



Commission for
Communications Regulation

Consultation on Price control obligations relating to Bundles

Further specification of the price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b)

Submissions to Consultation 17/51

Submissions to Consultation Document No. 17/51

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1. Alternative Operators in the Telecommunications Market (ALTO)

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alternative operators in the communications market

**Consultation: Price control obligations relating to Bundles -
Further specification of the price control obligation not to
cause margin squeeze: FACO and WLA (3a & 3b) - Ref: 17/51**

Submission By ALTO

Date: August 11th 2017

ALTO is pleased to respond to the Consultation: Consultation: Price control obligations relating to Bundles – Further specification of the price control obligation not to cause margin squeeze: FACO and WLA (3a & 3b) – Ref: 17/51

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

Preliminary Remarks

ComReg has imposed price control remedies to address competition problems arising from Eircom's Significant Market Power – SMP, across a number of markets. One such remedy is an obligation on Eircom not to unreasonably bundle. The obligation is designed to prevent Eircom from offering retail bundles that cause a margin squeeze between the price of the wholesale regulated services it offers/sells to Other Authorised Operators – OAOs, and the price of its retail bundle of services - where those wholesale services are required as inputs by OAOs in order to replicate that Eircom retail bundle.

To assess Eircom's compliance with this obligation, ComReg specified a Net Revenue Test – NRT, in the 2013 Bundles Decision.¹ The test assesses whether Eircom is covering its total costs when it offers a bundle of services together.

The Net Revenue test has not worked

Despite the Net Revenue Test being in place, Eircom has been able to apply discounts to retail bundles without corresponding reductions in the price of regulated wholesale inputs.

¹ http://www.comreg.ie/_fileupload/publications/ComReg1314.pdf

For example, in the summer of 2016 Eircom increased the price of wholesale broadband and at the same time offered deep retail discounts and *eir Sports* for free. The fact that this offer passed the Net Revenue Test suggests that there are significant underlying methodological issues with the test that render it ineffective.

We have identified two methodological issues:

1. The first is to the method for calculating the cost of non-regulated components in the bundle.
2. The second is the method for calculating the average effective price of the bundle, and in particular calculating the average customer life.

Non-regulated components

The NRT is intended to test whether Eircom's retail bundles, including those that include non-regulated components, could be replicated by an efficient competitor using Eircom's wholesale inputs. This is important because if Eircom's competitors are not able to replicate Eircom's retail offers using the wholesale inputs, then they will not be in a position to compete effectively in the retail market.

The NRT requires Eircom to account for the cost of each component of the bundle in the price of its retail bundle. Determining the cost of non-regulated services in the NRT is complex, and the resulting ambiguity makes it possible for Eircom to circumvent the NRT by applying discretion when allocating fixed and common costs. For this reason, it is important for ComReg to specify the methodology that Eircom must use when allocating costs to non-regulated components.

In 2016 Eircom offered a retail broadband and home phone bundle that included free *eir Sports* channels. In order to pass the NRT, the required margin between the cost of wholesale regulated inputs and Eircom's retail bundle must be

increased to reflect the cost to OAOs of providing these channels. ComReg has proposed that Eircom should include its own costs of producing the content in the margin, rather than including the wholesale price set by eir for the content. There is a risk that by doing so, Eircom will attempt to leverage its market power by increasing the wholesale price of *eir* Sports channels so that its retail bundle will not be replicable. The most obvious way to ensure that Eircom's bundle is replicable is to use Eircom's wholesale price of *eir* Sports as a proxy for the cost of providing the channels. However, if ComReg decides not to adopt this approach, then it needs to ensure that the model incorporates all relevant costs associated with producing the content.

Eircom incurred a significant upfront cost when it acquired Setanta, and also incurs ongoing variable cost that can be averaged per customer. The value of Setanta was enhanced by the BT sports contract, which includes exclusive access to the content. This contract has a finite time period and will cost a significant amount to renew. All of these costs would need to be incurred in order to replicate this service, and therefore we agree with ComReg that these costs should be included in the NRT.

Note that the effectiveness of this remedy, and of the entire wholesale access regime, relies on ComReg carrying out a robust assessment of the cost information submitted by Eircom for new retail bundles under the NRT obligation. ComReg should be mindful that Eircom has an incentive to under-allocate common and fixed costs to non-regulated components because, by doing so, it can avoid having to reduce its wholesale prices.

Average customer life

When applying the NRT, ComReg is required to estimate the average effective price of the bundle being tested. Calculating the average effective price involves estimating how long the average customer is likely to stay on this particular bundle.

ComReg is proposing to retain the 42-month customer life for calculating the average price of the retail bundle. This proposal fails to reflect the significant shift in the pricing structure of retail bundles, and the behaviour of customers that are taking new bundle offers in practice. Eircom is now primarily offering bundles with upfront discounts - consistent with a general trend in the market. This involves the customer paying a reduced price for the initial period of their contract, then a higher price thereafter. Given the shift towards two-tiered pricing, there is a greater incentive than before for customers that take these bundles to seek out a new offer after the initial contract period because doing so enables them to avail of a discount. Furthermore, there are more bundle providers now than there were in the past, meaning that there will be more opportunity for customers on new bundles to switch to another provider after the initial contract period.

ComReg's current approach for estimating this average customer life is flawed because it includes Eircom's substantial legacy customer base in the calculation. These customers have been with Eircom for a very long time, and have a low likelihood of moving or taking a new bundle. For the reasons set out above, customers that take the new bundle proposed by Eircom are unlikely to exhibit this behaviour. The inclusion of these legacy customers in the calculation has the effect of increasing the average customer life, which dilutes the weighting of the initial discount in the calculation of the average effective price, and ultimately results in an artificially inflated average effective retail price. In practice this can result in the test being ineffective. There is a risk that an ineffective NRT will result in OAOs being at a cost-disadvantage to Eircom, and therefore unable to match Eircom's offers. This means that they are not able to compete as effectively in the retail market, which is ultimately to the detriment of consumers.

There are two ways that this could be addressed:

1. **Use contract term as a proxy for lifetime** – This may be appropriate, given that customers shopping for bundles now are more likely to move again, or negotiate a new price, at the end of their contract.
2. **Use the average lifetime of customers that have joined in the last 4 years** – Compared to the current approach, this approach would provide a better estimate of the likely average lifetime for customers taking Eircom's proposed bundle, since it will include only those customers that have been active in the market relatively recently.

ALTO encourages ComReg to implement its plans set out in this Consultations, and subject to its deliberations, at the earliest possible opportunity to help the market function more effectively.

It is ALTO's submission that Margin Squeeze Tests – MSTs, in Ireland as designed and currently operative need revision in order to address the issue of cross subsidisation.

ALTO submits that on the issue of cost calculation, that such being done on a REO basis is a more fair reflection of the costs that would be incurred by other OAOs.

ALTO observes that the market for fixed telecoms services is extremely challenging and the fixed service needs to be viable at a local level for all operators.

ALTO submits that assessment of product costs using a portfolio product approach needs to ensure inclusion of all of the main products as recommended by the EC Commission. MSTs that are based on a portfolio approach can result in a squeeze on main products while less popular products are priced to ensure the portfolio passed the test.

ALTO submits that ComReg must be extremely vigilant in assessing performance of the MST by Eircom and their ongoing re-assessment. Without access to specific data in these tests all OAOs are relying on ComReg to reconcile costs incurred against forecasted costs used in the model.

ALTO submits that it is not only bundles that should be subject to MST but also the inputs such as wholesale components required for an OAO to replicate a service / bundle that is being offered. The focus of regulation in the exchanges should not only be on bundles but also contributing components and on individual subscriptions.

On the issue of average customer lifecycles, it is clear that setting the average customer life at 42 months is not a true reflection of the average customer for most products or bundles and gives the incumbent the required flexibility within the market. Consequently, promotions, discounts and/or retention offers should be included in any MST.

ALTO is generally in agreement with ComReg's proposed approach on *eir* Sports and the period for recovery of on-going content costs should be over the lifetime of the content novated, a defined period approach (of not more than 60 months) is preferable for the acquisition costs and the base should be for retail fixed broadband subscribers who are actually capable of receiving the service.

ALTO submits that pre-clearance is essential and that self-clearance will not suffice for the market given recent Eircom Regulatory Governance Model – RGM, disclosures.

ALTO submits that for ongoing monitoring to ensure bundles that the MST based on forecasts and assumptions continue to pass a MST based on actual data.

Response to Consultation Questions:

Q.1. Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA/WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.

A. 1. ALTO agrees with ComReg's pricing proposals and encourages ComReg to implement those proposals as soon as practicable. ALTO notes that there have been enough delays in the application of regulation in this area and the governance of SMP operators.

Q. 2. Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 (of 2007) if there was appropriate wholesale regulation upstream? Please justify your views.

A. 2. ALTO agrees with the ComReg agrees that the NRT could be removed as a pricing remedy with appropriate wholesale regulation upstream.

Q. 3. 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) of the FACO wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.

A. 3. ALTO agrees with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself.

WLR and some other regulated wholesale services remain important services and inputs to/for new entrant wholesale operators in Ireland. As a result and more

generally is therefore critical that Eircom are required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO components required by the OAO to replicate an Eircom retail bundle and the Eircom retail bundle price itself.

The margin squeeze / NRT obligation is important because it enables other operators to compete on a level playing field with Eircom, using FACO alongside Eircom's other regulated wholesale inputs. Without an effective margin squeeze test in place between Eircom's retail bundles and FACO, Eircom may be able to offer bundles of services that cannot be replicated by OAOs. In that case, OAOs will not be in a position to compete with, or match, Eircom's offers. Less competition is bad for consumers. Therefore the wholesale obligations relating to FACO (or any other wholesale markets where Eircom has SMP) are more effective at addressing competition problems when partnered with a margin squeeze obligation. Please see comments set out in the Preliminary Comments section above.

Q. 4. Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.

A. 4. ALTO agrees with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself.

ALTO submits that ComReg has found Eircom to have SMP in the WLA market on a national basis, so for the reasons set out above, the WLA obligation should be supported by a margin squeeze obligation on a national basis.

Q. 5. Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

A. 5. ALTO agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself.

Again, ALTO submits that ComReg has found Eircom to have SMP in the WLA market on a national basis, so for the reasons set out above, the WLA obligation should be supported by a margin squeeze obligation on a national basis.

Q. 6. ComReg is interested in receiving views from interested parties on the Proposed Urban Area, Regional Area 1 and Regional Area 2 as they apply to bundles. Please provide detailed reasoning and supporting information (where available) to support your views.

A. 6. ALTO agrees with ComReg’s proposal provided the obligation not to cause margin squeeze as applied to bundles, once that it is imposed on Eircom in the WLA market covering the same footprint (and Regional Areas 1 & 2) and the footprint as defined remains stable over the review period.

Q. 7. Do you agree with the proposed cost benchmarks for retail costs to be included in the bundles MST?

A. 7. ALTO agrees with ComReg that the proposed cost benchmarks for retail costs to included in the bundles MST.

Q. 8. Do you agree with our proposed removal of the downward only adjustment to the WAWNI? Please support your view with relevant data and evidence.

A. 8. ALTO agrees with ComReg's proposed removal of the downward only adjustment to the WAWNI. ALTO submits that it is quite clear that the NRT failed to capture the concept it was designed to and afforded Eircom time to potentially exploit the artificially low WAWNI as Wholesale operators' actual costs were clearly higher following the significant price increases, clearly this remains an issue.

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

A. 9. ALTO agrees with ComReg's proposal that the proposed Margin Squeeze Test be implemented in the Urban Area.

Q. 10. Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 1? Please give a detailed response with supporting data where appropriate to support your view.

A. 10. ALTO agrees with ComReg's proposal that the proposed Margin Squeeze Test be implemented in Regional Area 1.

Q. 11. Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to support your view.

A. 11. ALTO agrees with ComReg's proposal that the proposed Margin Squeeze Test be implemented in Regional Area 2.

Q. 12. Do you agree or disagree with our provisional view that the average customer life should be 42 months? Please give a detailed response with well justified supporting data where appropriate to support your view

A. 12. ALTO refers ComReg to the Preliminary Comments section above where this has been addressed. ALTO submits that ComReg should consider modifying its own thinking to contract life/term, rather than bundle life or customer life.

When a customer takes a new contract and receives a new discount, this essentially represents a new bundle, e.g., If a customer takes a new bundle from Eircom on 12 month contract each year at 6 months €40 and 6 months €70 for five years, then the effective price is only €55. If ComReg counts this as one customer life of 42 months, then they will heavily weight the €70 and arrive at an effective price of €66 for the bundle. This artificially inflated retail price gives a higher margin between wholesale input prices and retail bundle price, which means that Eircom can offer deep discounts or 'added services' without squeezing the inflated margin.

Q. 13. Do you agree or disagree with ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness in section 5.11? Please give a detailed response with supporting data where appropriate to support your view.

A. 13. ALTO does not agree with ComReg's proposal of carrying out a case-by-case assessment of bundles that fail the MST to consider whether such failure should be deemed permissible. This proposal does not provide for regulatory certainty and invites Eircom to seek to exploit the ambiguity inherent in such a proposal.

Q. 14. Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.

A. 14. ALTO agrees with ComReg's proposals in respect to other possible adjustments (detailed in section 5.12) to the MST.

Q. 15. Do you agree or disagree with ComReg's proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data where appropriate to support your view

A. 15. ALTO welcomes the fact that ComReg recognises the importance of accounting for retention promotions in the MST.

As noted by ComReg:

"where customers are re-contracting to a bundle then the MST should reflect the percentage of customers taking up the retention offer. Therefore, it is proposed that the cost of the retention offer should be spread over the period of the contract extension."

It remains unclear how ComReg plans to allocate a value to retention promotions and ComReg needs to provide greater transparency in this regard.

ALTO submits that it appears to make certain sense to assume the retention promotion will be at least equivalent to the most recent promotion on offer from Eircom specific to the bundle being assessed. In this regard, Eircom has signalled a willingness to discount to a level as reflected by the promotion so it is reasonable to assume they would do so again in order to retain the customers.

ALTO submits that ComReg's thinking on this issue is not quite clear and it should be properly addressed and clarified in the decision that flows from this Consultation. It should be the case as a matter of logic that a retention offer entails a new contract. Please refer to A. 12 and the Preliminary Comments section wherein contract life should be defined, rather than bundle life.

Q. 16. What are your views on the period over which Eircom needs to recover the on-going content costs of eir Sports, should the period be limited to the

duration of the rights?

A. 16. ALTO submits that the period over which Eircom needs to recover the on-going content costs of *eir Sports* should be limited (at an upper limit) to 60 months in duration. Any period further could have the affect of distorting competition in the market. ALTO submits that it is important that Eircom is required to account for the costs of *eir Sports* fully within the NRT, within the timeframe over which they have rights to provide the content.

ComReg should have in mind the costs that would be incurred by another operator attempting to replicate the *eir sport* service, e.g., all fixed and variable costs need to be recovered from subscribers

Q. 17. What are your views on the period over which Eircom needs to recover the acquisition costs of *eir Sports*? Should this be a set period or should Eircom be allowed to use excess broadband margins, if available, to shorten the set period?

A. 17. ALTO considers that a period for recovery of acquisition costs beyond 60 months is likely to distort competition by acting as a weak constraint on Eircom.

If Eircom spread the cost over many years then the cost per subscriber per month appears lower. If Eircom can make this lower in the NRT cost stack, then it means that they can include it in their retail bundle for free without having to reducing their wholesale price or increasing their retail price - essentially, it means that the NRT doesn't bind. Please see Preliminary Comments regarding Eircom's incentive to understate cost of providing *eir Sports*.

It is notable by submission that the acquisition came with significant upsides in terms of subscribers to Eircom and other value that is difficult to assess properly.

Q. 18. What are your views on the appropriate subscriber base over which Eircom needs to recover the costs of *eir Sports*? Are there any methods which you view as being more suitable than ComReg's preliminary view? In

your response please outline any practical issues which should be considered if such a method were to be implemented.

A. 18. ALTO submit that under the 'net cost' approach any suggestion that Eir's mobile subscribers should be included in the relevant subscriber base should be dismissed as proposed by ComReg. ComReg must consider free data allowances and streaming/network access promotions in assessing the appropriate subscriber base. Failure to do so properly will permit regulatory gaming.

One other option for ComReg might be to consider that the cost of *eir* Sports should be spread only over customers that actually watch/consume *eir* Sports, or pay specifically for *eir* Sports e.g., wholesale customers. These are the customers that receive value from the content.

Q. 19. Do you agree with ComReg's proposed treatment of eir Sports in the Margin Squeeze Test? If you consider another method would be more suitable can you please give details of such a method whilst being aware that content is an unregulated service.

A. 19. ALTO agrees with the ComReg's proposed treatment of *eir* Sports in the Margin Squeeze Test, save for the issues highlighted at answers 17 – 18. See also ALTO's Preliminary Comments above.

Q. 20. Do you agree or disagree with ComReg's preliminary view that a preclearance 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. 20. ALTO agrees with the ComReg preliminary view that a preclearance requirement is required ahead of Eircom launching a new or revised bundle.

Eircom is very aware of its obligations in relation to retail amendments and this should assist in terms of reducing any perceived regulatory burden.

At paragraph 7.6 of the Consultation paper it is quite apparent that Eircom has in the past failed to provide notification submissions to an established standard.

Industry knows from recent history (as evident from publications of Eircom's RGM reports) that it is appropriate that ComReg continues to require pre-clearance of new or revised bundle offers.

The importance of ComReg monitoring and verifying Eircom's NRT submissions can not be understated. OAOs need to be confident that ComReg is taking all required steps to ensure that the test is being applied effectively.

Q. 21. 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. 21. ALTO agrees with ComReg's proposed approach where an Eircom bundle is considered to be non-compliant with its obligation not to cause a margin squeeze. This is particularly important where non-compliant offerings are causing material damage to the market and competitors on an *ex ante* basis. This should be an improvement on the current operation of the MST regime.

Q. 22. Do you agree or disagree with ComReg's proposed approach to introduce a monitoring statement? Do you agree or disagree with ComReg's proposed approach to require this statement on a quarterly basis? Please explain your response and provide detailed information to support your view.

A. 22. ALTO agrees with ComReg's proposed quarterly monitoring statement approach. The importance of ComReg monitoring and verifying Eircom's NRT submissions can not be understated. OAOs need to be confident that ComReg is taking all required steps to ensure that the test is being applied effectively.

Q. 23. 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. 23. ALTO agrees with the ComReg's Regulatory Impact Assessment.

Q. 24. Do you believe that the draft text of the proposed Decision Instrument for the FACO Market 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. 24. ALTO confirms that the draft text of the proposed Decision Instrument for the FACO Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed.

Q. 25. Do you believe that the draft text of the proposed Decision Instrument for the WLA Market 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. 25. ALTO agrees that the draft text of the proposed Decision Instrument for the WLA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed.

Q. 26. Do you believe that the draft text of the proposed Decision Instrument for WCA Market 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. 26. ALTO agrees that the draft text of the proposed Decision Instrument for WCA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed.

ALTO

11th August 2017

2. BT Communications Ireland Limited (BT)

BT Communications Ireland Ltd ["BT Ireland"] response to ComReg Consultation:

Consultation on Price control obligations relating to Bundles Further specification of the price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b)

Issue 1.1 - 11th August 2011

1.0 Introduction

We welcome this opportunity to comment to this consultation. BT Ireland is not active in the Consumer Retail Market in Ireland and hence we do not have the local expertise or market awareness to comment to the key issues of the price control obligations for bundles. Please note that the absence of our comments should not be construed as agreement or otherwise to the text and proposals. However the consultation touches on a small number of wholesale issues and as an active participant in that market we do address those points.

1.1 Unstable upstream geographic boundaries

This appears to be the final consultation in a set of three broadband consultations (16/96, 17/26 and 17/51) and a continuous theme in all three is that geographic boundary between the urban and regional areas is stable, which it's clearly not. We have seen some of our VUA sites "Re-Homed" by Eircom which has partially stranded our backhaul investments in reaching those VUA locations to now only carrying LLU. To date Eircom has "Re-homed" the VUA traffic to other exchanges where we have VUA which has reduced the impact, however we expect there will become situations where they "re-home" to exchanges where we have no infrastructure and cannot viably reach with our network. If these are in the WCA Urban market where Eircom has no obligation to supply WCA services to regulated conditions we believe we would be foreclosed from the market. If such were to occur we consider those exchanges should revert to a status of Regional and the regulated WCA services should immediately be re-instated. The "Re-Homing" is also undermining investment confidence for further invest in VUA.

Hence we strongly disagree with ComReg statement in 4.27 in this consultation that identifies 88 exchanges defined for de-regulation and this figure should be reviewed downwards and considered unstable going forward in the context of Eircom's "Re-homing" of exchanges. I.e. the criteria for establishing the urban area is not stable. We have provided details of these exchanges in our recent 13D submission to ComReg and we consider ComReg should at least keep the boundaries alive to immediate re-definition the moment an underlying WLA is moved. Disappointedly this issue destabilises the regulatory proposals making them completely unacceptable.

Separately and as explained in our response to 17/26 we consider the lack of an MST between WLA and WCA is a considerable risk to sustainable wholesale competition in the WCA Urban market as Eircom will be able to continuously drop the price of WCA forcing wholesale competitors out of the market. Our downstream customers will always bench mark from the Eircom wholesale price whether it's published or not and this is a fact of life and is not going to change. Hence there is an absolute need for a WLA to WCA MST in the WCA Urban market.

In Conclusion - We consider both of these to be fundamental and unacceptable flaws in the proposed regulatory remedies.

2.0 Response to the questions

1. Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA/WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.

BT response to question 1.

As articulated in the introduction of our response we consider the boundary between the Urban Area and the Regional Areas to be unstable, particularly as Eircom are "Re-homing" VUA based exchanges. This raises the following fundamental issues and ultimately ComReg need to reconsider the boundaries and to propose a system of dynamically changing the boundaries.

1. BT has invested considerably to reach a sizable number of VUA locations although as we have indicated previously there are still many others that are not economically viable to reach. Since we completed these investments, Eircom has moved or "Re-homed" over 30% of the locations we have invested, causing us concern as to the viability of our investment in these locations and future investment. For the instances of "Re-homing" to date Eircom has relocated the VUA traffic to other exchanges where we also have a VUA presence, hence the impact has been reduced although it means we need to reconfigure our network. At this time the otherwise stranded backhaul investment is still being used for LLU although its value is now largely diminished.
2. Going forward we are most concerned Eircom will "Re-home" traffic to an exchange site where we do not have an existing presence and where it may not be viable for us to reach. If this were in the WCA Urban area, and Eircom were to refuse, or constructively refuse to offer us reasonable WCA services we would not be able to supply downstream services. Our wholesale customers require a full national solution for BB services and not having access to a WCA Urban exchange area would be a considerable problem. Hence we cannot accept that the WCA Urban to Regional boundaries as considered stable, and without a safety net of a remedy proposed by ComReg to protect competition against these events. As a minimum ComReg should insist that such a "Re-homing" to a site that is not already accessed by that operator should automatically trigger the exchange to be re-defined within the Regional area with WCA services on regulated terms re-instated immediately.

3. Given the behaviour of “Re-homing” it is also increasingly difficult to have confidence for further investment and we consider ComReg should act to stabilise the situation as a matter of urgency.

Hence we consider that ComReg should commence further work on the underlying foundations to the definitions of the Urban, Regional Area 1 and Regional Area 2 to resolve this “Re-homing” problem.

4 Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

BT response to Question 4

Separately and as explained in our response to 17/26 we consider the lack of an MST between WLA and WCA is a considerable risk to sustainable wholesale competition in the WCA Urban market as Eircom will be able to continuously drop the price of WCA forcing wholesale competitors out of the market. Our downstream customers will always bench mark from the Eircom wholesale price whether it’s published or not and this is a fact of life and is not going to change. Hence there is an absolute need for a WLA to WCA MST in the WCA Urban market.

6 ComReg is interested in receiving views from interested parties on the Proposed Urban Area, Regional Area 1 and Regional Area 2 as they apply to bundles. Please provide detailed reasoning and supporting information (where available) to support your views.

BT Response to Question 6.

Please see our response to question 1 and the confidential figures to support our position can be found in the recent 13D1 submission to ComReg of July 2017.

25 Do you believe that the draft text of the proposed Decision Instrument for the WLA Market 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.

BT Response to question 25.

We consider the draft decision requires updating to address the problems of re-homing and also the introduction of an MST between the WLA market and the WCA Urban market. We understand the MST already exists in the Regional areas, but if not it should be added there also.

As regards the other proposals in the draft decision we are not commenting – this should not be construed as agreement or disagreement.

26 Do you believe that the draft text of the proposed Decision Instrument for WCA Market 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.

BT Response to question 26.

We consider the draft decision requires updating to address the problems of re-homing and also the introduction of an MST between the WLA market and the WCA Urban market. We understand the MST already exists in the Regional areas, but if not it should be added there also.

As regards the other proposals in the draft decision we are not commenting – this should not be construed as agreement or disagreement.

End

3. Eircom Limited (Eircom)

eir

Response to ComReg Consultation & Draft Decision Paper:

Consultation on Price control obligations relating to Bundles:

Further specification of the price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b)

Consultation and Draft Decision

ComReg Document 17/51



11 August 2017



Document name	eir response to ComReg Consultation & Draft Decision 17/51
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Executive Summary

1. Competition is a desirable outcome. It promotes efficiency and leads to higher levels of consumer welfare in respect of choice, price, quality of service and value for money — both in the short and long-term. Accordingly, the Common Regulatory Framework of the European Union ('CRF') and Section 12(1) of the Communications Regulation Act 2002 (as amended) require ComReg to promote competition.¹ Ex ante regulation can play an important role in this in designing remedies that seek to replicate as far as possible competitive market outcomes in markets where significant market power ('SMP') has been found. Equally, for markets which are competitive or prospectively competitive, regulation may neither be required nor warranted and could actually be distortive.
2. ComReg is proposing in this Consultation to impose a retail margin squeeze test ('MST') on bundles of services offered by eir, having already proposed (in ComReg 17/26) to largely remove pricing flexibility at the wholesale level. If implemented, the combined effect of these measures will be to impose an artificial price floor in respect of eir's retail offering. In a retail market in which the market share of eir is already relatively moderate and in which it faces growing infrastructure competition and established retail competitors with their own relative advantages, this is likely to distort and not promote competition contrary to ComReg's statutory objectives.
3. When imposing ex-ante regulation and thereby interfering in the normal working of a market, ComReg's foremost concern has to be to do no harm. It is neither proportionate nor appropriate to impose a remedy on a market without being satisfied that this intervention is both necessary and going to be effective to the extent that its benefits will outweigh any unintended consequences. It is for that reason that any ex-ante intervention under the CRF proceeds from an analysis of the relevant market. ComReg has failed to undertake this step. It is proposing to control retail prices without having put itself into a position to be able to properly assess the effects of such an intervention.
4. The starting point for national regulatory authorities ('NRA') under the CRF is to correctly identify those markets which are susceptible to ex-ante regulation. In 2014, the European Commission published a list of markets which it considered to be susceptible to ex-ante regulation (the '2014 Recommendation').² The listing of a market as susceptible to ex-ante regulation does not imply that regulation is warranted but that an NRA must undertake a market analysis in accordance to Article 16 of the Framework Directive to impose or withdraw regulatory obligations.
5. At the same time, if a market is not listed in the 2014 Recommendation, an NRA can itself identify markets as being susceptible to ex-ante regulation but it must, in those

¹ Implementing the EU Regulatory Framework for electronic communications introduced in 2002.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0710&from=EN>



circumstances, carry out a Three Criteria Test — establishing, cumulatively, the presence of high structural or legal barriers to entry, a market structure that does not tend towards effective competition within the relevant timeframe, and the insufficiency of ex-post competition law. The purpose of this Three Criteria Test is expressly to limit the number of markets in which ex-ante regulatory obligations are imposed and thereby to contribute to one of the overall aims of the CRF: to reduce ex-ante regulation as competition in communications markets develops.³

6. The markets listed in the 2014 Recommendation are all wholesale markets. Indeed, the 2014 Recommendation states that "*Ex ante regulation imposed at the wholesale level should be considered sufficient to tackle potential competition problems on the related downstream market(s)*".
7. Having reviewed ComReg's wholesale market analysis consultation (ComReg 16/96) and ComReg's wholesale market analysis Decision on the Wholesale Fixed Voice Access and Call Origination market (FACO and ComReg Do5/15), it is clear that ComReg has failed to take account of the 2014 Recommendation and the wider requirements of the CRF in its proposed further specification of pricing remedies in this Consultation.
8. ComReg has failed to undertake the required Three Criteria Test in order to demonstrate that the retail market is or remains susceptible to ex-ante regulation — contrary to the presumption expressed in the 2014 Recommendation — and it has consequently failed to analyse that market. In suggesting the imposition of a series of retail MSTs, anchored largely against cost controlled wholesale inputs, it now nevertheless proposes to intervene ex-ante in the retail market, even if ostensibly through further specification of pricing remedies in wholesale markets.
9. In addition to this issue, which alone means that it would be ultra vires for ComReg to proceed with the imposition of the proposed package of remedies, the appropriateness of the MSTs detailed in this Consultation is further compromised by their proposed design which depart from the well-established economic principles and methodologies of an economic replicability test, as set out in the 2013 EC Recommendation.⁴ By relying on too generous a cost standard (see eir's response to Question 8), making adjustments to costs for scale not justified relative to market circumstances (see eir's response to Question 7) and by testing at a level of assessment so disaggregated that it bears no relation to actual competition in the market (see eir's response to Question 8), ComReg's proposals are creating a pricing umbrella in the retail market below which eir cannot compete and its competitors need not compete. This is liable to result in an unnecessary and unwarranted transfer of welfare from end-users to other operators in the Irish market and fails to achieve

³ See Recital 17 of the 2014 Recommendation.

⁴ European Commission Recommendation C(2013) 5761.



ComReg's objectives as set in Section 12(1) of the Communications Regulation Act 2002 (as amended) (the Act).

Failure to define and analyse the relevant market

10. While retail markets are used in wholesale market reviews as a starting point to assist in defining the scope of the wholesale markets an economic assessment of one market does not constitute the required level of analysis to impose regulatory remedies in the other. *"The market definition sets the boundaries within which to analyse competitive dynamics and to identify in a systematic way direct and indirect competition constraints faced by the undertakings that are present in the market in question"*⁵ [emphasis added]. ComReg's market analysis consultation 16/96 and ComReg's market analysis Decision D05/15 constitute wholesale market assessments only.
11. ComReg's failure to follow the required process and to take the utmost account of the 2014 Recommendation is further illustrated by the fact that its reasoning in this Consultation remains necessarily high level and abstract. ComReg appears to justify the numerous retail MSTs to be imposed on eir simply by reference to conceptual concerns without however providing the necessary evidential support, which it has never gathered. ComReg states, for example, without further elaboration that *"...given that Eircom has been identified as having SMP in a number of upstream markets it has both the ability and incentive to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users"*.⁶ Similarly superficial argumentation is also evident in Chapter 3 of the Consultation, where ComReg provides examples of generalised anti-competitive effects that might arise as a matter of theory due to eir having SMP in various wholesale markets, however again without providing a link back to the actual characteristics of the Irish retail market. Such abstract reasoning is misplaced in the context of justifying the imposition of regulation, and simply erroneous in the context of the relevant market. First, as set out in eir's response to Question 2, with the exception of FTTH wholesale services, all underlying wholesale inputs supplied by eir (WLR, LLU, LS, CGA, NGA FTTC) are subject to cost-orientation obligations and therefore eir does not have the ability to increase the prices of those inputs beyond the rates specified by ComReg. Secondly, the 2014 Recommendation is clear that in identifying retail competitive concerns the analysis must take into account ex ante regulation (if imposed) at the upstream level (i.e., the wholesale market) in determining whether SMP is likely on a forward looking basis at the downstream level (i.e., the retail market): *"A downstream market should only be subject to ex ante regulation if competition on that market still exhibits significant market power despite the presence of ex ante regulation on the related wholesale upstream market(s)"*.⁷ As ComReg has not undertaken any relevant analysis, the anti-

⁵ European Commission's staff working paper explanatory note to the 2014 Recommendation.

⁶ ComReg, Consultation, paragraph 1.5.

⁷ Recital 18.



competitive concerns it has identified can only be regarded as speculative rather than being grounded in any standard of economic assessment.

12. The second type of general, theoretical anti-competitive effects identified in Chapter 3 of the Consultation are said to arise from eir lowering its retail price in order to create a margin squeeze. However, ComReg has failed to acknowledge in the Consultation that the ability and incentive to discriminate does not necessarily follow from having SMP in a wholesale market; there needs to be the prospect of supra-competitive profits in the downstream market so that the firm has an incentive to margin squeeze. No evidence has been put forward by ComReg to demonstrate the prospect of supra-competitive profits in the downstream market. Similarly, no evidence has been offered to show that the examples of anti-competitive effects and concerns submitted by ComReg in this Consultation actually apply in this context. If one was to accept these theoretical outcomes as plausible, which eir does not (see eir's response to Question 2), then this would be a retail market that is not effectively competitive despite the presence of appropriate wholesale regulation. That is clearly not the case as ComReg's own data acknowledges.⁸ However, ComReg must undertake a Three Criteria Test as required by the 2014 Recommendation before imposing ex ante regulation in the retail market. "*National regulatory authorities may identify other markets than those listed in this Recommendation and apply the three-criteria test. In particular, if national regulatory authorities, having concluded that a retail market is not effectively competitive absent ex ante regulation, intend to regulate the corresponding wholesale market(s), and this/these market(s) is/are not listed in the Recommendation, they should always conduct the three criteria test*". ComReg has undertaken no such analysis for the retail market.
13. Such an omission may be due to ComReg, mistakenly, considering that it is imposing a wholesale pricing remedy, but that is not what in substance it is proposing to do. As the underlying wholesale inputs in this case are largely fixed at cost-orientation (with the exception of the FTTH service), retail prices are the only input variables that can change to ensure on-going compliance with the proposed MSTs. Consequently, irrespective of where the proposed MSTs are ostensibly anchored, in combination with cost-orientation obligations and regulated price points, they amount to *de facto* direct regulation of retail tariffs.
14. FTTH services are not proposed to be cost-oriented by ComReg (see ComReg WLA WCA Pricing consultation document number 17/26). Therefore, a MST in relation to FTTH based products is more likely to be justifiable by reference to the wholesale market and no Three Criteria Test may be required here. The same would be true on a broader scale if ComReg were to decide, contrary to its current proposals, not to limit wholesale pricing flexibility

⁸ See, e.g., <https://www.comreg.ie/publication/quarterly-key-data-report-q1-2017/>



more generally. However, even in this case, where the market is listed as principally susceptible to ex-ante regulation in the 2014 Recommendation and where ComReg may have identified some need for such regulation, not all possible remedies may be necessary or proportionate. In the context of bundles specifically, no separate regulation may be required. As the staff working paper explanatory note to the EC's 2013 Non-discrimination and Pricing Recommendation (the '2013 Recommendation') observes: "*...despite the fact that bundling is one of the dominant trends observed at the retail level, this Recommendation does not propose to define a separate retail market for bundles because evidence to date has not indicated that there is a need for ex ante regulation of bundles, which may contain a previously regulated input.*" [emphasis added]. ComReg puts forward no evidence to support ex ante regulation of retail bundles in Ireland.

15. Irrespective of the concerns expressed above, if ComReg wishes to proceed to imposing an economic replicability test in some form, in designing appropriate remedies for FTTH services it must then take the utmost account of the 2013 Recommendation. As the 2013 Recommendation recommends that the appropriate operator cost base is EEO and not a combination of REO/EEO (in Regional Area 1) as proposed by ComReg; that the appropriate cost standard is LRIC+; and that the replicability test applies for flagship offers only and not every offer using narrowly defined "portfolios" to recover total costs ('ATC') as proposed by this Consultation; it is evident that ComReg has given no such consideration to that Recommendation.

Inappropriate construction of the proposed MSTs

16. The departures from the 2013 Recommendation matter in terms of the functioning of the market and in terms of consumer welfare. For example, on the one hand, ComReg state that "*the obligation on Eircom not to cause a margin squeeze should not protect inefficient competition*".⁹ On the other, ComReg is proposing in the MSTs to assume that another operator will have higher costs than eir retail (i.e., an operator that is less efficient than eir). Without appropriate evidence by ComReg that competitors' costs are in fact higher than eir retail's, such an assumption is purely speculative and bound to introduce inefficiencies into the market. eir faces a number of well-established large multinational players with extensive retail experience. There is no obvious reason why such competitors should have higher downstream costs than eir and ComReg has not provided any evidence which would allow interested parties to determine whether its proposals are proportionate, objectively justifiable and based on the nature of the problem identified. In this response, eir demonstrates that on the contrary ComReg's regulatory intervention is liable to result in excessive retail prices for consumers. As outlined in eir's response to Question 7, eir should be allowed to compete on the merits of its own costs.

