



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

# Publication of Guidelines on Voluntary Commitments

## Response to Consultation 24/08

### Response to Consultation

**Reference:** ComReg 24/73

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# Contents

<b>Section</b>	<b>Page</b>
1 Introduction .....	3
2 Overview .....	3
3 Status of the Guidelines .....	4
4 Treatment of responses to a market test .....	4
5 Restrictions on ability to offer voluntary commitments .....	4
6 Assessment consistent with ECC Regulations .....	6
7 Timelines .....	8
8 Confidentiality.....	9
9 Making commitments binding and extending commitments .....	9
Appendix 1: Submissions to Consultation .....	11

## 1 Introduction

1. ComReg has today published its finalised Guidelines on Voluntary Commitments by a Significant Market Power ('SMP') operator under the European Union (Electronic Communications Code) Regulations 2022 (S.I. 444 of 2022) ("ECC Regulations") (the "Guidelines"). This follows a consultation on draft Guidelines ([ComReg Document 24/08](#)) which ran from 2 February 2024 to 7 March 2024. Submissions were received from two respondents, namely, Eircom Limited trading as Eir and Open eir ("Eircom") and Virgin Media Ireland Limited ("Virgin Media") (the "Submission(s)").
2. The Guidelines, which reflect ComReg's consideration of the Submissions received, have been published separately in ComReg Document 24/74 and apply with immediate effect in respect of any commitments offered by an SMP operator under Regulations 58, 60 or 61 of the ECC Regulations.
3. ComReg's consideration of the respondents' Submissions is set out below; it should be read together with the Guidelines and the respondents' Submissions published in the Annex to this response to consultation.

## 2 Overview

4. Virgin Media was generally supportive of ComReg's approach; Eircom welcomed publication of the Guidelines. Both Virgin Media and Eircom expressed concern as regards the proposed treatment of responses to a market test; Eircom was also of the view that, as drafted, the proposed approach would limit an operator's ability to offer commitments and prolonged and vague procedures would delay the implementation of voluntary commitments.
5. Prior to addressing the detail of the Submissions received, ComReg notes that a significant part of Eircom's Submission is dedicated to ComReg's "*historic*" approach to voluntary commitments which Eircom says, has been "*adversarial*". Eircom makes reference to commitments proposed in the context a June 2020 consultation on fixed access and call origination ('FACO') markets ([ComReg Document 20/46](#)); [ComReg Decision D11/21](#) of December 2021 concerning wholesale fixed network access charges; and [ComReg Decision D05/24](#) of January 2024 concerning wholesale broadband markets. For the avoidance of doubt, ComReg does not accept that its approach has been "*adversarial*" or that ComReg has "*ignored legislative requirements around voluntary commitments*" as Eircom contends. Suffice to say that ComReg's position, including among others as regards the effect of Article 61 of the European Electronic Communications Code<sup>1</sup> prior to transposition, is clearly set out

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<sup>1</sup> Directive (EU) 2018/1872 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ('EECC').

in ComReg Decision D11/21 (which Eircom has appealed and for which judgment is awaited) and ComReg Decision D05/24.

### 3 Status of the Guidelines

6. Virgin Media acknowledged, as set out in para 1.10 of the draft Guidelines, that they were not intended to be a legally binding statement of how ComReg will exercise its discretion in a particular situation. Virgin Media suggested however that it is further acknowledged that ComReg will seek to follow the Guidelines and explain any departure from them.<sup>2</sup> Additional wording has been added to the Guidelines to that effect.

### 4 Treatment of responses to a market test

7. Virgin Media suggested in respect of the market test consultation, that ComReg should address each of the points made by respondents to such a market test consultation, for transparency reasons and to show how the respondents' views have been dealt with.<sup>3</sup> Eircom was of the view that if ComReg does not address individual points raised by service providers to the market test, then it would not be clear that ComReg has fulfilled its obligations under the ECC Regulations to "take account" of such views.<sup>4</sup>
8. ComReg is required to take into account respondents' views to the market test and this is clearly stated in the Guidelines; ComReg does not accept that this, in and of itself, sets out a requirement as regards how ComReg is to show that it has done so. ComReg will exercise its discretion as to how it sets out its consideration of respondents' views taking into account the number of responses, the variety in the views expressed, the subject-matter of the market test and confidentiality requirements.

### 5 Restrictions on ability to offer voluntary commitments

9. Eircom took issue with the approach proposed in the draft Guidelines that unless commitments were received at least six months in advance of a planned consultation or decision, ComReg would proceed with the consultation or decision as planned and consider the commitments in a separate process, and not delay its consultation or decision to accommodate, as part of the decision or consultation, the offer of commitments.
10. According to Eircom, this would introduce a "*lock-out period*" and a restriction on a "*prospective SMP operator*" which is not envisaged under Regulation 61 of the ECC

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<sup>2</sup> P. 3 of Virgin Media's Submission.

<sup>3</sup> P. 5 of Virgin Media's Submission.

<sup>4</sup> Para 32 of Eircom's Submission.

Regulations and it was unclear how it could be implemented in practice.<sup>5</sup> Eircom contends that ComReg consistently misses deadlines for publication of consultations and completion of market analyses so that it would not be possible for an operator to know when the six month period is in operation.<sup>6</sup> Moreover voluntary commitments are to address the competition problems identified by ComReg. It is not possible to do so six months in advance of the competition problems being identified by ComReg. Instead ComReg should ensure that the prospective SMP operator is given the opportunity to provide voluntary commitments by incorporating as part of the consultation process, a clearly defined step and time for the offer of commitments.<sup>7</sup> In Eircom's view, ComReg's proposal to "give precedence" to completion of market analysis and proceed with SMP regulation would lead to inconsistency and unpredictability and its "tacit suggestion" that it will not accept voluntary commitments until completion of the market analysis is not consistent with Regulation 61.<sup>8</sup> Eircom also expressed "grave concern" that ComReg would not delay a market analysis to consider a voluntary commitment in the event that lower wholesale prices would result from an SMP designation versus those offered under a voluntary commitment.<sup>9</sup>

