



Commission for
Communications Regulation

Replicability Test

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

Consultation and Draft Decision

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An Coimisiún um Rialáil Cumarsáide

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Content

Section	Page
1 Introduction.....	6
2 Executive Summary	9
3 Competition Concerns.....	17
3.1 Overview	17
3.2 Margin Squeeze	19
3.3 Market 2: Wholesale Fixed Voice Call Origination and Transit Markets.....	24
3.4 Market 5: Wholesale Broadband Access	25
3.5 Market 4: Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location	27
3.6 Market 1: Retail Access to The Public Telephone Network at a Fixed Location	29
4 Larger Exchange Area	31
4.1 Overview	31
4.2 Market developments in the LEA	32
4.3 Market developments Outside the LEA.....	35
4.4 Conclusion	36
5 Components of the Margin Squeeze Test Model.....	37
5.1 Overview	37
5.2 Relevant Revenues.....	39
5.3 Relevant Costs.....	39
5.3.1 Retail costs.....	39
Cost Standard	43
Appropriate cost standard for LEA and non-LEA	49
5.3.2 Wholesale Input cost	51
5.3.3 Other Wholesale costs.....	56
5.3.4 Unregulated services	58
5.4 Bundle-by-Bundle versus Portfolio	59
5.5 ComReg Preliminary View	65

5.6	Case-by-case assessment of a Bundles reasonableness	77
5.6.1	Retail efficiencies	77
5.6.2	Increase customer lifetimes.....	78
5.6.3	Competitive assessment	79
5.7	Other possible options for revisions to the MST.....	80
5.7.1	When the bundle is in response to a competitor’s bundle	80
5.7.2	A different test for when a bundle is found unreasonable post launch	80
5.7.3	The ability to ‘bank’ / carry forward past margins to use as future discounts ...	81
5.7.4	Promotions and promotional discounts	81
5.7.5	Discretionary promotions / opt-ins.....	82
6	Notification, pre-clearance, modification / withdrawal of retail bundles.....	83
6.1	Overview	83
6.2	Notification and pre-clearance considerations.....	84
6.3	ComReg's Preliminary View	86
6.4	Non-compliance, modification and withdrawal	86
6.5	ComReg's Preliminary View	87
7	Draft Decision Instrument (Market 2)	89
8	Draft Decision Instrument (Market 5)	103
9	Regulatory Impact Assessment	118
9.1	Introduction	118
9.2	Steps for assessing regulatory options	119
9.3	Step 1 - Describe the policy issue and identify the objectives	120
9.3.1	Regulation 8 of the Access Regulations	120
9.3.2	Section 12 of the Communications Regulations Act.....	121
9.3.3	Regulation 13 of the Access Regulations	122
9.3.4	Regulation 16 of the Framework Regulations.....	124
9.4	Step 2 - Identify and describe the regulatory options	125
9.5	Step 3 - Likely Impacts on Stakeholders	126
9.6	Step 4 - Assess the likely impact on competition:	137
9.7	Step 5 - Assess the impacts and choose the best option.....	137
10	Submitting comments.....	140

Annex

Section	Page
Annex: 1 Legal Basis.....	141
Annex: 2 LEA	144

1 Introduction

- 1 This consultation and draft decision (**Draft Decision**) is concerned with ensuring that Eircom Limited (**Eircom**) can not cause a margin squeeze between the price of the wholesale services it offers/sells to Other Authorised Operators (**OAOs**) and the price of an Eircom retail bundle of services — where those wholesale services are required as inputs by OAOs in order to replicate that Eircom retail bundle.
- 2 As a vertically-integrated operator Eircom sets two sets of prices, namely: a wholesale price and a retail price. A margin squeeze can occur where Eircom (as a dominant operator) sets wholesale prices such that, given the prevailing retail prices, it does not allow an OAO to cover its downstream retail costs (e.g., sales, marketing etc.). Similarly, Eircom could set its downstream retail prices such that it may not cover the downstream retail costs incurred by the OAO after acquiring the essential wholesale inputs from Eircom's wholesale arm. In the medium-to-long-term if OAOs can not profitably replicate Eircom retail offers OAOs may exit the market — which would be to the long-term detriment of end-users. These types of potential abuse could be undertaken by Eircom offering standalone products / services or by products / services being offered in a bundle at the retail level.
- 3 These potential abuses are considered by competition law under Article 102 of the “Consolidated version of the Treaty on the Functioning of the European Union”¹ and are typically assessed on an ex-post basis by the relevant authorities and judicial courts. The purpose of ex-ante regulation is to prevent the possibility of such abuses and to promote competition by facilitating entry into the relevant markets. ComReg would note that it is neither necessary to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse. However, given that Eircom has been identified as having Significant Market Power (**SMP**) in a number of upstream markets it has both the ability and incentives to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users.
- 4 The Commission for Communications Regulation (**ComReg**) is the regulator for the electronic communications sector in Ireland.