⁹ See paragraph 3.26 of the Consultation.



17. In addition, ComReg has proposed MSTs which are very restrictive in nature. The combined impact of requiring eir to recover its ATC costs within narrowly defined portfolios in Regional Area 1 and at the individual bundle level in Regional Area 2 results in reduced pricing flexibility and competitiveness for eir. ComReg has erred in the design of the MSTs as they are not reflective of the cost standards actually considered as part of entry and expansion decisions of operators and are at such a disaggregated level (both from a product and geographic perspective) that ComReg fails to recognise that the retail market is national and that competition is across a portfolio of bundles and not at a product-level. As set out in eir's response to Question 8, eir's suggested alternative approach better meets ComReg's regulatory objectives and is consistent with the 2013 EC Recommendation and ex-post competition law.
18. ComReg's concern regarding eir's ability to leverage market power from regulated to unregulated services is unfounded and as recognised by Oxera is conditional on a series of hypothetical considerations.¹⁰ Indeed, as an example in the unregulated TV market, where eir is a new entrant, it may be eir not an OAO¹¹ that struggles to profitably replicate competitors' bundles. In addition, there is a clear disjoint between ComReg's stated objective to ensure a "bundle" is replicable and the way in which ComReg has constructed the test — which is to allow cross-subsidies between elements of the bundle only in one direction. This is an excessively restrictive control which does not reflect economic reality and requires eir to maintain additional margin above what would actually be required to replicate the relevant bundle in its entirety. As a consequence, eir's competitors can either (profitably) undercut eir's price allowing them to gain market share; or, follow eir's pricing in the confident knowledge that eir cannot compete and consumers suffer a detriment. As set out in eir's response to Question 9, in order to understand and reflect the commercial decisions of all operators in a market ComReg must recognise that replicability of a bundle is determined by the margins of the bundle in its entirety and therefore firms cross-subsidise between all elements within the bundle and bundle portfolio.
19. Equally, to the extent that eir's competitors would choose to compete directly in the provision of premium content such as sports content, they would not view this in the constrained way proposed by ComReg. The acquisition of premium content is a long term strategic investment and the ability to extract value when considering prices and cost recovery are considered at a broader level than the strict bundle-by-bundle analysis proposed by ComReg. ComReg's proposals not only prevent consumers from being offered competitive broadband offers by eir but also restrict eir Sports' ability to provide desirable premium sports content. This will ultimately limit consumers' enjoyment of eir's offer and have serious implications for eir Sports as a standalone wholesale/reseller content provider

¹⁰ Proposal on bundles margin squeeze test, Final Report, Prepared for ComReg, 1 June 2017, page 25.

¹¹ Other Authorised Operator ('OAO').



which in turn will impact consumer choice for Pay TV sports channels (a market which is outside the regulatory framework considered by the European Commission).

The way forward

20. ComReg has identified theoretical long-term concerns which eir has demonstrated in this response do not, in practice, stand up to closer scrutiny. ComReg's remedy proposals are misinformed because it has not undertaken the required level of economic analysis required to justify the imposition of ex-ante regulation which squarely and directly impacts the retail market and eir retail's prices and offers to the detriment of consumers.
21. ComReg has failed to follow the prescribed statutory process for the imposition of ex ante regulation, and a more detailed and evidence-based assessment of competition in the retail bundles market is now required. The likely outcome of such an assessment is that, as other regulators have found²², no communications provider has any relevant market power. In any event, however, absent a formal finding of SMP in relation to eir in the retail market, ComReg does not have the power to impose the proposed ex-ante pricing remedies set out in this Consultation in combination with those already proposed at the wholesale level.
22. In addition, even if ComReg should decide to retain wholesale pricing flexibility — in which case an economic replicability test may become appropriate — there are serious flaws with the construction of the proposed MSTs and eir has made alternative proposals in this response which better meet ComReg's regulatory objectives and are more consistent with the 2013 EC Recommendation and standards applied in ex-post competition law.
23. Overall, eir submits that further consultation is required at this stage, and eir is looking forward to engaging with ComReg in order to arrive at an eventual remedies package that supports ComReg's statutory objectives and the development of the Irish market to the benefit of its consumers.
24. In that context, and in relation to any residual concerns it may retain as to the working of the retail market, ComReg may also want to keep in mind that the choice is not between ex post competition law alone and an ex ante remedy now, but between leaving greater flexibility over bundles and retail pricing with the market today alongside the option of ex ante intervention in future (with a market review anticipated in three years' time).
25. Separately, ComReg must now also commit to revisiting, at the same time, the retail fixed narrowband access market to ensure in completing the WLA/WCA market analysis that all

²² For example, following initial competition concerns regarding fixed-mobile bundles and content exclusivities, the Dutch regulator recently undertook a separate consultation on the retail bundles market. It concluded, after careful consideration, that there were no grounds for intervention in that market in the Netherlands.



retail regulation remains appropriate — which the European Commission invited ComReg to do without undue delay in Article 7 correspondence in July 2015.¹³

¹³ C(2015) 5011 final – Letter from the European Commission to ComReg dated 14 July 2015.



Response to Consultation Questions

Question 1: Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA / WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.

26. There is insufficient economic assessment undertaken in ComReg's market analysis consultation 16/96 to allow ComReg to determine whether the theoretical competition problems identified, arising from hypothetical pricing behaviours, are in reality likely to occur in practice, in particular given that — with the exception of FTTH services — all the relevant wholesale inputs supplied by eir are already proposed to be subject to cost-orientation. Owing to this lack of analysis, the potential ability of eir to distort competition, its alleged incentives to do so and its purported impact are all overstated in both the market analysis consultation 16/96 and this Consultation. This results in ComReg proposing a complex and disproportionate set of regulatory pricing remedies at both the wholesale and retail level — which are further specified in this Consultation — to “address” potential market failures well beyond any uncompetitive market outcomes that are actually likely to occur.
27. In particular, eir considers that ComReg has:
- a. proposed ex-ante pricing remedies in competitive markets without an adequate economic assessment to determine whether any competition concerns arise or are likely to arise;
 - b. not assessed the full effects of each pricing remedy, in particular effects across multiple markets or value chains;
 - c. proposed a series of MSTs which are inconsistent in their design with the 2013 EC Recommendation.

Failure to undertake an economic assessment of competitive markets it proposes to regulate

28. eir currently is subject to an obligation not to unreasonably bundle, which encompasses an obligation to comply with a net revenue test ('NRT') that assesses whether or not eir retail is covering its total costs when it offers/sells a bundle of services together.
29. The NRT was imposed following eir's designation as having SMP in the bundled lower level voice access and higher level voice access market as determined in the Retail Fixed Voice Access market review (see paragraph 1.7 of the Consultation and ComReg 14/8g). As a retail price control, it was originally imposed (in 2013) based on a retail market analysis for the retail fixed narrowband access market as set out in ComReg's 2007 decision and carried forward pursuant to the 2014 Retail Fixed Voice Access market review decision.



30. ComReg now proposes in this Consultation (revisiting a 2014 consultation, ComReg document number 14/90) to replace the NRT with a MST for bundles containing a voice or broadband component in combination with other regulated or unregulated services.
31. However, ComReg proposes to impose the MST without either having defined or analysed the relevant market, which would be a segment of the retail market (for bundles of services) that as a whole is no longer identified by the European Commission as being susceptible to ex-ante regulation. This is problematic for two reasons:
- i. Having failed to follow the prescribed statutory process for the imposition of ex ante regulation, it would simply be ultra vires for ComReg to proceed to the imposition of a retail MST at this stage; and
 - ii. The insistence of the regulatory scheme for a market analysis to precede the imposition of any remedy is clearly sensible. Absent such an analysis, and therefore without recourse to the specific characteristics of the relevant market, it is impossible for ComReg to adequately assess the proportionality of any proposed measure, such as the MST in this case.
32. The proposed MST in combination with the proposed cost-orientation obligations for key wholesale inputs and the proposed prohibition on cross-subsidy for regulated components is in its effect and operation broadly comparable to the NRT. Given the anchoring in a regulated wholesale market, the practical effect of the MST is to impose a retail price control. ComReg acknowledges this when it states that in order to ensure replicability of bundles at the retail level it requires "*absent control over the retail price of the relevant bundle, [that] there would be no corresponding retail price increase in relation to the single headline bundle retail price*"¹⁴ It is surprising, therefore, that contrary to the process it followed in the context of the imposition of the NRT, ComReg now appears to suggest that it can proceed directly to the imposition of a retail price control without any preceding analysis of the relevant retail market.
33. ComReg stated in its 2014 Retail Fixed Voice Access market review (a market which is no longer recognised by the European Commission as being susceptible to regulation and which the current Bundles Decision is a further pricing specification of) that: "*If wholesale regulation including SB-WLR and margin squeeze in the FACO and WBA markets adequately supports the competitive constraint on Eircom posed by resellers, it will be appropriate for ComReg to revisit lower level fixed voice access sold inside a product bundle ('Bundled LLVA') and higher level fixed voice access ('HLVA') to identify whether a finding of SMP continues to be appropriate in relation to these FVA services. In this respect, ComReg may consult in early 2015 on a three criteria assessment ('3CT') in respect of the Bundled LLVA and HLVA Markets (i.e. the three*

¹⁴ See paragraph 3.17 of the Consultation.



criteria that must be cumulatively satisfied in order to determine whether a relevant market should be subject to ex ante regulation”[emphasis added].¹⁵ The pre-conditions identified by ComReg are now all in place, consequently, ComReg is now making proposals inconsistent with that previous decision and with its regulatory obligation to carry out an analysis of the relevant retail market. In that previous decision, ComReg clearly correctly recognised in 2014 the importance of a Three Criteria Test in order to consider the appropriateness of retail regulation going forward. However, in this Consultation where it is seeking to impose retail regulation through a wholesale market analysis it is no longer acknowledging this requirement.

34. Such a requirement was also identified in correspondence from the European Commission to ComReg in respect of the FACO market analysis Article 7 notification, where the Commission stated that *“The Commission notes that while transferring the WLR obligation from the retail access to the FACO markets, ComReg continues regulating the retail access market. ComReg explains in this respect that further work is required to replace the important price control obligations currently residing in former market 1, including inter alia a further specification of the cost orientation methodology and the margin squeeze test on the FACO markets. The Commission notes ComReg’s intention to monitor developments in the retail access market and to examine whether, in light of retail developments, regulation within the retail access markets (and the FACO markets) remains appropriate”* [emphasis added].¹⁶
35. However, through this Consultation, ComReg appears to purport to be able to impose retail regulation on the basis of its review of the wholesale market in the WLA/WCA market reviews and the various findings of SMP there.¹⁷ ComReg states for example in the Consultation that *“given that Eircom has been identified as having SMP in a number of upstream markets it has both the ability and incentive to engage in exploitative and exclusionary behaviour to the detriment of competition and consumers”*¹⁸ More specifically, ComReg argues that absent effective (bundling) remedies eir could leverage its upstream SMP vertically or diagonally into downstream retail markets.
36. Regulation 13 of the Access Regulations, from which ComReg purports to derive its relevant powers (see e.g., paragraph 1.9 of the Consultation), only allows ComReg to impose conditions in relation to the *“provision of specific types of access or interconnection”*. From the definition in Regulation 2(2), it is clear that access in this context means wholesale access only. ComReg’s powers to regulate retail markets are found in the Universal Services Regulations (as there are no remaining retail markets recognised by the European Commission as being susceptible to ex-ante regulation). However, the exercise of these

¹⁵ ComReg, Decision D12/14, paragraph 1.12.

¹⁶ C(2015) 5011 final – Letter from the European Commission to ComReg dated 14 July 2015.

¹⁷ Including the review in 2015 of the wholesale Fixed Voice Call Origination and Transit Markets.

¹⁸ See paragraph 1.5 of the Consultation.



powers is, in line with the European regulatory scheme, tied to the definition and analysis of a relevant retail market⁴⁹ including that market's assessment as suitable for ex ante regulation using a Three Criteria Test.

37. As a result, ComReg appears to be misdirecting itself in relation to the scope of its powers. In neither of the two Regulations is there a provision for the imposition of a retail remedy on the basis of a wholesale market review only. That is for good reason. eir's ability and incentive to leverage its upstream SMP to a downstream market, which ComReg is concerned about, is not self-evident. Once ComReg has imposed, as it proposes to do, a wholesale cost-orientation obligation in the upstream market, the extent of eir's ability to leverage its upstream SMP downstream depends on the characteristics of the relevant downstream market. Those characteristics cannot be assessed in the abstract, but only on the basis of an analysis of the relevant retail market for which ComReg has concerns about the functioning of competition. The regulatory framework does not envisage the sidestepping of such an analysis on the basis of an upstream market review. In fact, Regulation 13 of the Universal Service Regulations clearly considers the imposition of retail price controls to be a two-step approach — in that it envisages such imposition including the required market definition and analysis only in circumstances where a similar process has already taken place in the upstream market but wholesale obligations imposed under the Access Regulations are considered insufficient (Regulation 13(1) (b)).
38. On a factual basis, the requirement for a separate analysis of the downstream market is even more pronounced in the (current) case of a market for bundles of services that may include non-regulated components. Here, eir's upstream SMP for some of the bundle components may be of little (if any) overall significance. Indeed, depending on the importance of unregulated components (for example Pay TV and mobile) and the strength of OAOs in the upstream market for those components, it may be eir and, not the OAOs, that struggles to profitably replicate competitors' bundles. This can be seen from the market shares held by eir and its competitors in the Pay TV and mobile segments (Figure 1 and Figure 2 respectively), which are key unregulated inputs in retail bundles.

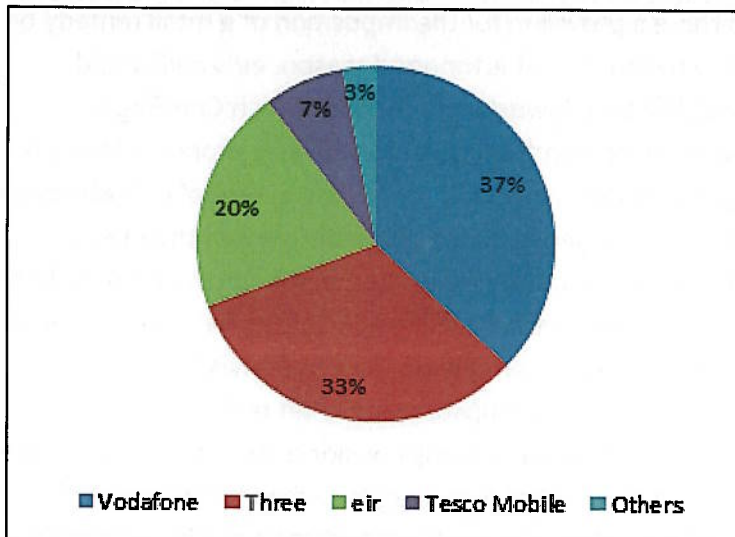
⁴⁹ Regulation 13(1)(a) Universal Service Regulations.



Figure 1: Pay TV, Q1 2017

✕

Figure 2: Mobile market share (excluding M2M), Q1 2017



Source: ComReg Quarterly Key Data Report

39. In its assessment of the retail market in the WLA/WCA market reviews (which did not amount to an analysis of those markets in the sense of the Framework Regulations), ComReg did not define bundles as a separate market, partly because it argued that doing so would have had no impact on its treatment of the upstream market given that the inputs used for standalone and bundled retail offers are the same. That is clearly correct. However, it also implies that once a cost-orientation obligation is imposed upstream, eir's ability to distort competition in a particular downstream market depends solely on the characteristics of that downstream market. The downstream market in this case has not been analysed in the context of a wholesale market review aimed at providing the basis for the imposition of wholesale controls pursuant to the Access Regulations.
40. Given its failure to analyse the relevant downstream market, ComReg provides very high level justification of the proposed MST throughout the Consultation. ComReg relies chiefly on identifying hypothetical mechanisms by which consumer harm could potentially occur without assessing the characteristics of the actual market in question and, in particular, whether such harm (mostly foreclosure of competitors) is actually likely to occur. See also eir's response to Question 2.
41. A poignant example of this can be found in ComReg's justification for its conclusion that ex post competition law is not sufficient to address its concerns. ComReg supports this conclusion not by an assessment of the nature of actual and potential competition in the retail bundles market but by reference to an ERG paper which states (correctly) that,



contrary to ex post intervention, ex ante regulation pursues *"the more ambitious goal of promoting competition by facilitating entry into those markets"* (see paragraph 3.24 of the Consultation). However, such a conceptual statement cannot justify ex ante intervention absent any analysis that would indicate that the risk of foreclosing entry in the context of the relevant actual market is either sufficiently likely in theory or already apparent from market trends. The pitfalls of such an abstract approach are clear from the fact that even a cursory reading of ComReg's own assessment of the retail markets in the WLA/WCA market reviews suggests that on the contrary there has been a significant degree of entry into the relevant retail market, with both large and small scale OAOs continuing to gain market share at the expense of eir.

42. In conclusion, ComReg cannot at this stage and on the basis of the analysis set out in the Consultation proceed to impose a retail MST on bundles of retail services. Doing so would be ultra vires in the context of the regulatory framework without having either defined or analysed the relevant retail market and assessed that market as suitable for ex ante regulation (following a Three Criteria Test) as prescribed by the Universal Services Directive and the transposing Irish regulations. Furthermore, absent such an analysis, it is simply impossible for ComReg to demonstrate — as it is required to do — that the imposition of an MST is a proportionate intervention in the specific circumstances of the market.
43. In the retail market reviews (ComReg 14/89), ComReg rightly stated (at paragraph 2.15) that:
- "In accordance with the spirit of the European regulatory framework and, as discussed throughout this Decision, ComReg's general regulatory approach is that where satisfactory competition exists at the wholesale level and/or where competition at the retail level is adequately underlined by effective regulation in place upstream at the wholesale level, regulation of affected retail markets could be relaxed or lifted."*
44. This guiding principle appears to be absent from this Consultation. eir suggests that an appropriate analysis of the relevant downstream market would lead ComReg to conclude that retail level regulation is no longer required in the Irish market and, in particular, not in the context of bundles where there is upstream regulation of key inputs.
45. Such a conclusion would also seem to align with the European Commission's view, which ComReg rightly refers to in the market reviews (at paragraph 4.267 of ComReg 16/96, citing from the explanatory document to the 2014 Recommendation):
- "High levels of bundling have been reported, particularly in relation to broadband access and fixed voice. However, despite the fact that bundling is one of the dominant trends observed at the retail level, this Recommendation does not propose to define a separate retail market for bundles because evidence to date has not indicated that there is a need for ex ante regulation of bundles, which may contain a previously regulated input" [emphasis added].*



Failure to assess the full impacts of each pricing remedy

46. ComReg has not taken into account the regulatory implications of its own market analysis findings in its consultation ComReg 16/96, and the stated views of a number of interested parties in their submissions to that consultation. eir, Virgin Media and Vodafone (and its consultants, Compass Lexicon) all supported a view that the market is subject to national retail pricing.
47. Consequently, an inconsistent retail MST in respect of the downstream retail costs used between different areas will result in higher prices in the Urban area — due to the requirement for eir to pass a more severe retail MST for the exact same retail products in the Regional area 1 and Regional area 2 (which is more severe again than Regional Area 1). This will create a pricing umbrella below which other operators are free to charge, safe in the knowledge that eir cannot compete — not only in the Urban area (which corresponds to the Urban WCA area which ComReg has identified as being fully competitive) but also in the Regional Area 1 and Regional Area 2. This issue also arises in Regional Area 1, where prices will be impacted by the regulatory regime in Regional Area 2. As such, the strict regulatory approach in the Regional areas will have a negative impact on consumers through inefficient pricing over and above the competitive level.²⁰

Figure 3: Illustration of impact as a result of sub-geographic remedies on a national competitive retail market



48. The differing remedies between defined regulatory boundaries fail to recognise the impact that they will have on eir's retail arm, a national competitive market, or on consumers. This is evident, in the separate wholesale network inputs (WAWNI) test proposed for CGA and NGA bundles, the lack of assessment undertaken by ComReg in creating smaller portfolios (by separating the Urban Area and Regional Area 1) where there was previously only one portfolio applied (i.e., the Larger Exchange Area), and by using a less efficient operator cost base which goes far beyond what is contemplated in the 2013 EC Recommendation. Without appropriate assessment by ComReg no conclusion can be made by it that an adjustment to the EEO cost base could be justified, or could be shown to be proportionate.

Failed to take the utmost account of the 2013 EC Recommendation

49. ComReg states in paragraph 5.4 of the Consultation that it "*has taken utmost account of the ex-ante replicability test parameters as set out in Annex II of the European Commission's Recommendation on non-discrimination obligations and costing methodologies*". However, no further reference is made of the relevance, or indeed the recommendations set out in the 2013 EC Recommendation throughout the Consultation.

²⁰ See also Table 2.



50. As set out in Chapter 2 of Brian Williamson's supporting paper to eir's submission²¹, the 2013 EC Recommendation on costing and non-discrimination, recital 61, proposes an economic replicability test where wholesale price regulation is not imposed. As all wholesale services (with the exception of FTTH-based services) are proposed to be cost-oriented ComReg's proposals clearly go beyond the intended scope of the 2013 EC Recommendation and the relevant markets in the 2014 EC Recommendation as being susceptible to ex-ante regulation.
51. Furthermore, as demonstrated in this submission, such errors are compounded by ComReg in proposing an operator cost base which creates additional and unnecessary margin for other operators competing with eir. Such artificial headroom introduces inefficiency into the market and is not compatible with any element of the regulatory framework. In addition, the MSTs proposed are at a level of aggregation which may portray pricing flexibility to the non-informed reader but in reality offer limited benefit to eir given that competition happens at a national level. In summary, ComReg's intervention is harming retail competition in the market and this will result in detriment to consumers in the short-medium and long-term. eir submits that ComReg's proposals are inconsistent with the 2013 EC Recommendation — which it is required to take the utmost account of. See also eir's response to Question 7 and Question 8.

Other Considerations

52. eir notes that in the intervening period since the publication of ComReg's review of the WLA and WCA markets, there have been a number of market developments, all lending themselves to even more competitive outcomes and benefits for end-users.

enet & Siro partnership agreement

53. enet and Siro have announced a partnership agreement whereby enet will become a Siro aggregator and will integrate Siro's last mile fibre access, with the Metropolitan Area Networks (MANs) as well as its own national fibre network, to provide a full end-to-end offering to all retail service providers (RSPs). enet and Siro had already reached an agreement that allowed Siro use of enet's network as part of its build.
54. The partnership will allow RSPs to target individual Siro towns or to offer services on a national basis, as well as delivering a more cost effective solution for smaller operators to sell FTTH/B services in their local area and in this manner will further drive competition in the broadband market by giving more telecoms companies access to Gigabit connectivity.

Siro & Rocket Broadband

55. Siro has now contracted with five different RSPs, the latest of which is Rocket Broadband. This partnership is the latest example of Siro enabling regional broadband providers in Ireland to compete with operators that are national and international in scale.

²¹ Brian Williamson, "Leveraging regulation into retail broadband and adjacent markets via margin squeeze - Primum non nocere", June 2017.



56. Siro and BT have completed their first 1Gbps trial in Cork, signalling the combination of BT's national fibre network with Siro's 1Gbps FTTB network.²²

Pure Telecom's Expansion Plans

57. Pure Telecom has signed a €1.75 million deal with the sales agency DSM to provide support in expanding its customer base. The company, which currently has approximately 42,500 residential customers, has plans to more than double that number to 100,000 by the end of 2019 as well as looking to double its revenue within the next three years.

Imagine's expansion plans

58. According to Imagine's CEO, the company is signing up roughly 2,500 customers a month and as of Q1 2017 had a base of circa 14,000 customers. Imagine is currently spending more than €1 million a month on the national rollout of its 4G TD-LTE network²³ and was one of the winners in the recent 3.6 GHz spectrum auction. Imagine, which is currently the country's largest wireless broadband operator, will pay €10 million for 60 MHz in each of four rural regions assigned in the auction.
59. Imagine already has a footprint covering 500,000 homes and businesses and plans to reach a target of 1 million homes passed with wireless broadband by 2018. Imagine currently has 50 live sites in Ireland and plans to grow this to 400 sites and 160,000 customers within three years.
60. Imagine has also recently announced a strategic partnership with Huawei and plans to deploy a national Wireless-to-the-x (WTTx) network, which using the latest LTE technologies will deliver speeds of at least 200 Mbps. Imagine will begin network roll-out in October and is seeking to cover 85 per cent of the market by 2019, save for limited urban areas where high-speed broadband over cable is available. This will be underpinned by the recent 3.6 GHz spectrum release.²⁴
61. The exclusion of fixed broadband provided over fixed wireless access (FWA) from the retail and thereby the wholesale broadband markets would therefore seem highly incompatible with the concept that a market review should be completed on a forward-looking basis. In addition, eir would like to reiterate the extent to which not only FWA but also mobile broadband and satellite broadband serve as effective substitutes, particularly in rural areas in Ireland.
62. According to the European Commission's Digital Scoreboard, 85.6% of households in Ireland have a broadband connection (DSL, cable, FTTx, Ethernet, private leased circuit (PLC), fixed wireless, satellite and mobile wireless). However, Ireland is at the lower end of the scale in

²² <http://siro.ie/bt-first-customer/>

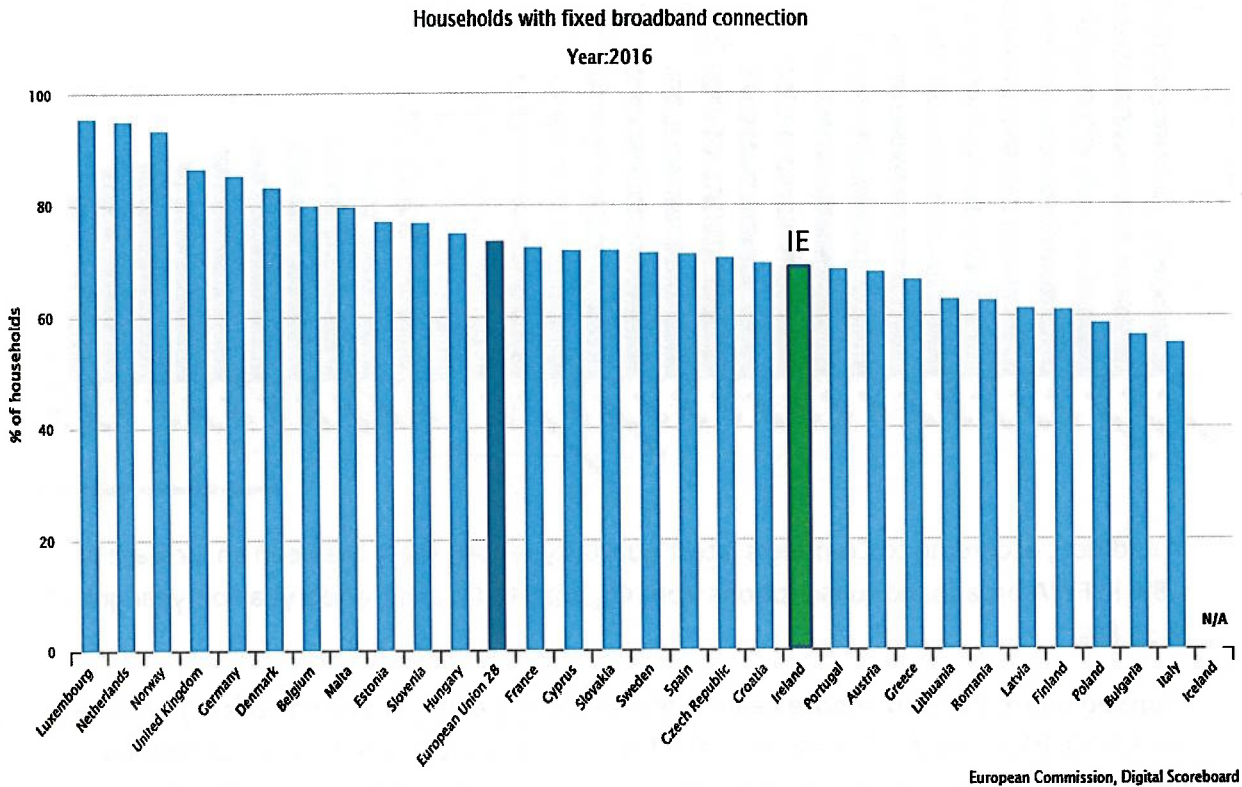
²³ <http://www.irishtimes.com/business/technology/fibre-broadband-figures-an-indictment-of-government-strategy-1.3005472>

²⁴ <http://www.huawei.com/en/news/2017/8/WTTxGame-Changer-Superfast-Broadband>



terms of households that have access to a fixed broadband connection with 68.8% of households nationally utilising a fixed connection compared to the EU 28 average of 73.8% (See Figure 4).

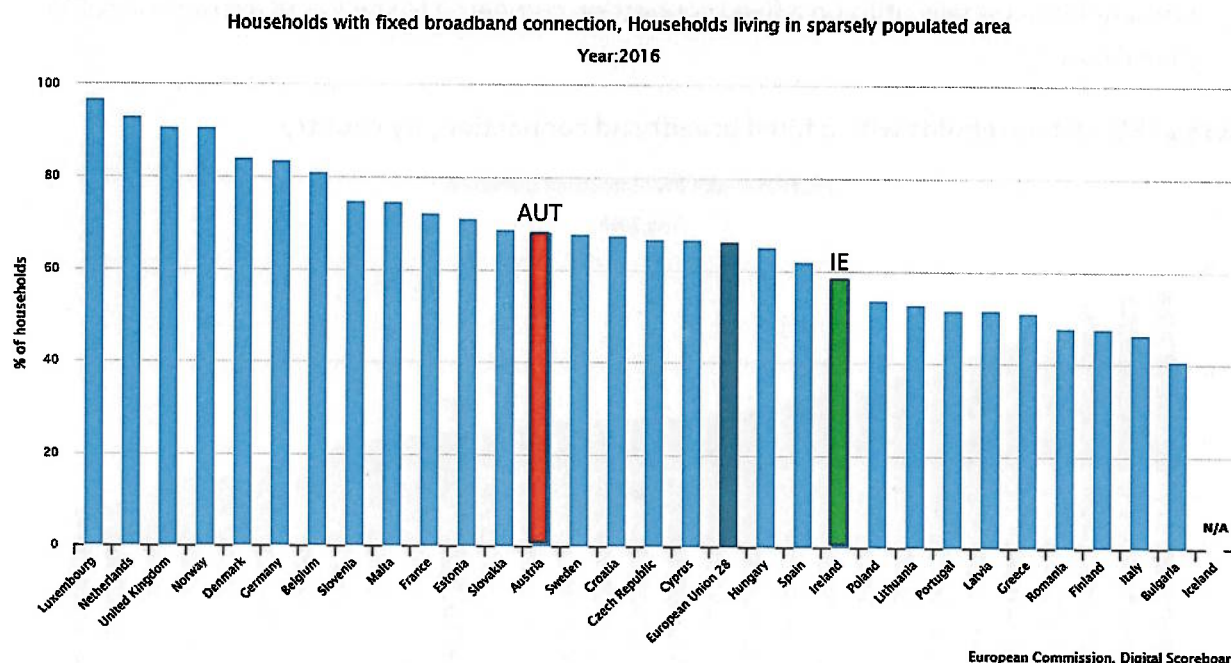
Figure 4: EU 28 households with a fixed broadband connection, by country



- 63. In terms of rural areas, there is only a slight drop in the number of households that have a broadband connection (of any type) at 81.4%. However, the change in the number of households with a fixed broadband connection as opposed to urban areas is, as one would expect, more dramatic. Just over half (58.6%) of households in rural areas in Ireland have a fixed broadband connection (see Figure 5).
- 64. For comparison purposes, in Austria, the first country to propose that mobile broadband is a substitute for ADSL and cable in the retail market for residential users), 68% of households nationally have a fixed broadband connection, while the corresponding figure in rural areas is 68.1%.



Figure 5: EU 28 households in rural areas with a fixed broadband connection, by country



65. In addition, according to ComReg's latest quarterly report, there has been an increase of 1.8% in FWA broadband subscriptions from Q4 2016 to Q1 2017, and a year-on-year growth of 12.8%.
66. ComReg is proposing to impose heavily interventionist and burdensome pricing remedies in the FACO, WLA and WCA markets on the basis of what appears to be a fundamentally flawed categorisation of the retail market. This is compounded by the fact that ComReg has not properly taken into account a number of developments in upstream markets such as Siro's network agreements and Imagine's roll-out plans. There is significant market entry and expansion absent reliance on eir's network infrastructure. This increasingly dynamic infrastructure competition and the increasingly competitive state of the markets does not support ComReg's proposal to indiscriminately impose more heavy-handed obligations, which by their very nature are extremely prone to regulatory error.

Question 2: Do you agree with ComReg's preliminary view that the NRT could be removed as a pricing remedy in Market 1 (of 2007) if there was appropriate wholesale regulation upstream? Please justify your views.

67. eir agrees with ComReg's preliminary view that once appropriate wholesale regulation is imposed upstream then the NRT can be removed. However, eir does not agree that ComReg's justification supports its preliminary view as set out in the Consultation.
68. ComReg considers that as a series of retail MSTs are being imposed which are anchored in the upstream wholesale markets (FACO, WLA, WCA) it can remove the NRT test which is



currently based in Market 1 (which is a retail market and is no longer a market identified by the European Commission as being susceptible to ex-ante regulations).

69. In addition to being ultra vires (see eir's response to Question 1), eir considers that ComReg has:
- a. failed to consider all the regulatory options available, including not considering the effectiveness of ex-post competition law in addressing ComReg's concerns regarding foreclosure;
 - b. relied on an erroneous view that a retail MST is required as a preventative measure of foreclosure, notwithstanding that due to proposed concurrent SMP pricing remedies eir does not have the ability to successfully undertake such a strategy;
 - c. failed to identify why asymmetric replicability in general is a desirable outcome for consumers.

ComReg has not considered all the regulatory options available

70. When the underlying wholesale inputs in the WLA, WCA and FACO (WLR) markets are subject to price control by cost-orientation all downstream ex-ante MSTs should be removed. There is no economic reason, once there is cost-orientation, to also have MSTs — given that it requires loss-making retail prices below cost with no reasonable prospect of recoupment. Therefore, both the general anti-competitive effects set out in the Consultation are illusory.
71. With respect to FTTH, which is the only wholesale input which is not proposed to be cost-orientated, ComReg is proposing in the WLA / WCA Pricing consultation to concurrently impose a retail MST between FTTH NGA retail prices and FTTH Bitstream services on a standalone basis. Consequently, eir submits that all the wholesale pricing remedies are in place such that ComReg's concern regarding foreclosure is now adequately addressed. ComReg should revisit the "justification" and "general anti-competitive effects" it has set out in the Consultation in light of this.
72. While ComReg is portraying in this Consultation that it is removing downstream regulation, to an informed reader it is evident from the substance of the far reaching and rigid minutia of the series of retail MSTs proposed that while anchored in wholesale markets, ComReg's proposals are in fact retail regulation through the back door — imposed without the required process or recourse to the appropriate statutory powers.
73. eir submits that ComReg should fully consult on all the regulatory options available. ComReg has traditionally argued, although not in this Consultation, that competition law is inadequate *"as it requires an ex-post assessment after any alleged anti-competitive practice has occurred and therefore such an assessment may be too late to prevent competition and efficient*



*infrastructure investment being adversely affected beyond repair*²⁵. However, this reasoning applies equally to any de-regulated and competitive market.