11. In contrast, Virgin Media agreed with the suggestion that reviewing commitments should not take precedence over a market analysis and suggested that should voluntary commitments be offered at the time of a market review, ComReg should clearly articulate to stakeholders how it intends to co-manage the processes.<sup>10</sup>
12. ComReg does not agree, as Eircom has contended, that its approach as regards the offering of voluntary commitments less than six months before a planned consultation or decision, means that an operator is "locked-out" of the possibility of offering voluntary commitments. Voluntary commitments may be offered at any stage; there is no limitation in this regard. The approach set out in the Guidelines is only concerned with the impact that receipt of an offer of voluntary commitments has on ComReg's ongoing work and whether it is possible to assess the offer of commitments as part of an ongoing process or not. ComReg considers that its approach is necessary to ensure that it keeps control of its work programme and that whatever intervention ComReg finds is appropriate and necessary at a point in time cannot be jeopardised, to the detriment of other operators and ultimately end-users, by an unexpected offer of commitments. This could be the case, for instance, where a decision subject to consultation is opposed by the SMP operator who may then seek to attempt to delay

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<sup>5</sup> Para 2-3 of Eircom's Submission.

<sup>6</sup> Para 4 of Eircom's Submission.

<sup>7</sup> Para 5-8 of Eircom's Submission.

<sup>8</sup> Para 12 of Eircom's Submission.

<sup>9</sup> Para 14 of Eircom's Submission.

<sup>10</sup> P. 4 of Virgin Media's Submission.

the regulatory process by making an offer of commitments that will not address the problem sought to be addressed by the draft decision.

13. ComReg also notes that operators will normally, in any event, have some visibility of consultation or decision timelines as they are publicised in ComReg's [Action Plan](#) which is published quarterly. This will notably be the case of an operator that wishes to ensure that an offer of commitments is considered post consultation when the competition problems will be identified, and pre-decision.
14. Furthermore, for the avoidance of doubt, the approach set out in the Guidelines does not mean that ComReg will never consider an offer of commitments where a consultation process is ongoing; on the contrary ComReg would do so save where the offer of commitments is received less than six months in advance of the next step in the process, be it a consultation or a decision. In that case, ComReg may, as appropriate, complete the ongoing process and thereafter re-examine the matter in light of the offer of commitments.
15. Having considered Eircom's and Virgin Media's Submissions, ComReg has decided to revise the wording of paragraph 2.10 of the Guidelines to ensure that it reflects the position outlined above. This has included deletion of the reference to having to give "*precedence*" to the review of commitments or the market review in order to avoid any suggestion that one matter primes another. ComReg considers that this amendment accords with the substance of Submissions received by both Eircom and Virgin Media. The text, "*the imposition of new SMP obligations including e.g., a price control resulting in a price decrease*", has also been deleted on the basis that it was too restrictive an example, has been subject to misinterpretation by Eircom and was not necessary for the purpose of the Guidelines.
16. ComReg does not consider that it would be appropriate to further amend the Guidelines, including for the purpose of providing for a specific step and window in the market analysis review process for making an offer of commitments, as suggested by Eircom. This would limit the possibility to make an offer of commitments in a manner that ComReg does not believe is contemplated by or acceptable under Regulation 61 of the ECC Regulations. ComReg will publicise an offer of commitments and how it proposes to approach its assessment at a time that ComReg believes is appropriate in light of market circumstances, its timing and the need for transparency.

## 6 Assessment consistent with ECC Regulations

17. In its Submission Virgin Media agreed with the acknowledgment in the Guidelines that a key consideration of the evaluation of voluntary commitments would be whether the commitments offered are adequate given prevailing competition

concerns.<sup>11</sup> Eircom emphasised that ComReg's decision as regards an offer of voluntary commitments needs to be underpinned by economic analysis and focus on the policy objectives and competition problems identified by ComReg in accordance with Regulation 50. Eircom suggested that ComReg has previously misinterpreted the purpose of voluntary commitments under the Code and wrongly required that voluntary commitments must address *all* competition problems. For Eircom, the assessment of voluntary commitments should be based on the relevant criteria and the resolution of identified competition problems, not on a comparison against draft regulatory remedies proposed by ComReg. Eircom further contended that ComReg must provide cogent economic analysis as evidence if it rejects voluntary commitments, and this should be included as a clear step in the process.<sup>12</sup>

18. ComReg agrees with the principle that voluntary commitments should be assessed relying on the criteria set out in the ECC Regulations with the view to establishing whether they address the competition problems identified. ComReg does not consider that there is anything in the Guidelines that indicates otherwise or suggests that acceptance of voluntary commitments will be conditional on the voluntary commitments addressing "*all*" competition problems. Whether or not voluntary commitments are acceptable will depend on the nature and form of the commitments and whether on their own, or together with other remedies, they adequately address all competition problems.
19. ComReg accepts further that this may involve reviewing economic or other relevant evidence. However, ComReg does not accept Eircom's contention that there is a requirement on ComReg to "*provide cogent economic analysis as evidence if it rejects voluntary commitments*". Such a requirement is not set out in the Regulations. As noted in the article quoted in Eircom's Submission,<sup>13</sup> "*Voluntary commitments should not be seen as a panacea. There are important considerations to make sure the proposed commitments are seen as credible and not as a 'plot to exploit market power' in disguise*" and for this reason, "*they require careful assessment and design*". In that context, the authors suggest that "*Incumbents that considering offering voluntary commitments should prepare the economic evidence to support their case in detail.*" Where economic evidence is submitted in support of an offer of commitments, ComReg will give it consideration as part of its assessment.
20. In light of this, an amendment has been made by ComReg to paragraph 2.11 of the Guidelines which now states that where commitments are offered in respect of SMP obligations which ComReg has proposed to impose in a draft decision already put to

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<sup>11</sup> P. 3 of Virgin Media's Submission.

<sup>12</sup> Paras 13, 19, 22-23 of Eircom's Submission.

