges a OAO would incur if it adopted a similar strategy.

for a DPE. In order to ensure that ComReg is capturing an appropriate level of DPE charges incurred, Sky considers that the test should include the following line items:

- Quantity of fibre sales where the DPE was ordered (ticked on the Universal Gateway or "UG") at the point-of-sale (charged at €55.00 per event).

- Quantity of fibre sales where the DPE was ordered on site i.e. where there was a DPE install, but where this was not ordered at point-of-sale[27] (charged at €85.00 per event).

(ii) Deliver and fit VDSL[28] Modem

6.3 It is not clear to Sky what costs precisely are being considered under this heading. Sky understands that when a customer purchases eircom's retail fibre product, eircom Wholesale engineers carry the eircom modem to the premises. eircom Wholesale however, does not offer a service to deliver the modems for OAOs where the eircom engineer is carrying out the Network Termination Unit ("NTU") installation at the customer's premises on behalf of those OAOs. Efficient OAOs therefore incur an unavoidable postage charge in order to supply customers with VDSL modems. Accordingly, Sky considers that an appropriate postage charge should be included in this cost line, in order to reflect this unavoidable cost to efficient OAOs.[29]

**Sky** **30 October 2014**

27 Sky understands that eircom Wholesale engineers require customers to sign a form where an on-site order for a DPE has been placed.

28 Very high speed digital subscriber line.

29 Sky currently incurs a charge of €7.50 for postage of broadband modems.

# 4 ALTO

alto

alternative operators in the communications market

# Consultation: Replicability Test: Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5 - Ref: 14/90

## Submission By ALTO

Date: October 30th 2014

ALTO is pleased to respond to the Consultation: Replicability Test: Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5 - Ref: 14/90

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

**Preliminary Remarks**

ALTO summarises its preliminary remarks below:

**Test Generally**

ALTO is generally satisfied with the tests but room for ambiguity needs to be removed. For example if eircom fail the first part of the combinatorial test on the margin squeeze inside the LEAs (i.e., the bundles test), then remedial action should be taken at that point. ComReg appear to be saying there are circumstances that if you fail this part of the test we will look at it on a case by case basis as to whether or not we will regard it as a failure. This approach leads to uncertainty for OAOs and will lead to eircom trying to exploit any ambiguity.

We would also urge ComReg to examine the extent to what portion of eircom customers are ordering Data Port Extensions –DPEs, at the point of sale or are ordering the DPE on site. There are two distinct charges for these services in eircom’s wholesale price list yet the proxy NRT model supplied by ComReg does not appear to break these charges out.

**LEA – current criteria may no longer be appropriate**

Eircom appear to be subject to less stringent margin squeeze tests on bundles sold inside the LEA. ComReg defined a set of criteria in order to determine LEAs in D04/13.

The main criterion (Criterion 1) that defined an LEA was where:

(a) there was at least one Alternative Infrastructure Provider; and
(b) there was at least one OAO providing retail services from LLU/VUA.

Almost 90% of LEA exchanges were defined using this criterion in D04/13 – this made sense because greater flexibility was to be given to eircom in areas with higher competition. However, as the NGA footprint has expanded a large proportion of exchanges no longer fulfil that key criterion and are rather included under the definition of Criterion 4 – Criterion 4 requires merely that an exchange is NGA enabled and is available to a reasonable number of homes in the exchange area. Many of these exchanges areas have competition characteristics the same or similar to exchanges currently outside the LEA i.e. eircom do not face any competition at the wholesale level and face less competition at the retail level by comparison to Criterion 1. The fact that eircom offer VUA at all NGA exchanges does not appear to have the impact of a greater degree of unbundling taking place than was is case for CGA/LLU.

ALTO therefore do not agree that eircom should be permitted greater flexibility on pricing in exchange areas where the competition dynamic is significantly different to dynamic in exchanges defined under Criterion 1. ComReg had committed to keep the issue of how the LEA's are defined under review in D04/13.

A further implication of the proliferation of the LEAs is that it could lead to a growing urban divide. As the LEA expands the non-LEA areas are made up of less and less economic/efficient exchanges due to higher fixed costs and lower economies of scale. This in turn results in raising the ceiling on the price eircom can charge WBA outside the LEA under its existing obligation to recover no more than its efficiently incurred costs in this area. Eircom has a history of increasing wholesale prices where it has the flexibility to do so.

ComReg therefore needs to consider the implications of allowing the LEA to expand on the basis of Criterion 4 in the context of the rural urban divide.

**Use of Aggregate usage in bundle**

ALTO does not believe that eircom cannot measure average peak usage on a bundle by bundle basis.