74. ComReg states in paragraph 3.24 of the Consultation that it considers "ex-post enforcement provided under competition law would be inadequate" and that, as stated by the European Regulators Group ('ERG'), "ex-ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets". However, whether an ex ante MST is warranted requires a careful assessment of the likely risks of imposing such a test compared with not imposing such a test. Compared with relying on competition law, ex ante tests carry a significant risk of preventing or hindering pro-competitive price offers. Furthermore, had ComReg fully considered the ERG report which it presents as championing an ex-ante MST, ComReg would have identified that the ERG only proposed this ex-ante remedy in particular circumstances, *"the firm must be active in the downstream market, which must not be effectively competitive. This does not mean that the vertically integrated firm needs to hold a dominant position downstream; it just means that there needs to be the prospect of supra-competitive profits in the downstream market so that the firm has an incentive to MS"* — as is clear from paragraphs 83-96 — this is not the case. The requirement to consider the competitiveness of the market before imposing ex-ante regulation is also explicitly specified in the Framework Regulations (see paragraph 76).
75. Furthermore, as stated in the European Commission's staff working document explanatory note to the 2014 Recommendation on relevant markets "despite the fact that bundling is one of the dominant trends observed at the retail level, this Recommendation does not propose to define a separate retail market for bundles because evidence to date has not indicated that there is a need for ex ante regulation of bundles, which may contain a previously regulated input." [emphasis added].
76. In addition, Regulation 16 (f) of the Framework Regulations²⁶ authorises ComReg in "imposing ex-ante regulatory obligations **only where there is no effective and sustainable competition** and relaxing or lifting such obligations as soon as that condition is fulfilled"[emphasis added]. Accordingly, ComReg does not have the power to impose these proposed regulations.
77. Paragraphs 3.14 and 3.15 of the Consultation set out a concern that given the importance of bundles, that without regulation, there will be a lack of oversight. However, ComReg fails to acknowledge that in any fully formed functioning markets that this will always be the case. Applying asymmetric ex-ante retail regulation on eir alone does not address this issue. All regulatory "concerns" identified by ComReg can equally apply, in theory, to all retail operators. However, the Consultation does not consider this. Of course, the merits or

²⁵ ComReg Decision D03/16.

²⁶ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.



otherwise of these regulatory concerns could have been readily established had ComReg undertaken the required Three Criteria Test.

78. Furthermore, it is unclear how this ex-ante retail regulation would be consistent with the EC Recommendation on the relevant products and services markets which states:

"... A downstream market should only be subject to ex ante regulation if competition on that market still exhibits significant market power despite the presence of ex ante regulation on the related wholesale upstream market(s)" [emphasis added]

79. ComReg has failed to undertake even the first step to justify imposing such regulation, a Three Criteria Test analysis to assess the suitability of the retail market for ex ante intervention, including an assessment of its competitiveness and the sufficiency of ex post competition law to address any residual risk of market failure. Had ComReg undertaken such a test or applied a cogent economics effects-based theory of harm it would have identified that its proposed remedy is inconsistent with its regulatory objectives and in particular Regulation 16(2) (f) of the Framework Regulations.²⁷
80. ComReg's concern of foreclosure can only be valid where eir can sustainably prevent effective competition — in the first instance by setting very low retail prices, and in later periods by setting very high retail prices — the after-effects of which are unaffected by the independent actions of its competitors and customers. As demonstrated in paragraphs 83-96, this is not the case.
81. eir submits that should ComReg maintain a view that due to timing concerns competition law alone is inadequate, which eir submits is incorrect, it should not exacerbate this error by departing from the economic principles and methodologies used in applying competition law in designing any additional remedy. In any event ComReg cannot simply impose ex-ante remedies on a competitive retail market without an appropriate economic assessment in order to determine if the competition concerns identified by ComReg can actually manifest.
82. ComReg should also explain expressly on what basis it has determined that it is appropriate for it to intervene in the retail market, seemingly on the basis of a lower standard of economic justification when compared to the general requirement to find SMP before any remedy can be imposed, and in so doing which statutory powers it purports to be exercising, and how it considers that approach to still be aligned with the desired outcomes envisioned by the EC Recommendation:

"The application of the three criteria should limit the number of markets within the electronic communications sector where ex ante regulatory obligations are imposed and thereby contribute

²⁷ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.



to the aim of the regulatory framework to reduce ex ante sector-specific rules progressively as competition in the markets develops".²⁸

ComReg has over-relied on a theoretical possibility to justify “de facto” retail regulation and failed to consider how far other controls successfully address any foreclosure concerns

83. An important issue in this Consultation is for ComReg to establish at a conceptual level — but grounded in the realities of the Irish market — that a vertically integrated operator which is dominant in the wholesale market can successfully undertake a price/margin squeeze strategy in the context of bundling one or more services together.
84. Paragraphs 3.7-3.8 and 3.14-3.22 of the Consultation set out a number of simplified general anti-competitive concerns which a vertically integrated firm could theoretically undertake if found to have SMP at the wholesale level. However, a key assumption in all the examples provided is that such a firm is not subject to any regulatory remedies. In this context, it is important to highlight that anti-competitive concerns such as excessive pricing or leveraging from the wholesale market are already addressed by ComReg in imposing cost-oriented prices, non-discrimination, transparency and cost accounting remedies at the wholesale level. Such a requirement is also recognised in the European Commission’s staff working paper explanatory note to the 2014 Recommendation such that even *“When a retail market has been identified as not being effectively competitive absent regulation, the market to be analysed first is the one that is most upstream of the retail market in question in the vertical supply chain. Taking into account the ex ante regulation imposed on that market (if any), an assessment should be made as to whether SMP is likely on a forward-looking basis on the related downstream market(s)” [emphasis added]*.
85. Consequently — the examples provided by ComReg in the context of eir raising its wholesale prices are factually incorrect — as prices for LLU, WLR, CGA and NGA FTTC services are required to be subject to cost-orientation by ComReg and by definition cannot be excessive and are prices which can only be changed with supporting cost models approved by ComReg.²⁹ Consequently, the only remaining anti-competitive concern identified by ComReg involves eir reducing its retail prices to the extent that it could foreclose competition. As discussed in paragraphs 86-96 this is not a valid concern.
86. In paragraph 3.9 of the Consultation, ComReg states that by eir reducing retail prices there may be the incentive concern that *“OAOs may exit the market as a consequence of a margin*

²⁸ Recital 17, 2014 Recommendation.

²⁹ The conditionality of ComReg’s margin squeeze concerns stemming from the wholesale market is also recognised by Oxera which note in their paper that *“...It [eir] can do this by either increasing wholesale charges (if these are not regulated)”* [emphasis added]. Similarly, no evidence or justification is provided by Oxera as to how eir could successfully cause a margin squeeze resulting in supra-normal profits by reducing its retail prices. Indeed, Oxera’s analysis on page 24 and 25 of their report suggests that the success of such a bundling pricing strategy is also quite conditional.



squeeze pricing strategy and/or may be deterred from future entry where there is a threat that Eircom might repeat the margin squeeze (even when margins are restored to their pre-squeeze level)”.

87. First, this rationale is flawed in that there are already a number of large well-resourced companies with differing commercial strategies operating in the Irish market and therefore it is highly unlikely that any exclusionary predatory pricing strategy to foreclose the market would be successful. Some of those operators also have greater access to elements of bundles than eir is ever likely to have.
88. Second, eir would not have any incentive to do so. The reality is that such a predatory pricing strategy would be undermined because eir could not profitably raise prices again — due to competition from other operators using WCA inputs (which as ComReg has stated is a competitive market in the Urban area) and from operators using regulatory access and cost-oriented obligations in the WLA, WLR including the WCA inputs of CGA and NGA FTTC inputs outside the Urban area. In order for a foreclosure strategy to be “commercial” the firm imposing the margin squeeze must somehow be able to recoup the profits sacrificed. This profit sacrifice must include the wholesale revenue foregone (i.e., the revenues lost as a result of operators leaving the market due to the margin squeeze) and the recoupment of downstream margins as a result of pricing below cost. As the wholesale prices are cost-oriented, they are fixed and therefore cannot increase to off-set any profit sacrifice (i.e., neither the wholesale revenues lost nor the additional downstream costs which are no longer recovered from retail prices can be recouped by having higher wholesale prices in later periods). In that sense, when previously exited operators re-enter the market based on the access and cost-oriented regulatory obligations, the firm is no better off than before the foreclosure took place — indeed it has lost margin relative to the sales it could have generated had no exit occurred. Similarly, at the retail level any price increases to attempt to recoup the profit sacrifice will trigger Regulation 14³⁰ — which gives customers the right to withdraw without penalty from a contract if they do not accept the proposed modification. As such, any customer market share gains during the squeeze are free to churn to another operator. Similarly, any financial gains during the period of abuse would be subject to financial penalty under competition law. As such, the firm has also failed to recoup any profit sacrifice at the retail level.
89. Third, eir would face a financial penalty under competition law for the duration of the squeeze.
90. In conclusion, eir submits that the fact that its entire retail customer base (including those customers representing the market share gained from the potential squeeze) would be free

³⁰ Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' rights) Regulations 2011.



to churn to another retail provider when prices rise, coupled with the fact that any financial gains would be more than off-set by competition law penalties, in combination with regulatory access obligations to cost-oriented WLA services (and from retail competition using WCA market inputs), means that pursuit of such a pricing strategy would not be commercially sound and would be unsuccessful.

91. In this context it is also important to note that all of eir's main competitors (including Sky, BT, Vodafone and Virgin Media), operate as part of large international corporations which take advantage of substantial economies of scale in terms of network deployment, product development at both the wholesale and retail levels, and content purchasing power and therefore, in addition to being well able to compete with eir, would readily make a complaint in the event of any potential abuse of dominance.
92. Consequently, the pursuit of such a foreclosure/margin squeeze pricing strategy would not be commercially sound and would be unsuccessful. In applying a cogent effects-based analysis to ComReg's regulatory concern, eir can demonstrate that such a regulatory fear is unfounded and illogical.
93. In paragraph 3.7 (bullet 3) of the Consultation, ComReg states that by reducing retail prices eir could undermine other wholesale OAOs' customers leading to their exit or failure to expand and thereby ultimately undermining the wholesale OAOs' business case. In response to this point, it is important to note that as recognised by ComReg "*a margin squeeze should not protect inefficient competition*".³² Consequently, any such exit at the retail level would clearly be by inefficient operators because either the wholesale price that this retail operator is purchasing is higher than eir's or that, even in purchasing a lower or equivalent wholesale cost, it was still too inefficient to be able to compete at the retail level. It is important to note that competitors face competition from eir as well as from each other including from large multi-national operators such as Virgin Media, Vodafone and Sky. Finally, in relation to ComReg's concern regarding the wholesale operator's business case, it is unclear why ComReg believes an ex-ante test is required when such a provision is already available to all such operators through ex-post competition law — in particular as the underlying wholesale inputs to eir retail's bundles are cost-oriented and therefore any below cost-selling could be readily established.
94. Paragraphs 3.14 to 3.16 of the Consultation state that "*Absent a specific test of bundles prices, there would be no means of determining whether an Eircom bundle is replicable by an OAO*" and "*that not having oversight over how RFTS [Retail Fixed Telephony Services] and retail broadband is sold when bundled would create a significant concern for ComReg*". However, such a concern equally applies to any de-regulated and competitive market. If ComReg has a concern that lower retail prices could lead to foreclosure in the market, how is it different in

³² ComReg 17/51, paragraph 3.26.

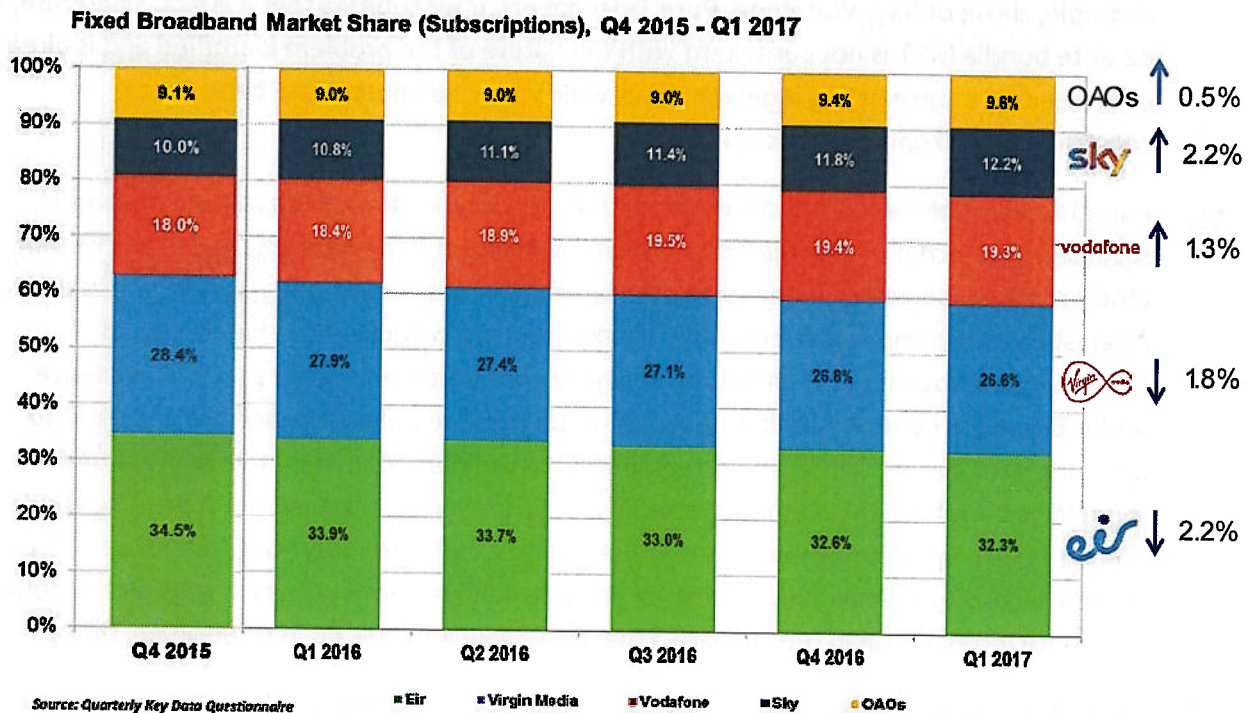


this case when ComReg doesn't have similar oversight of other competitor retail offers (for example, those of Sky, Vodafone, Pure Telecom etc.)? eir submits that it is not. Therefore, an ex-ante bundle MST is not consistent with the nature of the problem identified and is already addressed through existing legal remedies which provide appropriate behavioural constraints on all operators including eir.

95. Paragraph 3.18 of the Consultation states that *"A potential motivation to cause a margin squeeze is for Eircom to gain market power in downstream retail markets...to the extent that OAOs could no longer profitably supply the bundled services in the long-run" [emphasis added].* Against the backdrop where eir's retail market share is in decline (see Figure 6) and significantly below the 40% threshold normally considered necessary to find dominance under European competition law, any such outcomes are unlikely to occur in the short to medium term. Furthermore, should evidence of a problem in relation to margin squeeze in relation to bundles arise, ComReg would have the power to intervene in future. The choice is not between ex post competition law alone and an ex ante remedy now, but between leaving greater flexibility over bundles and retail pricing with the market today alongside the option of ex ante intervention in future (with a market review anticipated in three years' time).
96. ComReg also assert in paragraph 3.18 that *"as Eircom is a vertically-integrated operator the outlays between its retail and wholesale arms are inter-company transfers and could potentially be cash positive in aggregate (due to upstream profits and the presence of sunk costs). However, from an OAO's perspective this is a real cash outlay"*. Such argumentation fails to acknowledge that eir has strong incentives to grow demand on its network infrastructure. The investment decisions undertaken by eir require take-up from a range of retail service providers and wholesale aggregators and not just demand from eir's own retail arm. As identified in paragraph 88, eir would be worse off relative to the sales it could have generated had no exit occurred as a result of any margin squeeze strategy.



Figure 6 : Fixed Broadband Market Share (source: ComReg)



97. Paragraphs 3.20-3.22 of the Consultation set out ComReg's concerns that in relation to unregulated services, in which eir doesn't have SMP at the wholesale level, eir could leverage its market power from the wholesale market into the unregulated market and thereby undermining wholesale SMP remedies — if the costs of those unregulated services were not included in a MST. In respect to the first concern, it is unclear to the meaning of ComReg's "leveraging" concern from the wholesale market into the unregulated market through retail bundling. One interpretation may be that as eir has a large wholesale arm it could demand more favourable deals for unregulated services to offer as part of its retail bundles. This logic is flawed in that any provision of the unregulated services would be based on eir retail demand only and therefore no such "leveraging" can actually occur. In this context, it is important to note that the Irish market has a number of well-established large multinational players who can leverage their pan-European and/or global purchasing power and therefore any scale issue of eir retail compared to these operators is unwarranted (see Figure 7, Figure 8 and Figure 9). Another interpretation, as put forward in Oxera's report is that eir could try to offer mobile services (in which eir has no dominance) in a fixed voice and broadband bundle "two markets in which it is dominant at the wholesale input levels" in order for eir to gain dominance in triple play retail bundles. However, as identified by Oxera for this to be the case it is highly dependent on the consumer demand for standalone mobile services and different bundle types of services sold by other operators — and of course demand for similar triple play bundles from other operators which Oxera has omitted from its assessment. As such, the "leveraging" concern which ComReg and Oxera put forward is based on a number



of spurious assumptions which are easily counter-balanced by even Oxera's own assessment — as eir's ability to do so is conditional. Of course, the plausibility of any of these outcomes could have actually been identified had ComReg undertaken the required Three Criteria Test of the retail market.

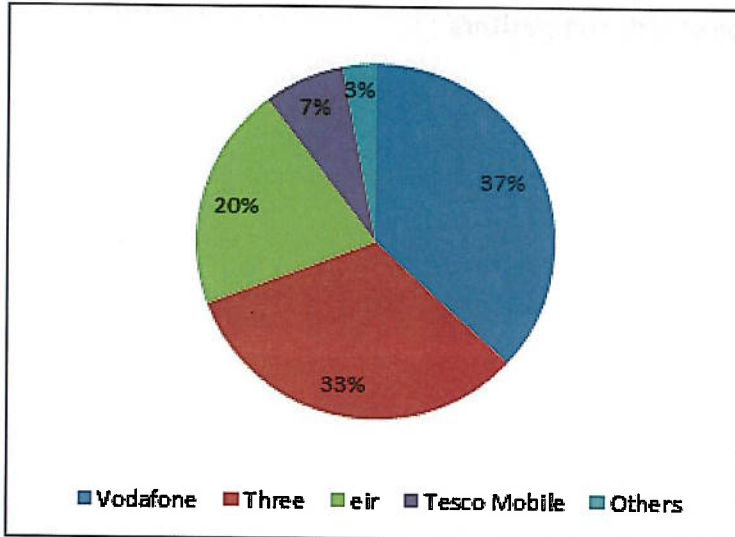
Figure 7 : Snapshot of scale and scope of eir's competitors

✕

Figure 8: Pay TV, Q1 2017

✕

Figure 9: Mobile market share (excluding M2M), Q1 2017



Source: ComReg Quarterly Key Data Report

Failed to identify the benefits of non-homogenous bundles

98. Different operators have adopted different strategies and use their own strengths in bundling service together. For example, Sky has the ability to bundle its own exclusive television content. Liberty Global (the parent of Virgin Media) owns Formula One and other content and has the ability to offer on-demand video streaming content through Netflix due to its global partnership agreement in bundles. Vodafone has a significant global presence in the mobile market and their bundle of broadband and TV includes one button access to Netflix. Therefore, it is unclear to eir why ComReg has a concern as to whether eir's exact retail offer is replicable. As recognised in the Oxera report, eir's ability to leverage market power from relevant wholesale inputs to retail bundles is unclear and depends on a number of factors being present. On page 25 of its report, Oxera states:

"For example, eircom could include mobile services at a discount in a fixed voice and broadband bundle—two markets in which it is dominant at the wholesale inputs level—hoping to extend its market power to triple-play bundles including mobile services by leveraging its market power diagonally across these markets as explained in section 2.2.1. However, its ability to do so will depend on consumer demand for and propensity to buy stand-alone mobile services supplied by competing mobile operators (such as Vodafone and Three) and different bundles of services sold by these operators (e.g. a streaming music subscription service bundled with a mobile subscription). If consumers are willing to unpick eircom's bundles in response to these competitive offers by mobile



operators then eircom may not be able to leverage its market power as effectively as it would be able to otherwise."

99. In addition, it is important to not lose sight of the fact that retail bundling is pro-competitive even when undertaken by dominant firms — which eir is not. As Bishop & Walker state *"describing a theory of anti-competitive leveraging is not the same as establishing actual competitive harm to consumers. Economic analysis indicates that tying and bundling can have both pro-competitive and anti-competitive effects. This implies that each case should be considered on its merits and there should not be per se rules against tying and bundling even when such conduct is engaged in by dominant firms"*.³² While ComReg has not per se prohibited bundling, ComReg is proposing rules to regulate in minutia every element of the test on an ex-ante basis (although more appropriate remedies exist using ex-post competition law) and so the risk of regulatory failure increases in what is a competitive and complex market.
100. As identified in Brian Williamson's paper *"Competition is not simply a matter of other market participants replicating what eir offers, and vice versa"* and that *"whilst different bundles compete they are not necessarily replicable. Requiring eir to ensure that others can replicate their bundles, when the same does not hold in reverse, is clearly asymmetric."*
101. In addition, there is a clear disjoint between ComReg's stated objective to ensure the "bundle" is replicable and the way in which ComReg has constructed the test — which is to say that cross-subsidies between elements of the bundle can only occur in one direction (from regulated to unregulated). This excessively restrictive control requires eir to maintain additional margin above what is actually required to replicate the bundle in its entirety. This means that eir's competitors can either undercut eir's price allowing them to gain market share; or, follow eir's pricing in the confident knowledge that eir cannot compete. This is liable to result, in the first instance, in prices being above competitive levels, and, in the second instance, in an unnecessary and unwarranted transfer of welfare from end-users to other operators. To apply exclusions which effectively unpick the bundle margins is not pro-competitive or pro-consumer and does not take into account the commercial decisions of retailers in bundling services together.
102. As such, ComReg's proposal that the unregulated services cannot cross subsidise the other retail services (which are all regulated by cost-orientation at the wholesale level, with the exception of wholesale FTTH services) would not be a proportionate regulatory remedy. eir would be the only retail operator to which this rule would apply, against the backdrop of a competitive retail market (in which eir's retail market share continues to decline), a competitive Urban WCA market, and competing network operators in alternative

³² *"The Economics of EC Competition Law: Concepts, Application and Measurement"*, Simon Bishop and Mike Walker, 2012, Sweet & Maxwell.



technologies such as cable, FTTH and wireless. Consequently, it would be disproportionate and unjustified in light of ComReg's statutory objectives³³ to continue to apply such a price control on eir when other operators are only restricted by behavioural constraints imposed by the threat of ex-post competition law. Finally, as stated by Brian Williamson "*Applying asymmetric regulation to eir will only accentuate and entrench the advantage others in the market hold; whilst limiting the scope for eir to offer bundles that benefit consumers, help drive broadband adoption and support competition*" and "[t]he goal of regulation should be to support investment and competition, not to support competitors or to eliminate the rationale for bundling by imposing constraints that amount to treating each service as a standalone service".

103. The concern ComReg has identified from indicative market shares absent wholesale regulation is addressed by it imposing wholesale regulation. ComReg is now over-reaching its regulatory powers to further intervene in the retail market. ComReg's unwarranted intervention is contrary to the outcomes envisioned by Regulation 6 (1) of the Access Regulations and does not achieve ComReg's objectives, nor are they proportionate relative to the nature of the theoretical and unsubstantiated problem identified (as required by Regulation 8 (6) of the Access Regulations).³⁴ ComReg has, without any market analysis or gathering of any evidence, identified possible theoretical foreclosure in the long-run and imposed short-term remedies despite there being a more appropriate and a less onerous option of relying on competitive market outcomes in the retail market. This has been done in the knowledge that ComReg has the power to intervene in the short-term under ex-post competition law and in the medium-term after undertaking a proper market analysis.
104. In this context, while the 2013 EC Recommendation does recommend a replicability test, it does so in the context of recommending an appropriate regulatory price control for NGA services through a margin squeeze as an alternative to implementing cost-orientation and not both.
105. As set out in eir's submission to ComReg's WLA / WCA Pricing consultation, ComReg's proposals are much more severe than regulation on comparable companies elsewhere in the EU. eir would be the only SMP designated operator in Europe that would be subject to concurrent cost-orientation and margin squeeze obligations for both FTTC Bitstream and FTTC-based VUA — an even starker fact when considering eir's relatively low retail market share compared with that of other European ex-incumbents.
106. In conclusion, eir submits that ComReg has failed to justify the need for retail regulation. ComReg cannot proceed to introduce a series of MSTs without a detailed market analysis. To

³³ Including its duties set out in s12(1)(a)(i) and s12(2) of the Act.

³⁴ Even if ComReg were justified in taking such measures under the Access Regulations, which eir does not agree with (see paragraph 36).



introduce retail regulation through a wholesale market is merely introducing retail regulation through the back door.



Figure 10: Regulation of FTTC Bitstream

Country	No regulation	Margin squeeze (or retail minus)	Cost-oriented (some with a mark-up over costs)	Margin squeeze and cost-oriented	Incumbent's national broadband market share
Luxemburg		✓			67%
Croatia			✓		59%
Austria		✓			59%
Estonia			✓		58%
Denmark			✓		53%
Macedonia	✓				53%
Switzerland	✓				52%
Malta	✓				50%
Latvia	✓				50%
Lithuania	✓				50%
Belgium		✓			50%
Italy			✓		46%
Cyprus			✓		46%
Greece			✓		45%
Spain			✓		44%
Netherlands	✓		✓		42%
Norway		✓			41%
Germany		✓ ¹			41%
France			✓		40%
Slovakia	✓				39%
Hungary		✓			38%
UK	✓				37%
Sweden	✓				37%
Slovenia		✓			35%
Ireland		✓		✓	32%
Portugal	✓				33%
Poland			✓ ²		32%
Finland	✓				29%
Czech Republic	✓				28%
Romania	✓				27%
Bulgaria	✓				26%

Source and notes: Pricing regulation from national regulators websites and Incumbent's broadband market share from Telegeography, GlobalComms Database. ¹ Price squeeze test, IP-BSA: Ex post price control for abusive prices, L2-BSA: Ex ante price control based on LRIC+15% and PST, ² Cost regulation only in areas considered not competitive <https://en.uke.gov.pl/new-regulations-concerning-wholesale-broadband-internet-access-services-in-poland-14775>

Figure 11: Regulation of FTTC-based VUA

Country	No regulation	Margin squeeze (or retail minus)	Cost-oriented	Margin squeeze and cost-oriented	Incumbent's national broadband market share
Luxembourg	✓				67%
Croatia	✓				59%
Austria				✓	59%
Denmark			✓		53%
Estonia	✓				58%
Macedonia		✓			53%
Switzerland	✓				52%
Malta		✓			50%
Latvia			✓		50%
Lithuania			✓		50%
Belgium			✓		50%
Italy				✓	46%
Cyprus	✓				46%
Greece				✓	45%
Spain				✓ ¹	44%
Netherlands	✓ ²				42%
Norway		✓			41%
Germany			✓		41%
France			✓		40%
Slovakia			✓		39%
Hungary	✓				38%
UK		✓ ³			37%
Sweden			✓ ⁴		37%
Slovenia	✓				35%
Ireland		✓		✓	32%
Portugal	✓				33%
Poland	✓				32%
Finland	✓				29%
Czech Republic		✓			28%
Romania	✓				27%
Bulgaria	✓				26%

Source and notes: Pricing regulation from national regulators websites and Incumbent's broadband market share from Telegeography, GlobalComms Database, ¹No VULA obligation in the more competitive 66 municipalities, ²ACM said it would only adopt a price control decision if the market does not reach an agreement. In that case, a combination of a price cap and a price squeeze test would apply. ³Proposed to move to price regulation for speed up to 40 Mbit/s. ⁴At the time of last market review in Sweden, TeliaSonera has 39% of the retail market, almost double the next largest operator (Telenor with a share of 20%) and much higher than the cable operator Com Hem with a share of 18%.

Question 3: 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) of the FACO wholesale



components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself? Please provide cogent reasoning to justify your views.

107. eir does not agree that where wholesale prices are cost-oriented that a concurrent ex-ante MST is appropriate. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs.
108. eir does not have SMP in the retail market for retail line rental. eir's market share for fixed voice (whether sold on a stand-alone basis or in bundles) continues to decline, currently 39.3%, and is below the 40% threshold normally considered necessary to find dominance under European competition law. See also paragraphs 110 and 116. This means that any such competition concerns arising from FACO bundles are unlikely to occur in the short to medium term.
109. ✂.

Figure 12: eir's proportion of fixed voice subscriptions – standalone and within a bundle, Q1 2013 to Q1 2017

✂

Figure 13: Dual Play – eir's Broadband and Fixed Voice Subscriptions, Q1 2013 to Q1 2017

✂

110. Upon examination of eir's fixed voice and broadband subscriptions as a proportion of all dual play bundle subscriptions and all bundle subscriptions at the market level (See Figure 14), it is clear that eir is below the threshold that would be considered for market power to be identified.

Figure 14: eir's fixed voice and broadband subscriptions as a proportion of all dual play bundle subscriptions and all bundle subscriptions, Q1 2013 to Q1 2017

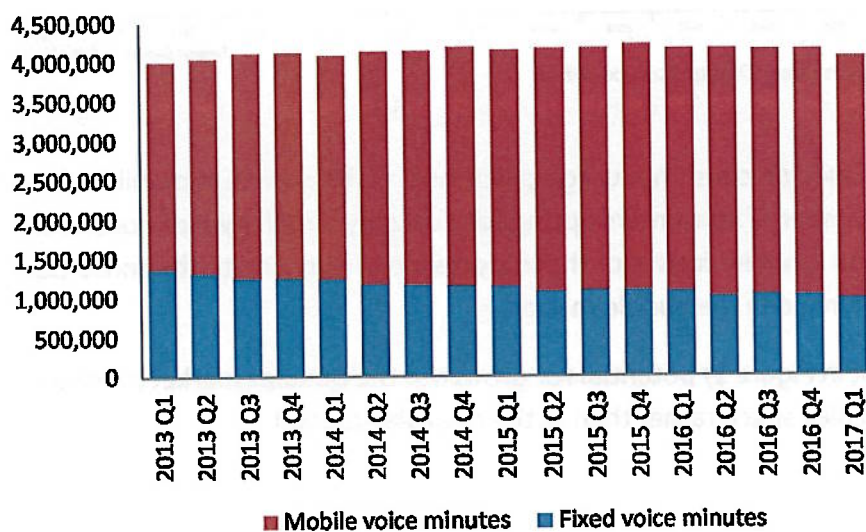
✂

111. In addition, the fact that fixed voice is being increasingly sold as part of a bundle does not necessarily infer that the fixed voice component is important to customers or indeed that its inclusion in a bundle drives demand in this market, but rather that the bundling of fixed voice with broadband services is an inheritance of the historical configuration of the fixed line market. In other words, as identified in Brian Williamson's paper the importance of fixed-voice within bundles is overstated "*because consumers who had fixed line voice have progressively adopted fixed broadband, rather than via a conscious decision to adopt a "bundle" of fixed voice and fixed broadband*". The European Commission also has recognised this in its explanatory note to the 2014 Recommendation stating that "*in cases of the provision of the fixed voice service with broadband access and/or IPTV, bundling at the retail level is rather a*

phenomenon of continued provision of a declining fixed voice service alongside broadband access and/or IPTV, rather than an economically significant offer that alters the competitive dynamics over a longer period.”

112. In fact when usage patterns of fixed voice services are examined, it is clear that customers are increasingly switching to mobile voice usage. Globally, fixed voice minutes have declined relative to mobile voice minutes. This is a trend that is replicated in Ireland with a continual decline in fixed voice minutes from Q1 2013 to Q1 2017 (See Figure 15).

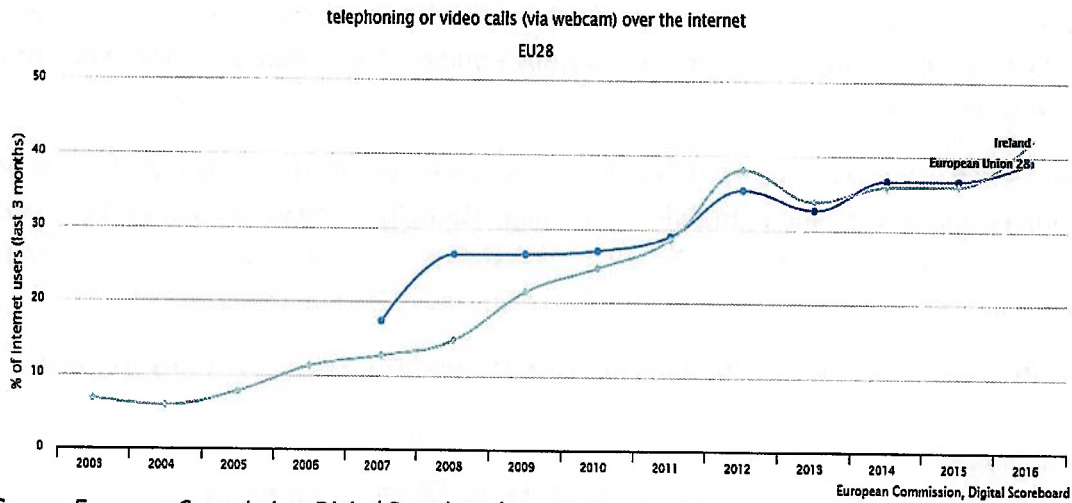
Figure 15: Proportion of National Mobile and Fixed Voice Minutes, Q1 2013 to Q1 2017



Source: ComReg Quarterly Key Data Report

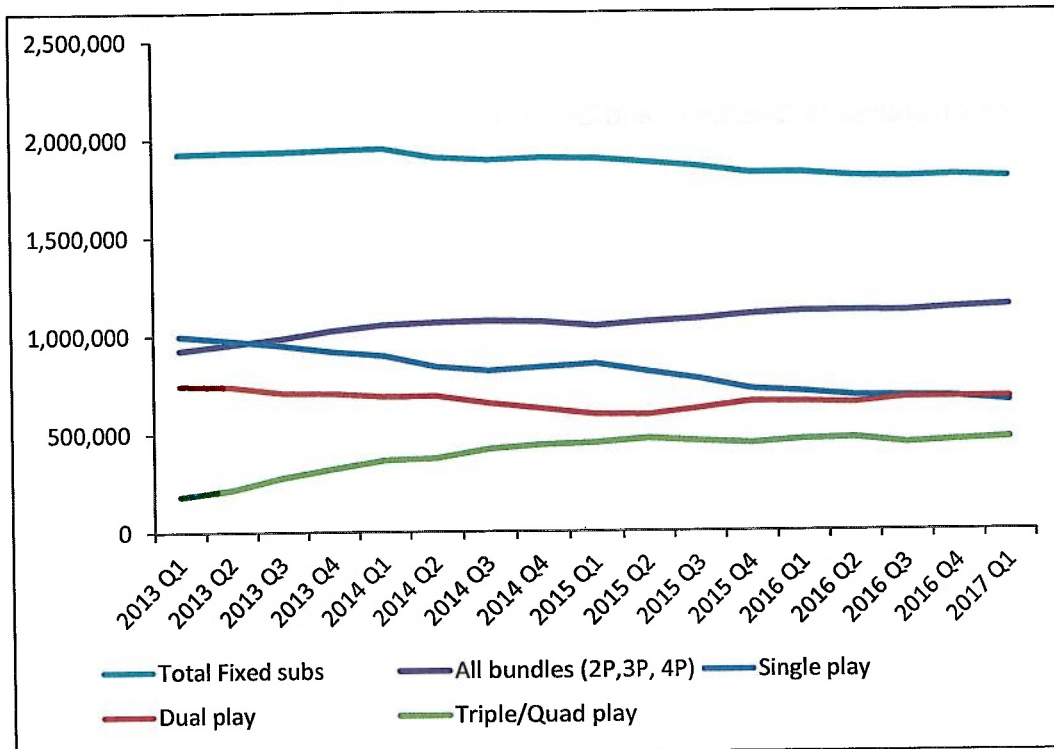
113. Furthermore, consumers are increasingly moving away from legacy voice services to over-the-top ('OTT') communication services, including both voice and video calls. According to the European Commission's Digital Scoreboard, 42.2% of internet users in Ireland had used telephoning or video calls (via webcam) over the internet in the last 3 months (as of the end of 2016). This is a trend that has remained in line with the EU 28 average since 2007 and has in fact currently surpassed the EU average (See Figure 16).