<sup>13</sup> (p. 6 of Eircom's Submission). Tuomas Haanperä, Serafino Abate, Bruno Basalisco (Copenhagen Economics), "*Voluntary Commitments in Telecoms: Flight of Fancy or a Safe Step Towards Deregulation?*", 29 April 2021.



consultation, the SMP operator's offer of commitments should set out how the commitments would address competition problems in the market.

## 7 Timelines

21. Eircom was of the view that the Guidelines as drafted set out prolonged and vague procedures that will delay the implementation of voluntary commitments. It indicated that there should be no delays in dealing with an offer of voluntary commitments during the currency of a market review and that it was particularly important to have clear timings in respect of the assessment of commitments concerned with co-investments.
22. As regards specific procedural steps, Eircom was concerned that the preliminary assessment should be a *prima facie* assessment completed within a specific maximum time, not a full assessment; Eircom was of the view that the statement in the draft Guidelines that "*the scope and extent of preliminary assessment will depend on the nature of commitments offered*" was too vague an approach and inserted a procedural step that is not set out in legislation. Clear timings should be given in the Guidelines for completion by ComReg of a step while the SMP operator should be given sufficient time to assess the Statement of Preliminary Conclusions; this meant in particular that request for an extension of time should be readily facilitated.
23. ComReg agrees that review and decision on voluntary commitments should be undertaken as swiftly as possible. ComReg however does not accept that the Guidelines set out prolonged and vague procedures that will delay the implementation of voluntary commitments. For instance, the Guidelines are clear that the preliminary assessment is a *prima facie* assessment.
24. ComReg also notes that Eircom accepted that dealing with matters arising with voluntary commitments may require time to consider and indeed pleaded in favour of allowing extensions of time. Having considered Eircom's Submission and reviewed further the Guidelines, in particular Chapter 3, ComReg has made the following amendments with the view to ensuring clarity of the process and timelines:
  - Para 3.2 and para 3.5 now provide an indicative timeline of 25 working days for the completion of the preliminary assessment;
  - The word "*normally*" has been deleted in para 3.6 (as suggested by Eircom) so that ComReg will in all cases where it applies, give an indication as to when it intends to perform a market test consultation;
  - Para 3.10 now sets out that ComReg will provide an indicative timeline for the commitments review when issuing a market test consultation.



25. ComReg notes that the period allowed to the SMP operator for confirming its position as regards the Statement of Preliminary Conclusions is “*at least 30 days*”. In light of this no amendment to the Guidelines is required.
26. As regards Eircom’s concern with the statement at para 3.2 of the Guidelines that “*the scope and extent of the preliminary assessment will depend on the nature of commitments offered*”, ComReg has clarified the text to make it clear that this is not a test in addition to the statutory requirements. On the contrary it is a reference to the fact the preliminary assessment will vary depending on whether commitments fall to be considered under Regulations 60, 61 or 79 which each sets different requirements.

## 8 Confidentiality

27. While Virgin Media supported the position set out at paragraph 2.7 of the draft Guidelines that no claim of confidentiality would be accepted in respect of the contents of Submissions to be market tested,<sup>14</sup> Eircom submitted that the principle that the voluntary commitments would be published in full must be balanced with the requirement to protect sensitive business information where required and that this was particularly important in the case of voluntary commitments concerned with co-ownership or long-term risk sharing through co-financing.<sup>15</sup>
28. Having considered Virgin Media’s and Eircom’s Submissions, ComReg accepts that it may be necessary to protect the confidentiality of business sensitive information included in an offer of voluntary commitments. Paragraph 2.7 of the Guidelines has been amended accordingly to provide for a case-by-case assessment of confidentiality claims and engagement as required with the SMP operator with the view to ensuring protection of any commercially sensitive/sensitive business information while allowing meaningful market testing with interested parties. For the avoidance of doubt, ComReg agrees that maximum transparency is needed in order to allow proper engagement in a market test consultation and ComReg envisages that redactions of material will be permitted only in narrow circumstances where the SMP operator makes a clear case that redactions of certain material are required in order to protect business and competition sensitive information, the redactions are limited to the maximum extent possible and do not jeopardise respondents’ ability to understand the full extent of the commitments offered and engage meaningfully in the market test.

## 9 Making commitments binding and extending commitments

29. Virgin Media made the point that the Guidelines indicate that in certain circumstances voluntary commitments would need to be made binding but that in its view,

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<sup>14</sup> P.4 of Virgin Media’s Submission.

<sup>15</sup> Para 33 of Eircom’s Submission.

adjustment or removal of SMP obligations is inherently serious and, in most cases, voluntary commitments would need to be binding in nature.

30. ComReg wishes to clarify in response that the Guidelines are generally concerned with the process that ComReg will normally follow for the purpose of determining whether voluntary commitments offered by an SMP operator should be accepted and made binding, in which case some or all of the SMP obligations imposed on the operator concerned may be withdrawn. In a number of limited circumstances as set out under the ECC Regulations, namely where voluntary commitments are concerned with an offer of co-investment which meets the criteria set out in the ECC Regulations, ComReg has no choice but to make the commitments binding where ComReg is satisfied that the criteria set out in Regulation 58(2) of the ECC Regulations are met.
31. Eircom pointed out that the draft Guidelines do not include a procedure for considering and implementing an extension to voluntary commitments where required, before they expire, and expressed the view that “*ComReg must take a pro-active approach and plan timelines accordingly, not allowing commitment periods to lapse before reviewing existing commitments*”.<sup>16</sup>
32. A sub-section (section 4.5) has been added to the Guidelines to confirm that where voluntary commitments have been made binding, ComReg will monitor their implementation and effects on the market and give consideration to their extension accordingly, in particular where they appear to work satisfactorily and the period for which they have been made is less than the period for which they had been offered. Where ComReg considers that an extension is warranted, ComReg will approach the SMP operator to ascertain whether the SMP operator wishes to have the commitments extended. If that is the case, ComReg will hold a public consultation before making a decision to extend. These steps may be undertaken in preparation for a market review that falls due in or around the time that the commitments expire.
33. ComReg notes that it is also open to the SMP operator to take a pro-active approach and seek the extension of commitments where applicable.