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102&from=EN>

- 5 Our objectives, in line with Section 12 of the Communications Regulations Act 2002² (**‘the Communications Regulations Act’**) are to promote competition, to contribute the development of the internal market and to promote the interests of users within the community. As such, where it is deemed appropriate, ComReg is required to design appropriate remedies (including price controls) which achieve those objectives.
- 6 Currently, the Net Revenue Test (**‘NRT’**) pursuant to ComReg Decision D04/13³ is the price control remedy, pursuant to the obligation not to unreasonably bundle⁴, used to assess whether or not Eircom is covering its total costs when it offer / sells a bundle of services together. In addition, there are a number of regulatory obligations at the upstream level (i.e., where Eircom is considered to be dominant at the wholesale level) to ensure that a margin squeeze or excessive pricing does not occur.
- 7 As part of the retail fixed narrowband review⁵ and in the 2014 Fixed Access & Call Origination market analysis consultation paper⁶, ComReg indicated that it was considering the introduction and specification of a margin squeeze test (**‘MST’**)⁷ — possibly in the wholesale markets for Fixed Voice Call Origination and Transit Markets⁸ and for wholesale broadband access (**‘WBA’**)⁹. ComReg noted that if a MST was effectively implemented upstream it might permit the removal downstream of the current NRT in the Retail Fixed Voice Access market. The purpose of this Draft Decision is to set out and consult on ComReg’s preliminary view of the structure and implementation of such a MST.

² Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011). ComReg has also taken into account its functions, objectives and obligations under Regulation 6, 8 and 13 of the Access Regulations (European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the **‘Access Regulations’**), and Regulation 16 of the Framework Regulations (European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the **‘Framework Regulations’**).

³ <http://www.comreg.ie/fileupload/publications/ComReg1314.pdf>

⁴ ComReg, “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers”, (**‘ComReg Decision D12/14’**).

⁵ <http://www.comreg.ie/fileupload/publications/ComReg1395.pdf>

⁶ <http://www.comreg.ie/fileupload/publications/ComReg1426.pdf>

⁷ ComReg uses the term “margin squeeze test” throughout this document but for the avoidance of doubt the test is not a margin squeeze test as measured under Competition Law. The margin squeeze test in this context is specified by the Margin Squeeze Test Model (see chapter 5).

⁸ Referred to as ‘Market 2’ as it is the second market listed by the European Commission as being prima facie susceptible to regulation.

⁹ Referred to as ‘Market 5’ as it is the fifth market listed by the European Commission as being prima facie susceptible to regulation.

- 8 ComReg has considered the views of its expert consultants Oxera Consulting ('**Oxera**') in arriving at the Draft Decisions set out in this paper.¹⁰
- 9 This document is structured as follows:
- **Chapter 2:** provides an executive summary of the main points of the consultation and ComReg's overall objectives.
 - **Chapter 3:** sets out the competition issues associated with bundling.
 - **Chapter 4:** provides an overview of the Larger Exchange Area.
 - **Chapter 5:** discusses ComReg's preliminary view on the overall framework to ensure that Eircom can not cause a margin squeeze where it sells wholesale inputs which are required by operators to replicate an Eircom retail Bundle and the various components of the Margin Squeeze Test.
 - **Chapter 6:** sets out ComReg's preliminary views of the notification, pre-clearance, modification/withdrawal of Bundles.
 - **Chapter 7:** sets out the draft decision instrument associated with the further specification of the price control not to cause a margin squeeze in Market 2.
 - **Chapter 8:** sets out the draft decision instrument associated with the further specification of the price control not to cause a margin squeeze in Market 5.
 - **Chapter 9:** sets out an analysis of the likely effect of the proposed further specification of the price control obligation not to cause a margin squeeze.
 - **Chapter 10:** provides the timelines for consultation response and how confidential information should be dealt with.