Figure 16: Take up of telephony or video call services over the internet in Ireland and the EU 28



114. eir considers that based on consumer usage patterns and the growth in mobile voice and OTT services the number of consumers opting for dual play bundles which consist of fixed voice and broadband is not indicative of the importance of bundling to the consumer nor the elements driving demand in the bundle market.
115. In fact, as is evident in Figure 17 potential for growth in the Bundles market presents itself in the triple and quad play space rather than in the dual play market.

Figure 17: Breakdown of subscription types in Ireland, Q1 2013 to Q1 2017



Source: ComReg Quarterly Key Data Report

116. In the context of the triple and quad play bundles market, eir's market share is approximately 3% (See Figure 18). Which is significantly below the 40% threshold normally considered necessary to find dominance under European competition law.



Figure 18: Growth in triple and quad play bundles and eir's market share, Q1 2013 to Q1 2017



117. See also eir's response to Question 1 and Question 2.



Question 4: Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

118. eir does not agree that where wholesale prices are cost-oriented a concurrent ex-ante MST is appropriate. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs.
119. eir does not have SMP in the retail market for retail broadband. eir’s market share for broadband (whether sold on a stand-alone basis or in bundles) continues to decline³⁵ (see Figure 6) and is significantly below the 40% threshold normally considered necessary to find dominance under European competition law. This means that any such competition concerns arising from WCA bundles are unlikely to occur in the short to medium term.
120. As recognised by Oxera *“Retail competition from alternative network operators like Virgin Media and SIRO will also constrain eircom’s ability to leverage its wholesale market power because such infrastructure based competition is not dependent on wholesale access inputs provided by eircom. Again such retail competition is more prevalent in Zones 1 [Urban Area] and 2 [Regional Area 1] where these alternative operators have network coverage (or are likely to expand network coverage)”*. Similarly, as the wholesale broadband market is already competitive in the Urban area, ComReg should consider what prevents other retail operators using WCA services from undertaking a margin squeeze against operators dependent on purchasing cost-oriented WLA inputs from eir. Using the same coherent theory of harm, how is it plausible that this is somehow different in eir’s case?
121. The discursive narrative and justification set out in paragraph 3.42 of the Consultation for the retail margin squeeze is not transparent relative to the actual test ComReg proposes in the Urban area. ComReg’s stated objective in proposing this MST is to prevent foreclosure in the WLA market. Indeed, ComReg states in paragraph 5.71 of the Consultation that: *“...for the Urban Area the WAWNI calculations will assume that the inputs these OAOs are using are WLA only i.e. VUA (in the case of NGA), and LLU (in the case of CGA)”*. However, in the proposed MST (see Table 5.1 of the Consultation) it appears that ComReg proposes to include the wholesale price of WLR/POTS — which is not a wholesale service in either the WLA market or WCA market — as an input to the test. Therefore, the question as to whether respondents’ agree or disagree relative to a test in the Urban WCA Market between the WLA components required to replicate an eir retail bundle is misleading. This is further discussed in eir’s response to Question 9.
122. See also eir’s response to Question 1 and Question 2.

³⁵ 32.3%



Question 5: Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the prices of the WCA wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

123. eir does not agree that where wholesale prices are cost-oriented that a concurrent ex-ante MST is appropriate. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs.
124. Furthermore, as set out in eir’s response to ComReg’s WLA / WCA Pricing consultation, there is no evidence of SMP in the wholesale market for Bitstream.³⁶ See also paragraph 61.
125. See also paragraph 119.
126. For bundles containing FTTH, which is the only remaining wholesale service which is not proposed to be subject to cost-orientation, the replicability test proposed by ComReg is inconsistent with the 2013 EC Recommendation. See paragraph 196.
127. See also eir’s response to Question 1 and Question 2.

³⁶ eir’s response WLA/WCA Pricing consultation, paragraph 44-51.



Question 6: ComReg is interested in receiving views from interested parties on the Proposed Urban Area, Regional Area 1 and Regional Area 2 as they apply to bundles. Please provide detailed reasoning and supporting information (where available) to support your views.

128. The original Bundles Decision was published in February 2013 based on a 2007 market analysis for retail fixed narrowband access and some two and a half years after the 2011 market analysis for wholesale broadband. At that time, the creation of the Larger Exchange Area attempted to recognise, absent more updated market analysis, that retail competition was continuing to develop and that infrastructure development was continuing to grow (in particular Virgin Media and eir's roll-out of FTTC). At the time of the Bundles Decision the wholesale services of WLR, CGA and NGA were all set either on a retail-minus or on a margin squeeze basis. This meant that eir had the pricing flexibility to change its wholesale prices provided that there was sufficient margin between such prices and its equivalent retail price.
129. Today, WLR and CGA are subject to cost-orientation and ComReg is proposing in its WLA / WCA consultation to also set NGA FTTC services based on cost-orientation. Therefore now is the appropriate time to remove the current NRT and not impose any alternative retail margin squeeze remedy — thereby also recognising that the “unreasonably bundle” obligation in the retail market only exists in the old retail Market 1. ComReg has failed to undertake even the first step to justify imposing such regulation in a retail market, a Three Criteria Test analysis to assess the suitability of the retail market for ex ante intervention. As such, eir considers that defining sub-geographic areas in a national retail market is not appropriate.
130. In respect of the regulatory sub-geographic areas defined by ComReg, which eir does not agree is appropriate, eir has the following comments.
131. As stated in the European Commission's staff working document explanatory note to the 2014 Recommendation on relevant markets *"The exact criteria to be taken into account when assessing the homogeneity of competitive conditions in different geographic areas may vary depending on the market(s) in question but are based on the same competition law principles to be applied for any geographic market delineation. This means that NRAs should look at the number and size of potential competitors, distribution of market shares, price differences or variation in prices across geographies, and other related competitive aspects, which may result from relevant competitive variations between geographic areas (nature of demand, differences in commercial offers, marketing strategies etc."*. It is unclear what analysis, if any, or the in-depth extent of such analysis, ComReg has undertaken in revisiting the Larger Exchange Area criterion in defining sub-geographic areas. A cursory view of derived market shares based on geographic areas (see Annex 2 of the Consultation) is not sufficient to enable any economic regulatory authority to impose ex-ante regulation. Creating sub-geographic regions to impose de-facto retail regulation in those areas when ComReg has failed to even undertake the required national retail market analysis, let alone any at a sub-geographic



level, is bad regulatory practice and certainly not to the standard required by the 2014 Recommendation.

132. The relationship between retail and wholesale products is many-to-many, rather than the one-to-one situation originally envisaged by the current Bundles test pursuant to ComReg Decision Do4/13. 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 was also recognised in Compass Lexicon's paper submitted as part of the Vodafone response to ComReg's 16/96 market consultation *"Operators do not set localised prices depending on whether an exchange area is served based on WLA or WCA. An operator may rely predominantly on WLA and only use WCA in exchange areas in which volumes do not justify using WLA, as we understand is the case for Vodafone. Under national pricing, an increase in WCA prices should at most be passed on into retail prices in proportion to the share of the operator's user base served using WCA. However, the incentive for an operator to do so will depend on any impact this will have on its competitiveness across its entire retail offering."* As such, by ComReg defining individual geographic areas with separate and more stringent tests depending on the regulatory area bears a significant risk of regulatory failure as a result of its heavy handedness and lack of recognition of the market dynamics and does not replicate the pricing strategies undertaken by retailers in the competitive national market.
133. For example, as demonstrated in paragraph 189, by now proposing separate portfolios, ComReg is actually reducing the pricing flexibility previously available to eir retail in Regional Area 1 by ca. 3% for CGA retail offers.³⁷ Due to national pricing this means that the Urban Area flexibility is also foregone due to the requirement of eir to pass a more severe retail MST for exactly the same retail products in the Regional Area 1 and more severe test Regional Area 2. Similarly, by proposing a less efficient cost standard in Regional Area 1 and Regional Area 2 the national retail pricing (all other things being equal) of CGA will be ca. 3% on average higher than required in the Urban Area due to Regional Area 2 margin squeeze test requirements. Similarly, where national prices are set irrespective of underlying technologies this will also impact eir's NGA prices (in Urban Area and Regional Area 1). ComReg's approach creates a pricing umbrella below which other operators are free to charge safe in the knowledge that eir cannot compete. This could not have been ComReg's intention and if it were it indicates a lack of understanding of competition in the retail market and of ComReg's regulatory duties. The approach of applying different bundles tests based on artificial regulatory regions will have a negative impact on consumers through inefficient pricing over and above the competitive level. This approach is inconsistent with ComReg's

³⁷ NGA retail offers are also impacted 3%.



statutory duties not to distort competition and to promote competition and provide the maximum benefit to end-users.³⁸

134. It is also worth noting that due to the contiguous nature of eir's network deployment there may be multiple exchange footprints in a single residential area or within a county boundary. Therefore, by setting varied and complex tests in different "areas", any offers are based on the highest regulatory bar set by ComReg. Also, as ComReg is aware, in the retail market pricing is national and not regional.
135. From an administrative point of view given the increasing infrastructure based competition that is occurring in Ireland it appears that ComReg is best positioned to ensure that the list of exchanges categorised as Regional Area 1 and Regional Area 2 are kept up-to-date. As stated by ComReg in the Consultation:

"ComReg expects that the following will add further exchanges to the LEA:

- *Eircom's NGA roll-out plan continues to expand outside the current LEA footprint;*
- *Virgin Media has announced plans to further expand their network footprint to more towns around the country;*
- *The national electricity network (ESB) has launched a joint venture, Siro, with Vodafone. Siro has entered the Irish broadband market and is leveraging the electricity access network; and*
- *The Government's National Broadband Plan (NBP) which aims to ensure a minimum speed of 30Mbps across the country may well have an impact on the take-up of bundles, and enhance competition over the medium to longer term."*³⁹

136. Apart from eir's NGA roll-out plan, the details of which are available to all operators, eir's retail arm does not have sufficient detail to accurately suggest updates to or maintain the LEA. Therefore, in order to ensure that any retail pricing flexibility proposed by the Consultation is attainable by or available to eir, ComReg must accept the responsibility of keeping the analysis fully up-to-date. This would also require ComReg to systematically collect information from OAOs undertaking alternative network investment including Siro, Imagine and Virgin Media.
137. In addition, where exchanges meet the Urban Area criterion over time that area must immediately be taken into account in the pricing remedies. The reason that eir finds it necessary to insist on this immediate action, is due to the continued and substantial negative impact on eir's leased line business in a competitive market as a result of the inexcusable and on-going delay in ComReg's review of the price control by cost-orientation implemented in that market in 2008.

³⁸ Section 12 of the Communications Regulation Act 2002 (as amended).

³⁹ ComReg, Consultation, paragraph 4.17.



138. eir considers that in order to provide retail certainty for all operators, including eir, once an exchange area is allowed greater pricing flexibility then an exchange area cannot be downgraded to a more stringent Regional Area.



Question 7: Do you agree with the proposed cost benchmarks for retail costs to be included in the bundles MST?

139. eir agrees with ComReg's preliminary view regarding the use of EEO to calculate the retail costs of line rental and call costs.
140. eir does not agree with ComReg's preliminary view regarding the appropriate cost base to use for broadband costs. In particular, eir considers that ComReg has:
- a. failed to fully justify the proposed operator cost base in the Urban area, although eir agrees that the ComReg's preliminary view to use the EEO cost base is correct;
 - b. proposed an operator cost base which is inconsistent with the competition issues identified in Regional Area 1 and Regional Area 2.

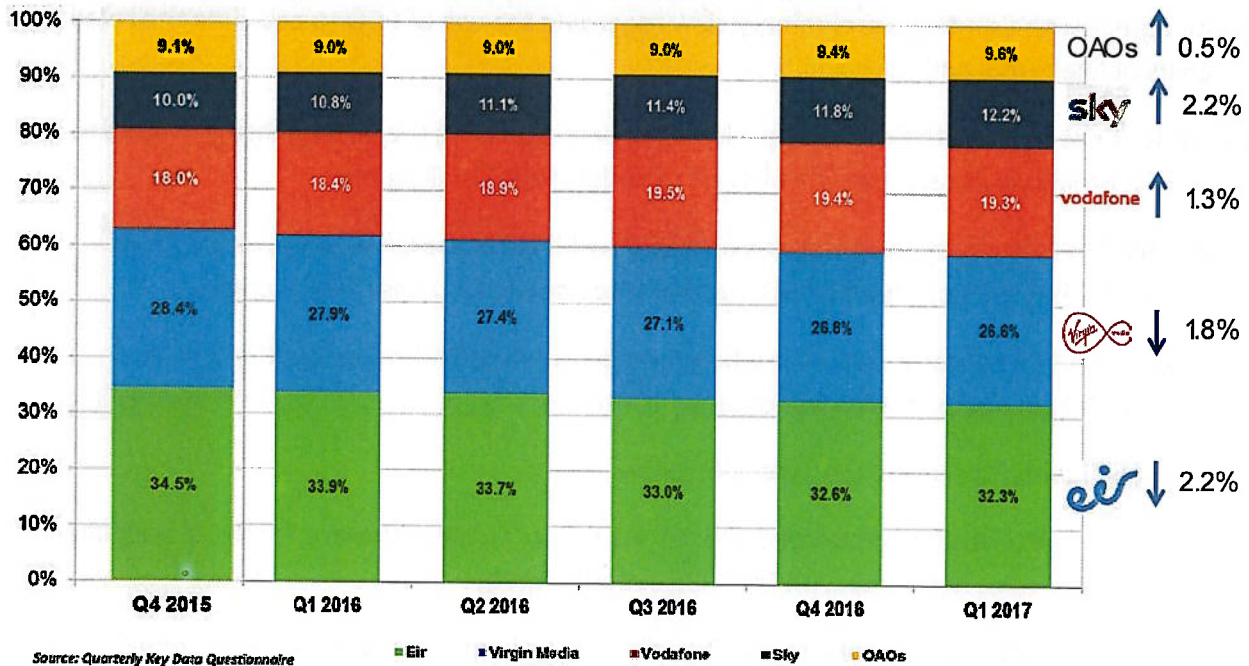
Failed to fully justify the proposed operator base

141. eir agrees with ComReg's proposed use of the EEO cost base in the test for the Urban area. However, eir does not agree with ComReg's methodology.
142. ComReg's reasoning as to why the EEO methodology is appropriate is because "*retail broadband is competitive in the Urban Area*" and Oxera's view is "*that eircom is not the largest provider of broadband services in Zone 1, a move to EEO from a mix of EEO and SEO for NGA and CGA broadband would be appropriate in Zone 1*" is presenting the competitive market dynamics in a simplified way. Both the Urban WCA market and the WCA retail market are competitive as recognised by ComReg's market analysis consultation 16/96. As such, the use of the EEO cost base is consistent with competition law and aligns with the 2013 EC Recommendation.
143. Based on the national retail market shares of other operators a lower cost base would be inconsistent with ComReg's statutory objectives under Section 12 of the Act — in particular, in promoting competition and encouraging efficient investment. An alternative cost base on the other hand would provide unnecessary margin and result in static and dynamic inefficiency in WLR, WCA and WLA markets. A higher cost base would result in regulatory windfall gains to OAOs and lead to inefficient investment decisions over-time. Which are all to the detriment of consumers.



Figure 19: Fixed Broadband Market Share (source: ComReg)

Fixed Broadband Market Share (Subscriptions), Q4 2015 - Q1 2017



144. Furthermore, due to the low barriers to geographic expansion in the retail market coupled with the fact that there are large multinational broadband providers already in the market, an alternative cost base would be contrary to ComReg's statutory obligations as set out in Regulation 6(1) of the Access Regulations) and would be inconsistent with Regulation 8(6) of the Access Regulations⁴⁰ — which requires ComReg to impose only objectively justified and proportionate obligations. An alternative cost base is unwarranted given the existing competitive nature of the market and any additional margin would result in a direct transfer in benefits away from consumers to OAOs.

Incomplete justification of the assumed operator cost base

145. eir does not agree with ComReg's preliminary view that a combined REO cost base (or the SEO cost base as a proxy for REO in the absence of REO cost data) and EEO cost base is appropriate for the retail MSTs in Regional Area 1. Similarly, eir does not agree that it is appropriate to use an REO cost base (or the SEO cost base as a proxy for REO in the absence of REO cost data) in Regional Area 2.

146. ComReg proposes to implement measures on the basis of its powers under the Access Regulations. As stated in paragraph 36, ComReg is acting ultra vires in seeking to impose

⁴⁰ Even if ComReg were justified in taking such measures under the Access Regulations, to which eir does not agree (see paragraph 36).



price controls in a retail market using these regulations. Notwithstanding this point, even if ComReg were justified in taking such measures under the Access Regulations (which eir does not agree with), ComReg's proposal to use REO data in the proposed retail MST(s) is inconsistent with ComReg's statutory objectives under the Access Regulations. As is evident from retail market shares, the Irish market has a number of well-established large multinational players (see Figure 19). Consequently, the use of an REO cost base would not promote efficiency, would not lead to sustainable competition, and would not maximise benefits to end-users. Similarly, it is unclear to eir how using an REO cost base would be consistent with the nature of the problem identified or which operator ComReg would choose to be the appropriate benchmark. Applying an incorrect benchmark could result in unnecessary and unwarranted margins and might have no correlation to eir's own actual costs which could in fact be higher. Accordingly, the proposal by ComReg to use REO data is inappropriate and creates legal uncertainty regarding the appropriate benchmark. The use of REO data is also inconsistent with both competition law (which uses an EEO cost base) and the 2013 EC Recommendation (which also recommends the use of an EEO cost base).

147. Secondly, it is important to highlight that the Oxera recommendations which ComReg relies on to support its preliminary views do not appear to be based on any meaningful market analysis other than assessing retail market shares in the counter-factual in each area assuming wholesale regulation is removed. This is the incorrect lens to determine retail market shares as such market outcomes are already addressed by imposing wholesale regulation. This means the retail market shares are over-stated and to base any retail remedies on such analysis is simply wrong. Furthermore, any attempt to infer significant market power based solely on market shares does not provide a complete competitive analysis. This is why the economic practice of undertaking a Three Criteria Test is required by all national regulatory authorities before imposing remedies — which ComReg has failed to do in this instance for the retail market.⁴¹ Finally, in proposing an SEO approach in Regional Area 2 (or as referred to by Oxera as Zone 3), Oxera reasons that *"This area remains less competitive in terms of retail broadband and there is no prospect of infrastructure competition...hence the SEO"*. As mentioned above, Oxera's estimate of the retail market shares is incorrect and in any event market shares do not provide any meaningful assessment of competitive conditions. In respect of Oxera's view regarding the development of infrastructure competition, this consideration is irrelevant when there is wholesale regulation to address any such regulatory concerns.
148. Third, ComReg's proposed use of SEO for the majority of downstream retail costs is based on wholly insufficient reasoning. Little evidence has been produced as to the type of operator ComReg is trying to protect. There is a lack of cogent reasoning as to why ComReg considers

⁴¹ In the event, eir's retail market share is in decline and one which is significantly below the 40% threshold normally considered necessary to find dominance under European competition law.



it appropriate in the current market to provide economic space for small scale less efficient new entrants even if there were such companies. It is also unclear to eir what assessment, if any, ComReg has done to assess that eir has lower downstream unit costs due to economies of scale or scope. Similarly, ComReg has not provided any justification as to why large multinational operators require additional retail margin or headroom in different geographic footprints which are determined by a wholesale market analysis. At the retail level, barriers to geographic expansion are low and firms face little if any incremental downstream costs in offering their retail services in “new” geographic locations. This would have been apparent to ComReg had it undertaken, as required, the Three Criteria Test in order to impose regulation on the retail market. ComReg has not provided any evidence-based justification as to why certain costs should be adjusted for SEO costs, or why certain costs would be higher depending on the particular exchange — noting in particular that due to the contiguous nature of eir’s network deployment there may be multiple exchange footprints in a single residential area or within a county boundary.

149. Based on a high-level competitor pricing analysis set out in Table 1 it is evident that eir’s competitors have no issue replicating eir’s overall headline price or the level of promotions typically offered by eir. Table 2 illustrates the pricing umbrella ComReg’s proposed approach is creating.

Table 1: Snapshot Competitor Pricing on Dual Play and Triple Play offers⁴²

✂

Table 2: The impact on consumers due to regulation of eir’s bundles prices

✂

150. Fourth, ComReg has not provided any evidence that the commercial strategies of existing competitors require additional headroom depending on the area (defined by regulation) in which they are currently competing. ComReg has given no consideration to the impact the Regional Handover product will have on the commercial investment decisions of firms in respect of any further requirement to expand their VUA footprint, and the inter-relationship such outcomes may have on competition — including consumer choice and pricing, or whether the retail pricing remedies proposed on eir adequately take into consideration such outcomes. In the current competitive market, priority should be focused on facilitating competition and not protecting competitors or providing a theoretical economic space for market entry at the expense of transferring possible benefits and efficiencies from end-users, contrary to ComReg’s primary duties.

⁴² All prices inc. VAT and correct as at 21/06/2017.



151. Fifth, ComReg has not acknowledged the fact that an SEO cost base artificially raises prices above the competitive level which leads to reductions in static efficiency. Due to the maturity of the retail market a higher cost base than required also impacts long-term dynamic efficiencies.
152. Sixth, in proposing a different operator cost base, depending on the wholesale exchange area, ComReg has not taken into account the regulatory implications of its own market analysis findings in its consultation ComReg 16/96, and the stated views of a number of interested parties in their submissions. eir, Virgin Media and Vodafone (and Compass Lexicon) all supported a view that the market is subject to national retail pricing. Consequently, an inconsistent retail MST in respect of the downstream retail costs used between exchange areas will result in higher prices in the Urban Area — due to the requirement of eir to pass a more severe retail MST for exactly the same retail products in the Regional Area 1 and an even more stringent test in Regional Area 2. This will create a pricing umbrella below which other operators are free to charge, safe in the knowledge that eir cannot compete — not only in the Urban Area but also in Regional Area 1 and Regional Area 2. This regulatory approach will have a negative impact on consumers through inefficient pricing over and above the competitive level.
153. Finally, ComReg has provided no evidence to support its preliminary view that it is appropriate to depart from the 2013 EC Recommendation which recommends to NRAs when imposing NGA remedies that "*Downstream costs are estimated on the basis of the costs of the SMP operator's own downstream businesses (EEO test)*". eir has demonstrated that departing from the 2013 EC Recommendation leads to higher than required retail prices and therefore ComReg's regulatory intervention by using the proposed margin squeeze methodology in the retail market will result in excessive prices for consumers. The detrimental effect on competition will also serve to impede efficient commercial investment in infrastructure and services, contrary to ComReg's stated goals.
154. eir should be allowed to compete on the merits of its own downstream costs (i.e., an EEO cost standard). This would also be consistent with the 2013 EC Recommendation which states "*The use of the EEO standard enables NRAs to support the SMP operators' investments in NGA networks and provides incentives for innovation in NGA-based services*". In addition, it better meets ComReg's regulatory objectives as it:
- i. does not need to rely on complex assessments of the economies of scale and scope of an efficient operator or subjective calculations on the adjustments to be applied to EEO;
 - ii. is proportionate and takes account of the sustainable level of retail competition evident in the market;



- iii. removes the pricing umbrella and current regulatory windfall gains experienced by other operators through inappropriate economic space and leads to the lowest possible retail prices for end-users;
- iv. is consistent with the 2013 EC Recommendation;
- v. provides regulatory and legal certainty; and
- vi. supports efficient investment.

Other considerations

155. eir agrees with ComReg's preliminary view that a DCF model is appropriate to use in the retail MSTs. A dynamic model recognises that in a competitive and dynamic retail broadband market prices today are set based on a forward-looking view of costs and revenues. This is particularly important in the context of retail price changes and Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' rights) Regulations 2011 — which provides customers with the right to withdraw without penalty from a contract if they do not accept a modification. As such, a firm would only pass through such costs in the form of higher retail prices if it considered those changes to be reflective of on-going future costs.
156. ComReg has failed in this Consultation and the WCA / WLA Pricing consultation to fully consult on the different types of operators that can be considered in a DCF Model. In addition, ComReg has also failed to consult on the market share that the operator attains over the life of the model. eir considers that, while a DCF Model has been used in past regulatory decisions it cannot simply be carried forward as part of a new market analysis consultation without fully consulting on the parameters of such a model, particularly given the extent of changes in the market including⁴³:
- Virgin Media's expansion and upgrade plans;
 - The Liberty Global and Netflix partnership;
 - The provision of television services by eir and Vodafone;
 - The entry of Sky into the retail broadband market;
 - The network agreements between BT, eNet and others, and Siro; and
 - Imagine's aggressive plans to roll-out a national wireless network to support 'fibre-speed' broadband.

⁴³ eir's submission to ComReg 16/96 market analysis consultation provides a more in-depth submission on these market developments.



157. The DCF Model assumes that the type of operator considered in the model is a new market entrant which only offers standalone broadband. eir considers that, given the stage of market development and assessing the relevant market shares in the Irish market, it is now appropriate to assume an existing “equally efficient operator” in the DCF model. It is highly unlikely that a new entrant will enter the market to offer exclusively standalone broadband retail products, and this approach is inconsistent with the use of eir’s HCA accounts which are based on offering a portfolio of NGA and CGA services.⁴⁴
158. Similarly, a new market entrant capable of achieving sufficient scale is more likely to acquire an existing operator and assume their market share rather than to try and build their base solely from churn between operators. Given the market entry and successful expansion of a number of operators including Sky and Vodafone (which have varying degrees of reliance on wholesale inputs from eir), and the continued market position of the independent operator Virgin Media, ComReg has successfully achieved its regulatory objective of promoting competition in previous regulatory decisions (evident both in terms of market entry and expansion of sustainable competition). Now that competition has eventuated, ComReg must ensure that it is not disproportionate in placing undue regulatory restrictions on eir’s retail arm.
159. While the WLA / WCA Pricing consultation states that the DCF Model assumes a 25% market share, it is evident in examining the DCF model supplied to eir that the “new entrant” slowly gains a market share of 20% at the end of the DCF time period. eir considers that, given the current stage of market development and assessing retail market shares, it is more appropriate that the assumed operator is an existing “equally efficient operator” which maintains its market share over the DCF period.

⁴⁴ In addition, eir notes that the DCF Model supplied to eir as part of the Consultation process is extremely dated and has been surpassed not only in terms of the updates but also in that it fails to include NGA retail services — which have been included for some time to allow a more accurate comparison to eir’s HCA accounts.



Question 8: Do you agree with our proposed removal of the downward only adjustment to the WAWNI? Please support your view with relevant data and evidence.

160. eir does not agree with the proposed removal of the downward only adjustment to the WAWNI.
161. At the wholesale level, there has been a plethora of activity from other operators whose impact may remove reliance on eir's network, for example: Vodafone's and ESB's Siro FTTH network now reaches ca. 70,000 premises and is expected to reach 200,000 by the end of 2017, with the target of reaching half a million homes by the end of 2018 well in reach; Virgin Media has confirmed that it plans to expand its footprint by another 200,000 homes over the next 2 years (a 25% increase in coverage); BT and eNet have both reached network agreements with Siro; and Imagine is in the process of upgrading its network nationwide to TD-LTE with a commitment of providing a wholesale TD-LTE service.⁴⁵ Such developments will mean that the WAWNI may move back towards the higher cost inputs of SB-WLR and BMB inputs and POTS-based VUA for CGA and NGA inputs respectively. Where competition is increasing at the wholesale level the WAWNI should be reflective of this and be downward adjusted only — to do otherwise would continue to only impact and restrict eir retail's pricing flexibility in an ever increasing competitive market to the detriment of consumers. Furthermore, there is a real danger that in allowing the WAWNI to increase means that the test will become increasingly onerous on eir without compensating for the fact that the increase is because infrastructure competition is reducing the reliance on eir's wholesale network. It is only in the specific circumstance where wholesale prices are increasing (for example WLR) that the WAWNI should increase — which as ComReg are aware has been the practice to date.
162. eir believes that the WAWNI must promote the interests of fair competition and produce tangible consumer benefits. This can be achieved if ComReg sets a target wholesale mix that is based upon efficient usage of eir's wholesale products, and defines a glide-path from the current mix of products to the target mix. This transition should be achieved over a reasonable period of 12-18 months from the date on which a decision comes into effect. This would also be consistent with ComReg view "that the obligation on Eircom not to cause a margin squeeze should not protect inefficient competition"⁴⁶.
163. In the Urban area, eir does not agree that a bundles MST is required. If ComReg is still minded to introduce a retail MST in this area it must at a minimum ensure that a target efficient mix of wholesale inputs is introduced in this area immediately. This would recognise that the Urban WCA area is competitive and that infrastructure-based competition is effective — meaning that it would be proportionate and consistent with ComReg's regulatory

⁴⁵ Time Division Long-Term Evolution service.

⁴⁶ ComReg, Consultation, paragraph 3.26.



objectives to only use WLA inputs in any bundles test in that area. See also paragraphs 180 and 182.

Other considerations

164. Similar, to ComReg's failure to take into account the impact of Regional Handover (see paragraph 150), the Consultation does not acknowledge that in order to calculate the broadband usage charge for the relevant cost stacks of CGA services (LLU and Line Share) and of NGA services (POTS based VUA and Standalone VUA) that the appropriate cost to take into account is not eir's wholesale price for backhaul but a calculated floor cost.
165. ComReg is of the preliminary view that ATC is the appropriate cost standard to use in the test. eir does not agree.
166. Oxera's assertion in paragraph 5.42 of its report that the recovery of ATC costs influences expansion and entry decisions in the market is misaligned to the actual retail test being imposed by ComReg. The requirement that ATC is recovered within small piecemeal portfolios (and bundle by bundle in Regional Area 2) is not representative of the entry and exit considerations of operators in a national retail market. ComReg's proposed tests do not recognise that firms recover costs across the broadband market as a whole and not in defined regulatory regions or at the individual offer level. Importantly, as fixed indirect and common costs already exist in all investment outcomes they do not enter into the exit or entry decisions of either existing competitors or potential entrants.
167. The ATC cost standard is also inconsistent with the 2013 EC Recommendation (which recommends LRIC+) and ex-post competition law (which favours LRAIC — note that the lack of a plus signals that a contribution to fixed and common costs is not considered).
168. An ATC cost standard does not provide eir with the pricing flexibility required in a dynamic competitive retail market and, in particular, as ComReg proposes to implement this cost standard at the individual portfolio level (i.e., separately for CGA and NGA in Regional Area 1). While some flexibility is proposed by ComReg in the Urban area (as CGA and NGA portfolios are assessed together) ComReg is still proposing (in all areas including the Urban area) to impose a strict pricing constraint on eir which its competitors do not face (i.e., ComReg is requiring eir to recover the exact same average of fixed indirect and common costs across different portfolios in Regional Area 1 and on an individual bundle basis in Regional Area 2). Such a poorly designed regulatory intervention increases the risks of regulatory failure to the detriment of consumers. In this context, ComReg's most readily identifiable regulatory failure, by increasing the economic space that would naturally occur absent regulation, is directly transferring welfare from consumers to Industry.
169. It is important to highlight that eir's downstream costs (which are used to inform inputs to the MSTs) are incurred on the basis of promoting a broad portfolio of broadband retail offers



as well as an allocation of fixed indirect and common costs (i.e., eir's downstream costs taken from the HCA accounts are akin to ATC). By using these costs as an input to the DCF model they arrive at a close proxy for a LRAIC+ standard. In that sense the service increment considered is retail broadband (both CGA and NGA) including standalone and bundled offerings. Σ . This means that a large proportion of eir's downstream costs are a fixed indirect and common cost for both individual retail broadband offers and even within individual broadband portfolios (e.g., if one considered all CGA offers and all NGA offers separately).

170. Therefore, ComReg should more fully consider the merits of a LRAIC cost standard⁴⁷ at the individual portfolio level. The Consultation states that "*ComReg believes that relying only on any other cost measure would exclude any assessment of common costs and would therefore ignore the market entry or expansion realities faced by OAOs and new entrants*"⁴⁸. However, the LRAIC cost standard also recognises that an operator is better off selling a retail offer than not doing so if it is incrementally profitable. Subsequently, at the individual portfolio level an overall positive margin recognises that the firm's activities are making a contribution to its fixed indirect and common costs.
171. That is not to say that fixed indirect and common costs cannot be recovered through retail pricing within each portfolio but that any ex-ante allocation rule for distributing such costs between portfolios of CGA and NGA retail products or between regions is merely arbitrary. Provided that there is a positive margin at an overall portfolio level after LRAIC costs are deducted then the firm's activities are making a contribution to the recovery of those other costs.
172. In competitive markets, the quantum of this recovery of fixed and common costs will naturally fluctuate year-on-year and recovery decisions between portfolios will be dependent on the competitive strategy decisions of individual operators. As noted in Compass Lexicon's paper submitted as part of the Vodafone response to ComReg's 16/96 market consultation "*operators rely on WLA, WCA, combinations of WLA and WCA, cable, and FTTH to compete at retail level. It is therefore not clear that there is a uniform cost level to which competition will drive down prices or that operators failing to pass through wholesale cost increases for one of several upstream products would become loss-making*". Compass Lexicon further states that "*Operators do not set localised prices depending on whether an exchange area is served based on WLA or WCA. An operator may rely predominantly on WLA and only use WCA in exchange areas in which volumes do not justify using WLA, as we understand is the case for Vodafone. Under national pricing, an increase in WCA prices should at most be passed on into retail prices in proportion to the share of the operator's user base served using WCA. However, the incentive for an operator to do so will depend on any impact this will have on its competitiveness across its*

⁴⁷ Note that the lack of a plus signals that a contribution to fixed and common costs is not considered.

⁴⁸ ComReg, Consultation, paragraph 5.43.



entire retail offering.” Putting it differently, retail pricing is not influenced by individual bundles or small portfolio margins and therefore to apply an ATC test to each and every portfolio is placing a disproportionate regulatory burden on eir and is providing eir’s competitors with unnecessary and unwarranted margin within individual WCA portfolios.

173. Applying a higher cost standard than LRAIC at the individual portfolio level raises the real prospect of chilling competition over the next regulatory pricing period. In the light of ComReg’s statutory objective of promoting competition it is important that consideration be given in choosing the correct cost standard at the individual portfolio level in order to distinguish between promoting competition and promoting competitors (i.e., the difference between applying a LRAIC cost standard or an ATC cost standard). As evidenced by the market shares and continued growth and expansion of OAOs, sustainable competition is already present in the market and ComReg must ensure that it is not disproportionate in placing undue regulatory restrictions on eir retail to protect potential “new entrants” at the cost of consumers.
174. A higher cost standard than required could lead to sub-optimal and inefficient entry to the market. In addition, a higher cost standard leads to sub-optimal pricing flexibility in terms of how fixed and common costs are recovered between portfolios and puts eir at a significant pricing disadvantage compared to how pricing works in reality.
175. While ComReg presents the flexibility of a portfolio approach in the Consultation, the reality of a full ATC cost standard in piece-meal portfolios does not replicate as far as possible the commercial pricing decisions and outcomes of competitive markets — which in this case is the entire Retail Broadband Market (and not by regulatory defined regions). eir considers that applying MST within small portfolios based on regulatory defined sub-geographic regions (and at an individual offer level in Regional Area 2) puts undue and disproportionate constraints in the form of SMP remedies on eir and does not address the conjectural competition problems identified by ComReg (i.e., market entry or expansion) or the commercial pricing decisions identified by Compass Lexicon⁴⁹ in setting retail prices.
176. As such, eir submits that ComReg should design a retail MST(s) which recognises dynamic pricing decisions (see paragraphs 170-172) and provided that the LRAIC+ costs are recovered at the overall Broadband bundle portfolio level then ComReg’s concerns regarding market entry and expansion decisions in the retail broadband market are appropriately addressed.
177. eir considers that its proposal of applying a LRAIC cost standard (without the plus) at the individual portfolio level better meets ComReg’s regulatory objectives as it:

⁴⁹ Submitted as part of the Vodafone response to ComReg’s 16/96 market consultation.



- i. considers the specific service increment and therefore mirrors efficient decision making by firms between individual portfolios;
 - ii. removes the regulatory windfall gains experienced by other operators through inappropriate economic space and leads to the lowest retail prices for end-users; and
 - iii. is consistent with ex-post competition law.
178. In addition, eir's proposal to recover LRAIC+ costs at the overall Broadband portfolio level achieves good regulatory outcomes as it:
- i. ensures fixed indirect and common costs are recovered;
 - ii. replicates as far as possible the dynamic pricing decisions of competitive markets;
 - iii. is consistent with the 2013 EC Recommendation; and
 - iv. removes unnecessary implementation complexity, as it is easier to compare to eir's HCA costs through the DCF model.