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<sup>16</sup> Para 35 of Eircom’s Submission.

# Appendix 1: Submissions to Consultation

**eir's Response to ComReg Consultation 24/08 Guidelines on Voluntary Commitments by an SMP operator under the European Union (Electronic Communications Code) Regulations 2022 (SI 444 of 2022)**

**ComReg Document: ComReg 24/08**



**7 March 2024**

## DOCUMENT CONTROL

<b>Document name</b>	eir response to ComReg Consultation 24/08
<b>Document Owner</b>	eir
<b>Status</b>	Non-Confidential

The comments submitted in response to this consultation document are those of Eircom Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

Please note that, for the purposes of the Freedom of Information Act 2014 and the Communications Regulation Act 2002 (as amended) and in the context of the eir Group's general rights and obligations, information supplied by the eir Group to you may contain confidential, commercially sensitive or price sensitive information consisting of financial, commercial, technical or other information, whose disclosure to a third party could result in financial loss to the eir Group, could prejudice the competitive position of the eir Group in the conduct of its business, or could otherwise prejudice the conduct or outcome of contractual or other negotiations to which the eir Group is a party.

Accordingly, you are requested to contact a member of eir Group's Regulatory Strategy Team where there is a request by any party to have access to records which may contain any of the information herein and not to furnish any information before the eir Group has had an opportunity to consider the matter.

## Response summary

eir considers voluntary commitments an important regulatory tool to (a) address competition concerns identified by an NRA; (b) assist the prospective SMP or SMP provider in the deployment of very high-capacity networks, for example, by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements; and (c) voluntary separation by a vertically integrated SMP or prospective SMP operator.

However, eir is concerned by ComReg's proposal to effectively impose restrictive time limitations on when voluntary commitments can be offered by the prospective SMP operator(s) and when those commitments will be considered by ComReg. Such restrictions are not contemplated in Regulation 61 of the ECC Regulations nor is it in compliance with the spirit of those regulations. ComReg is suggesting that its decision making process regarding market analysis will carry-on regardless of the voluntary commitments made during the six month "lock-out" period, even though from a proportionality, transparency and fair procedural process perspective, it is impossible for the operator(s) to know prior to a ComReg consultation as to whether it is proposed to be designated with SMP. It is also impossible to know what the competition concerns pursuant to Regulation 50 are such that any prospective voluntary commitments could address these concerns.

In addition, eir is concerned by ComReg's historical approach to its cursory dismissal of eir's voluntary commitments which incorrectly dismissed without cogent reasoning or assessment those commitments and has misinterpreted the purpose of voluntary commitments.

eir welcomes the publication of ComReg's procedures document but as currently proposed, the procedures will:

- limit an operator's ability to make voluntary commitments which is not in compliance with Regulation 61 of the ECC Regulations; and
- delay implementation of voluntary commitments due to the prolonged and vague procedures.

eir considers ComReg should review its proposed procedures and:

1. Remove the arbitrary time limit on making voluntary commitments to ensure its procedures are compliant with Regulation 61 of the ECC Regulations.
2. Ensure its assessment when reviewing voluntary commitments is focused on the competition problems identified pursuant to the ECC Regulations.

3. Remove unnecessary layers of ComReg assessment and introduce time periods within its procedures to avoid delaying the implementation of voluntary commitments.



## Introduction

Below eir outlines its concerns with ComReg's proposed draft guidance on voluntary commitments submitted by an SMP operator.

### 1. ComReg has proposed limits on the prospective SMP operator's ability to submit voluntary commitments

1. eir considers ComReg has proposed to limit a prospective SMP operator's ability to make voluntary commitments by:
  - creating an arbitrary time limit that is not in compliance Regulation 61 of the ECC Regulations;
  - creating limits on a prospective SMP operator's ability to make voluntary commitments during a market review; and
  - not outlining how it will focus its review of the voluntary commitments on the competition problems identified pursuant to the ECC Regulations.

### *Creating an arbitrary restriction on submission of voluntary commitments*

2. eir notes ComReg's recognition that under Regulation 61 of the ECC Regulations there should not be restrictions on an SMP operator offering voluntary commitments. eir is unclear therefore why ComReg has stated that "*unless commitments are offered more than six months in advance of a planned consultation or planned decision (as the case may be), the commitments review process could lead to a delay in the market analysis*" (emphasis added). eir considers this is creating a baseless, arbitrary restriction on a prospective SMP operator offering voluntary commitments.
3. It is also unclear that a six-month deadline would work in practice. A prospective SMP operator cannot predict when exactly ComReg will release a consultation. ComReg's annual work plan only includes quarterly dates for potential publication.
4. ComReg consistently misses the deadlines for publishing consultations and market reviews set out in its annual work plan. eir has raised this issue several times, and the European Commission has threatened infringement proceedings regarding delays to market reviews. ComReg considers the five-year market review period as a target rather than a maximum review period, and has just recently missed this deadline in the reviews of the WLA/WCA and PIA markets (which were required to be undertaken on a three year market review basis as the Code had not been transposed at the

time). ComReg's delays in market reviews are due to its poor planning, which means that operators are unable to predict when planned consultations will be published. Therefore, prospective SMP operator(s) are not able to provide voluntary commitments to ComReg six months in advance of a planned market review which may occur at an unspecified date in the future.