¹⁰ For information purposes only, their report was published as ComReg Document 14/90a. Hereafter referred to as the "Oxera Report". Oxera's views expressed are not necessarily the views of ComReg.

2 Executive Summary

- 10 As provided for by ComReg Decision Document D12/14¹¹ under Market 1 (Retail Access), Eircom currently has an obligation not to engage in unreasonable bundling. This remedy addresses the risk of horizontal leverage from Fixed Voice Access (“FVA”) to other (potentially more competitive) retail markets.
- 11 The test prevents margin squeeze between the price of wholesale products in markets where Eircom is dominant and the price of downstream retail bundles. This could arise where the gap between retail and wholesale prices is reduced to the point that even an efficient competitor, relying on Eircom wholesale products (e.g., Wholesale Broadband), could not match Eircom’s retail prices and still make a return. This could lead to such an operator being forced from the market.
- 12 Absent regulation, Eircom would potentially have the incentive, because of its dominant position in retail access, to leverage its position horizontally from one retail market (retail access) to other potentially more competitive retail markets where it is not dominant.
- 13 Similar concerns arise from Eircom’s dominance in the respective wholesale markets — where it may have the ability to leverage in a similar manner into downstream retail markets. Consequently, very similar remedies may be needed. However, to date, ComReg has taken the view that such remedies are not needed at both retail and wholesale levels due to the current implementation of the NRT in Market 1.
- 14 As part of the retail fixed narrowband review and in the 2014 Fixed Access & Call Origination market analysis consultation paper (see paragraph 7), ComReg noted that if a MST was effectively implemented upstream it might permit the removal downstream of the current NRT in the Retail Fixed Voice Access market.
- 15 ComReg is of the preliminary view that it is appropriate to further specify the existing obligation not to cause a margin squeeze in the wholesale markets for Market 2 and for Market 5 to ensure that existing wholesale remedies can not be undermined by Eircom through the process of bundling.

¹¹ supra n. 4.

- 16 For the purposes of Market 2, ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself. Where Bundle means a package of services, consisting of Retail Line Rental and one or more other services, which is on offer or on sale by Eircom to end-users.
- 17 For the purposes of Market 5, ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the retail “Bundle” itself. Where Bundle means a package of services, consisting of a Retail Broadband Product¹² and one or more other services, which is on offer or on sale by Eircom to end-users.
- 18 In deriving an appropriate MST, ComReg acknowledges the need to protect competition which is based on using Eircom’s network but considers that there must also be appropriate flexibility so that Eircom Retail’s pricing is not unduly constrained by regulation at the wholesale level. Consequently, ComReg considers that the MST must have sufficient flexibility going forward.
- 19 For bundles sold / offered in the Larger Exchange Area (**‘LEA’**) a two-part MST will apply. For bundles sold / offered outside the LEA a single one-part MST will apply. This is summarised further below.
- 20 For bundles sold / offered in the LEA, the two-part MST is a combinatorial test (i.e., that is to say that both tests must be passed), bundles are assessed on a bundle-by-bundle basis and secondly on a portfolio basis (i.e., the bundles sold / offered in the LEA are aggregated together).

¹² For the purposes of this Draft Decisions Paper a Retail Broadband Product means any Eircom Current or NGA retail broadband product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated at the wholesale level in accordance with ComReg Decision D06/11 and/or ComReg Decision D03/13.