Question 9: Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the Urban Area? Please give a detailed response with supporting data where appropriate to support your view.

179. eir does not agree that where wholesale prices are cost-oriented that a concurrent ex-ante MST is appropriate. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs.
180. The WAWNI proposed by ComReg in the Urban Area includes WLR/POTS as a wholesale input. This is incorrect. The Urban Area is competitive at a wholesale and retail level and on a forward looking technology basis WLR will be surpassed by Managed VOB. As such, WLR/POTS should not be included in the WAWNI weighting.
181. See also paragraph 164.
182. Without prejudice to paragraph 179, as set out in response to Question 8, at a minimum the WAWNI should be based on an immediate target wholesale mix that is based upon efficient usage of eir's wholesale products. A similar proposal is set out in ComReg's consultant report from Oxera on page 45, where a notional rather than actual usage is proposed in the test:
- "The WAWNIs should be estimated based on weights derived from actual OAO usage of different WNIs. The only exception in Zone 1 [the Urban Area] would be 3b wholesale inputs. It would be appropriate to exclude the 3b wholesale inputs from the WAWNI calculation in Zone 1, assuming that the 3b market is deregulated in Zone 1.*
- "OAOs that continue to use 3b wholesale inputs in Zone 1 could be notionally assumed to use VUA (if they are using a deregulated NGA bitstream product) or LLU (if they are using a deregulated CGA bitstream product) in Zone 1, as VUA/LLU is considered to be the efficient forward-looking technology in Zone 1." [emphasis added].
183. In the Urban Area, ComReg has identified that the aggregate level on which the test should be undertaken is at the overall portfolio level. This means that individual CGA and NGA retail bundles (including dual play and triple play bundles) are able to cross-subsidise each other provided that, at the portfolio level, it is profitable to do so. From a resellers' perspective, eir requests ComReg to clearly set out the logic for allowing this approach in the Urban Area and applying this same logic using cogent reasoning as to why it is somehow different for individual regions (which ComReg purports to imply in this Consultation). eir considers that it is not and a cogent assessment of actual broadband market replicability would indicate that any MST proposed by ComReg should be at the wider Broadband market portfolio level.

Other Considerations

184. There is a clear disjoint between ComReg's stated objective to ensure the "bundle" is replicable and the way in which ComReg has constructed the test — which is to say that



cross-subsidies between elements of the bundle can only occur in one direction (from regulated to unregulated). See also paragraph 101. In order to imitate the commercial decisions of all operators in a market ComReg must recognise that replicability of a bundle is determined by the margins of the bundle in its entirety and therefore firms cross-subsidise between all elements within the bundle and bundle portfolio.



Question 10: Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 1? Please give a detailed response with supporting data where appropriate to support your view.

185. eir does not agree that where wholesale prices are cost-oriented that a concurrent ex-ante MST is appropriate. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs.

186. See also paragraph 61.

Other Considerations

187. There is a clear disjoint between ComReg's stated objective to ensure the "bundle" is replicable and the way in which ComReg has constructed the test — which is to say that cross-subsidies between elements of the bundle can only occur in one direction (from regulated to unregulated). See paragraph 184.

188. As set out in paragraph 150, ComReg has not given any consideration to the impact of Regional Handover in the Consultation. See also paragraph 164.

189. eir welcomes the proposed use of portfolio approach in Regional Area 1. However, in eir's view, as it is used as a part of a combinatorial test it does not go far enough to provide the pricing flexibility required and that a single national portfolio test is more appropriate or at the very minimum a single portfolio test in the Regional WCA Market. In addition, because ComReg proposes separate portfolios for the Urban Area and Regional Area 1, compared to the single LEA portfolio test (which would have incorporated both the Urban Area and Regional Area 1 in one test), as a result of the WAWNI eir's retail margins will decrease in Regional Area 1 and create an immediate negative impact of ca. 3% on eir's pricing flexibility for CGA bundles respectively in those exchanges now classified within Regional Area 1.⁵⁰ Of course such outcomes will result, unless appropriately specified, in eir retail's prices becoming less competitive in the Urban Area (for example due to different operator cost bases used in the Urban Area and Regional Area 1). This highlights that the risks of economic harm associated with poorly designed or unmerited regulatory interventions and as to why well-designed regulatory regimes seek to rely on ex-post competition law wherever possible.

190. eir considers that the bundle-by-bundle approach in Regional Area 1 is inappropriate. To implement a retail MST obligation(s) at an individual service offer level provides too much weight by ComReg to the theory that retail competition in its entirety would be harmed if individual offers did not pass a MST.⁵¹

⁵⁰ See "Bundles response Copy of RC_PRI_C11 Quarterly WNI Report July 2017 Conf-Reg-INFO .xlsx". NGA retail offers are also impacted 3%.

⁵¹ In circumstances where at the portfolio level there is a positive margin.



191. For example, typically retail operators advertise a single retail headline price for “as fast as your line will go” or an “up to” X offer. The nature of the speed provided is determined in part by the available service from the relevant wholesale operators (e.g., open eir or Siro). Virgin Media’s campaigns are also based on an “up to” single price retail offer. Therefore, depending on the wholesale variant cost the relative retail margin may fluctuate based on the single retail price offer (as recognised by Compass Lexicon’s paper included in Vodafone’s submission to ComReg Consultation 16/96 — see paragraph 172). In Regional Area 1 and Regional Area 2, the retail competitive dynamics are no different to the Urban WCA Market and a firm using this pricing approach may be willing to generate different margins for different products and/or incur short-run losses on certain individual offers. This is because from an incremental perspective attaining that customer is attractive for potential speed upgrades or cross-selling opportunities. Therefore, the fact that an operator is “carrying” losses or decides not to compete on a particular narrow subset of the market does not exclude that operator from the entire market. Even if there are players who choose to supply just a small subset of products, regulatory remedies should not be concerned about their exclusion if competition is driven by firms that compete across a fuller range of products.
192. In addition, a single national price reduces marketing spend and avoids customer confusion (compared to the alternative scenario where there are bespoke retail prices and offers depending on for example the distance from the exchange — for which the line speed is unknown until a line test is performed).
193. The proposed bundle-by-bundle approach unduly restricts eir’s flexibility in how it allocates its fixed indirect and common costs between its offers, and focusing on individual retail offers is not beneficial to consumers. Putting it another way, if there is no prospect of an efficient firm being excluded from the market as a whole, then there is no reason for the bundle-by-bundle approach and is in fact preventing the market moving towards competitive market outcomes.
194. Similarly, as noted in eir’s response to Question 7, an inconsistent retail MST between areas will result in higher prices in the Regional Area 1 — due to the requirement of eir to pass a more severe retail MST for the exact same retail products in the Regional Area 2 market.
195. eir should not be in the position of having to provide competitive headroom for firms that elect to compete across an inefficiently narrow range of products. If ComReg wishes to replicate, as far as possible, the dynamic outcomes of a competitive market, which are in the long-term interests of consumers, then a single test at a national portfolio level must be used.
196. For FTTH bundles (as FTTH should be by regulatory definition be in the Urban Area or in Regional Area 1) the application of the test is wholly inconsistent with the 2013 EC Recommendation — which recommends that the appropriate operator cost base is EEO and



not REO/EEO as proposed by ComReg. It also considers that the appropriate cost standard is LRIC+ and that the replicability test (which they recommend as an alternative to wholesale price regulation) applies for flagship offers only and not every offer using narrowly defined “portfolios” which each must recover ATC as proposed by ComReg. ComReg has failed to take the utmost account of the 2013 EC Recommendation and has not addressed why it believes it appropriate to deviate from the recommendation. See also eir’s response to Question 7 and Question 8.



Question 11: Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to support your view.

197. eir does not agree that where wholesale prices are cost-oriented that a concurrent ex-ante MST is appropriate. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs.
198. eir considers that the bundle-by-bundle approach in Regional Area 2 is inappropriate. To implement a retail MST obligation(s) at an individual service offer level shows ComReg has put too much weight on the theory that retail competition in its entirety would be harmed if individual offers did not pass a MST.⁵² See also paragraphs 191-195.
199. See also paragraph 61.
200. See also eir's response to Question 7 and Question 8.

Other Considerations

201. There is a clear disjoint between ComReg's stated objective to ensure the "bundle" is replicable and the way in which ComReg has constructed the test — which is to say that cross-subsidies between elements of the bundle can only occur in one direction (from regulated to unregulated). See paragraph 184.
202. As set out in paragraph 150, ComReg has not given any consideration to the impact of Regional Handover in the Consultation.

⁵² In circumstances where at the portfolio level there is a positive margin.



Question 12: Do you agree or disagree with our provisional view that the average customer life should be 42 months? Please give a detailed response with well justified supporting data where appropriate to support your view.

203. ComReg is of the preliminary view that a 42 month customer lifetime should be used in the margin squeeze model. ✗. eir considers that a longer customer lifetime would be more appropriate for NGA services to recognise the migration of customers switching to the new technology during the current market review period and that fibre broadband should lead to higher customer satisfaction — due to fibre being a more compelling product than copper, with better speeds and ability to cross-sell additional value-added services over time, such as IPTV and high-definition on-demand content.
204. eir notes that the Consultation proposes however to *"during the consultation phase and thereafter to engage further with industry to gauge if an alternative method is superior or indeed possible to derive an appropriate ACL"*. Such a review can only be upward adjusting as to do otherwise would be inconsistent with ComReg's obligation to act proportionately. It would be disproportionate in this case to impose stricter regulation on eir over time which could retrospectively make eir non-compliant and/or create a high-degree of uncertainty regarding future business cases and projections. Such outcomes would be to the detriment of consumers and inconsistent with ComReg's statutory objectives.
205. In addition, the average customer lifetime calculation is used to *inter-alia* calculate the minimum contribution per month required to recover the cost of promotions. This is a minimum contribution cost only and margins may be sufficient even at on individual bundle basis (which eir does not agree is the appropriate level of aggregation to perform any MST) to allow for the recovery cost of such promotions in an earlier timeframe. eir proposes that where margins are sufficient, that if eir considers it commercially prudent to do so, to write-off any promotional burden that has already been recovered within the 42 month average customer lifetime for CGA services and ✗ month average customer lifetime for NGA services. In order to ensure that margins are reflective of on-going promotions and previous promotions at any given time, thereby ensuring replicability of eir's offers over a reasonable timeframe, eir would at a minimum under this proposal carry ✗ months of promotional cost. Under this approach, eir would submit a compliance statement including calculations to ComReg to demonstrate that the promotional costs have been fully recovered. See also paragraph 206.
206. The impact on margins for tactical promotions, such as vouchers (e.g., coffee coupons), low value monetary items such as sports jerseys and one-off flash sale items such as free tablets or televisions, has been relatively immaterial. This is attributable to the fact that such promotions are ✗. Similar, to eir's proposal in paragraph 205, where regulatory margins



support the earlier recovery of such costs then eir will demonstrate to ComReg that these promotional costs have been fully recovered. ✕.

Other Considerations

207. The use of the average customer lifetime to calculate promotional cost for a particular bundle is correct and is based on all operators' expectations that prospectively that promotional cost will be recovered on average by customers staying with the operator beyond the initial contract period. That is not to say that average customer lifetime is tied to the bundle. In paragraph 5.135 of the Consultation ComReg state that the average customer life "*is not how long a customer stays with a particular operator, but rather how long they remain on a specific bundle*". This is incorrect. On average customers may stay on a particular bundle over a period of time but equally they might migrate to alternative new plans or switch to rival operators. ComReg's statement is also counter to how average customer lifetimes are calculated or how ComReg describes average customer lifetimes in paragraphs 5.141 to 5.148. It is also a proposed change as to the current methodology used in the NRT. Finally, ComReg has failed to identify the nature of the problem it is trying to address by this change.
208. eir considers that there to be a possible regulatory concern surrounding the use of the average customer lifetime, although a full Three Criteria Test would still be required in any event, eir's retail market share would need to be significantly higher and growing quarter-on-quarter. As is evident in Figure 19, this is not the case and therefore it is unclear what concerns ComReg is trying to address with this remedy in the first instance and why it is proposing an alternative to the existing NRT regime in the second.
209. See also eir's response to Question 15.
210. In addition, ComReg states in paragraph 5.136 of the Consultation that "*Eircom should be mindful of the potential risk arising from promotional costs may not be recovered over a bundle*". ✕.

Question 13: Do you agree or disagree with ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness in section 5.11? Please give a detailed response with supporting data where appropriate to support your view.

211. eir 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. In addition, ComReg should also consider the materiality of the bundle in question including an assessment of competitor's pricing.



212. This assessment should of course not be at the individual bundle level. To undertake any individual bundle assessment provides too much weight by ComReg to the theory that retail competition in its entirety would be harmed if individual offers did not pass a MST.



Question 14: Do you agree or disagree with ComReg’s proposals in respect to other possible adjustments (detailed in section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.

213. ComReg has reprised the ‘other options’ previously considered in the 2013 Bundles Decision 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.
214. For example, when a bundle is in response to a competitor’s bundle, ComReg states its position that *“if Eircom’s pricing does not cover its ATC (at the portfolio level in the Urban Area and Regional Area 1 and at the bundle-by-bundle level in Regional Area 2) 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. Other operators’ ability to compete with Eircom would therefore be constrained, their incentives to enter would be weakened, and their ability to establish themselves as sustainable retail competitors in the longer term could also be hampered”*⁵³. ComReg has entirely ignored the fact that, as identified in its own market analysis consultation 16/96, the retail market is national. In addition, competition is increasingly driven by bundling and that eir’s competitors typically leverage one or more components of the bundle that they produce themselves (such as mobile services and/or TV services), or source from a supplier other than eir (such as mobile services). eir does not have economies of scale and scope across the components of bundles that others are unlikely to be able to match, and it is imperative that ComReg update its approach accordingly (Figure 7, Figure 8 and Figure 9). This point is recognised by Oxera *“OAOs using their own infrastructure or wholesale NGA access provided by eircom are likely to be in a stronger competitive position to supply these bundles. Moreover, these OAOs can exploit economies of scope in supplying these other services (i.e. their unit costs of providing triple-play bundles are likely to be lower, as they exhibit cost advantages from providing other related products)”*. While Oxera were referring to OAOs present in the Urban area the underlying logic holds true in all regions and for all efficient operators who have or are capable of reaching scale. See also paragraphs 165-178.
215. eir considers that the competitive assessment should be undertaken at the overall national portfolio level.
216. eir considers that if an appropriately defined MST is used then there should be no need to apply a different test post-launch if a bundle is found to be unreasonable. However, this view is based on ComReg undertaking an appropriate competitive assessment.

⁵³ ComReg, Consultation paragraph 5.166.



217. eir considers that it is appropriate that margins cannot be “banked”/carried forward. However, a one month compliance period is too short to provide any meaningful assessment of a bundle’s replicability (see paragraphs 282-285).
218. eir considers that it is appropriate that where it is anticipated that only proportion of customers will avail of a promotion/discount that the MST should reflect the proportionate cost of those that opt-in relative to the type of bundle that offer is being made available with.



Question 15: Do you agree or disagree with ComReg’s proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data where appropriate to support your view

219. eir does not agree that there should be a different treatment for retention offers.
220. In proposing an alternative treatment for retention offers, ComReg has failed to identify the nature of the problem it is trying to address. Therefore, there is no basis to determine if ComReg’s proposal is proportionate and justified. As such, the Consultation is not consistent with ComReg’s statutory obligation to act proportionately having regard to its objectives.
221. eir considers that there to be a possible regulatory concern surrounding retention offers, although a full Three Criteria Test would still be required in any event, eir’s retail market share would need to be significantly higher and growing quarter-on-quarter. As is evident in Figure 19, this is not the case and therefore it is unclear what concerns ComReg is trying to address with this remedy in the first instance and why it is proposing an alternative to the existing NRT regime in the second.
222. As identified by ComReg retention offers are not typically used for all customers remaining on bundle when their contract expires. There are numerous commercial reasons and at different cost standards than those considered by ComReg, provided that it makes commercial sense to offer such retention offers a firm will do so and re-contract a customer with a retention promotion.
223. There are two broad commercial considerations for offering retention promotions which merit consideration by ComReg. The first is that from a revenue perspective both in terms of the extended contract but also the potential to unlock revenues in the future through cross-selling it makes commercial sense to re-contract certain customers using retention offers. The second is that from an incremental cost perspective at an offer level it is cheaper to retain a customer than acquire a new customer. Each is discussed in turn below.



Future revenues

224. With the possible exception of dunning, in all scenarios — a firm is better off retaining a customer than to lose that customer to a competing operator and thereby forego all current and future revenue opportunities — provided that its entire Broadband base is at least recovering their LRAIC+.
225. From an incremental perspective an operator attains certain customers in anticipation of being able to unlock future cross-selling opportunities (e.g., moving from dual play to triple play to quad play, upgrading the TV package and/or increased pay-per-view sales). Cross-selling increases the firm's margins and also reduces the customer's propensity to churn. Therefore, provided that at the portfolio level the operator has a range of different customer profiles (of varying margins) which in aggregate make a positive contribution, the firm is better off providing retention offers than not doing so.
226. From a consumer perspective there are a number of new customer acquisition promotions available from other operators with which eir's retention offer is competing and therefore such activity by eir offering retention offers and other operators offering acquisition offers is pro-competitive and pro-consumer — which are positive commercial outcomes. While there is no guarantee that eir (or any similar strategy by other retailers for that matter) will be successful in retaining customers over the medium to long-term to unlock future revenue opportunities in offering retention promotions today — that is the nature of any competitive market. The consumer is free to choose what they consider to be the most advantageous offer. Both eir and OAOs are anticipating that, in retaining or attaining that customer, they will stay beyond their contract duration and that they will be revenue generating both from an on-going perspective as well as potentially adding further revenue generating services in future. However, by ComReg defining strict recovery of costs on eir based on the re-contract duration there is no implicit consideration of future revenues and it is in effect only imposing the commercial down-side to each retention promotion eir offers (i.e., the customer will not stay beyond their contract duration and provide no probability of generating higher future revenue). This ignores one of the many reasons why retention promotions are offered by market participants.

Cost considerations

227. The incremental cost of retaining a customer is significantly different to the incremental cost of attaining a new customer. Therefore, while ComReg is proposing to apply a LRIC at the bundle level for retail costs in Regional Area 1 this is significantly different to the incremental costs of retaining existing customers (note that ComReg is also proposing to apply ATC on a bundle-by-bundle basis in Regional Area 2).

Cost Category	Type of Cost
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Sales	Majority of costs sunk
Modem	Sunk
Delivery	Sunk
Backhaul	Sunk
IP connectivity	Sunk
Connection	Sunk
Billing	Incremental
Marketing and Product Development	Sunk
Accommodation	Sunk
Helpdesk	Sunk
Order handling	Majority of costs sunk
Servers	Sunk
Corporate overheads	Sunk

In order to more accurately reflect the actual cost considerations in offering a retention offer the MST would need to be amended to cater for different retail costs depending on whether the promotion is a retention or acquisition promotion in the Urban Area, Regional Area 1 and Regional Area 2. As the DCF Model is based on a new entrant whose market share grows slowly over the period and whose costs are adjusted to reflect less efficient operators the costs included in the MST are significantly out of kilter with the actual costs considered in offering retention promotions by any operator including eir. Adjusting the retail costs depending on whether a promotion is a retention offer represents a significant unnecessary regulatory burden on eir (in particular for these costs to be reflected from an on-going monitoring of margins perspective) and coupled with the other considerations identified below represent unduly complex calculations which as currently proposed in this Consultation would require pre-approval on an on-going basis by ComReg.

228. As set out in paragraphs 224-227, ComReg's proposal does not allow for future revenue cross-selling opportunities, does not adequately consider the actual incremental cost considerations in making these offers available or that the customer will stay beyond their re-contract period. As such, the commercial decisions in making such offers available are not considered in the prescriptive nature of the test as currently proposed by ComReg. Reflecting the incremental costs considerations in the monitoring of margins is unduly complex (retention offers would need to be isolated from all other offers, margins calculated and



different cost standards implemented at an individual offer level — whether competition can be detrimentally impacted at an individual offer level is also strongly debateable) and would only represent one possible commercial consideration as to why retention promotions are offered. Therefore, on balance, the existing approach under the current NRT, where the divisor used to write-off the retention promotion cost up to 42 months (see also paragraph 231) continues to provide a reasonable alternative methodology that, while not scientific, acknowledges that potential future revenue streams by retaining a customer may be higher and the cost of retaining that customer will be lower over the average customer lifetime.

Other Considerations

229. ✗. This would be to the detriment of end-users and impose artificial non-commercial pricing decisions on eir's retail arm solely due to distortions created by ComReg.
230. In proposing a different methodology for retention offers, ComReg is placing too much weight on a supposition that competition in its entirety can be distorted by eir at the individual offer level. Furthermore, eir would be the only retail operator to which this rule would apply, against the backdrop of a competitive retail market (in which eir's retail market share continues to decline). As such, ComReg's proposal is not consistent with its obligation to only take proportionate measures having regard to its statutory objectives.
231. As set out in eir's response to Question 12 ✗.
232. From a billing perspective there is currently no unique identifier to enable the tracing of a retention promotion i.e., the narrative on the customer's bill is exactly the same as a standard promotion. From a regulatory margin monitoring perspective, ComReg's proposal would place an disproportionate regulatory burden on eir to be able to identify (which would be at an individual customer level) the proportion of customers who take-up the offer and the contract duration that these customers subscribe to in order to determine an average contract extension duration. eir's proposal in paragraph 228 achieves a more balanced approach from an on-going monitoring perspective and permits some acknowledgment of the commercial factors which are considered in offering a retention offer but are not explicit in the test.



Question 16: What are your views on the period over which Eircom needs to recover the on-going content costs of eir Sports, should the period be limited to the duration of the rights?

233. The purchase by eir of on-going content in its own right or through non-group commercial intermediaries is a long-term strategic investment. While eir has made the commercial decision to provide its sports channels to its broadband customers free of charge, ComReg and its advisors should not lose sight of the fact that eir Sports is a business in its own right — that enters into commercial contracts and assesses content opportunities. This is a market where eir does not have SMP, it is a market that is not within the regulatory framework considered by the European Commission and is a market in which eir faces strong competition.
234. ComReg’s proposal that the content costs should be recovered within the time period that the content has value is treating eir as being a new entrant in each individual year of the control period. However, unlike a new entrant whose business case can fluctuate over time, eir must always recover its ATC each year in an unregulated market due to wholesale SMP in an unrelated market. The cost standard proposed is also in stark contrast to the LRIC cost standard that ComReg has applied to the assessment of unregulated services in the past and the cost standard used in ex-post competition law. Coupled with ComReg’s proposal (see Question 19) that such costs are recovered at the individual bundle level, this proposal places a disproportionate restriction on eir’s pricing flexibility as to how to recover such costs and to maintain competitive prices.
235. ComReg’s proposed approach (i.e., that the content right costs are recovered within the year it has value) does not recognise that there will not be an immediate correlation between additional rights costs and associated revenues including impact on the subscriber base. Furthermore, content acquisition also provides a marketing tool for the underlying platform and the intrinsic value of content can be used to target end-users long before such content actually airs and is perpetual even when individual content rights expire as such rights are replaced by others.
236. Consumers today have less loyalty to underlying platforms and are instead attracted to specific content. This phenomenon of “cord cutting” is discussed in Chapter 3 of Brian Williamson’s paper and the increase in unbundling of services by consumers due to the non-replicable bundles in the retail market and growth in over-the-top services.
237. The attempt to address these challenges is evident by the premium “traditional” companies are willing to pay for exclusive content rights and the shift towards producing content themselves. In the retail market in Ireland this is also particularly evident by the rising importance of TV in the overall service offering. For example, the launch of an IPTV offering by Vodafone, and the expanding content offering of Virgin Media (including a multi-year partnership with Netflix and the acquisition of two terrestrial television companies in Ireland,



as well as the acquisition of the Formula 1 franchise by its parent company Liberty Global). In addition, Sky has also recently launched "Now TV" in Ireland a service which it launched in the UK in 2012. Similarly, Virgin Media also recently announced the launch of a 30 day contract television service of "Freedom TV".

238. Finally, ✕.

239. eir considers that a more dynamic view of content costs is required to address the weakness of the short-term view of content costs proposed by ComReg — including that content can have longer value from a consumer perspective than its finite rights — and a more specific acknowledgment in the test as to the level of flexibility required in order to recover such costs. Each is discussed in turn below:

Dynamic view of on-going costs and recovery of costs

240. ✕, see paragraph 238, eir should have the discretion to allocate those content rights, if it so chooses, over a further 12 months. This would also allow the cost of future additional content to more closely align to the subscriber base most likely to benefit from that content (based on contract duration) and that it allows eir to retain customers over time greater than the necessary individual content rights. This approach is also consistent with paragraph 235, as it recognises that content value is not solely aligned to the rights' period within which content is aired. However, ✕.

241. An important consideration therefore is the design of an appropriate regulatory recovery mechanism which achieves the balance of recovery and pricing flexibility. eir considers that a Net Present Value ('NPV') business case model for content and on-going running costs commencing from 1 July 2016 (the eir Sports launch date, see also paragraph 256) for a 42 month period would align to a view similar to the long-run costs of eir Sports and ensures cost recovery of the unregulated service. It would allow for a smoothing out of material short term or single year content costs in the MST while equally ensuring that over time that margins are sufficient to recover those costs. Such cost recovery in combination with a wider portfolio approach would, while not eliminating it entirely, further militate against negative market outcomes as a result of ComReg rigidly setting regulatory pricing/recovery controls on an unregulated service (see paragraph 244).

242. Recognising that a single monthly contribution based on an NPV value may result in under-recovery in some later years — but only if the subscriber base does not grow relative to the base assumed in the model — a PMT payment function can be used. However, a drawback of the PMT approach (using the current assumptions) is that it does not allow for a growing subscriber base over time. To overcome this drawback the assumed subscriber base can be discounted over time and allowing for the increase in subscribers whom could avail of eir sports in later periods (in this case it would be possible to include eir mobile customer base



although overall growth in our broadband base is also likely). This methodology is consistent with the approach in the current DCF Model pursuant to ComReg Decision D11/14.

243. In the “eir sports Bundles consultation.xls” model the PMT approach has a value of $\text{€}1.2$. The discounted subscriber base NPV approach provides a slightly higher value of $\text{€}1.3$. eir considers that the discounted subscriber base is the most appropriate approach as it allows updates to the subscriber base overtime to be reflected. By accounting for such costs at the overall broadband portfolio level (see eir’s response to Question 19) ensures that the eir’s premium sports channel is overall replicable by another operator — while also providing some level of retail pricing stability to the individual bundles and standalone offers within the overall broadband portfolio.

Appropriate flexibility to the recovery of costs

244. See also eir’s response to Question 19.

Other Considerations

245. With respect to ComReg’s alternative proposal set out in paragraph 6.4 of the Consultation, where an inferred wholesale charge could be used in the test, this is not appropriate. eir does not have SMP in the market and therefore such a mechanism would be contrary to any of ComReg’s regulatory obligations and powers.
246. In Ofcom’s review of the UK pay TV wholesale must offer obligation it noted that *“we consider that Sky continues to benefit from a number of bidding advantages which help maintain its strong position. In particular these include the scale advantages arising from its large existing pay TV subscriber base willing to pay for sports content. Whilst we note some of Sky’s competitors have large subscriber bases taking other communications services (e.g. BT’s nearly 8m broadband subscribers and Vodafone’s 18m mobile subscribers), these operators face uncertainty about the ability to monetise investment in sports content using these subscriber bases”*.⁵⁴ Such an assessment is also applicable to the Irish market and there are comparisons between Ofcom’s view of BT and to eir as a new entrant to the content market and eir’s business model. In this respect, as identified by Brian Williamson’s paper *“access to scarce (content) bundle inputs that are not regulated is not the preserve of eir – but is a feature of the Irish market. Imposing an economic replicability test on eir may therefore serve not only to limit pricing freedom and investment incentives, but also limit eir’s ability to compete effectively, thereby reducing competition overall.”*
247. $\text{€}1.2$. This issue is somewhat mitigated by eir’s proposal to account for the recovery of on-going costs at the portfolio level and not at the bundle level.

⁵⁴ Ofcom, Review of the pay TV wholesale must-offer obligation, 19 November 2015.





Question 17: What are your views on the period over which Eircom needs to recover the acquisition costs of eir Sports? Should this be a set period or should Eircom be allowed to use excess broadband margins, if available, to shorten the set period?

248. The acquisition by eir of Setanta provides eir in the short/medium term, attractive content and allows it to develop appealing bundle propositions for existing and new broadband customers. Furthermore, the acquisition provides eir with access to its own television studio, new existing customer contracts, a current and former customer database, and management know-how. Long term, the acquisition provides eir with the backbone of content-centric capabilities enabling eir to develop further content-led bundled offerings and exclusive sports content in its own right.
249. However, for the purposes of the MST the purchase price for Setanta is completely irrelevant. The substantive economic issue is whether, on an on-going basis, eir sets retail prices based on actual incurred operational costs. This is also be consistent with ComReg's proposal that unregulated services should recover their LRIC. In this context, eir's purchase price should be considered to be a sunk cost as it does not affect future decision making.
250. Notwithstanding this, ComReg is of the preliminary view that the appropriate cost to include in the MSTs is a minimum cost per broadband user based on a maximum payback period. ComReg states that for "clarity and consistency it provides" that its preference is to continue to use that method. eir notes that once any methodology is fully specified that "clarity" is achievable using any approach. Furthermore, that "consistency" for consistency sake without further considerations is not grounded in any cogent reasoning an economic regulator should consider — in particular, as eir has previously argued to ComReg that the current treatment of the acquisition cost while allowing for a maximum payback period does not imply that such cost cannot be recovered in a shorter time frame.
251. eir considers that there are two approaches which can be used together in order to calculate the recovery of the acquisition costs of eir Sports. The first approach, where the acquisition cost is recovered over a maximum payback period represents the minimum costs that need to be recovered each period — such that all costs are recovered at the end of that payback period at the latest. The second approach is a complimentary assessment to determine whether additional margins are such that the actual recovery of the acquisition cost is recovered earlier than anticipated.
252. With respect to the second approach, in paragraph 6.27 of the Consultation, ComReg appears to have confused a minimum payback contribution based on a defined time frame with the actual recovery of such costs and the banked margins concept. The banked margins argument in respect of bundles is that eir cannot generate significant profits in a period to offset below cost selling in other periods such that it would be compliant with its margin



squeeze obligations.⁵⁵ The accumulated margins approach recognises that, while there is a defined minimum contribution within the MST (using the first approach) to ensure a payback is achieved, there is also additional margin generated in a given month meaning that a fixed cost outlay may in fact be paid back faster (using the complimentary second approach). In other words, to the extent that the recovery of such a large sunk cost was considered relevant to a commercial operator's pricing decisions it would not continue to factor in such costs beyond the period in which they are actually recovered. Consequently, banked margins and the second approach are in no way the same.

253. In addition, eir does not agree with the complexity that ComReg presents of the second approach in paragraph 6.26 of the Consultation. Such a calculation is merely mathematical and is not complex or significant in nature. It is also not apparent how ComReg can align its proposal to require a monitoring statement on quarterly basis⁵⁶ — presumably demonstrating margins on a monthly/quarterly basis — but that a further calculation using that output is somehow “significant”. Furthermore, it is wholly unclear what ComReg means when it states that *“the counter-factual of what may have occurred had content not been offered may also be considered in such a calculation”*.⁵⁷
254. In paragraph 6.27 of the Consultation, ComReg conflates the recovery of costs with the types of MSTs that it is proposing in the Urban Area, Regional Area 1 and Regional Area 2 such that it considers the second approach would not be possible — as it would in ComReg's view disregard the proposed retail MSTs. This is incorrect. The tests proposed, which eir does not agree are correct, are margin squeeze assessments. eir retail's margins are generated on a national basis and the second approach is merely using those profits to recover a fixed common cost and nothing more. If ComReg accepts that under the first approach all individual end-users contribute to the recovery of eir Sports costs, then it is unclear to eir how the use of margins (generated from the same individual end-users) for that same recovery is somehow different. eir argues that it is not.
255. Furthermore, the complimentary use of the first and second approach is also consistent with an EEO operator cost base. Without the complimentary second approach being implemented it would require a continued allocation in the cost stack of the acquisition cost for a cost that may have long been recovered — which results in higher than required margins and restricts eir's ability to transfer such margin back to consumers through increased value-based propositions and competitive retail offers.
256. Based on a projected EBITDA of ca. £<.

⁵⁵ However, it is important to note that even under competition law selling below cost is not necessarily a de facto abuse in itself.

⁵⁶ See section 7.4 of the Consultation.

⁵⁷ ComReg, Consultation, paragraph 6.26.



Question 18: What are your views on the appropriate subscriber base over which Eircom needs to recover the costs of eir Sports? Are there any methods which you view as being more suitable than ComReg's preliminary view? In your response please outline any practical issues which should be considered if such a method were to be implemented.

257. ComReg is of the preliminary view that it would not be appropriate to allow mobile subscribers to be added to the calculation of cost recovery as it would *"in effect be a cross-subsidy from an unregulated service to a regulated one (into Eircom retail fixed broadband)"*.⁵⁸ This is of course incorrect. First, absent the required Three Criteria Test and notification to the European Commission of a market definition retail fixed broadband is not a regulated market. Second, eir Sports and mobile services are both in unregulated markets.
258. The correct subscriber base to consider is all end-users that can benefit from eir Sports content. ComReg proposing exclusions to its cost recovery is counter-intuitive to the fixed indirect and common costs that eir Sports represents. However, how eir apportions and chooses to recover those costs is a matter for it and not the regulator. Provided eir applies a methodology, at any given time, to demonstrate cost recovery then by default it ensures replicability.
259. As an unregulated service eir should be allowed to determine itself how best to ensure cost-recovery of a fixed indirect and common cost. ComReg should not attempt to restrict or rigidly attempt to enshrine through regulation how this is done. The market continues to evolve and eir must be able to adapt and respond quickly to such changes as it sees appropriate. ✕

⁵⁸ ComReg, Consultation, paragraph 6.34.



Question 19: Do you agree with ComReg’s proposed treatment of eir Sports in the Margin Squeeze Test? If you consider another method would be more suitable can you please give details of such a method whilst being aware that content is an unregulated service.

260. ComReg proposes that the on-going and acquisition cost (together the ‘eir Sports Costs’) should be included in all bundle-by-bundle tests and portfolio tests. eir does not agree with the bundle by-bundle approach. In addition, the portfolios defined by ComReg in the Urban Area and Regional Area 1 are too narrow to provide any meaningful flexibility as to the recovery of what is a fixed indirect and common cost for bundles.
261. There is a significant risk that ComReg’s approach will only impact non-regulated markets, as the wholesale underlying telecommunication service inputs which are used in the MST are all cost-oriented (with the exception of FTTH). For example, \propto . eir submits that a mechanism is needed to minimise the impact of such short term fluctuations on what are long-term pricing decisions.
262. \propto . This lack of appreciation for the differences in the regulatory framework under which ComReg imposes regulation on eir and the commercial competitive market in which it operates puts into sharp focus eir’s concerns that such undue regulatory intervention — in a market which is not subject to SMP — will increase the risk of regulatory failure.
263. The inclusion of eir Sports costs on a bundle-by-bundle basis does not recognise the pricing flexibility required in order to recover the high fixed and sunk cost nature of finite TV content rights or the acquisition cost of Setanta Ireland. This restrictive calculation limits eir’s ability to recover those costs and is circular in nature (see paragraph 261).
264. As such, the bundle-by-bundle retail MSTs proposed by ComReg explicitly implies that each subscriber in each bundle must contribute evenly. In reality customers are spread over a range of bundles at different price points. As such, the proposed approach does not recognise that some subscribers could contribute more on average than others.
265. From an incremental point of view any additional margin from any customer on any bundle contributes to the recovery of eir Sport Costs which in turn reduces the average portfolio cost. Applying a strict cost at an individual product level restricts the ability to attract new (or prevent churning) customers to (or from) those offers. This in turn in aggregate could prevent eir recovering those costs — which in the long-run may dampen eir’s ability to compete in the retail market or restrict eir’s competitiveness in the acquisition of sports rights or other content (an unrelated and separate market).
266. Consequently, the current approach could result in retail price increases for certain offers (the users of which may or may not actually value the free TV Sports offering) and restrict eir retail’s ability to offer new promotions and discounts. This effectively prices eir retail out of an already very competitive retail market.