5. More importantly, the six-month "lock-out" period proposed by ComReg is incorrect from a transparency, proportionality or fair procedural process perspective. Prior to a ComReg consultation it is impossible for an operator to know whether it will be prospectively designated with SMP by ComReg. Second, it is impossible in advance to offer voluntary commitments pre-consultation that address the current or most up-to-date market conditions and competition problems pursuant to Regulation 50 of the ECC Regulations, including assessment of the remedies that ComReg propose to be proportionate to impose to address those competition concerns - when such draft positions have yet to be drafted by ComReg.
6. Voluntary commitments must address the competition problems identified by the regulator as specified under Recital 205 of the Code which sets out, "[a]ny new market developments should be taken into account in deciding on the most appropriate remedies." A prospective SMP operator will not have visibility of the current competition problems which are yet to be identified by ComReg when submitting voluntary commitments if it is required to do so six months prior to a market review consultation being published.
7. This flaw in the logical process proposed is recognised in the consultation itself where in paragraph 2.11, ComReg states, "*Where commitments are offered in respect of SMP obligations which ComReg has proposed to impose in a draft decision already put to consultation, the SMP operator's offer of commitments should make reference to the competition problems described in the draft decision the subject of public consultation, rather than those set out under any existing market analysis decisions.*"
8. Put simply, the lock-out process proposed by ComReg is illogical, lacks proportionality and is procedurally flawed including from a fairness perspective when a prospective SMP operator cannot know the outcome of a future market analysis consultation or the competition problems which its voluntary commitments are required under the ECC Regulations to reference and address. No such proposed designation or reference to competition problems can validly occur ahead of time to

allow an operator to submit those commitments per ComReg's proposal six months in advance of a market review consultation actually happening.

*Limits on operator's ability to make voluntary commitments during a market review*

9. eir highlights the obligation is on ComReg to conduct market reviews in a timely manner under Regulation 49 of the ECC Regulations. A prospective SMP operator should not be limited in making voluntary commitments as part of a market review to compensate for ComReg's inability to plan its market reviews accordingly to meet deadlines and its obligations. It is not sufficient for ComReg to state that it will "*normally not delay completion of the market review and adoption of a final decision*" if voluntary commitments are offered at a time when a market review is ongoing and subject to public consultation or pending final approval.
10. eir considers that ComReg should be focused on providing opportunity for a prospective SMP operator(s) to provide voluntary commitments by incorporating a clearly defined step (and time) in market reviews which allows for prospective SMP operators to submit voluntary commitments where appropriate, and complete a market test, so the commitments can be assessed as part of the market review.
11. eir also considers that ComReg's proposal to proceed with SMP Regulation, and subsequently then address voluntary commitments submitted as part of a market review, will lead to inconsistency and increased unpredictability for the market. ComReg acknowledged that this may result in ComReg amending a market analysis decision that was only recently completed. However, it fails to acknowledge the significance of this impact on the market, creating uncertainty for providers due to frequent changes to regulatory obligations or the cost on the SMP operator of implementation and compliance.

*ComReg must ensure its focus on voluntary commitments is consistent with the ECC Regulations*

12. eir considers ComReg's position, "*ComReg does not believe that reviewing commitments should take precedence over completing a market analysis in accordance with the timelines,*" misinterprets the purpose of voluntary commitments and the lens in which they should be viewed. ComReg is tacitly suggesting it will not accept voluntary commitments until it has completed its own SMP regulation, which is not in line with Recital 205 of the Code or Regulation 50 (1) of the ECC Regulations.

13. Any decision to implement voluntary commitments needs to be underpinned by economic analysis<sup>1</sup> and focus on the policy objective and the competition problem identified by ComReg - consistent with Regulation 50 of the ECC Regulations. For example, in some scenarios it may be more beneficial to opt for voluntary commitments provided regarding pricing over the imposition by ComReg of a specified price control obligation. A voluntary commitment on pricing by the proposed SMP operator could address the competition concern identified pursuant to Regulation 50 of the ECC Regulations, and provide certainty and predictability which is to the long-term benefit of end-users and can encourage investment. Pursuant to Regulation 61 (2) of the ECC Regulations, eir notes that such voluntary commitments can be for a period greater than the market review period.
  
14. eir is gravely concerned by ComReg's stated example in the consultation to illustrate why it would not delay its market analysis to consider a voluntary commitment. In the consultation, ComReg suggests that it would not delay its market analysis, for example, in the event that lower wholesale prices would result from a SMP designation decision versus those offered under a voluntary commitment. However, this example is a clear mis-step by ComReg and is not consistent with Regulation 50 to which the assessment of the voluntary commitment is to be applied. In particular, in this example, the nature of the problem typically identified is that the dominant operator(s) could act independently of its customers and excessively raise its wholesale charges or lower its wholesale prices to foreclose its rivals. Therefore, the voluntary commitment must be considered against those concerns and not crudely "goal-seek" assessed to determine [fairness and reasonableness] against the potential outcome of the further specification of a price control obligation, which has made a number of modelling assumptions which may depart from actual outcomes.
  
15. *In addition, if a "fair and reasonable" price can only be determined through a regulated price cap then the voluntary commitments process could be rendered meaningless. This is not consistent with the spirit of Regulation 61 of the ECC Regulations, and the approach to favour SMP regulatory remedies by default is also not in line with the European Commission view that "[o]ne of the aims of the new regulatory framework is to progressively reduce ex ante sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic*

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<sup>1</sup> Copenhagen Economics (2021) [Voluntary Commitments In Telecoms: Flight Of Fancy Or A Safe Step Towards Deregulation?](#)

*communications markets are governed only by competition law.<sup>2</sup>*

16. eir considers that ComReg has previously taken an adversarial approach to considering voluntary commitments, overlooking the purpose of voluntary commitments, which appears to be echoed in the draft procedures. ComReg stated that *“Eircom seems to construe Article 79 as allowing for a bargaining process whereby it will offer proposals in return for the lessening or removal of SMP obligations.”* eir notes that according to Recital 205 of the Code, which outlines that when voluntary commitments are submitted *“the national regulatory authority then takes into account in deciding on the appropriate regulatory obligations.”* In addition, eir highlights that ComReg refused to accept voluntary commitments in response to the FACO and ANM consultations<sup>3</sup>, as the Code was not transposed in Ireland at the time, but the legislation had *“direct effect.”* This means that ComReg failed to consider a viable alternative solution in favour of over-regulation and ignoring legislative requirements around voluntary commitments.
17. eir is also concerned that historically ComReg has misinterpreted the purpose of voluntary commitments.
18. First, ComReg has previously misinterpreted the purpose of voluntary commitments when reviewing eir’s proposed voluntary commitments in the consultation on *Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers Wholesale Fixed Access and Call Origination (FACO) (ComReg 20/46)* in June 2020. ComReg mistakenly stated that eir’s proposed voluntary commitments, *“on their own would have been insufficient to address all of the competition problems identified in Section 9 of this Consultation”*.
19. There is no requirement under the ECC Regulations for voluntary commitments to address all the competition problems identified. Pursuant to Regulation 61 and Regulation 50 it is acceptable that proposed voluntary commitments can be targeted to address in part or in full specific competition problems identified. For example, a prospective SMP operator’s voluntary commitment does not need to address all the