If ComReg is going to accept eircom's position on this then as a counter weight to that leniency it must also ensure that where a bundle fails the MST at the first stage of the combinatorial test in all cases eircom are required to take remedial action to amend its pricing i.e. there are no circumstances where eircom can have a negative value output on the bundle by bundle analysis and still not fail the MST.

**Publication of Wholesale Network Input – WNI**

We believe the WNI should published by ComReg. There is no valid reason for not doing so. This cost is not a commercially sensitive figure that is particular to eircom. The WNI is calculated by reference to actual usage of various inputs by all operators on eircom's network in the LEA. It is therefore a notional cost. It is hard to reconcile how ComReg could consider that publication of the WNI could encourage price following when it has determined that none of the OAOs has market power. Rather than encourage price following by OAOs, it will in fact send efficient market entry signals and potentially encourage investment higher in the network to reduce OAOs own WNI.

**Response to Consultation Questions:**

**Q. 1 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Where Bundle means a package of services, consisting of Retail Line Rental and one or more other services. Please provide cogent reasoning to justify your views.**

A. 1. ALTO believes that is a requisite that a monopoly or company deemed to have SMP should have to demonstrate that their actions do not cause a margin squeeze.

ALTO agrees with the concept proposed by ComReg however, ALTO do not agree with the model that ComReg are proposing especially the models outlined in Paragraph 31 and 33 in relation to LEA and outside LEA areas.

ALTO believes that there is no longer a requirement to for the LEA distinction as firstly, it is seemingly being abused based on the fact at of the x number of exchanges deemed to be Lea only x come within criteria. Also, secondly, the concept is now redundant as the incentive for LEA is being removed and also the end user is agnostic to their geographic location and whether they are within LEA or not.

ALTO believes that the LEA defitions as operative, now act as a disincentive to investment as due to suggested ability to cross subsidise regulated services means companies like ALTO can no longer recover costs versus eircom's offering.

ALTO must highlight that it does not agree with the inclusion and continued inclusion of criteria 4 of LEA as set out in D 04/13. ALTO have yet to understand what *"a reasonable number of lines"* is, under criteria 4, 2/3 of lines been rolled out in that exchange.

**Q. 2 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself.? Where Bundle means a package of services, consisting of a Retail Broadband Product and one or more other services. Please provide cogent reasoning to justify your views.**

A. 2. ALTO reiterates what it has outlines above.  It is imperative that a company with a ubiquitous, country wide network should be required to demonstrate that they are not causing a margin squeeze between wholesale inputs and price when an OAO is attempting to replicate an Eircom bundle.

**Q. 3 Do you agree with ComReg's preliminary view that a further specification of the obligation not cause a margin squeeze is not currently required in Market 4? Please provide cogent reasoning to justify your views.**

A. 3. ALTO believes that an obligation not to cause a margin squeeze in Market 4 is important.

ALTO does not agree with the statement set out in paragraph 68, ALTO as an LLUO is not *"better able to offer differentiated products and set prices independently".*  Historically that may have been the case when Eircom did not offer uncongested 24MB products.  However, Eircom now offer equivalent products to ALTO broadband only products at equivalent prices based on wholesale inputs.

Thus, ALTO rejects ComReg's generic and untrue statement at paragraph 68. However, it is imperative that a margin squeeze test remains to protect the investment albeit a much devalued investment made by OAO's to date.

**Q. 4 Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 if there was appropriate wholesale regulation upstream? Please provide cogent reasoning to justify your views.**

A. 4. ALTO agrees that the NRT could be removed in Market 1 if there was appropriate wholesale regulation upstream.

However, ALTO do not agree that the MST suggested by Comreg is appropriate.

Firstly, it distinguishes between two areas and allows two different tests, this allows cross subsidisation in one and not in the other, however, the cross subsidisation price will become the headline price and the other test will become irrelevant. Customers will not and do not understand the geographical distinction and will want the service at the headline price advertised. Thus, moving to a flawed MST is not an appropriate wholesale remedy and thus, the NRT is Market 1 should not be removed if the MST as it stands is the one being implemented.

Though Comreg will state that Eircom have to adhere to the outlines MST, ALTO believes Eircom will be creative in their packaging of their products and promotions that within and outside LEA will have similar pricing.