267. The opportunity cost of not completing a sale at an individual bundle level is higher to eir when the positive margins that bundle would have generated are foregone because they were below (or even just below) a regulatory specified indirect common cost contribution.
268. eir Sports is available to all eir broadband customers (both current generation and next generation) and so the correct level of assessment to determine replicability of the on-going costs of eir Sports is at the overall Broadband portfolio level or the individual broadband portfolio level (if ComReg maintain a view that CGA and NGA bundles must be assessed separately).
269. Combining a commercial and economic view of the eir Sports Costs, the on-going costs including eir Sports' content and the acquisition cost of Setanta Ireland are very different. The on-going cost including eir Sports' content is the incremental cost of being in the sports television market. Consequently, such costs over the appropriate timeframe could be considered to be a close proxy to eir's LRIC. The use of this cost standard is also consistent with ComReg's regulatory approach as to the treatment of unregulated services to date.
270. With respect to the acquisition cost of Setanta Ireland, this represents a one-off sunk cost which has no bearing on future business decisions regarding the eir Sports platform. As such, eir considers that the corporate transaction should not be considered relevant to the replicability of eir retail's offering. However, to the extent that this cost was relevant — which eir does not agree that it is — it is a fixed indirect or common cost. In other words, the type of cost which is considered within the plus symbol of LRIC+.
271. Consequently, eir submits that a more appropriate test that ensures replicability but also allows more appropriate pricing flexibility is that on-going costs including content are considered at the individual portfolio level (consistent with eir's proposal regarding the recovery of eir's other LRIC) and that the acquisition cost is considered at the overall portfolio level (consistent with eir's proposal regarding the recovery of eir's other LRIC+ costs).
272. By accounting for such costs at a more aggregate level (as opposed to the bundle-by-bundle proposal by ComReg) it allows updates to the subscriber base and the net cost of eir Sports to be reflected and ensures that it is overall replicable by another operator — while also providing some level of retail pricing stability to the individual bundles and standalone offers within the overall broadband portfolio.
273. In addition, eir's approach provides appropriate flexibility as to how it recovers common costs between different bundles within the portfolio and allows eir to have different margins for different end-users (and implicitly that some contribute more to the recovery of the eir Sports Costs than others).





Question 20: 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.

274. eir does not agree with ComReg’s preliminary view that there is a need for a pre-clearance and approval by ComReg for eir to offer a new or revised bundle. This is completely disproportionate. eir considers that it would only be proportionate for it to pre-notify and obtain pre-clearance from ComReg of retail offerings in the case where there was an underlying change in the wholesale inputs to the test. With the exception of FTTH-based services, all other wholesale inputs are subject to cost-orientation therefore it is not apparent what regulatory powers ComReg could use to impose this requirement absent defining and imposing SMP in the retail market on eir.
275. The competitive market dynamics in the retail market mean that eir has to be quicker and more responsive in respect of its retail offerings and promotional activity than other operators. At present, there are two processes within eir. The first is a commercial process which assesses the commercial business case for a particular promotion or plan. The second is to determine whether, in a regulatory context, that commercial decision would comply with the current NRT. As part of the second process, a regulatory compliance statement including workings (which take different views of costs and portfolios than undertaken in the first commercial process) is required to be submitted to ComReg — which are then assessed by ComReg typically within the five day approval process. Going forward eir must be able to respond more effectively to market outcomes including consumer demand. ✕. This is simply unacceptable for any commercial operator.
276. In the context of the product-by-product test proposed by ComReg in Regional Area 2 (which eir considers inappropriate) it is important to consider that when a new or revised offer is launched it requires some level of forecasting regarding take-up and relevant qualification for promotional/discounts. Given that offers can be launched part way through months, take-up rates are step-functions over time (rather than all customers purchasing the bundle on “day 1”) and early usage patterns may not be representative (due to small subscriber numbers) of the profile of a more stable base — it means that a longer time period to assess compliance is more appropriate (see also paragraphs 278). Furthermore, some flexibility needs to be given to eir to test market demand — which would not necessarily be apparent from one or two month out-turns. Finally, whether a single non-compliant offer could harm competition is also strongly debatable.
277. Similarly, for a new offer to make a portfolio test non-compliant, it would have to represent a significant up-take to affect the overall portfolio weighting. As the obligation to remain compliant with eir’s regulatory obligations lies with eir post launch, actual uptake and portfolio margins will continue to be monitored by eir to ensure compliance and as a matter



of commercial common sense. Therefore, it is unclear to eir how a pre-clearance and approval requirement at the portfolio level addresses ComReg's regulatory concern "*that products launched by Eircom can be effectively replicated by other operators, where appropriate, and are beneficial to end users and the marketplace*"⁵⁹. ComReg in this regard should have confidence that competition will deliver benefits to consumers.

278. In respect of ComReg's proposed alternative requirement (where pre-approval would not be required by eir pre-launch, but that compliance will be assessed for a retail amendment every quarter) eir considers that while this methodology is preferable to ComReg's preliminary view, the compliance/assessment period is not adequate without an effects-based approach / competitive assessment (see paragraphs 282-285) and/or the number of consumers may not have reached an appropriate retail subscriber threshold — where such a compliance statement could provide any meaningful assessment of forward-looking margins. Consequently, eir submits that a six month period is more appropriate to undertake an assessment of compliance at an overall portfolio level⁶⁰. This would provide ComReg with sufficient oversight that eir is not causing a margin squeeze and is in compliance with any regulatory obligations imposed as part of the market review. After a twelve month period (which should preferably coincide with eir's financial year) a full compliance statement can be submitted by eir to ComReg. Such a period provides the optimum balance between ensuring eir is compliant with its regulatory obligations and providing appropriate pricing flexibility to eir.⁶¹
279. eir is aware of its regulatory obligations, and a pre-clearance and approval process places too much weight on a misjudged concern on the part of ComReg that eir may somehow deliberately launch a non-compliant offer. eir considers that an alternative ex-post assessment by ComReg of launched offers is more appropriate and, given eir's proposal on the compliance period (see paragraph 285), will provide adequate oversight to ComReg of the impact of eir's offers and promotional activity. This will provide ComReg with comfort that offers are consistent with eir's regulatory obligation(s) and address the nature of the problem identified, and ensure ComReg's objective are achieved (i.e., that the offer is replicable and is not causing a margin squeeze).

⁵⁹ ComReg, Consultation, paragraph 12.27.

⁶⁰ eir considers that a 5,000 retail subscriber threshold should be applied before a statement of compliance is required. It is not until subscriber levels are at a sufficient level that such a statement can provide any meaningful assessment of forward-looking margins and compliance.

⁶¹ eir notes that this would be consistent with the VULA margin squeeze test in the UK, which has been tested by litigation.



Question 21: 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.

280. eir does not have any market power in the retail market. Therefore, absent ComReg's concurrent competition powers, it is not apparent what powers ComReg could use to enforce the compliance of any eir retail offer in respect of a potential margin squeeze.
281. Furthermore, it is not clear to eir why ComReg has consulted on its statutory enforcement powers in the context of retail MSTs. First, it would appear that ComReg could not fetter its regulatory obligations one way or the other as a result of the consultation and that it would be a matter for ComReg to consider what appropriate steps, if any, it decided to take. Second, it is unclear to eir why ComReg expressly discusses its enforcement powers in a retail market but has never done so in the context of any wholesale markets when imposing regulatory remedies. Notwithstanding these points, eir welcomes the idea of ComReg consulting on enforcement policy, albeit only on a very narrow aspect.

Other Considerations

282. The Consultation does not specify the assessment period for the retail MST. Section 5.9 of the Consultation refers to monthly margins and therefore eir's submission is based on the assumption that compliance will be assessed on a monthly basis.
283. A one month compliance period is too short to provide any meaningful information on whether any offer is capable of recovering its ATC (as proposed by ComReg) or LRAIC (as proposed by eir and LRAIC+ at the overall broadband portfolio) — even on a portfolio basis. As the claim that the results in any given month will lead to exclusion in the market is not plausible, it should not be necessary to analyse whether short run losses or profits are being incurred in any portfolio.
284. There may be reasonable explanations as to why an individual portfolio may not be positive in a single month. For example, there may be higher than average throughput/broadband usage during certain months such as December and January, which are not representative of general traffic profiles. A longer compliance period would provide eir with the required flexibility to develop better offerings to consumers in the long-term, including assessment of consumer trends and usage profiles, which would be to the benefit of consumers as well as allowing eir to better compete with its competitors.
285. eir submits that a six month period is sufficient to undertake an assessment of compliance at an overall portfolio level. This would provide ComReg with sufficient oversight that eir is not causing a margin squeeze, and is in compliance with any regulatory obligations imposed as part of the market review. After a twelve month period (which should preferably coincide with eir's financial year) a full compliance statement can be submitted by eir to ComReg.



286. Such a period provides the optimum balance between ensuring eir is compliant with its regulatory obligations and providing appropriate pricing flexibility to eir.⁶²
287. Finally, eir notes that under the existing NRT test the procedure for a post launch assessment of a non-compliant bundle is more detailed and specific. In particular, the Bundles Decision set out specific timelines of review and the nature of correspondence required between ComReg and eir and explicitly provided that not less than two consecutive NRT monthly data sets would be considered. It is unclear to eir why ComReg has not clearly detailed any such procedures in this Consultation. eir considers that in order to provide regulatory certainty ComReg must include detailed provisions as to the relevant steps it will take and the requirements of eir during this period. Paragraphs 6.14-6.16 of the Bundles Decision stated that:

"...where ComReg is of the preliminary view that a particular existing bundle is non-compliant, it will inform Eircom in writing of this preliminary view. Eircom will then have a period of ten working days within which to inform ComReg in writing as to whether it intends to modify or withdraw the relevant bundle. It should be noted that, once Eircom receives ComReg's preliminary view that a particular bundle is non-compliant, it must not add any new customers to the relevant bundle until further notified by ComReg (i.e., until the bundle is modified to ComReg's satisfaction).

In cases where Eircom has informed ComReg that it proposes to modify the relevant bundle, ComReg will inform Eircom in writing of its view as to whether the proposed modified bundle complies with the obligation under ComReg Decision Do7/61 not to unreasonably bundle services. Prior to informing Eircom of its view, ComReg may seek further information from Eircom to inform its assessment of the proposed modified bundle. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, ComReg will not provide Eircom with its assessment of the proposed modified bundle pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed with its assessment of the proposed modified bundle.

Where Eircom fails to notify ComReg of proposals to modify or withdraw the relevant bundle(s) within the stipulated ten-day period, or where proposals submitted are considered by ComReg to be insufficient to remedy the non-compliance, ComReg may decide to use its existing statutory enforcement powers (or other relevant statutory powers) for the purposes of ensuring compliance with the obligation not to unreasonably bundle services. For example, and without prejudice to ComReg's power to use whatever approach it deems appropriate in a particular case, this could potentially involve civil enforcement under Regulation 31 of the Universal Service Regulations, criminal enforcement under Regulations 13(9) / 35(2) of the same

⁶² We note that this would be consistent with the VULA margin squeeze test in the UK, which has been tested by litigation.



Regulations, and/or the issuing of urgent directions under Regulation 30 of the Universal Service Regulations (in conjunction with Regulations 12(2) and 13(8) of the Framework Regulations)."



Question 22: Do you agree or disagree with ComReg’s proposed approach to introduce a monitoring statement? Do you agree or disagree with ComReg’s proposed approach to require this statement on a quarterly basis? Please explain your response and provide detailed information to support your view.

288. eir does not agree with ComReg’s proposal to introduce a monitoring statement. eir is concerned that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *de facto* regulation of retail tariffs. ComReg has no power to impose such regulation in the context of the current wholesale market review, nor does it purport to exercise any such powers (which exist under the Universal Services Regulations⁶³) to impose retail regulation.
289. Furthermore, as identified in paragraphs 282-286, short compliance periods do not provide any meaningful information on whether any offer or portfolio is replicable. As the claim that the results in any given month will lead to exclusion in the market is not plausible, it should not be necessary to analyse whether short run losses or profits are being incurred in any portfolio.
290. eir submits that a six month period is sufficient to undertake an assessment of compliance at an overall portfolio level (provided by means of a margin squeeze model with explanatory note). This would provide ComReg with sufficient oversight that eir is not causing a margin squeeze. After a twelve month period (which should preferably coincide with eir’s financial year) a full compliance statement can be submitted by eir to ComReg.

⁶³S.I. No. 337/2011 - European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011.



Question 23: 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.

291. The RIA ignores the very high costs to eir and to consumers of ComReg continuing the highly interventionist approach that applies only to the pricing of eir's retail bundles. In addition, the administrative costs associated with applying a highly complex ex ante MST on eir are high and continue to increase (due to more complex regulation being imposed incrementally by ComReg over time) from an on-going notification, monitoring and reporting perspective.
292. ComReg's concerns are theoretical in nature and rely on a number of conditions to hold in order for such outcomes to potentially manifest. In comparison, it is interesting to note that due to initial competition concerns regarding fixed-mobile bundles and content exclusivities in the Netherlands, the Dutch regulator undertook and recently concluded a separate consultation on the market. After careful consideration the Dutch regulator concluded that there are no grounds for intervention in the retail bundles market in the Netherlands. It is unfortunate that ComReg did not undertake such an analysis itself or carry out the required Three Criteria Test before publishing this Consultation.
293. The RIA fails to consider the relevant risk of adverse effects arising from price distortion by imposing retail price regulation. Absent an appropriate assessment of the competitive conditions on the retail market, it is simply impossible for ComReg to demonstrate that the imposition of a MST is a proportionate intervention in the specific circumstances of the market.
294. eir has provided comments on steps 1, 3 and 5 identified by ComReg as being necessary for assessing the various regulatory options it has considered. Each is discussed in turn below:

Step 1: Describe the policy issue and identify the objectives

295. ComReg's market analysis consultation 16/96 and ComReg's market analysis Decision D05/15 constitute wholesale market and not retail market assessments. See also eir's Executive Summary and response to Question 1.
296. Furthermore, as identified by eir in its response to Question 1, Regulation 13 of the Access Regulations, from which ComReg purports to derive its relevant powers, only allows ComReg to impose conditions in relation to the "*provision of specific types of access or interconnection*". From the definition in Regulation 2(2), it is clear that access in this context means wholesale access only. ComReg's powers to regulate retail markets are found in the Universal Services Regulations (as there are no remaining retail markets recognised by the European Commission as being susceptible to ex-ante regulation). However, the exercise of these powers is, in line with the European regulatory scheme, tied to the definition and analysis of



a relevant retail market (Regulation 13(1)(a) Universal Service Regulations), including that market's assessment as suitable for ex ante regulation using a Three Criteria Test.

297. As a result, ComReg appears to be misdirecting itself in relation to the scope of its powers. In neither of the two Regulations is there a provision for the imposition of a retail remedy on the basis of a wholesale market review only.
298. In the event that the Access Regulations are relevant, which eir considers that they are not, eir considers that ComReg:
- a. is proposing to act inconsistently with Regulation 8 of the Access Regulations: ComReg's market analysis consultation 16/96 and ComReg's market analysis Decision Do5/15 constitute wholesale market assessments only. Without undertaking a Three Criteria Test of the relevant retail market, consistent with the requirements of the 2014 Recommendation, it is not possible to determine whether eir has significant power such that its actions are unaffected by the independent actions of its competitors and customers. Consequently, the nature of the problems identified by ComReg in this Consultation is merely speculative. See also eir's response to Question 1 and Question 2.
 - b. fails to deliver the key objectives outlined in Regulation 13 (3) of the Access Regulations: By relying on too generous a cost standard (see eir's response to Question 8), making uninformed adjustments to costs for scale (see eir's response to Question 7) and at a disaggregated level of assessment for which competition concerns are not grounded in sound economics (see eir's response to Question 8), ComReg's proposals are creating a pricing umbrella in the retail market below which eir cannot compete and its competitors need not compete. As such, ComReg's proposals clearly fail to promote efficiency, promote sustainable competition and maximise consumer benefits.
 - c. is misapplying the actual outcomes of ComReg's proposals to the objectives of Regulation 16 of the Framework Regulations: ComReg argue that the MST promotes regulatory predictability as there is currently an NRT already in place. Predictability for consistency's sake without further consideration is not grounded in any cogent reasoning an economic regulator should consider. Furthermore, the competitive conditions ComReg claims to have taken into account in defining different regional areas with differing MST for each of the regions is inconsistent with the national pricing strategy undertaken by retailers in the market. As such, even the most flexible region is burdened by the requirement to pass the equivalent test in the most stringent area. See eir's response to Question 7 and Question 8. Finally, ComReg has failed to take the utmost account of both the 2014 Recommendation and 2013 EC Recommendation.



- d. fails to deliver ComReg's objectives as set out in Section 12 of the Act: see eir's response b. above.

Step 3: Likely impact on stakeholders

Option 1: No MST for bundles is implemented

299. ComReg state that absent the MST the NRT would continue to be required pursuant to the 2014 Retail Fixed Voice Access market review decision. However, the Retail Fixed Voice Access market review is now dated and requires re-assessment. In that regard, as this market is no longer recognised by the 2014 Recommendation, if ComReg wish to continue to impose the NRT it would first be required to undertake a Three Criteria Test assessment.
300. See also paragraph 25.



Option 2: The MST takes into account that Eircom including OAOs using its wholesale platform are facing more competition in certain areas

301. See eir's response to Question 6.

Option 3: The MST is conducted on various bases (i.e., a bundle-by-bundle and/or a portfolio test)

302. The RIA fails to consider the impact of applying differing remedies between defined regulatory boundaries on eir, OAOs and consumers in the context of a national retail market.

303. The RIA fails to consider the impact of the separate wholesale network inputs (WAWNI) proposed for CGA and NGA bundles, the lack of assessment undertaken by ComReg in creating smaller portfolios (by separating the Urban Area and Regional Area 1) where there was heretofore only one portfolio applied (i.e., the Larger Exchange Area), and the impact of inconsistent downstream retail costs used between areas.

304. See also eir's response to Question 7 and Question 8.

Option 4: A lower cost standard for calls, line rental, and broadband retail costs and the overall appropriate cost standard for the MST

305. See paragraph 302.

306. See also paragraphs 164-178.

Option 5: The MST reflects a weighted average cost of the applicable wholesale input

307. See paragraph 302.

308. ComReg proposes separate portfolios for the Urban Area and Regional Area 1 compared to the single LEA portfolio test (which previously incorporated all the exchanges in the Urban Area and Regional Area 1 into one test using the NRT pursuant to the Bundles Decision). As a result of the separate WAWNIs, eir retail's margins will immediately decrease in Regional Area 1 and create a negative impact of ca. ⚡ on eir's pricing flexibility for CGA bundles in those exchanges now classified within Regional Area 1.⁶⁴

⁶⁴ NGA retail offers are also impacted ⚡.



Option 6: Allow on a case-by-case basis known future reductions in cost e.g., Mobile Termination Rates

309. eir agrees that it would be appropriate for eir to reflect known future changes in cost in order to ensure that the cost stacks used in the MST (and currently in the NRT) are not artificially higher than they need to be.

Option 7: That the MST should use different cost standards for retail costs for broadband in the various areas

310. eir does not agree.

311. Without appropriate evidence by ComReg that competitors' costs are in fact higher than eir retail's, such an adjustment is purely speculative.

312. The Irish market has a number of well-established large multinational players and ComReg has not provided any evidence in support of its proposal which would allow interested parties to determine whether its proposals are proportionate, objectively justifiable and based on the nature of a real and substantiated market failure. In this submission, eir has demonstrated that ComReg's regulatory intervention will result in excessive retail prices to the detriment of Irish consumers and, by limiting competition, will hamper efficient commercial investment in infrastructure and services.

313. As set in eir's response to Question 7, eir should be allowed to compete in the retail bundles market on the merits of its own costs. It is a competitive market and the proposed regulatory intervention is disproportionate and ultimately both distortive of competition and contrary to the interests of consumers.

Option 8: Unregulated products and services will be included at LRIC cost standard. Cross-subsidisation is allowed from the regulated product/services to the unregulated services

314. eir considers that, as LRIC is consistent with the cost standard applied by ex-post competition law, it is the appropriate standard to use.

315. However, in order to imitate the commercial decisions of all operators in a market ComReg must recognise that the replicability of a bundle is determined by the margins of the bundle in its entirety and therefore firms cross-subsidise between all elements within the bundle and bundle portfolio.

Option 9a New/revised bundles must be pre-notified and pre-cleared with ComReg; and Option 9b Eircom self-certifies that a new/revised bundle meets its obligation not to cause a margin squeeze



316. See eir's response to Question 20.

Option 10 If and when a bundle is causing a margin squeeze

317. eir does not have any market power in the retail market. Therefore, absent ComReg's concurrent competition powers, which it is not seeking to rely on, it is not apparent what powers ComReg could use under the Access or Framework Regulations to enforce compliance of any eir retail offer in respect of a potential margin squeeze.

318. See also eir's response to Question 21.

Option 11a: The net costs of Eir Sports should be included in qualifying bundles

319. To the extent that eir's competitors would choose to compete directly in the provision of sports content (i.e., eir Sports) or a similar investment, they would not view this in the constrained way as proposed by ComReg. The acquisition of sports content and content more generally is a long term strategic investment and the ability to extract value when considering prices and cost recovery are at a broader level than the strict bundle-by-bundle proposed by ComReg. The proposed MSTs lack the required flexibility to allow eir to determine how best to recover its large fixed and indirect common cost.

Option 11b: The inferred wholesale charges for Eir Sports should be included in qualifying bundles

320. An inferred wholesale charge is not appropriate to be used in the test. eir does not have SMP in the market and therefore such a mechanism would be contrary to any of ComReg's regulatory obligations and powers.

Step 5: Assess the impacts and chose the best option

321. eir's submission to this Consultation considers two matters. The first demonstrates that the facts and reasoning used by ComReg in this Consultation are wrong. Having failed to follow the prescribed statutory process for the imposition of ex ante regulation, it would simply be ultra vires for ComReg to proceed to the imposition of a retail MST at this stage. Second, with respect to the components and workings of the MSTs, eir has proposed alternative price control measures which better meet ComReg's regulatory objectives and are more consistent with the 2013 EC Recommendation and ex-post competition law.





Question 24: Do you believe that the draft text of the proposed Decision Instrument for the FACO Market 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.

Question 25: Do you believe that the draft text of the proposed Decision Instrument for the WLA Market 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.

Question 26: Do you believe that the draft text of the proposed Decision Instrument for WCA Market 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.

322. eir has no specific comments on the proposed Decision Instruments. However, as will be clear from eir's overall response to this Consultation, eir considers that the Decision Instruments seek to implement a regulatory measure that ComReg does not have the power to implement in the context of a wholesale market review.
323. In addition to further consultation on market definition and designation of the market as susceptible to ex-ante regulation, including market analysis and on remedy design, ComReg will need to reframe the proposed Decision Instruments such that they are reflective of the (retail market) powers found in the Universal Services Regulations, which ComReg would actually need to exercise.
324. In reframing the Decision Instruments, ComReg may also want to consider in the interest of legal certainty including more of the specification of the MST, currently contained in Chapter 5 of the Consultation, in the Decision Instrument itself, including relevant definitions of cost standards etc.
325. In the Decision Instruments, Criterion 4 of the Regional Area 1 definition needs to be expanded to include FTTH NGA services.
326. Finally, as set out in paragraph 287, ComReg should include in the Decision Instruments, the requirements and procedures it will follow and the relevant timelines in the event that a bundle (which eir does not consider is the appropriate level of aggregation to assess compliance) or portfolio is considered to be non-compliant by ComReg.

Brian Williamson

Leveraging regulation into retail broadband and adjacent markets via margin squeeze - Primum non nocere

June 2017

Disclaimer

This is an independent report funded by eir. The opinions offered herein are those of the author. They do not necessarily represent the views of eir, nor do they represent a corporate opinion of Communications Chambers.

About the Author

Brian Williamson is a Partner at Communications Chambers. He has extensive policy, strategy and regulatory experience in relation to network access, internet applications and radio spectrum. His clients include governments, regulators, leading fixed and mobile telcos and global online and device businesses.

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1. Executive summary

ComReg propose moving from wholesale pricing freedom for Fibre to the Cabinet (FTTC) to comprehensive price controls. ComReg also propose a margin test of eir service bundles, to ensure that others can replicate eir's service offers including bundles which include non-regulated services.¹

First, there are sound grounds for not moving to comprehensive price controls for FTTC (as argued in a companion paper in June 2017 entitled "Supporting fibre rollout and infrastructure investment in Ireland via continued pricing flexibility" Comprehensive wholesale price controls would harm investment, infrastructure competition and delivery of the National Broadband Plan.

Second, if comprehensive wholesale price controls are adopted, there is no need for an *ex ante* economic replicability test as well. Introducing such a test would represent a belt and braces approach which goes beyond guidance offered by the European Commission and norms in terms of regulatory conduct by other regulators.

Third, if an economic replicability test is imposed alongside wholesale pricing freedom then it should not be overly constraining on service and pricing freedom, including in relation to service bundles. An economic replicability test, in line with European Commission guidance, should be less not more constraining than an ex post margin squeeze test – given that there is established retail competition.

ComReg assert that eir "...has both the ability and incentive to engage in exploitative and exclusionary behavior to the detriment of competition and end-users". However, eir faces growing infrastructure competition, established competitors who offer bundles that eir cannot necessarily replicate and who are seeking to grow the market for next generation access services with the support of retail partners. Under these circumstances eir is unlikely to have the ability or incentive to engage in exclusionary behavior.

ComReg also assert that there is a trend towards competition for bundles rather than standalone services. However, if fixed voice is excluded on grounds that it is of diminishing importance given competition from mobile voice and over the top communications services, the extent of bundling is relatively low and stable. The

¹ ComReg, [Consultation on Price control obligations relating to Bundles](#), Reference 17/51, June 2017.

internet has tended to unbundle services, by separating provision of applications from networks or devices (provided consumers can access the internet). The rise of streaming music and streaming video are examples of internet driven unbundling.

Content is however offered as a part of bundles by several market participants, and these offers may involve unique content and be non-replicable. This, however, is a feature of competition in the Irish market and applies equally if not more so to competitors to eir than to eir itself.

The challenge of replication is not a one-way street with Virgin, Sky and Vodafone all offering bundles, and including non-replicable elements in some bundles. Commercial partnerships may also strengthen the position of competitors to eir.

ComReg cannot, and should not, seek to eliminate all differences between competitors; and should not seek to tie the hands of eir and require eir alone to allow others to replicate their bundles.

Applying asymmetric regulation to eir will only accentuate and entrench the advantage others in the market hold; whilst limiting the scope for eir to offer bundles that benefit consumers, help drive broadband adoption and support competition.

If an economic replicability test is applied the relevant cost standard should be an equally efficient operator, and testing should either be at the level of broadband alone on an avoided cost basis or at a more aggregated level if the test provides for recovery of fixed cost elements.

Scope for flexibility over retail offers and pricing, including for bundles, should be preserved, subject to an effective constraint on the pricing of wholesale broadband access. Maximising scope for service and price innovation will support competition and investment, and benefit both consumers and the economy in Ireland.

The aim, if regulation is extended to the retail market with established competition and bundles including non-regulated inputs, should be to first do no harm.

2. There is no need for a belt and braces approach

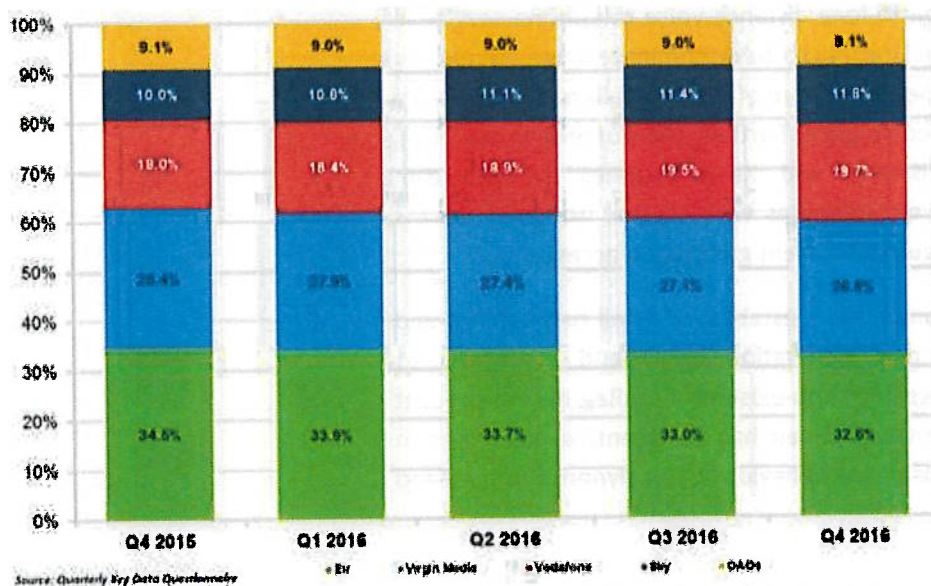
ComReg propose both a comprehensive cost-oriented price control for FTTC and margin squeeze tests, including a test related to bundles. Such a belt and braces approach is not necessary.

Fear of foreclosure is entirely hypothetical

The concern ComReg express that other authorised operators (OAOs) may not be able to profitably replicate eir's retail offers and may exit the market is entirely hypothetical, particularly given growing retail competition.

In the fixed broadband market eir has a market share of 32.3%, a share that has been declining (Figure 1); whilst in the mobile broadband market eir has a share of just 12.8%.²

Figure 1: Fixed broadband market share



Irrespective of the approach to price controls in relation to wholesale access, eir will continue to be obliged to offer network access on non-discriminatory terms. Further, as discussed later in this report, eir's competitors enjoy several non-replicable competitive advantages in terms of the service bundles they offer.

Fear of foreclosure, at least on the time frame relevant to this review period, would appear to be entirely hypothetical. Extending, or leveraging, asymmetric regulation into adjacent retail markets

² ComReg, *Quarterly Key Data Report Data as of Q1 2017*, June 2017.

via a margin squeeze test on bundles supplied by eir is neither necessary nor proportionate.

Other retailers are partners as well as competitors

ComReg assert that, absent controls on the margin on bundles, eir would have the both the ability and incentive to engage in exclusionary behavior. However, in a market with infrastructure competitors and which is in transition to next generation broadband access this is far from clear cut. Other retailers are partners in selling broadband access, as well as competitors in the retail market.

The literature on incentives to discriminate in downstream telecoms markets was developed in the era of fixed telephony when infrastructure competition was non-existent or limited, demand for fixed voice was inelastic and incumbent operators dominated the market.

For example, Weismann and Kang (2001)³ considered incentives to discriminate in relation to long distance voice telephone service in the US and found that: incentives to discriminate were decreasing with more retail competition, more efficient retailers, the elasticity of demand and the access price. Further, the numerical modelling carried out by Weismann and Kang assumes an upstream monopolist, whereas eir competes with several upstream access providers and with regulated current generation access.

With infrastructure competition, established retail competition and elastic demand for next generation broadband incentives to discriminate may be weak or non-existent. ComReg do not present evidence for the assertion that eir has an incentive to engage in exploitative and exclusionary behavior in the dynamic broadband market.

Cross-selling and cross-subsidy can increase internet adoption

Concern over the possibility of eir cross subsidising broadband is also misplaced, and in any event unlikely to be that successful given competition in relation to other possible elements of a service bundle. Ireland would benefit not only from universal broadband availability, but from near universal adoption and use. In 2016 82% of adults had used the internet in the past three months; whilst

³ Weismann and Kang, Incentives for discrimination when upstream monopolists participate in downstream markets, *Journal of Regulatory Economics*, September 2001, Volume 20, Issue 2, 2001.

equal to the European average, that still leaves 18% of adults essentially offline.⁴

Only when internet adoption and use is near universal can there be confidence that digital services will create opportunities for all, rather than introducing new divides. Near universal online adoption is also likely in practice to be a prerequisite to government moving to digital service delivery by default. Opportunities for cross-selling and cross-subsidy are one way of reaching those who are not yet online.

Guidance and precedent is inconsistent with the ComReg proposals

The 2013 recommendation on costing and non-discrimination

The aim of the 2013 recommendation can be interpreted as promoting efficient investment via pricing freedom whilst protecting competition.

In this context, an economic replicability test is relevant where pricing freedom is allowed at the wholesale level and there is a “demonstrable retail price constraint” from regulated current generation access and other competing infrastructure. An economic replicability test is therefore contemplated where, as is the case in Ireland, there is already effective retail competition.

The 2013 recommendation on costing and non-discrimination, recital 61, proposes an economic replicability test where wholesale price regulation is not imposed:⁵

“In order to establish whether alternative access seekers can economically replicate a downstream offer provided by the SMP operator with the regulated wholesale input available, in cases where wholesale price regulation should not be imposed, an NRA should undertake an economic replicability test.”

An economic replicability test is therefore proposed where wholesale price controls are not imposed; whereas in Ireland both a wholesale price control and a replicability test are proposed. Should ComReg proceed with a comprehensive price control, an *ex ante* economic replicability test need not also be applied.

⁴ Eurostat, *Digital Economy and Society*, 2016.

⁵ European Commission, *Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment*, September 2013.

However, should ComReg decide, having reflected on responses to the consultation and the evidence base, that a wholesale price control is not required, then whilst an economic replicability test may be imposed it is in the context of established retail competition. This has implications for the choice of method and of parameters, to protect already established competition, not to protect inefficient competitors or discourage investment.

As Annex II of the 2013 Recommendation notes:

“When setting the parameters of the *ex ante* economic replicability test, NRAs should ensure that the SMP operator is not put at a disadvantage vis-à-vis access seekers regarding the sharing of investment risk.”

The recommendation proposes, for example, that downstream costs should be estimated based on an equally efficient operator (EEO test). Further, the bar for an adjustment to downstream costs to support alternative operators is set high in Annex II:

“Where market entry or expansion has been frustrated in the past... [or] objective economic conditions do not favour the acquisition of scale by alternative operators, NRAs may make adjustments for scale to SMP operator’s downstream costs in order to ensure that economic replicability is a realistic prospect.”

In Ireland retail competition is established, eir has one of the lower ex incumbent retail market shares in Europe and several competitors - Sky, Liberty Global and Vodafone - have scale across multiple markets. Relevant downstream costs should therefore clearly be estimated based on an EEO test.

The recommendation has a limited amount to say about bundles, focusing on the concept of flagship products, noting that flagship products are likely to be offered as a bundle, and that NRAs should assess innovative variations of such bundles, if they are likely to replace the flagship product.

What is clear is the focus on investment incentives, which implies leaving as much scope as possible for price flexibility, service-price differentiation and flexibility regarding the recovery of common costs. Flexibility over the recovery of common costs implies flexibility over non-cost based service-price differentiation for next generation access and flexibility over the recovery of common costs within bundles offers.

What this implies for an economic replicability test depends on the level of product aggregation at which a test is applied. If at the single product level, then to preserve flexibility over common cost recovery then an avoidable cost standard – incremental cost without the allocation of common costs – test would preserve flexibility; whereas as the level of aggregation increases, including bundles, then recovery of shared costs may be consistent with pricing flexibility in relation to standalone products.

A further consideration is the fact that several competitors in the Irish market offer bundles with non-replicable elements (discussed further in Section 4). In other words, service providers are competing over differences, as well as efficiency in delivering common service elements. In this context imposing an overly strict economic replicability test on eir alone may distort and diminish competition, as well as harming investment. Judgement, and a degree of forbearance, is required given the market reality in Ireland.

The 2014 recommendation on relevant markets

The Explanatory Note accompanying the recommendation on relevant markets notes the following in relation to bundles:⁶

“this Recommendation does not propose to define a separate retail market for bundles because evidence to date has not indicated that there is a need for ex ante regulation of bundles, which may contain a previously regulated input.” Section 3.2.

The explanatory note goes on to note that:

“Furthermore, even if an NRA would define a retail market for triple play, for example, the wholesale inputs needed to compose this bundle would remain separate and non-substitutable, such as for example local access, higher-level access and termination. What is important in this respect is that NRAs are able to ensure that the vertically integrated SMP operator's regulated elements of the bundle can be effectively replicated (in terms of both technical and economic replicability) at the retail level, without an implicit extension of regulation to other components which are available under competitive conditions.” Section 3.2.

ComReg have in fact not defined a retail market for bundles including triple play. The explanatory also cautions against the

⁶ European Commission, *Explanatory Note accompanying the recommendation on relevant markets*, October 2014.

extension of regulation to components available under competitive conditions.