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020H2245>

<sup>3</sup> Response to Consultation and Decision - Retail Fixed Telephony Services and Wholesale Fixed Access and Call Origination Markets (D05/22) and Regulated Wholesale Fixed Access Charges Review of the Access Network Model (D11/21).

potential remedies (transparency, non-discrimination, accounting separation, price control and cost accounting) proposed by ComReg in order to be validly assessed.

20. Second, ComReg also made a similar assertion in its review of the Access Network Model (D11/21). ComReg stated:

*“6.11 ComReg also notes that the fairness and reasonableness of Eircom’s proposals are questionable when the proposals are limited to prices and do not include any other measures of any sort for the purpose of enabling sustainable competition on downstream markets or to facilitating cooperative deployment and take-up of very high capacity networks in the interest of end-users. While high prices on copper-based networks may be seen by Eircom as a way to encourage migration to fibre-based services, in the absence of any specific measure which ensures availability of such fibre services, high prices above the efficient cost-oriented level will not be in the interest of end-users” (emphasis added).*

ComReg incorrectly assessed eir’s voluntary commitments. The purported reasoning outlined by ComReg to reject the voluntary commitments is not relevant to the competition concerns that would have been identified during the analysis conducted under Regulation 50 of the ECC Regulations in order to impose a price control remedy.

21. Third, in the recent WLA market analysis decision (D05/24), ComReg continues to misinterpret the objective of voluntary commitments and not meet the requirements of the ECC Regulations. In ComReg D05/24, ComReg outlined that it does not consider eir’s proposals to be voluntary commitments. ComReg did so without conducting a full assessment and only provided redacted, high level reasons for rejecting the commitments, without outlining economic analysis or reasoning to underpin its conclusion (see paragraph 6.211). More fundamentally, despite the ECC Regulations being in place since June 2023, ComReg did not follow the process under Regulation 61 to review the proposed commitments according to the criteria and perform a full market test of the commitments. ComReg also did not allow eir the opportunity to resubmit commitments following ComReg’s initial review, a fundamental step in the procedures as outlined under Regulation 61. See also paragraph [24].
22. Finally, ComReg has misinterpreted the purpose of voluntary commitments regarding proposed SMP obligations. In paragraph 2.11 of the proposed procedures, ComReg states, “[t]he submission should clearly explain how the commitments address the

competition problems identified in the draft decision consultation, **including by comparison with the proposed obligations**” (emphasis added). The assessment of voluntary commitments should be based on the relevant criteria and the resolution of identified competition problems, not a comparison against draft regulatory remedies proposed by ComReg. If voluntary commitments are assessed against ComReg’s proposed regulatory remedies, this would render submitting voluntary commitments under Regulation 61 of the ECC Regulations as meaningless. The procedural step ComReg has proposed would lead to a voluntary commitment becoming a de facto ‘copy and paste’ of a proposed ComReg obligation, in effect a further specification of an obligation as drafted by ComReg. eir considers this is a mis-step in the proposed procedures that ComReg needs to remove in order to comply with Regulation 61.

23. ComReg must provide cogent economic analysis, as evidence, if it rejects voluntary commitments and this should be included as a clear step in the review process. This analysis must be based on the competition problem identified and on clear economic reasoning as to why the voluntary commitment is not sufficient. ComReg should account for this in its procedures document, and make it clear that in its preliminary conclusions statement, it will outline the economic analysis it has used to reach its conclusions.
24. In addition, pursuant to Regulation 61 (6), the prospective SMP operator must have the ability to revise its voluntary commitment following the communication by ComReg on its preliminary conclusions on whether the voluntary commitments offered comply with the objectives, criteria and procedures set out in Regulation 61 and, as applicable, in Regulation 58, 60 or 50 and under which conditions it may consider making the commitments binding. ComReg must allow time for such critical steps in its market analysis consultation process.
25. eir is unclear on why ComReg has made a general statement that voluntary commitments have to “*and/or complement existing obligations effectively*” (paragraph 1.3). Voluntary commitments must address identified competition problems in markets. ComReg should be focused on ensuring effective regulation “*acting proportionately and using the least intrusive way*” (Regulation 50 (1) of the ECC Regulations) to regulate SMP operators rather than ways to complement existing obligations. ComReg in its assessment must also be focused on its obligation to remove regulation in a timely manner when no longer required, as set out under the Code (Article 3(4)(f)) and Regulation 50 of the ECC Regulations.