Using uncorroborated evidence of a guestimate (however, sophisticated) customer lifespan and a guestimated customer take up neither which are verifiable at the time of the product being approved for launch. Is there a timeline when comreg say to Eircom that the input costs are now higher than at time of launch because:

1. Have not obtained the customers they had forecast
2. lifespan of the customer being obtained is far lower than what used in initial calculation

Thus, the question ALTO is asking is, is ComReg proactively monitoring a product or bundle post launch to ensure the guestimates, timelines, lifespans provided are being met or are appropriate? ALTO has concerns that though the initially launched products pass the test based on presumptions and guesses, but ALTO suggests and assumes that ComReg are retesting or requiring Eircom to retest monthly using up to date statistics modelled out based on uptake, churn rates etc and compared this with original expectations and if the product is not on trend then there is a difficulty with that product and it should be suspended. This obligation should fall on Eircom to have a monthly obligations to:

1) reprove MST is being complied with
2) model current data set out versus the original propose data set

ALTO does not want to see a rubber stamp on a product bundle when a continuous assessment based on a set of criteria that are just conjecture and once real data flows through the model isn't continuously examined for any potential gaming of the model.

**Q. 5 ComReg is interested in receiving views from interested parties on developments in the LEA which submitters consider relevant and which have occurred since publication of the LEA criterion as set out in ComReg Decision D04/13. Please provide detailed reasoning and supporting information (where available) to support your views.**

A. 5. ALTO do not believe that the LEA decision has made any difference to the market and think that now is a good time to get rid of the LEA distinction or re-evaluate its criteria. ALTO have a particular issue with Criteria 4, that the area/exchange must just be NGA enabled. This means that there are areas that have technically one infrastructure provider to provide them services whether current or next generation. This does not make the area competitive and does not enhance the area's broadband. The WLR discount associated with LEA areas has not made a huge significance to ALTO due to ALTO's customer demographic i.e. broadband only subscribers and with the removal of that discount means the LEA area definition has become redundant as the only operator who obtains any benefit from its continuation is Eircom within ComReg's MST decision to allow Eircom subsidisation within LEA from unregulated products. Going forward by distinguishing a location based on competition on Eircom retail is overarching regulation and not allowing competition take place and also styming the investment in infrastructure. An operator may chose not to invest in a location because it will move that location from non LEA to LEA and therefore a different MST as proposed herein by ComReg. This LEA MST test leads to Eircom retail being able to cross subsidises between regulated and unregulated products. This means an operators business case for investing in a particular area becomes redundant and is jeopardise by the competitors' ability to shift goal posts due to a change in the area definition.

ALTO do not dispute paragraph 86 but the market should not be regulated to such an extent that it is only UPC and Eircom becoming the only providers. UPC has a particular offering but it must be remembered that Eircom is regulated on a national level, whereas UPC is geographically limited. Also it is assumed people want bundled offerings i.e. all 3-4 products together, ie. TV, Phone, broadband and mobile. However, currently only 1 provider can provide all four products together and that is Eircom retail, UPC will enter the mobile market sometime next year, but Sky the only other operator who offers nationwide TV does not offer NGA services nor offers mobile services. It would seem that there is no market place for all other providers and ALTO believes this questions OAO's business model.

Overall ALTO do not agree with the continuation of the LEA distinction. It is allowing the national marketplace be distorted as customers are only interested in the headline prices and are unconcerned about their geographical location. By allowing cross subsidisation on MST in LEA areas, only Eircom retail will benefit and it will become a race to the bottom in a pricing ware between Eircom retail and other operators invested in this area.

ALTO have an issue with LEA list seems that the only reason a majority of these areas fall within this LEA list is because they have NGA not because there is another retail operators with an alternative network or an LLU provider. To ALTO it seems that the "intention" of the LEA has been abandoned and makes no sense.

**Q. 6 When do you believe it might be appropriate to use only the EEO cost standard to determine the downstream broadband retail costs in the MST for Bundles? Please support your view with relevant data and evidence.**

A. 6. ALTO does not agree that SEO should be across bundles. ALTO believes that SEO is more appropriate due to economies of scale and ubiquity of Eircom. No OAO has been able to come close and this inability to be an equally efficient operator. Can argue with paragraph 118. Paragraph 113 eircom get more favourable volume rates and therefor a lot of self supply costs from other operators should be reviewed to give an accurate insight.