However, both the 2013 recommendation on costing and non-discrimination and the 2014 recommendation on relevant markets do not address the challenge of judging what to do when competitors offer non-replicable, and unregulated, services. An overly broad and overly constraining economic replicability test applied to eir risks distorting and discouraging competition in such circumstances.

Ofcom review of wholesale local access

Ofcom propose removal of the existing *ex ante* margin squeeze test alongside the introduction of a regulated anchor product for FTTC (a form of wholesale access regulation that would be less constraining than that proposed by ComReg):⁷

“In our judgement, given the importance of the 40/10 VULA service and the substitutability of SFBB services, the imposition of a charge control on the 40/10 service for the period starting in 2018/19 would provide considerable protection against the distortion of competition and would be sufficient to protect retail competition.”

“We therefore consider that the detailed compliance arrangements that we introduced in the 2014 FAMR to guard against a margin squeeze on VULA services are no longer appropriate and we propose to discontinue these arrangements.”

Whilst the somewhat different circumstances in Ireland must be assessed, it is not clear what would justify a margin squeeze test in addition to wholesale access regulation. Absent a comprehensive wholesale price control, for example, were an anchor product approach adopted, a margin squeeze test in addition may also not be required. Finally, if a margin squeeze test is applied it could apply to broadband only, rather than to bundles.

Conclusion

An *ex ante* margin test in addition to wholesale access price controls is unwarranted. Should concern regarding margin squeeze remain, assuming the *status quo* approach to wholesale regulation is maintained, then the safeguard of review in three years' time may be judged sufficient. Under no realistic scenario does

⁷ Ofcom, *Wholesale local access market review*, Volume 1, March 2017. Paras 8.48-8.49.

leveraging regulation into adjacent markets via regulation of the margin for bundles appear appropriate.

3. Bundling is not a trend – the internet is unbundling services

The starting point for analysis by ComReg is that much of the competition in the fixed line market is based on bundles of products. Yet the primary example cited to support this view is a “bundle” of fixed voice and fixed broadband.

Legacy fixed voice is no longer economically important

Historically this “bundle” has arisen because consumers who had fixed line voice have progressively adopted fixed broadband, rather than via a conscious decision to adopt a “bundle” of fixed voice and fixed broadband. During the same period, since around 2000, mobile adoption and use has grown, as has use of over-the-top services including Skype and WhatsApp.

Fixed voice minutes have declined relative to mobile, with mobile now making up 76% of managed voice minutes (the introduction of Wi-Fi calling for mobile, introduced by eir in May 2017, may encourage a further relative shift to mobile voice). The majority of households have mobile and fixed (63%), whilst 34% are mobile only and only 3% are fixed only.⁸

However, this hides a wider shift (for which data is not available), away from legacy voice services and towards other forms of communications including over-the-top messaging (OTT), voice and video calls. Growing 4G coverage, with household coverage in Ireland of 94% in 2016 (ten percentage points above the EU average)⁹ is contributing to the growth in over-the-top communications.

In relation to OTT and bundles the European Commission, in the Explanatory Note accompanying the recommendation on relevant markets (2014), noted that:

“Another important factor when assessing whether a retail market for bundles exists is the increased use of services offered by OTT providers, which break the link between network access and service provision, and users relying on OTT services would usually have no real incentive to subscribe to a bundled plan as broadband access alone may

⁸ Eurobarometer, *E-Communications and the Digital Single Market*, May 2016.

⁹ European Commission, *Europe's Digital Progress Report 2017 – Ireland*.

suffice for the delivery of the required service bouquet.”
Section 4.2.

Consumers who are provided with fixed voice and broadband - with voice often included by default - may either use their fixed voice phone infrequently or not at all, or may not even have a phone connected to their fixed line. The observation that number of households with fixed broadband and fixed voice has grown is entirely uninformative regarding the importance of bundling.

In relation to voice and broadband “bundles” the European Commission, in the Explanatory Note accompanying the recommendation on relevant markets (2014), noted that:

“Moreover, it has been argued that, in cases of the provision of the fixed voice service with broadband access and/or IPTV, bundling at the retail level is rather a phenomenon of continued provision of a declining fixed voice service alongside broadband access and/or IPTV, rather than an economically significant offer that alters the competitive dynamics over a longer period.” Section 3.2.

The 2014 recommendation on relevant markets also removed voice origination from the list of markets susceptible to *ex ante* regulation, with the explanatory concluding:

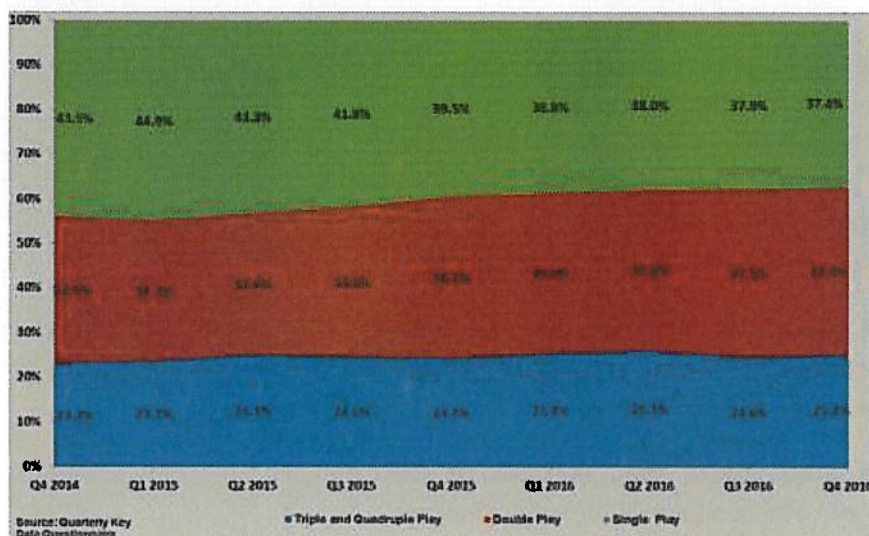
“In view of the above [mobile, VoIP and OTT based competition], in particular the lower barriers to entry and tendency towards effective competition, the competition law instruments seem to be sufficient to ensure competitive market conditions of the wholesale call origination service from a forward-looking perspective. The *ex post* competition law safeguards are more suitable to address potential (individual) market problems than *ex ante* regulatory intervention.” Page 27.

There is no clear trend towards bundling

Take fixed voice out of the picture, and the proportion of households with a triple or quad play (a dual or triple play bundle excluding fixed voice) bundle hovers around 25% - see Figure 2 (assuming most double play is fixed voice plus fixed broadband).¹⁰

¹⁰ ComReg, *Irish Communications Market Quarterly Key Data Report Data as of Q4 2016*, March 2017.

Figure 2: Excluding voice, bundling is not a dominant force in the market



In relation to video, unbundling due to the rise of over-the-top services is an established phenomenon. Some of these services are provided by pure play providers such as Netflix, who now account for 35% of total peak time internet traffic in the US.¹¹ Other over-the-top video services include Sky Now and Amazon Prime.

In the US, there is growing evidence that online video is disintermediating existing bundles, a phenomenon referred to as “cord cutting” in relation to the cable industry.¹² Whilst cord cutting has developed slowly, the evidence is now clear and the pace may have quickened.¹³

Streaming music has unbundled downloaded music, which previously providing a degree of lock-in to the device and/or operating system.¹⁴

Whilst bundles are part of the competitive landscape, there is nothing inevitable about the rise of bundles. The internet is a powerful un-bundler of services, leaving consumers free to pick and mix. However, to the extent that bundles including content are important, it faces competitors able to offer non-replicable bundles. This issue is explored in the following section.

¹¹ Sandvine, *Global Internet Phenomena*, Latin America and North America, 2016.

¹² The Economist, *The future of television - Cutting the cord*, July 2016.

¹³ Recode, *Another half-million Americans cut the cord last quarter*, May 2017.

¹⁴ Benedict Evans, *Content isn't king*, 16 July 2017.

4. The challenge of replication is a two-way street

It was concluded in Section 3 that the internet has an unbundling tendency, and that voice is no longer an economically important part of service bundles centred on fixed broadband access (given actual and potential competition from mobile voice and over-the-top communications services).

Asymmetric regulation should not be extended

Content may, however, be non-replicable; and non-replicable content offers and bundles are a feature of the Irish market. eir does not have a strong position versus competitors in this regard. There is limited guidance on what should be done in these circumstances, for example, a report by CRA on economic replicability testing notes that:¹⁵

“Situations where access seekers cannot technically replicate a bundle offered by an access provider (for example, because the access provider has exclusive access to a scarce bundle input that is not regulated) issues that are not covered in this report.”

However, as discussed below, access to scarce (content) bundle inputs that are not regulated is not the preserve of eir – but is a feature of the Irish market. Imposing an economic replicability test on eir may therefore serve not only to limit pricing freedom and investment incentives, but also limit eir’s ability to compete effectively, thereby reducing competition overall.

Competition is not simply a matter of other market participants replicating what eir offers, and *vice versa*. Rather each market participant ideally seeks to innovate and differentiate their offer. Indeed, competing over differences, rather than the textbook version of perfect competition for the same service, is arguably the hallmark of effective competition.

At the access level competition based on different infrastructures, in addition to access based competition, continues to develop with competition between telco, cable, fibre entrant, mobile, fixed wireless access and satellite services. On the retail side service-price differentiation and differing bundles are part of the competitive landscape.

¹⁵ CRA, *Economic Replicability Testing for NGA Services*, March 2015.

In relation to network access, eir is subject to *ex ante* access requirements, whilst other network providers are not. It might be argued that eir has significant market power on a national basis, and should therefore alone be subject to obligations. However, if current generation access is no longer considered sufficient pricing constraint on next generation access - as ComReg argue¹⁶ - then other next generation access providers may also have market power in the areas where they deploy next generation access. The current proposals in relation to access are therefore asymmetric.

The proposed approach in relation to bundles is also asymmetric, since whilst different bundles compete they are not necessarily replicable. Requiring eir to ensure that others can replicate their bundles, when the same does not hold in reverse, is clearly asymmetric.

Whilst it might be argued that a degree of asymmetry in relation to access regulation is justified on transaction cost grounds, there do not appear to any grounds for extending regulatory asymmetry to retail services including bundles.

eir faces competitors who offer non-replicable content bundles

Standalone and bundled offers by market participants may involve non-replicable content elements, for example:

- Sky Atlantic.
- Netflix original content.
- Amazon Prime including original content bundled with same day delivery.

Partnerships may also differentiate services in ways that cannot be readily replicated, for example:

- Vodafone Red offers a bundle of mobile with Spotify music or Sky Sports Mobile TV.
- Sky and Virgin have partnered to share data used for targeted advertising.¹⁷
- Liberty Global partnering to offer Netflix app integration on Liberty Global set top boxes.
- Vodafone TV bundling of broadband and TV including one button access to Netflix (see Figure 3 below).

¹⁶ ComReg, *Pricing of wholesale services in the Wholesale Local Access (WLA) market and in the Wholesale Central Access (WCA) markets: Further specification of price control obligations in Market 3a (WLA) and Market 3b (WCA)*, April 2017.

¹⁷ Sky, *Sky and Virgin Media announce strategic partnership to accelerate brand-safe targeted TV advertising*, June 2017.

Figure 3: A non-replicable bundle



Regulation should not seek eliminate the potential benefits of bundling by eir

The goal of regulation should be to support investment and competition, not to support competitors or to eliminate the rationale for bundling by imposing constraints that amount to treating each service as a standalone service.

eir should be allowed to compete and competition to flourish

eir is competing against strong players with a cross country presence and who bring non-replicable competitive advantages to the market. The emergence of global content providers with direct access to consumers such as Netflix and Amazon is a recent phenomenon, and one that is likely to become increasingly important in the market. Facebook¹⁸ and Apple¹⁹ are also reportedly planning to expand their original content offers. eir should be allowed to compete, rather than impeded from competing due to the extension of regulation.

¹⁸ Recode, *Facebook has hired an MTV executive to create original content*, February 2017.

¹⁹ Ars Technica, *Breaking Bad execs move to Apple to lead original video content*, June 2017.

5. The way forward

There are no clear grounds for imposing both price regulation of wholesale access and an economic replicability test including bundles. Further, a concern that eir might foreclose the retail market is hypothetical and without foundation. The relevant risk is not that eir leverage market power from access to other markets, but that regulation is leveraged into other markets.

Applying asymmetric regulation to eir will only accentuate and entrench the advantage others in the market hold; whilst limiting the scope for eir to offer bundles that benefit consumers, help drive broadband adoption and support competition.

Should access pricing freedom be maintained, and an economic replicability test imposed, the test should be structured mindful of the fact that there is retail competition, that competitors to eir are well established and enjoy access to non-replicable content.

The aim should not be to ensure that every aspect of the services that eir offers, including non-regulated services, is necessarily replicable; as doing so would tie the hands of eir when other established players are able to compete and offer non-replicable content services and bundles of their own.

If an economic replicability test is applied the relevant cost standard should be an equally efficient operator, and testing should either be at the level of broadband alone on an avoided cost basis or at a more aggregated level if the test provides for recovery of fixed cost elements.

Scope for flexibility over retail offers and pricing, including for bundles, should be preserved, subject to an effective constraint on the pricing of wholesale broadband access. Maximising scope for service and price innovation will support competition and investment, and benefit both consumers and the economy in Ireland.

4. Sky Ireland Limited (Sky)



**Sky Response to Consultation on Price control obligations relation to Bundles:
Further specification of price control obligation not to cause a margin squeeze: FACO
and WLA (Market 3a) and WCA (Market 3b)**

Response to Q1.

1. Sky would note that there is nothing in this “Bundles” consultation that would undermine the preliminary conclusions drawn by ComReg with respect to the appropriate market definitions, proposed SMP designations and/or obligations required to address market failures. Constraining the extent to which Eircom can leverage market power (from FACO, WLA or WCA) to distort competition lies at the heart of imposing a margin squeeze obligation on bundle in particular as Eircom are formally on the record as stating that it would protect its broadband base by using Eir Sport as leverage. This highlights the need to ensure wholesale SMP remedies are not undermined through bundling strategies.
2. While we appreciate ComReg’s giving respondents a further opportunity to provide views on its market review consultation is well intentioned, we would reiterate our previously expressed view that an assessment of the market and whether or not an operator has in fact SMP in those markets should not be impacted by the obligations proposed to remedy such market failures. ComReg gave an extensive period of time to respondents and the public to respond to that consultation and we would regard new substantive or lengthy submissions from any party at this stage as being designed to potentially frustrate a timely conclusion to the process. As we have also noted previously, every month Eircom can delay a conclusion to the market review process (if preliminary views expressed by ComReg are to be implemented) results in a substantial financial windfall to Eircom to the detriment and expense of its wholesale customers and the wider retail market.
3. There can be no suggestion that ComReg has not afforded respondents to the market review adequate time to consider the reasoning, supporting evidence or options presented by ComReg in relation to its preliminary views. Thus ComReg has clearly complied its obligations to properly consult in relation to the appropriate market definitions and assessments of market power. Where ComReg is failing to fulfil its obligations however, relates to the length of time it is taking to complete the current market review and we would urge ComReg ultimate decision at the very least does not slip into a 7th and 8th calendar year respectively since the WBA and WPNIA market reviews.

Response to Q.2

4. Sky agrees that the NRT could be removed as a pricing remedy with appropriate wholesale regulation upstream.

Response to Q.3 - Q.5



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5. As noted by ComReg WLR is currently an important wholesale input for OAOs to purchase from Eircom wholesale if they wish to replicate an Eircom retail bundle. It is therefore critical that Eircom are required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO components required by the OAO to replicate an Eircom retail bundle and the Eircom retail bundle price itself.

Response to Q.6

6. Sky would note that it does not see any justification for information being redacted from Table 4.4 and are strongly of the view that ComReg is required to provide this information if it is to fulfil its transparency obligation. ComReg has identified 3 regions in which it is proposing to differentiate regulatory obligations on Eircom. One of the key variables ComReg is relying on to justify a different approach to each region is retail broadband market shares within the region. However, it is apparently unwillingly to provide any detail on those market shares and at the same time is asking for comments on whether the approach taken is appropriate. Given the level of operator level data published (unredacted) in the ComReg quarterly reports, it is therefore surprising that the same type of data is not published for a matter of considerably greater consequence. Sky would urge ComReg to publish the data currently redacted from Table 4.4 in making its final decision so that OAOs and wider industry can have confidence that the basis for ComReg's position as outlined in this section of the consultation is appropriate.
7. Sky would expect that Eircom's retail market share in Regional Area 1 and 2 is in excess of 40% and in the Urban Area is less than 40%. Consequently, in relation to the Urban Area where ComReg is proposing to deregulate the WCA market, Sky do not think this is unreasonable provided the obligation not to cause margin squeeze, as it applies to bundles, is imposed on Eircom in the WLA market covering the same footprint (and Regional Areas 1 & 2) and the footprint as defined remains stable over the review period.

Response to Q8 - Q15

VoB notional charge should be published

8. ComReg note that a margin for Voice over Broadband will be assumed in the cost stacks in the calculation of WAWNI for ULMP and SABB. Sky would note that this margin should be published by ComReg as it is not a confidential cost based on Eircom's own costs but rather a notional cost. As such there is no reason that only Eircom should be provided with this information and there is no reason that OAOs should be deprived of data/information that can send a definitive 'build or buy' signal to market, a concept that ComReg continually highlights the virtues of. The figure is not commercially sensitive to Eircom, gives clear guidance to the market (and not Eircom alone) on what it needs to achieve if it is to compete and thus ought to be published.

Double counting concerns not clear

9. At paragraph 5.67 ComReg note that it is "*cognisant that the SB-WLR VUA cost stake may need to be adjusted for costs that are counted twice within the SB-WLR*





and VUA cost stack (e.g. faults, migration charges etc.)". It is not clear how such costs can be counted twice at least in the context of faults e.g. Eircom's fault management process does not allow for duplicate faults to be logged for different services. If a fault is logged to broadband (e.g. VUA) but should have been correctly logged as a SB-WLR fault then Eircom will reject the broadband fault and the fault must be re-logged correctly. Consequently, the costs associated with VUA fault repair ought to never appear in the SB-WLR cost bucket and so double counting is avoided. As such Sky would ask that ComReg explain in greater detail their concerns/proposed adjustments pertaining to double counting.

Downward only WAWNI adjustments not justified

10. Sky agrees with ComReg's proposal that downward only adjustments to the WAWNI is not justifiable particularly when bulk migration processes can be used. Additionally, as ComReg is aware Eircom increased VUA charges substantially in September 2016. Under a downward only WAWNI adjustment the NRT failed to capture the very concept it was designed to and afforded Eircom a period of time in which to exploit the artificially low WAWNI as OAOs actual costs were clearly higher following the significant price increases.

No grounds for not publishing WAWNI

11. Sky remain of the view that WAWNI figure ought to be published on a periodic basis by ComReg for all the reasons outlined in our response dated 30 October 2014 to the Replicability Consultation. The reasons outlined therein supporting publication remain sound while ComReg's case for not publishing the figure is argued on the grounds that are nebulous at best e.g. it could lead to coordinated pricing strategies notwithstanding only one operator has been found to have SMP (successful coordinated pricing strategies would imply operators are jointly dominant which ComReg at no stage raises as a concern).

Backhaul Charges – Linear v Logarithmic

12. At paragraph 5.85-5.90 ComReg discusses the treatment of backhaul charges in the MST. It should be noted that in ComReg's WLA/WCA pricing consultation the question of whether backhaul charges proposed by ComReg would be charged on linear or logarithmic (current regime) basis was left open. It is important to state that whichever approach is ultimately applicable (linear or logarithmic) that the same approach must be applied to the MST for it to remain appropriate. The bundles consultation makes no reference to this point but the final decision should be explicit on the issue.

Case by case assessment of MST failures

13. Sky does not agree with ComReg's proposal of carrying out a case by case assessment of bundles that fail the MST to consider whether such failure should be deemed permissible. The proposal does not provide for regulatory certainty and invites Eircom to seek to exploit the ambiguity inherent in such a proposal. Both Eircom and OAOs on the other hand have regulatory certainty where failure to pass the MSTs will not be afforded a further opportunity to gain ComReg approval through an arbitrary process that would also put demand on ComReg resources and whereby any such decisions may be subject to legal challenge.





Concerns in relation to the latter are highly unlikely where a clear test and obligation to pass same has been imposed.

Retention Promotions

14. Sky welcomes the fact that ComReg recognises the importance of accounting for retention promotions in the MST. As noted by ComReg *“where customers are re-contracting to a bundle then the MST should reflect the percentage of customers taking up the retention offer. Therefore, it is proposed that the cost of the retention offer should be spread over the period of the contract extension.”* However, it is unclear how ComReg plans to allocate a value to retention promotions and ComReg needs to provide greater transparency in this regard. In Sky’s view it makes sense to assume the retention promotion will be at least equivalent to the most recent promotion on offer from Eircom specific to the bundle being assessed. In this regard, Eircom has signalled a willingness to discount to a level as reflected by the promotion so it is reasonable to assume they would do so again in order to retain the customers. Making an assumption about the value of retention promotions based on historical levels is unlikely to capture the prevailing nature of competition in the retail market and in any event it would be difficult or even arbitrary in attaching any such value to bundles that are likely to have evolved to the extent they look nothing like historical bundled offerings. As such Sky would recommend that the acquisition promotion (treated as a cost) is duplicated for the percentage of customers seeking retention promotions at end of contract life and treated as an upfront cost recovered over the customer life for the purposes of the MST. Sky assumes that this is what ComReg is proposing but it is not entirely clear from the consultation and ComReg should be clearer on this point in its final decision.

Response to Q.16-Q.19

Eir Sport/BT Sport

15. Sky agrees with ComReg’s proposal that the ‘net cost’ approach can be an appropriate means of assessing the costs of Eir Sport to be included in the MST. Nevertheless it would be appropriate to monitor developments on wholesale pricing Eircom may agree in the future with retail providers and compare the per subscriber/inferred subscriber costs under both approaches to ensure ComReg’s ultimate goal i.e. ensuring replicability of bundled offers is not compromised by having wedded itself to an approach that can be seen to be failing in this regard if new information comes to light.
16. Sky further agrees the treatment of the recovery of costs should be split between two sets of costs reflecting acquisition cost of Setanta Sport and on-going costs pertaining to sport rights content.
17. With respect to the recovery of acquisition costs we note the Oxera report’s reference to Ofcom’s use of 60 months in context of BT Sports in its VULA Margin test. We would note however, that unlike BT, Eircom were not required to “launch” a new platform, pursue content rights and start from a zero subscriber base. In this regard, we consider 60 months should be set as the upper limit on the time in which it ought to recover acquisition costs. As noted by ComReg, there are solid



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grounds on which to argue the acquisition costs should be recovered over the remaining life of sports rights which were novated to Eircom at the time of the acquisition. As such softening that approach to allow for recovery over a 60 month period is more than generous in terms of a concession to Eir in particular as ComReg's overriding concern must be to ensuring replicability in the context of bundled offers. Considering a period for recovery of acquisition costs beyond 60 months is likely to distort competition by acting as too weak a constraint on Eircom.

18. In this regard, it is clear that Eircom's acquisition of Setanta Sports was driven by a strategy to further bolster its retail position in broadband (from a subscriber retention and acquisition perspective). This strategy has been confirmed by Eir through numerous public statements and releases e.g. following the acquisition of Setanta Sports by Eircom, Managing Director of Eircom's consumer division, said the "objective" of its sports package was to "reward broadband customers" and to "differentiate between Eir and what other broadband companies offer"¹.

19. In its annual report to bondholders² it further noted:

"We believe that our TV offering will be strengthened by our acquisition of Setanta Sports Ireland in April 2016, which was rebranded to eir Sport in July 2016, as it gives us access to premium sports content, which we expect will increase bundle penetration and reduce broadband and access churn" (page 40)

"Following the lead of operators in other markets, eir will leverage sports content in a bid to protect the broadband base." (page 78, emphasis added)

20. Eircom's strategy in this regard was further compounded by its failure/refusal to reach agreement with Virgin Media in August 2016 to continue to carry its channels.

21. With respect to on-going costs it is self-evident that content costs should be associated with the time period in which the content has value, as noted by ComReg. This reflects standard accounting treatment of programme rights costs, which is based on the principle that assets should be expensed over the period of their useful economic lives. In addition as already noted, Eircom are not an entrant to the pay TV broadcasting marketing seeking to monetise its rights through revenues streams such as subscription, wholesale revenues and advertising. Rather Eircom has clearly entered the market to drive revenue and profits in its telecommunications business. As such any potential argument that rights costs should be spread over a longer period has been rendered redundant by Eircom's self-proclaimed reasons for market entry. Sky therefore agrees with ComReg's proposal on recovery of on-going costs of Eir Sport and how they should be applied to the MST.

¹ See Irish Times, 11 March 2016 piece entitled " 'Everything is about selling the bundle' for rebranded Eir"

² [Annual Report for Bondholders Year Ended June 30, 2016](#)





22. As noted by Ofcom, “even customers that appear to have no interest in BT Sport may prefer to purchase a superfast broadband bundle that includes BT Sport rather than an identically priced bundle that does not. This is because the former includes BT Sport as a free option.”³ Eircom’s report to bondholders highlights their sports strategy as taking the lead from “operators in other markets” and it is clear the BT’s retail strategy in the UK is being closely followed in this respect. As such ComReg will be aware of arguments presented by BT as to the treatment of sports rights in the relevant margin squeeze tests in the UK and in particular its argument pertaining to value pricing of sports as being an appropriate measure for inclusion in bundles margin squeeze tests. The theories drawn up by BT in this regard had no basis in economic/regulatory literature and were readily dismissed in BT’s appeal to the Competition Appeals Tribunal (CAT) in the UK⁴. ComReg will no doubt be aware of the particulars of that case and will be alive to any attempt by Eircom to run similar arguments in response to this consultation.

Exclusion of mobile subscribers from the relevant base

23. Under the ‘net cost’ approach any suggestion that Eir’s mobile subscribers should be included in the relevant subscriber base should be dismissed as proposed by ComReg. In applying the ‘net cost’ methodology revenue from mobile subscribers pertaining to Eir Sports would rightly be accounted for. However, as noted by ComReg there has been no revenue generation to Eir Sports from this base and as such its impact on the ‘net cost’ will be zero. Were ComReg to acquiesce to including mobile subscribers to the calculation (by increasing the subscriber devisor) it would compromise the integrity of the MST and reward regulatory ‘gaming’. In fact it is worth noting that not only is Eir Sport generating zero revenue from Eircom’s mobile subscriber, given that customers also have free data charges where they consumer Eir Sport it is in fact adding cost to the cohort of the base that consumes Eir Sport on their mobiles. As such Eircom are likely to benefit from a conservative estimate of mobile usage in the context of the MST where an average mobile user’s usage profile rather than the average usage of mobile customers accessing Eir Sport is assumed.

Response to Q. 20 - Q.22

24. Sky agrees with Comreg’s preliminary view that a pre-clearance requirement should be maintained ahead of Eircom launching a new or revised bundle. As noted by ComReg Eircom are sufficiently aware of its requirements/obligations in relation to retail amendments and this should assist in terms of reducing any perceived regulatory burden. It is apparent (although not conclusive) from paragraphs 7.6 that Eircom has failed in the past to provide notification submissions to an established standard. We know from recent history (as evident from publications of Eircom’s Regulatory Governance Model reports) that Eircom has often adopted an ambivalent approach as regards its regulatory obligations and consequently it is appropriate that ComReg continue to require pre-clearance of new or revised bundle offers.

³ Paragraph 5.93 of Ofcom’s “Approach to VULA Margin: statement” March 2015

⁴ Case: 1238/3/3/15 BT v Ofcom





25. Furthermore, it is appropriate that Eircom notify ComReg immediately of any occurrence whereby a bundle is found to not be compliant with the MST post-launch. It is critical that Eircom are required to carry out regular reviews of its bundles post-launch as it undoubtedly has an incentive to plead "ignorance" by not carrying out regular and on-going monitoring of bundles if not mandated to do so. This behaviour was evident in the context of the aforementioned Regulatory Governance Model reports. As such Sky agrees with ComReg's proposal of requiring quarterly monitoring statements.

10 August, 2017



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Non-Confidential Version

Vodafone Response to ComReg Consultation Document 17/51

Consultation on Price control obligations relating to Bundles

11 August 2017

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Executive Summary

- i. Vodafone welcomes the opportunity to respond to ComReg's consultation on price control obligations relating to bundles as part of the broader response on the WLA/WCA market review and the pricing of such services. Each of the papers contains important and necessary improvements to market regulation, which Vodafone encourages ComReg to implement at the earliest possible opportunity to help the market function more effectively.
- ii. As stated in previous responses, Vodafone strongly disagrees with the proposed de-regulation of the Urban WCA market. In the event that ComReg decide to proceed with the proposed de-regulation, then this should only be implemented when the necessary safeguards are in place (as outlined in our response document to 17/26). Such safeguards must include an effectively designed (Margin Squeeze test) MST for all bundles offered in the market. In addition, we would call for stronger sanctions to be developed and put into force in the event that breaches of an MST occurs.
- iii. The MSTs as proposed by ComReg need to be revised in order to address the existing potential issue of cross subsidisation between differing geographic regions. eircom has the potential to use its dominance in one region to, in effect, cross subsidise its retail products in another region. If not prohibited, this would allow eircom to lower its headline price to unfairly gain retail market share. While the potential for this type of horizontal leveraging of market power was acknowledged and mentioned as a key risk by both Oxera and ComReg, there was no apparent follow through on the need for this risk to be addressed within the requirements of the revised MSTs. Therefore, we would urge ComReg to address this risk as a matter of urgency.
- iv. Furthermore, the cost benchmarks used in ComReg's proposed MST also require revision. In particular, retail costs should not be calculated on the basis of Equivalent Efficient Operator ('EEO' or eircom's cost base), but should be based on costs which reflect the true costs of other efficient retail operators. This approach known as a Reasonable Efficient Operator ('REO') approach should be used as it would represent be a truer reflection of the costs that would be incurred by other retail operators. We also note that there is no provision for a profit margin accruable to such operators included in the MSTs as designed by ComReg. We urge ComReg to review the logic of this approach as this could damage retail competition to the benefit of eircom, who as a vertically integrated operator could continue to earn substantial profits at the wholesale level. Vodafone would like to make clear that the business case for investment in Ireland in fixed services is extremely challenging and returns associated with the provision of fixed services need to be viable in order for other operators to compete at a both a national and a regional level.
- v. In addition, if ComReg are to proceed with using a portfolio product approach then flagship products should be also be reviewed as part of this process, this is as recommended by the EC Commission. Unless it is changed, then the current MSTs that are based on a portfolio approach could permit flagship products to cause a squeeze whilst other less popular products are priced to make the basket or portfolio test pass.
- vi. Vodafone stresses the importance of ComReg being both vigilant and diligent in its oversight of Eircom's compliance with the MSTs on an ongoing basis. Without access to the data used in margin squeeze tests, OAOs rely on ComReg to reconcile costs incurred against forecasted costs used in the model and against the separated accounts for validation purposes. Other inputs such as take- up assumptions will also require on-going review.

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- vii. Vodafone does not agree with the mechanism that ComReg is proposing for adjustments to the weighted average wholesale network inputs ('WAWNI'). If adjustments to the WAWNI, other than regulated approved changes to their associated wholesale prices, are to be permitted (on a downward or upward basis) it should only be done so by exception and in a manner transparent to all stakeholders confirming the rationale and justification. There is a real risk that adjusting the WAWNI when combined with other factors can foreclose other entrants from entering the market.
- viii. A key consideration for this pricing review is the Average Customer Life ('ACL') being used in the assessment of products or a bundle's compliance with all MSTs. As stated in our previous response documentation, it is in the incumbent's interest to seek the longest ACL achievable as it enables them to avail of sufficient pricing flexibility to pass a margin squeeze test (due to the extended period of time over which costs can be recovered) whilst still allowing it to "squeeze" its rivals. It is our belief that setting the average customer life at 42 months is not a true reflection of the actual customer life for most products or bundles. Vodafone believe it is too simplistic for a blanket pricing approach across all products and services. Given its importance to an MST, any ACL should be assessed on a more focussed basis with quantifiable supporting data such as historical trends on similar products or bundles adjusted to what could be realistically achieved by a new entrant. Vodafone is willing to partake in any analysis proposed by ComReg to define a more realistic ACL.
- ix. Vodafone do not agree with a case-by-case assessment approach for MST in the interest of clarity, transparency, consistency and predictability. In the same vein, it is clear to Vodafone that any promotions, discount or retention offers should be included in the MST.
- x. In respect of eir Sports, Vodafone are largely in agreement with the ComReg's proposals. The period for recovery of on-going content costs should be over the lifetime of the content that is novated; a defined period approach is preferable for the acquisition costs and the base over which costs should be recovered should be the retail fixed broadband base who are or have availed of the service.
- xi. Vodafone believe that a pre-clearance requirement is essential for all bundles to prevent competition in the markets being eroded. Self-certification does not suffice as a robust pre-clearance process. Similarly, there is a requirement for ongoing monitoring to ensure bundles that pass the MST based on forecasts and assumptions continue to pass the MST based on actual data. Vodafone believe post-launch monitoring should take place monthly as opposed to quarterly as suggested by ComReg.

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Introduction

1. On 9 June 2017, ComReg published its consultation on the Price Control obligations relating to bundles¹. We welcome the opportunity to respond to this consultation and we set out our views in detail below.
2. Principally there is a requirement for ComReg to design effective controls to prevent margin squeeze occurring. Margin Squeeze Tests (MSTs) are designed as the main preventative measure to this occurring. To design margin squeeze tests effectively there are some fundamental questions to be answered in advance:
 - How should unregulated product costs, such as TV content costs, be reflected in the test?
 - How should the industry bundles and products mixtures be reflected in the test?
 - How can the incumbent be prevented from undermining the test by manipulating average customer tenure assumptions?
3. It is clear that ComReg have taken many of these considerations into account and Vodafone broadly agree with the proposals raised in ComReg 17/51; however, Vodafone believes that certain revisions are required in order to prevent eircom from abusing its overall dominant market position by offering bundles that cannot be replicated by other retail operators.

Our response

4. We have adopted the following approach in our response:
 - Our response is structured to align to each section of the ComReg Consultation.
 - We have responded to each question put forward in the ComReg Consultation; some responses to questions where there are overlaps are short and include reference to another relevant response.
 - We note that ComReg has issued this document as a follow up to two separate consultations, ComReg 16/96 on the WLA and WCA Market Reviews and ComReg 17/26 on the Pricing of Wholesale Services in the WLA and WCA Market to which we have already issued our detailed response. It should be stated from the outset that arguments set out in those responses will be referred to at a high level here but that the detailed focus will be on questions raised in this draft decision.
 - Furthermore it is noted that any final Decision regarding Consultation Document 16/96, Consultation Document 17/26 and the upcoming consultation on Bundles will be published (and become effective) simultaneously.

ComReg Document 16/96

5. In this section, we will briefly reiterate our principal issue with the pricing proposals in ComReg Document 16/96 (WLA / WCA Market Review) in light of the pricing obligations further specified in this Draft Decision.

¹ <https://www.comreg.ie/consultation-price-control-obligations-relating-bundles/>

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Question 1: Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA / WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.

Vodafone broadly agrees with ComReg’s pricing proposals in ComReg Document 16/96 in light of the pricing obligations specified in this Draft Decision

6. Vodafone would like to re-iterate at the outset that due to the importance of these markets to all telecom operators, it is imperative that ComReg finalise all considerations and make final decisions at the earliest possible date. ComReg Documents 16/96, 17/26 and 17/51 propose vital and necessary amendments that should be implemented immediately to address ongoing negative market impacts.
7. We note the overall maturity of the broadband markets and the NGA broadband market. This has been well documented, especially in ComReg’s latest Quarterly Irish Communications Market publication. While eircom’s share of the retail broadband market continues to decline, this contrasts with a marginal increase in it’s share of the fixed wholesale broadband market from 68% in Quarter 1 2016 to 69% in Quarter 1 2017. This level of wholesale market share gives rise to concerns about eircom’s ability to exert vertical leverage into the associated retail market and thus justifies ComReg’s continuing use of margin squeeze tests in retail markets. In addition, this is consistent with the requirements of the EU Framework Regulations. Given the continuing dominance of eircom in the wholesale market, the question must arise as to whether now is really the time to allow additional pricing freedom to eircom and in this context Vodafone considers that the proposed regime needs strengthening in key areas, which we will highlight below.
8. Of particular interest is that NGA (VDSL) volumes represented 55% of overall eircom wholesale volumes, demonstrating that this is definitely the appropriate time to move to a cost orientation regime for these services, as current and future costs and volumes are more capable of being forecast than was previously the case. This aligns with information produced by eircom itself as part of it’s quarterly updates². For example, eircom itself reports that fibre (NGA Broadband) penetration is running at almost 60%, thus it is clear that this is now a mature product and not at an early stage in it’s development cycle from an investment perspective.
9. What is also of note is that is that when the volumes in the fixed and mobile broadband markets are combined, it is clear that eircom’s retail share of these markets is in excess of 55%. Thus, any arguments with regard to eircom not having significant market power in fixed broadband, or that these markets should not continue to be regulated, is moot.
10. Given the volume increases and the continuing and future cost reductions that eircom wholesale is reporting in it’s quarterly presentations, we strongly encourage ComReg to review these against the modelling completed to-date. Where necessary this could involve reviewing the potential for revising upward future modelled volumes and revising downward the modelled costs. This has the potential to put downward pressure on the indicative wholesale prices as published by ComReg in it’s consultation. For example, while eircom’s response to 17/26 mentions the need for higher costs due to new SLA’s³, if would have been expected that were these of a material nature some reference to this by would have been included in the quarterly presentations.