## 2. ComReg has proposed prolonged and vague procedures that will delay implementation of voluntary commitments

26. ComReg must ensure its preliminary assessment step does not prolong the assessment process and add an unnecessary layer of evaluation. Regulation 61(3) states that ComReg must conduct a market test, “*except where commitments **clearly do not fulfil** one or more relevant conditions or criteria*” (emphasis added). eir considers ComReg should complete the preliminary assessment step as quickly as possible, focusing on whether it is clear that the commitments do not meet the criteria, rather than to what degree they meet the criteria, so not to delay the review procedure set out in legislation under Regulation 61 of the ECC Regulations. ComReg needs to be clear on how it will ensure it is reviewing voluntary commitments “*prima facie*” and not conduct a full review against the criteria at the preliminary assessment stage.
27. eir notes that ComReg states in the proposed procedure, “*the scope and extent of the preliminary assessment will depend on the nature of the commitments offered.*” eir considers this is too vague an approach towards a procedural step that is not set out in legislation and ComReg should set a maximum time period for this step in ComReg’s own procedures and timelines.
28. In addition, ComReg should clearly state the procedure in place for performing a market test following this preliminary review step to ensure it does not leave a significant gap. eir does not consider it is acceptable that ComReg “*normally will give an indication as to when it intends to perform a market test*” in response to the preliminary assessment. ComReg must give this indication every time as a clear step in the procedure document with a maximum time period for completing the preliminary assessment made clear.
29. In fact, to ensure the review process is not overly delayed, ComReg must set out clear timings in its procedures document for each step of the ComReg process. Otherwise, this could lead to prolonged, unnecessary regulation and imposition of SMP obligations. eir notes that ComReg has set time periods for the process steps that involve the SMP operator e.g. the 30 calendar days for the SMP operator to consider ComReg’s preliminary conclusions statement and offer amendments. Yet ComReg has not set out the time period in which it will provide this statement to providers, nor to review any revision of commitments and to publish a subsequent preliminary conclusions statement regarding the amended offer. ComReg must set out clearly

these timelines to avoid prolonging and delaying the implementation of voluntary commitments.

30. eir notes that ComReg will “**normally** set a period of at least 30 calendar days for the SMP operator to confirm its position as regards the Statement of Preliminary Conclusions and any amendments that it may wish to offer” (emphasis added). eir considers an SMP operator or a prospective SMP operator should not be limited in its assessment of ComReg’s conclusions or its ability to revise its initial offer as set out under Regulation 61 (6) of the ECC Regulations, by the short 30 calendar day review period proposed by ComReg. ComReg should facilitate an SMP operator or prospective SMP operator in exercising this right. eir understands that proposing a ‘normal’ set time period for this process step can assist the flow of the process. However, eir expects that any extension requests will be granted where further analysis by the SMP operator of the conclusions is required, and any amendments to the commitments need to be developed. This is to ensure that the operator is not limited in exercising its rights under Regulation 61 (6).
31. ComReg should not unnecessarily prolong the process by seeking additional detail beyond what is required to conduct its assessment. If ComReg requires additional detail to that provided by the prospective SMP or designated SMP operator as set out in paragraph 2.4 of the Consultation, it must promptly request this to ensure ComReg itself does not delay the process unnecessarily.
32. eir considers that ComReg should undertake market tests and subsequent consultations in line with consultation procedures, including its review of responses. Under Regulation 102 (1) of the ECC Regulations, ComReg must “*take account of the views of...undertakings that provide electronic communications networks or services,*” in response to consultations. If ComReg does not address individual points raised by providers in the market test, then it is not clear that ComReg has fulfilled its obligations under the ECC Regulations to “take account” of provider views. This is especially important regarding proposals in consultations “*where they have a significant impact on the market,*” as set out under Regulation 102 (1) which is likely to include situations in which voluntary commitments are offered. Therefore, ComReg should revise this point in its procedures so it provides the required response to the market test which clearly “takes account” of all views.
33. eir notes ComReg’s statement that it will publish the voluntary commitments in full, “*ComReg will not accept any claims of confidentiality as regards the contents of the submission which is to be market tested*” (paragraph 2.7). However, ComReg cannot

put a blanket ban on confidentiality considerations. ComReg must balance transparency requirements with the protection of sensitive business information where required. This is particularly important in the context of voluntary commitments made regarding very high capacity networks including offering co-ownership or long-term risk sharing through co-financing. Where the advance publication of such details without redaction could detrimentally impact competition in the market. In particular, if the “acceptance” or otherwise of such commitments by ComReg is prolonged leading to a gap in the market which allows competitors to close or foreclose the opportunity subject to the co-investment commitment.

34. eir also notes that ComReg reserves the right to refer to such offer of commitments in subsequent market reviews or as appropriate. However, ComReg must ensure that each market review ComReg conducts is based on forward looking analysis of market conditions, and not reliant on previously proposed commitments that were based on past market conditions or which have been subsequently withdrawn.
35. ComReg has not set out its procedure to consider and implement the extension of the application of voluntary commitments where required, before they expire as under Regulation 61 [12]. ComReg must take a proactive approach and plan timelines accordingly, not allowing commitment periods to lapse before reviewing existing commitments. This is especially significant given the fluctuations in the WLA market, and requirement to review this market annually, as noted by the European Commission in a letter regarding ComReg’s latest WLA market review in December 2023.

### **3. ComReg must not delay making voluntary commitments binding between market reviews**

36. ComReg must act swiftly to ensure it does not delay implementing any voluntary commitments that may be offered outside of a market review. For instance, it should not take two years from the date commitments are submitted for the commitments to be made binding due to delays with consultations for the market test or for the review of SMP obligations under Regulation 61 [10]. Such unnecessary delays would in effect result in limiting operators making voluntary commitments outside of a market review.
37. In the case of co-investment commitments, ComReg has not outlined timings for conducting the consultation and notification process or a maximum period for completing this step. eir considers a maximum time period is required for this step, to

provide more certainty for providers and the market, given the significance of co-investment voluntary commitments to assist in the roll out of VHCNs.



## **Virgin Media response to:**

ComReg's Guidelines on Voluntary Commitments by an SMP operator under the European Union (Electronic Communications Code) Regulations 2022 (SI 444 of 2022)

March 2024  
Non-Confidential

## Foreword

This is the Virgin Media Ireland Limited (“Virgin Media”) response to ComReg’s Guidelines on Voluntary Commitments by an SMP operator under the European Union (Electronic Communications Code) Regulations 2022 (SI 444 of 2022).

This response is non-confidential and can be published in its entirety.