**Q. 7 ComReg is interested in receiving views from interested parties as to whether it would be more appropriate to apportion “approximated” (where the data is not actually quantifiable by Eircom) wholesale bandwidth at peak hour for different portfolios or bundles of retail bundles offers (e.g., whether a separate usage profile is used to assess Bundles including “Unlimited” broadband which may be more reflective of the type of average customer usage on such packages compared to the portfolio of all packages). Please support your views with cogent reasoning.**

A. 7. Further to our premliminary comments, we offer the below remarks.

1) How does Comreg see operators advertising indies and outside LEA

2) ALTO members need sight of the WNI cots. This is not a commercially sensitive information and is discriminationg against OAO’s by providing it to Eircom

3) ComReg is, in our view, incorrect if it believes CMR migrating to full LLA. ALTO only fully LLU provider in the marketplace and its customer on bull LLU but not investing in any more exchanges as they are not economically attractive due to the

emergence of NGA.  VUA is potentially attractive but that is moving customer off LLU to VUA therefore moving back down the ladder rather than up.

ALTO like all other operators monitor traffic and speed regularly and can't see why Eircom can't do the same.

ALTO suggests that overall usage should be monitored daily and can be captured daily.  ALTO does not understand that based on 95$^{th}$ percentile and one pipe in and out and how can a company have separate usage bundles and separate the portfolios out.

**Q. 8 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the LEA? Please give a detailed response with supporting data where appropriate to support your view.**

A. 8 . ALTO does not agree with cross subsidisation within LEA. Current bundles cannot be replicated by ALTO and feel if cross subsidisation allow ALTO would redraw completely from the residential market which is currently in the plans for 2015 based on the current NTR regime.  Adding the ability to further erode margin.

**Q. 9 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented Outside the LEA? Please give a detailed response with supporting data where appropriate to support your view.**

A. 9. ALTO agrees with the MST test for outside LEA areas but believe that this should be rolled out nationally.

**Q. 10 Do you agree or disagree with the ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness as detailed in section 5.6? Please give a detailed response with supporting data**

**where appropriate to support your view.**

A. 10. ALTO does not agree with the 42 month lifespan of a customer proposition. We have found from our experience customers that sign up to a special offer normally churn within x number of months. Customers that don't sign up for an offer churn after x number of months.

**Q. 11 Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.7) to the MST? Please give a detailed response with supporting data where appropriate to support your view.**

A. 11. Overall ALTO agrees with all the proposals that CoMReg outline in the position relating to adjustments. Having such adjustments based on banking credits, competitors promotions etc is giving Eircom retail an unfair second bite of the cherry. However, as outlined in ALTO's answer in question 10 it does not agree with the 42 month lifespan of a customer being utilised in the test calculations.

**Q. 12 Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised Bundle? Please provide detailed reasoning to support your view. ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance.**

A. 12. ALTO agrees that preclearance is an imperative as otherwise Eircom retail will have a free reign and having a test would become redundant.

Eircom would be self policing and due to the sensitivity of the market and the numerous opportunities for Eircom to leverage vertically and abuse any dominant positioning, so essentially having a robust pre-clearance process is essential.

**Q. 13 Do you agree or disagree with ComReg's proposed approach where an Eircom Bundle is considered to be non-compliant with its obligation not to cause a margin squeeze? Please explain your response and provide detailed information to support your view.**

A. 13. ALTO agrees with ComReg in principle, but states that to some extent ComReg's hands are tied in relation to time lines.

ALTO would like to see tighter time lines to ensure that an abuse is not allowed and cannot become a form of prolonged abuse**.**

**Q. 14 Do you believe that the draft text of the proposed Decision Instrument for Market 2 is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.**

A. 14. ALTO believes now is an appropriate time to remove the LEA differential as ALTO does not believe that it is helping competition as areas in LEA are only qualifying based on the fact and only reason is the fact that NGA has been rolled out in that are e.g. Carrigtwohill Co Cork. This small village as no alternative infrastructure provider, it has not had its exchanges unbundled, its only inputs are all Eircom wholesale inputs e.g. Eircom current and next generation access.

ALTO fails to understand how this promotes or enhances competition and allows Eircom cross subsidise when their customer base has no alternative but to buy a Eircom product whether directly with Eircom or resold via alternative operators. ALTO proposes if LEA is not being removed that criteria 4 that the exhcnage is

NGA enabled is removed as there is no logical reason to introduce it as it is capturing locations that are not competitive and that there is no real alternative available to its residents.

**Q. 15 Do you believe that the draft text of the proposed Decision Instrument for Market 5 is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.**

A. 15. As above

**Q. 16 Do you have any views on the Regulatory Impact Assessment above and are there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.**

A. 16. ALTO does not agree. ALTO believes that ComReg has failed to take all alternatives into account and it has prejudged the outcome of the consultation and has not followed due process.

Also during this consultation market definitions have changed and ComReg has not recognised this fact and thus, the consultation itself may itself be effectively be redundant before it is even published.

**ALTO**

**30th October 2014**