² See "eir Third Quarter and Nine Months to 31 March 2017 Results Presentation, <https://www.eir.ie/investorrelations/reports/2016/>

³ See eircom response to 17/26 p.37, <https://www.comreg.ie/publications/page/2/>

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11. As outlined previously, Vodafone supports many of the remedies decided upon by ComReg but we must reaffirm our belief that the incorrect decision has been made with regard to the deregulation of the Urban WCA market. In particular, we believe that the evidence does not support the inclusion of SIRO, Virgin Media, Vodafone and others as providing an effective competitive constraint in the WCA Markets.⁴ Furthermore, Vodafone believe that the margin squeeze obligations that remain in place, in particular between the WLA and WCA markets, will not suffice in preventing eircom from manipulating the WCA market through specific pricing movements should it decide to do so.
12. Vodafone agrees with Compass Lexecon's conclusions in its report (commissioned by Vodafone and submitted with our response to ComReg 16/96) on ComReg's competitive assessment in relation to the product market definition⁵ and we would strongly encourage ComReg to address the specific points raised through a more gradual removal of obligations from eircom. This gradual removal will allow more time for the market to adjust. In addition, it will enable provision of more real time data upon which to assess the timelines and extent for the removal of its regulatory obligations.
13. Additionally Vodafone would like to point out that while the issues raised by designating certain exchanges to be in the newly defined Urban WCA market might theoretically be addressed through the sourcing of wholesale services from alternative suppliers, the switching costs and the operational impact of changing wholesale service providers effectively limit the level of competition. Vodafone acknowledge the provision of a six month 'sunset period' but argue that this window is insufficient given the likely switching costs, engineering work and commercial agreements that would need to be completed within that timeframe. We see no evidence that these switching costs, which are in effect a barrier to competition in the WCA market, have been considered and we strongly urge ComReg to address this as a matter of urgency.
14. If ComReg decide to deregulate this market, it must only be done with safeguards in place to prevent severe negative distortion of competition. Absent regulatory obligations, eircom has the ability and incentive to engage in exploitative and/or exclusionary behaviour leading to a dysfunctional market. Should deregulation go ahead there does not appear to be any safeguards preventing eircom from withdrawing their WCA services from competing operators and gaming the market.
15. Vodafone strongly encourage that ComReg reassess its planned implementation process for deregulation of the Urban WCA market should they decide to proceed. In place of a 'light touch' six-month sunset period, a slower more gradual implementation should take place whereby the impact of the withdrawal of regulations are assessed as they occur. Vodafone believe that ComReg should retain powers to enforce sanctions if market gaming is taking place in this transitional period and ultimately the power to reverse any actions towards deregulation if it does not appear to be creating a functioning self-regulating market as intended.

Margin Squeeze and Regulatory Development

16. In this section, we comment on questions raised in relation to potential competition problems in connection with margin squeeze by an operator with SMP, the current regulatory position on bundles and recent and forthcoming regulatory developments.

⁴ §§10.133 and 10.175 of the ComReg Consultation.

⁵ §§ 2.1 to 2.38 of the Compass Lexecon expert report.

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Question 2: Do you agree with ComReg’s preliminary view that the NRT could be removed as a pricing remedy in Market 1 (of 2007) if there was appropriate wholesale regulation upstream? Please justify your views.

Vodafone does not agree in principle that the NRT could be removed as a pricing remedy in Market 1 as the appropriate upstream regulations are not currently in place

17. Vodafone agree with the view that NRT could be removed where strong upstream wholesale regulations are enacted and we would highlight that this needs to be resolved before this could be achieved. However we believe that margin squeeze controls alone are unlikely to be effective at promoting effective competition, unless they are well designed and implemented. In our experience, incumbents are well versed in circumventing and undermining poorly designed regulatory remedies.
18. Vodafone does not agree that the MST suggested by ComReg is appropriate. This is due to the distinction made between three geographic areas, namely, Urban, Regional 1 and Regional 2, and the different treatments under three different tests. Vodafone cannot see that any measures have been taken to address the potential issue of eircom cross subsidizing it’s business from one geographic area into another. Vodafone would encourage ComReg to implement measures that would prevent any cross subsidization between geographic markets occurring.
19. Furthermore, Vodafone would encourage that modelling should be based on REO. It is extremely difficult to reflect the true underlying economics of scale across the industry with EEO, as it only reflects eircom cost base. While we would acknowledge the difficulties in gathering REO information, we would still encourage ComReg to engage with industry on how such information to inform REO calculations could be gathered.
20. In addition, as set out in our previous submission Vodafone do not agree that any modelling should be completed on the basis of a portfolio product group that excludes flagship products.
21. Vodafone welcome the average total costs approach that is used in the model and note that the wholesale inputs appear reasonable.

Question 3: 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) of the FACO wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

Vodafone agrees that there should be a requirement for Eircom to demonstrate they are not causing a margin squeeze

22. Vodafone agrees that it is necessary and appropriate for there to be a requirement for Eircom, as an entity with SMP, to demonstrate that it is not causing a margin squeeze between the price of the FACO wholesale components required by an OAO to replicate an Eircom retail bundle offer and the price of the Eircom bundle itself. As the market increasingly uses bundling as a pricing and competitive strategy, it is vital that Eircom are not in a position to foreclose competition in the market by leveraging its market power, squeezing potential competitors and preventing market entry.
23. Vodafone would like to take this opportunity to express concern on actions taken relating to the oversight of MST specifically on the severity or lack thereof of punitive action being taken in the event of post-launch MST failure. Without an adequate MST there is a risk that the incumbent will be able to exploit any weakness in the regime proposed and effectively close out competition.

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24. To enable this market to function efficiently and in a competitive manner to the benefit of all market operators (and most importantly the consumer), there needs to be strict enforcement of the MST regulations. This must include use of appropriate powers held by ComReg.
25. Vodafone believes that Eircom should have a monthly obligation to ensure that the required MST is compliant based on current proven data and for the variance between original projected data and actual data to be tracked in order to better support future testing of the various bundles for margin squeeze. Vodafone believes this can provide assurance that there is no gaming of the model taking place.

Question 4: Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

Vodafone agrees that eircom should be required to demonstrate it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself.

26. As previously set out in our response to ComReg document 16/96 Vodafone does not agree with the deregulation of the Urban WCA. Vodafone recommends that the rules and regulations as put in place for Regional Area 1 and 2 are equally applied to the Urban WCA.
27. In the event of deregulation, Vodafone agrees with the requirement for the MST in this market to be designed on the same basis as set out in our response on question 2. In other words, the same concerns are relevant here on the use of i) EEO in assessing retail costs, ii) for action taken to prevent cross subsidisation between the different geographic areas - Urban, Regional 1 and Regional 2, iii) for strict enforcement of regulation using appropriate penalties and iv) for there to be a monthly requirement to retest the MST.

Question 5: Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.

Vodafone agrees that eircom should be required to demonstrate it is not causing a margin squeeze in the Region WCA Market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself.

28. Vodafone agrees there should be a requirement for eircom to demonstrate that it is not causing a margin squeeze. Given OAOs cannot access the margin squeeze models, we rely on ComReg to ensure that appropriate and timely reconciliations take place between the forecast and the actual results. Vodafone

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note that the provision of any such model to industry would be so heavily redacted, due its commercially sensitive nature, as to render it meaningless.

29. Whilst Vodafone agrees with the proposals for the MST in this market, please refer to our response on question 2. The same concerns are relevant here for there to be action taken to prevent geographic cross subsidization, for there to be strict enforcement of regulation using appropriate penalties and for there to be a monthly requirement to retest the MST.
30. As stated in our submission to ComReg document 17/26 Vodafone would suggest that the adjustment of costs to that of an REO/SEO with a 25% market share needs to be carefully managed. For example in areas where no alternative infrastructure providers exist, the costs are likely to be more accurately assessed using a top down historical cost approach.
31. Furthermore, Vodafone believes that setting the market share of a hypothetical operator at 25% may be too high when considered against the fixed retail revenue market share of authorised operators excluding Eircom. The top 3 of these are Virgin (14.7%), Vodafone (14.3%) and BT (5.3%). We strongly urge ComReg to reflect on this information when deciding on how best to model a real life REO operator.

Exchange Areas

32. In this section, we comment on the competitive conditions in the WCA/WLA market.

Question 6: ComReg is interested in receiving views from interested parties on the Proposed Urban Area, Regional Area 1 and Regional Area 2 as they apply to bundles. Please provide detailed reasoning and supporting information (where available) to support your views.

Vodafone has already expressed their views in previous consultations on the proposed geographic division of the market and the deregulation of the Urban WCA

33. As previously set out in our response to ComReg document 16/96 Vodafone do not agree with the deregulation of the Urban WCA. As such, Vodafone would recommend that the rules and regulations as put in place for Regional Area 1 and 2 are equally applied to the Urban WCA. We have expressed our concerns around the different treatments above.
34. Vodafone would also like to note that there appears to be an over reliance on the examination of the broadband bundles in these markets, whereas focus should be across all retail subscription types and we would encourage ComReg to clarify that this will be the case in these revised MSTs.

Components of the Margin Squeeze Test Model

35. In this section, we comment on modelling obligations imposed for compliance with the margin squeeze test.

Question 7: Do you agree with the proposed cost benchmarks for retail costs to be included in the bundles MST?

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Vodafone does not agree with certain components of the proposed cost benchmarks

36. Vodafone does not agree with the use of an EEO basis within the MST and would strongly urge ComReg to change this to an REO approach. This would provide a more realistic operator cost base as such an approach is based on other operator costs.
37. Vodafone also expects - though it is not explicitly stated in the consultation - that ComReg reconcile the retail costs used in the MSTs back to the eircom's regulatory accounts. This would ensure that costs contained in any MST are fully representative of eircom's retailing costs.
38. It would appear that ComReg considers that costs with respect to marketing/ advertising, billing and product management are more susceptible to scale and scope advantages. This would appear to be especially in the context of bundle offers that are more often sold in the market previously known as the LEA. However, ComReg does not offer any evidence to support this view and does not indicate the difference in wholesale prices that this assumption would make.
39. We also note that in paragraph 5.26⁶ ComReg suggest that operators with an international presence could take advantage of scale and scope across their area of operation. Vodafone would like to make clear that the business case for investment in Ireland in fixed services is extremely challenged and as such retail fixed service returns need to be viable at a national and a regional level.
40. It can be argued that the only savings that might accrue to an operator with international presence are in terms of branding and to a certain degree in advertising to the extent only where key advertising campaigns can be repeated across different countries. Pricing strategies are generally specific to different markets and thus billing systems are typically unique and bespoke. ComReg should consider the application of an EEO very carefully, as the effect of an overly aggressive approach may be to allow for the lowering of the retail price offered by eircom to such an extent that existing and prospective competitors cannot compete profitably in the market.
41. ComReg further states in paragraph 5.13⁷ that they intend to adjust eircom's costs to reflect the economies of scale and scope available to a hypothetical entrant with a retail broadband market share of 25%. As referenced in our response to question 5, Vodafone is of the view that the assumed market share of 25% is too high especially in Regional Area 1 and for all areas for calls and narrowband voice markets. This level of market share may allow for the lowering of eircom's retail price to such an extent that new entrants to the market may not be able to compete for market share. Only eircom and large volume OAOs will be able to offer competitive services.
42. Vodafone would also like to highlight that as a general comment that while we understand that ComReg have continued to exclude any profit margin element from the bundle Margin Squeeze Tests we are concerned that this should not have been the case when ComReg is assessing larger groupings of bundles and products, for example when reviewing at the portfolio level. We would ask ComReg to consider whether this has an unintended consequence of reducing profit margin levels across the industry as it encourages eircom, as a vertically integrated operator, to price based on solely recovering its costs and refocussing it's search for profits at the wholesale level. We would thus encourage ComReg to consider whether this issue should now be addressed and corrected.

⁶ § 5.26 of ComReg Consultation document number 17/51.

⁷ § 5.13 of ComReg Consultation document number 17/51

Question 8: Do you agree with our proposed removal of the downward only adjustment to the WAWNI? Please support your view with relevant data and evidence.

Vodafone agrees with the removal of the downward only adjustment to the Weighted Average Wholesale Network Inputs

43. Vodafone would like to take this opportunity to highlight that downward only movements in the WAWNI should not be allowed. We would also highlight that where WAWNI adjustments are to be allowed, these should be done so infrequently and in a manner transparent to the market. In particular, a reduction in WAWNI and a consequent reduction in the MST floor may serve to foreclose new entry to the market, due to reduced retail prices causing margin squeeze. Vodafone would also request further clarity with respect to paragraphs 5.78 to 5.81⁸.
44. The mechanism by which it is proposed that eircom retail can view the monetary value of the WAWNI in advance of competitors creates an opportunity for eircom retail to offer more aggressively priced bundles and thus reduce the margins an OAO had "earned" through investment. To prevent these occurrences the logical approach is to not allow downward movements in WAWNI, if this were not possible then it would be preferable to only allow downward movements on an infrequent basis e.g. an annually following review. The results of any adjustment should be transparent to the market at the same time and with sufficient notice. Vodafone cannot envisage circumstances where the WAWNI might increase apart from inflationary increase in operational costs. The frequency of any proposed should be on an annual basis only.
45. Vodafone agree with the removal of the downward only adjustment to prevent eircom from using an input in the margin squeeze test calculation that is lower than what the OAOs have to use. It should always be a pre requisite of any modelling exercise that wholesale inputs used by eircom should be replicable by OAOs. Please refer to question 7 on using an REO basis and not an EEO as this is more reflective of a realistic operator cost base.

Question 9: Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the Urban Area? Please give a detailed response with supporting data where appropriate to support your view.

Vodafone does not agree with the MST to be implemented in the Urban Area

46. To reiterate, as stated throughout and in the previous response documents to consultation 16/96 and 17/26 Vodafone do not agree that the Urban WCA market is competitive.
47. The MST as proposed is for a single MST test across the portfolio, this allows eircom the ability to market specific bundles which of themselves would not have to pass an individual MST. We strongly disagree with this approach in particular as it allows for cross subsidisations from one bundle to another but also between unregulated and regulated services within the Urban region portfolio of bundles/products. Therefore, we submit that this would give an unfair advantage to the incumbent over other operators.

⁸ § 5.78 – 5.81 of ComReg Consultation document number 17/51

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48. We recognise that this is balanced somewhat by the use of ATC for the portfolio bundle. Using ATC for the aggregate bundle would reduce eircom's flexibility in pricing, as a single bundle if decreased in price (and as a result sold in high volumes) would make it difficult for eircom to pass the aggregate portfolio MST by recovering total costs. Operators who have invested in their own infrastructure may be able to be more aggressive in particular offers to the market which eircom could not match because of the impact of the aggregate MST test.
49. Again, Vodafone would also state that the portfolio bundle mix to be used across all MSTs must reflect the industry and not just eircom's bundle and product mix. This would provide better alignment of the costs being incurred across all retail operators, and not just eircom. It would also reduce the ability of eircom to game the bundle and/or portfolio mix to its advantage and to the detriment of other operators.
50. Vodafone notes that while there does appear to be a comprehensive view of retail costs proposed to be used in the MST, an accurate assessment cannot be formed without a thorough review of the model. As such, we rely on ComReg to ensure that all costs included in the model are a true reflection of the costs incurred and that the margin squeeze test is performed appropriately. As stated in our response to question 7 ComReg should ensure that all costing modelled for use in the MST are capable of being reconciled back to the regulated accounts.
51. [CONFIDENTIAL TEXT REMOVED] Vodafone do not agree with the application of a 42 month customer lifetime. This outdated assumption applies a blanket rule across all bundles that is unlikely to reflect the individual characteristics of all bundles. Further, there does not appear to be any adjustment to take account of eircom's inert customer base derived from its legacy incumbency. Vodafone stresses that the incorrect application of the customer lifetime effectively facilitates an incumbent in causing a margin squeeze. If a more realistic customer lifetime of 24 months was adopted there are likely to be a number of eircom products that would fail the net revenue test. Given the proposed deregulation of the WCA market, it is imperative that the average customer lifetime reflects the reality of a truly competitive market. It is inappropriate to apply a 42-month average in the context of the urban WCA market.
52. The use of 42 months would appear to be based on the average eircom customer base and thus when using REO, SEO or even EEO this would not appear to be appropriate as it does not reflect the actual customer lifetimes being experienced by operators other than eircom, and this not aligned with the average of the wider industry.
53. Vodafone would also state that unregulated services, such as providing access to eir Sports TV, should be included in any MST on a similar basis as regulated products. Moreover, while at an individual bundle level we can understand the continued use of LRIC or AAC assessment of unregulated services included in the bundle we would highlight that the use of this basis at the overall portfolio level would seem to imply that certain costs are not explicitly being reflected correctly in the MST.
54. Finally, as stated in our response to question 7, Vodafone would again highlight, as a general comment, that while we understand that ComReg have continued to exclude any profit margin element from the individual bundle Margin Squeeze Tests we are concerned that this should not have been the case when ComReg is assessing a larger grouping of bundles and products. When reviewing at the portfolio level Vodafone would ask ComReg to review and correct this issue. This, combined with the issues raised above, implies that the MST as currently designed would not accurately reflect the industries true retailing costs and as such would directly damage retail competition.

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Question 10: Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 1? Please give a detailed response with supporting data where appropriate to support your view.

While Vodafone agrees in principle with many of the elements of the proposed MST, we does not agree with cross subsidisation and use of portfolio within Regional Area 1

55. As we detailed in our response to question 9, we would again state that the portfolio bundle mix to be used across all MSTs must reflect the industry and not just eircom's bundle and product mix. This would provide better alignment of costs being faced by all retail operators and also reduce the ability of eircom to game the bundle and/or portfolio mix to the advantage of eircom and to the detriment of other operators. In addition, this would be more consistent with the use of EEO and/or REO than the current approaches as it would use the bundle mixes of the industry as a whole and not just those of eircom.
56. Vodafone would also like to restate, as in our response to question 9, that unregulated services, such as providing access to eir Sports TV, should be included in any MST on a similar basis as regulated products. In addition, while at an individual bundle level we can understand the continued use of LRIC or AAC assessment of unregulated services included in the bundle we would highlight that the use of this basis at the overall portfolio level would seem to imply that certain costs are not explicitly being reflected correctly in the MST. This, combined with the exclusion of a profit margin, could thus not accurately reflect eircom's or the industry's true retailing costs and as such would impact on competition.

Question 11: Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to support your view.

Vodafone agrees in principle with the Margin Squeeze Test to be implemented in Regional Area 2

57. In general, Vodafone supports ComReg's proposal with regard to the MST to be implemented in Regional Area 2. We have addressed the majority of our concerns and comments in the previous questions and would encourage ComReg to take our broader concerns on board. And with regard to cross subsidisation, which would appear to be allowed in Regional Area 2 albeit on a more limited basis, please see our responses to questions 9 and 10 for the details of our concerns. For example, we would encourage the use of an industry wide bundle and product mix rather than the current reliance on eircom's in addition to the use of industry wide Average Customer Lifetime rather than eircom's.
58. In addition, as stated in our response to Q.13, Vodafone does not agree with ComReg's preliminary view on case-by-case assessment of a bundle's reasonableness.

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Question 12: Do you agree or disagree with our provisional view that the average customer life should be 42 months? Please give a detailed response with well-justified supporting data where appropriate to support your view.

Vodafone strongly disagrees that the average customer life should be 42 months

59. Vodafone would like to highlight at the outset that incumbents have an incentive to seek the longest Average Customer Life ("ACL") so that they have sufficient pricing flexibility to pass the margin squeeze test while still squeezing rivals.
60. It is overly simplistic to assume that the ACL is fixed across all products and services (e.g. bundles) and over time where the level is typically set based on historical ACLs.
61. Using excessive ACLs allows the incumbent to offer aggressive up-front discounts that, while successful at attracting new customers, are highly unlikely to result in actual average customer tenure that is as long as is allowed with said ACL.
62. It is Vodafone's view that in order to ensure effective competition in the market, the ACL should:
- be based on what an entrant could reasonably expect to achieve;
 - relate to the same group of products/services being considered by the margin squeeze test; and
 - reflect the specific characteristics of the output increment under consideration.
63. We note and welcome the plan to consult further with industry to develop a solid base of data.
64. In addition, using eircom data in isolation in and of itself creates a bias, as the eircom retail customer base cannot be seen as reflecting the broader retail market and thus the average customer life across the industry. This is especially true given that according to ComReg's latest Quarterly Report the overall eircom Retail Market share now stands at 42.7%⁹. More specifically, we note the following comment in the Oxera document published to support the ComReg Draft Decision document "We recommend that if robust data is available, it would be appropriate to make adjustments to the ACL and/or factor additional discounts offered to subscribers into the cost over the 42-month period". We acknowledge that such information can at times be difficult to gather but we would encourage ComReg to proceed quickly to collect such information as we strongly suggest that continuing use of eircom data only will be damaging to the market.

Question 13: Do you agree or disagree with ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness in section 5.11? Please give a detailed response with supporting data where appropriate to support your view.

Vodafone disagrees with ComReg's preliminary views regarding case-by-case assessment

65. This question has to be taken in conjunction with considerations as to whether eircom has to provide evidence of passing an MST in advance of launching a new offer. In Vodafone's view, eircom should in all cases be obliged to prove to ComReg in advance that a proposed bundle passes an MST. Any

⁹ Eircom Fixed Retail Revenue Market Share was reported as 42.7%, see p.16 of ComReg publication - "Irish Communications Market, Quarterly Key Data Report, Data as of Q1 2017", ComReg 17/50, 08/06/2017.

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adjustments to the MST caused by retail efficiencies should be clearly identified by eircom in their submission to ComReg. Vodafone assumes that ComReg will assess such proposals to the maximum possible extent before allowing eircom to launch aggressive pricing in the market. Vodafone cannot envisage circumstances where eircom could provide satisfactory evidence for an increase in ACL due to a particular bundle offer. As argued above using eircom ACL figures distorts the loyalty metric in the MST. It is not clear that evidence from other markets, were it to be available, would apply to the Irish market. Vodafone is of the view that given the already uncertain nature of the calculation of ACL that any proposals by eircom using ACL as a primary justification for a lower price should not be allowed,

66. In the interests of fairness, clarity and consistency, wherever a bundle fails a margin squeeze test it should be considered to be causing a margin squeeze. If the model is performing correctly and if a bundle passes or fails the MST then there should be no change to this status based on a case-by-case assessment.
67. Vodafone believe that if bundles fail an MST test but are allowed on the basis of an individual assessment there is a risk this will retrospectively be viewed as the incorrect decision only after the damage has been already done in the market. This logic appears flawed. Vodafone is of the view that strict enforcement of MST for bundles, prior to launch, is potentially the least disruptive and therefore the recommended approach. If any such requirement for individual case-by-case assessment is required then ComReg should publish thresholds and criteria for such assessments and we strongly encourage ComReg to publish the criteria around the use of any competitive assessments that might be used in addition to the MST.
68. There would appear to be a risk that allowing case-by-case judgement on bundles would encourage eircom to challenge all bundles failing an MST to be reviewed on an individual basis.
69. Vodafone would like to reiterate the importance of ComReg performing proactive monitoring of all bundles post-launch to ensure the timelines, lifespans and costs provided are appropriate. The concern remains that though the initially launched products pass the test based on original assumptions, if the MST was to re-performed post-launch using up-to-date statistics modelled on actual uptake, churn rates and other necessary inputs the result may be different.
70. As highlighted above, this would mean that the product should be suspended with consequent disruption to the market. However, it should incentivise strict adherence to an MST at the outset.
71. Whilst we disagree with the ComReg proposal in this area, however, were ComReg to implement, on an exceptional basis, a one-off assessment of a bundle, then this should only be allowed on a highly limited basis by ComReg. Vodafone would argue that should any individual case-by-case assessment be required, the incumbent should be obliged to notify ComReg in advance of the pre-approval assessment. The justification for the exception should be communicated as early as possible supported by independently verifiable data. Should ComReg decide to grant any such exception this should be notified to the OAOs with the rationale and supporting data provided in the interests of transparency and clarity.

Question 14: Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.

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Vodafone agrees with ComReg's proposals in respect to the adjustments to the MST

72. Vodafone believe that in the interests of transparency ComReg should provide greater clarity and clearly describe the competitive assessment process and criteria to be used.
73. Eircom should not be allowed to launch a bundle without proving to ComReg that the bundle passes an MST. Market and consumer harm can occur where a bundle is offered which fails the MST and then has to be withdrawn. As stated above it is not clear how the competitive assessment process would work. In addition, we strongly urge ComReg that eircom should not be allowed to bank margins for use across other bundles in a manner that is advantageous to eircom and is to the detriment of other operators.
74. A bundle must recover its costs over the lifetime of the customer use and this calculation should take account of promotional offers. Vodafone would suggest, that if ComReg does not lower the ACL, to better reflect the ACL's across industry, that ComReg gives consideration to using a lower ACL when calculating recovery of promotional offers. Customers who avail of such offers are likely to be more volatile than "laggards" and engage in value shopping more frequently thus having a lower ACL.
75. Vodafone would recommend that in the case of opt-ins that a mechanism for monitoring take up of the offers should be established to ensure that the forecasts made by eircom are reasonable. In the event of the volume of opt-ins being higher than forecast and thus causing the MST to fail eircom should be obliged to remove the offer immediately.
76. Vodafone agrees with ComReg that any promotions or discounts should be considered as part of the MST. Similarly, if the bundle is in response to a competitor's bundle or if a bundle is found unreasonable post launch this should be deemed to be causing a margin squeeze in the same manner. A bundle must recover its costs over the lifetime of the customer and this calculation should take account of promotional offers.
77. On opt-in promotions, Vodafone would recommend that in the case of such opt-ins that a mechanism for monitoring take up of the offers should be established to ensure that the forecasts made by eircom are reasonable. In the event of the volume of opt-ins being higher than forecast and thus causing the MST to fail eircom should be obliged to remove the offer immediately.

Question 15: Do you agree or disagree with ComReg's proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data where appropriate to support your view.

Vodafone agrees with ComReg's proposals in respect of retention offers and their treatment in the MST

78. Vodafone agrees with the proposals in respect of retention offers and their treatment in the MST. This 'as and when' approach is more attuned to the reality of the market and approval by ComReg in advance of the retention offer being launched is necessary,

Eir Sports

79. In this section, we comment on the various issues raised in respect of eir Sports.

Question 16: What are your views on the period over which Eircom needs to recover the on-going content costs of eir Sports, should the period be limited to the duration of the rights?

80. Vodafone believe that the most reasonable approach is to assess the overall cost of content over the lifetime of content novated, with a contribution for any other costs associated with the purchase of content.
81. It would appear based on information contained in the eircom's 2016 bondholder report¹⁰ that the acquisition of eir Sports is being amortised over a 4 – 5 year period and as such the same approach should be followed for all MSTs. As such, Vodafone believe that the 96 months referred to for the margin squeeze DCF model is too long. In addition, there are highly limited direct retailing assets that would be discounted/recovered over an 8 year period. Thus, it would appear most logical to take guidance from eircom's own documentation on this and limit the duration to a 4 – 5 year period.

Question 17: What are your views on the period over which Eircom needs to recover the acquisition costs of eir Sports? Should this be a set period or should Eircom be allowed to use excess broadband margins, if available, to shorten the set period?

Vodafone agrees with using a set period approach

82. In the interests of clarity, certainty and transparency the defined period approach based on the maximum payback period for the recovery of the acquisition cost appears reasonable.

Question 18: What are your views on the appropriate subscriber base over which Eircom needs to recover the costs of eir Sports? Are there any methods which you view as being more suitable than ComReg's preliminary view? In your response please outline any practical issues which should be considered if such a method were to be implemented.

Vodafone does not agree with all of ComReg's preliminary views on the subscriber base for cost recovery

83. Vodafone agree that the addition of mobile subscribers to be included in the divisor would not be appropriate as it could potentially lead to a cross-subsidy from an unregulated service to a regulated service. Only Eircom retail fixed broadband subscribers (with sufficient line speed to avail of such services) that are 'active' eir Sports customers should be included.

¹⁰ eircom Holdings (Ireland) Limited ("EHIL") September 1, 2016, Annual Report for Bondholders Year Ended June 30, 2016

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84. Vodafone believe that the most equitable approach is to only include those subscribers in the divisor that are actively availing of the service. Vodafone acknowledges that there are practical issues with this metric due to variability in usage and numbers across relevant bundles but we would suggest that it would be unusual if such data is not actively monitored and collated by eir. ComReg may need to provide guidance and what should be deemed an active customer. There should then be a requirement for eir to provide independently verifiable data confirming their 'active customers' number which should be used in the divisor.
85. To include all fixed broadband subscribers would provide eir with an unfair advantage effectively providing a cross-subsidy as it increases the divisor thereby reducing the per unit costs to be recovered. However, we do note from eircom's Quarter 3 presentation that they themselves state that there is a 42% uptake of eir Sport by eir (retail) consumers¹¹ and this would, at the very least, be a starting point for determining this most appropriate divisor.

Question 19: Do you agree with ComReg's proposed treatment of eir Sports in the Margin Squeeze Test? If you consider another method would be more suitable can you please give details of such a method whilst being aware that content is an unregulated service.

Vodafone agrees in principle with the proposed treatment of eir Sports in the MST

86. Vodafone agree in principle that the acquisition and ongoing costs in the year should be used in the MSTs for all markets.

Pre-launch and post-launch assessment of Bundles

87. In this section, we address the discussion on whether there should be a pre-notification and post-launch requirements on applying a MST.

Question 20: 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.

Vodafone strongly agrees that a pre-clearance requirement is necessary

88. Vodafone believe that a pre-clearance requirement is required ahead of eircom launching a new or revised bundle. Without pre-clearance, there is a risk there Eir could release bundles to the market that do not meet the MST. When a bundle is launched into the market, which fails the MST, it is very difficult

¹¹ See "eir Third Quarter and Nine Month to 31 March 2017, Results Presentation",
https://www.eir.ie/.content/pdf/IR/presentations/2016_2017/quarter3/eir_3rd_quarter_results_presentation_FY1617_3.pdf

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to then retrospectively correct the damage done in the market place where customers have purchased such a bundle,

89. Vodafone does not support a self-certification regime. In relation to self-certification, we note in the recent Cartesian review¹² of eir operational processes that weaknesses were found in the current self-certification process. It was determined that the current process could create a risk that eircom fail to comply with its obligations.
90. Only through the use of a robust pre-clearance obligation can the risk of market manipulation be minimised.

Question 21: 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.

Vodafone agrees in principle with ComReg’s proposed approach on post launch non-compliance

91. A properly functioning MST is a cornerstone of a properly functioning market. Eircom’s compliance with ComReg’s MST is fundamental to retail operators being able to compete with Eircom. Without such a properly functioning MST process then there is every potential for, and incentive on eircom, to undercut the prices of all other retail offerings through its capability to cause a margin squeeze. As a vertically integrated operator, Eircom can continue to earn wholesale profits even on retail bundles that cause such a margin squeeze.
92. While Vodafone agrees with ComReg’s proposed notification approach following post-launch non-compliance and enforcement of the associated regulations, it believes that the enforcement actions that ComReg may take as a result of such a breach may not be sufficiently robust. It is Vodafone’s view that enforcement measures need to be strong enough to provide a sufficient disincentive on Eircom launching bundles in breach of a MST.
93. Vodafone encourages ComReg to give greater consideration on how to rectify the damage in the market in such instances. As these considerations arise post-launch, the damage has already been in done, so there needs to be steps taken to dis-incentivise post-launch breaches of the MST.
94. Vodafone also re-iterates the argument made in our response to question 13 on why there should be strict enforcement of a defined set of MST rules and no decisions made on a ‘case by case’ approach.

Question 22: Do you agree or disagree with ComReg’s proposed approach to introduce a monitoring statement? Do you agree or disagree with ComReg’s proposed approach to require this statement on a quarterly basis? Please explain your response and provide detailed information to support your view.

Vodafone agrees with the proposal to introduce a monitoring statement

95. Vodafone fully agree there should be a requirement for eircom to provide a monitoring statement for actual performance compared to original projections on the bundles offered for sale in order to ensure

¹² ComReg Doc 1764b ‘Cartesian Operational Assessment of eir’s Regulatory Governance Model’

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- continued adherence to the regulated MST. The current practice of basing the MST on the forecasted take-ups and margin is unacceptable due to its speculative nature. In the absence of post launch monitoring there is an incentive for Eircom to forecast more aggressive take-up and margins favourable to eircom to allow it pass the MST initially.
96. Vodafone agree that the production of a monitoring statement should increase transparency on the relationship between bundle offers and their costs over their lifetime.
97. As referred to our answer to question 3 and throughout, it is Vodafone's view that a monitoring statement should be provided on a monthly basis. It is our view that quarterly monitoring is too infrequent and increases the risk that post launch non-compliance continues for longer than is necessary.
98. In the absence of access to the MST data, OAOs have to rely on ComReg to ensure that all bundle offers cover their lifetime costs (and so are not being used to manipulate the market) based on the pre and post-launch review of MSTs. The proposed introduction of monitoring statements, while not in themselves a perfect solution, should go some way to improve the monitoring of eircom with respect to margin squeeze.

Regulatory Impact Assessment

Question 23: 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.

99. Vodafone generally agrees with the Regulatory Impact Assessment (RIA). It captures the benefits and risks of various remedies where SMP exists, and concludes correctly that it is justifiable to maintain Access, Transparency, Non-Discrimination, Price Control and Cost Accounting and Accounting Separation obligations in both the WLA and Regional WCA Markets (Referred to as Option 4 by ComReg). We note that all such remedies are required and are complementary to each other.
100. Furthermore, and as we have discussed elsewhere in our response, there are certain remedies that need refining and improving. Introducing these suggested improvements will, in our view, greatly increase the effectiveness of the proposed remedies.
101. Vodafone disagrees with ComReg's preliminary conclusion that no undertaking has SMP in the Urban WCA Market (and that the RIA has not been extended to consider relevant regulatory obligation in respect of this market). We stress the negative impact that will result from the incorrect market definition proposed for the Urban WCA Market. Absent sufficient regulatory obligations, Eircom has the ability and incentive to engage in exploitative and/or exclusionary behaviour. We therefore urge ComReg to implement the proposed de-regulation in a manner outlined in Section 15 above.

Draft Decision Instrument – Fixed Access and Call Origination Market(s)

Question 24: Do you believe that the draft text of the proposed Decision Instrument for the FACO Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

102. Vodafone has no comment on the Decision Instrument other than to state it is in general agreement with the text subject to consideration of the comments provided in response to this consultation and Vodafone's response to the main consultation (ComReg document 16/96).

Draft Decision Instrument – Wholesale Local Access Market

Question 25: Do you believe that the draft text of the proposed Decision Instrument for the WLA Market 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.

103. Vodafone has no comment on the Decision Instrument other than to state it is in general agreement with the text subject to consideration of the comments provided in response to this consultation and Vodafone's response to the main consultation (ComReg document 16/96).

Draft Decision Instrument – Wholesale Central Access Market

Question 26: Do you believe that the draft text of the proposed Decision Instrument for WCA Market 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.

104. Vodafone has no comment on the Decision Instrument other than to state it is in general agreement with the text subject to consideration of the comments provided in response to this consultation and Vodafone's response to the main consultation (ComReg document 16/96).