## Response

- This is the Virgin Media response to ComReg’s consultation reference 24/08 (“the Consultation”) of 2 February 2024.
- In the Consultation, ComReg seeks feedback on its proposed Guidelines on Voluntary Commitments by an SMP operator under the European Union (Electronic Communications Code) Regulations 2022 (SI 444 of 2022).
- ComReg’s proposed Guidelines are pursuant to Regulation 61 of the EU, which transposes into Irish law Article 79 of the Code (Directive 2018/1972).
- Virgin Media supports the creation and publication of Guidelines by ComReg setting out how it would deal with requests from an SMP operator, including how requests would be evaluated and the overall process that would be followed.
- Such requests, should they arise, would be innately important given that they would have the potential to impact competitive conditions in regulated markets, and could result in amendment to / removal of existing SMP remedies. Given this, it is right that the regulatory process for dealing with such requests is transparent to stakeholders.
- ComReg notes at paragraph 1.10 in the Consultation that: *“These Guidelines are not intended to be a legally binding statement of how ComReg will exercise its discretion in a particular situation and should not be taken as such.”* While this is understood, Virgin Media would expect that ComReg would seek to follow the Guidelines it publishes in evaluating Voluntary Commitments from an SMP operator, and if it chose to depart from those Guidelines, this would need to be openly acknowledged and justified by ComReg. It would be helpful if ComReg could add text addressing this specific point in the final Guidelines.
- ComReg correctly notes that, as part of the process to evaluate whether to accept Voluntary Commitments or not, a key consideration would be whether the commitments offered were adequate, given prevailing competition concerns. At paragraph 1.3 in the Consultation ComReg emphasises that Commitments would need to be *“..adequate to address the competition problems in the markets concerned, and/or complement existing obligations effectively.”* Virgin Media supports this position – while the Voluntary Commitment process could in theory unlock benefits, it is imperative that this is not done in a way that exacerbates competition problems or brings unintended consequences that could negatively impact stakeholders. ComReg must therefore conduct a detailed review of the pros and cons of meeting Voluntary Commitments as part of any evaluation.
- It is helpful to all potential stakeholders that ComReg clearly sets out in the Guidelines the requirements of the SMP operator – for example by detailing what information the



SMP operator would be required to provide at paragraph 2.5.

- ComReg notes that in certain circumstances Voluntary Commitments would need to be made binding. In Virgin Media's view, the adjustment to or removal of SMP obligations is an inherently serious matter, and we would expect in most cases that Voluntary Commitments offered by an SMP operator would need to be binding in nature since if this was not the case, there would be an immediate risk to the adequacy of such commitments (which, as noted above, ComReg rightly notes is a key consideration in judging whether to accept commitments in the first place). If ComReg were to accept voluntary commitments that were not binding in nature, it would have to clearly explain its decision in this regard – and in particular why this would not impact the adequacy of the new arrangements being put in the place, given the competition problems identified.
- Virgin Media also supports ComReg's emphasis at paragraph 2.7 on the need for transparency. ComReg says: *"..ComReg will not accept any claims of confidentiality as regards the contents of the submission which is to be market tested. Any requests that certain matters within an offer of commitments be treated on a confidential basis or market tested with a limited number of interested parties should clearly identify the information concerned and provide clear and compelling reasons as to why the information is confidential. For the same reason, commitments will only be considered by ComReg under Regulation 61 where they are made on an "open basis" with no "without prejudice" privilege attached to the making of the offer of commitments."* Full transparency is critical to this process working effectively since: (i) for the process to operate properly, stakeholders that would be affected by the SMP operator being granted concessions in return for Voluntary Commitments must be able to put their views to ComReg as part of any consultation process, and in order to engage properly in that process, and not be at a disadvantage vis a vis the SMP operator, they would need to have full access to the matters under consideration; and (ii) in terms of perception and reputation, stakeholders will only have confidence in the process in circumstances where it was being conducted in a transparent manner.
- At paragraph 2.10 in the Consultation, ComReg rightly notes that the Voluntary Commitments process would need to co-exist with other regulatory processes such as market review consultations. Virgin Media also agrees with ComReg that reviewing commitments should not take precedence over completing a market analysis. Should an evaluation of a Voluntary Commitment be required at the same time as market analysis (in support of a market review) is being conducted, it will be imperative that ComReg clearly articulates to stakeholders how it intends to co-manage the processes, including setting out the potential implications for the market review of the Voluntary Commitment evaluation.

- At paragraph 3.9 in the Consultation ComReg sets out the steps envisaged in the process, pursuant to Regulation 61 of the ECC Regulations.<sup>1</sup> One of those steps is: “A market test consultation...by way of a public consultation of interested parties, in particular third parties which are directly affected.” This is clearly a critically important part of the process, in which affected stakeholders other than the SMP operator can put forward their views / evidence for ComReg’s consideration. Given this, it is important that ComReg does not unduly exclude any parties that have a valid interest from participating in such a process.
- Finally, at paragraph 3.16 in the Consultation, ComReg says (in the context of the Preliminary Conclusions Statement) that it “.. will take into account all the views expressed in the market test consultation but will not separately respond specifically to each submission received as part of the market test consultation process.” Virgin Media is concerned at this wording – which suggests that as part of its consultation process ComReg will not address even each submission by stakeholders, let alone all the points raised in those submissions. Virgin Media considers this approach would be a retrograde step. In Virgin Media’s view, in conducting important consultations (which any consultation relating to Voluntary Commitments from SMP operators would inevitably be), ComReg should follow best practice, where best practice means that in its response, ComReg does address each submission, and each of the points made in those submissions, including whether it agrees with the point made (or not), and why. This is an approach that ComReg is used to adopting, and it provides important confidence to stakeholders in the integrity of the consultation process itself. Virgin Media considers that moving away from such an approach, presumably for the purposes of saving time and resource, would be a mistake. As a simple example, while ComReg says it will “..take into account all the views expressed in the market test consultation..” Virgin Media questions how stakeholders will have confidence that this is the case if they don’t have line of sight to the points they themselves made in their submissions along with ComReg’s reaction to the same. Note, this is not an argument about ComReg agreeing to points made or not, it is purely about transparency and best practice in the management of consultations. Virgin Media considers that the strength / trust in the whole process would be greater in circumstances where ComReg addressed each point raised by stakeholders and its position in relation to the same.

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<sup>1</sup> Virgin Media notes that a slightly different set of steps would apply where the offer of commitments was associated with voluntary separation, pursuant to Regulation 60.