- 21 The MST offers somewhat more flexibility in the LEA. Firstly, a lower cost standard (Long Run Incremental Cost ('**LRIC**'))¹³ for retail calls and broadband retail costs is applied in the bundle-by-bundle approach for bundles sold / offered in the LEA only. ComReg considers that this approach would be more consistent with that produced in competitive markets — as the LRIC cost standard enables incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle. However, if the LRIC cost standard was applied across all bundles the test could result, on an aggregate basis, in the portfolio of bundles not making an adequate contribution towards common costs, potentially rendering the bundles unprofitable. Consequently, ComReg considers it appropriate that at the portfolio level that the aggregate of all bundles must cover their Average Total Cost ('**ATC**'), which incorporates a share of common costs in addition to the relevant fixed and variable costs. The provision that Eircom must recover its ATC at the portfolio level in the LEA and in the bundle-by-bundle assessment outside the LEA, ensures that nationally (i.e., inside and outside the LEA) Eircom is not causing a margin squeeze by bundling more than one services together at the retail level.
- 22 The second proposed source of flexibility in the MST (within the LEA only) is through the use of a Total Wholesale Access Input Cost also referred to in this Document as a weighted average Wholesale Network Input (the '**WNI**') applied in both the bundle-by-bundle and portfolio assessment. ComReg considers that to recognise the increased investment of OAOs in Local Loop Unbundling ('**LLU**') and Next Generation Access ('**NGA**') it is appropriate that the MST take these developments into account. Therefore, it is proposed that the MST will be set by reference to the different wholesale Access prices available from Eircom weighted for the relevant usage (or number of customers) of each input that OAOs in the LEA use (i.e., the WNI). Consequently, as infrastructure-based competition increases in the LEA the WNI could decrease for Eircom Retail in the MST — which, depending on the number of customers OAOs have succeeded in winning, will allow Eircom Retail a lower network input and therefore additional margin to use in their retail pricing strategy for bundles. As such, there is a direct link between increased competition and regulatory flexibility within the MST (i.e., as OAOs invest in and migrate their customers to Full LLU¹⁴, Eircom can lower its own Retail prices due to the lower WNI in the MST).

¹³ For Retail calls this is estimated from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs.

¹⁴ Full LLU is sometimes more commonly referred to as ULMP. ULMP is the implementation of Full Unbundled Access to the Local Loop.

- 23 The purpose of the WNI is to reflect the cost components faced by an OAO that it would be required to incur in order to replicate an Eircom individual bundle. Consequently, in order to reflect the use of NGA inputs and the fact that legacy wholesale inputs cannot be used by OAOs to replicate an Eircom NGA bundle, ComReg considers that it is appropriate to have a separate WNI for legacy and NGA bundles. Furthermore, without a separate NGA WNI, by virtue of the flexibility within the MST (in the LEA only), Eircom could potentially price NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. The use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and that the WNIs are reflective of the average wholesale input costs incurred by an “efficient” operator to replicate legacy and NGA bundles in the LEA.
- 24 The separate WNIs for both CGA and NGA will be calculated with reference to the average wholesale network inputs of an ‘efficient’ hypothetical operator and will be guided by the actual usage of the various wholesale inputs used by OAOs in the LEA. For the avoidance of doubt, ComReg is not defining explicitly what the migration path of an ‘*efficient hypothetical*’ operator would be by introducing a glide path. Rather the test reflects the actual use of wholesale inputs.
- 25 In order for the WNI to be timely, ComReg proposes that Eircom Wholesale is best placed to inform ComReg of the actual number of customers on the various wholesale products such as bitstream, Line Share, LLU etc., at the end of each quarter. However, ComReg also considers that in order for the WNI to be capable of reflecting the likely usage by OAOs of the various platforms over a given period, that in exceptional cases, confirmed future bulk migrations may be included in the relative weighting on a prospective basis, for example large orders from Line Share to LLU or from Line Share to VUA — where it is clear these will happen seamlessly and on a defined date.
- 26 ComReg considers that Outside the LEA the prospective competitive conditions are not as evident as those within the LEA. The majority of competitors in these non-LEA areas rely on SB-WLR and Bitstream from Eircom. As such, for non-LEA bundles ComReg considers that the flexibility provided by the two-part test is not appropriate. Consequently, ComReg considers that for bundles sold / offered outside the LEA it is appropriate for the bundles to be assessed on an individual bundle basis. Each bundle must pass its own ATC. As such, the LRIC cost standard for retail calls and broadband retail costs and the WNI will not be applied in the MST for non-LEA bundles.

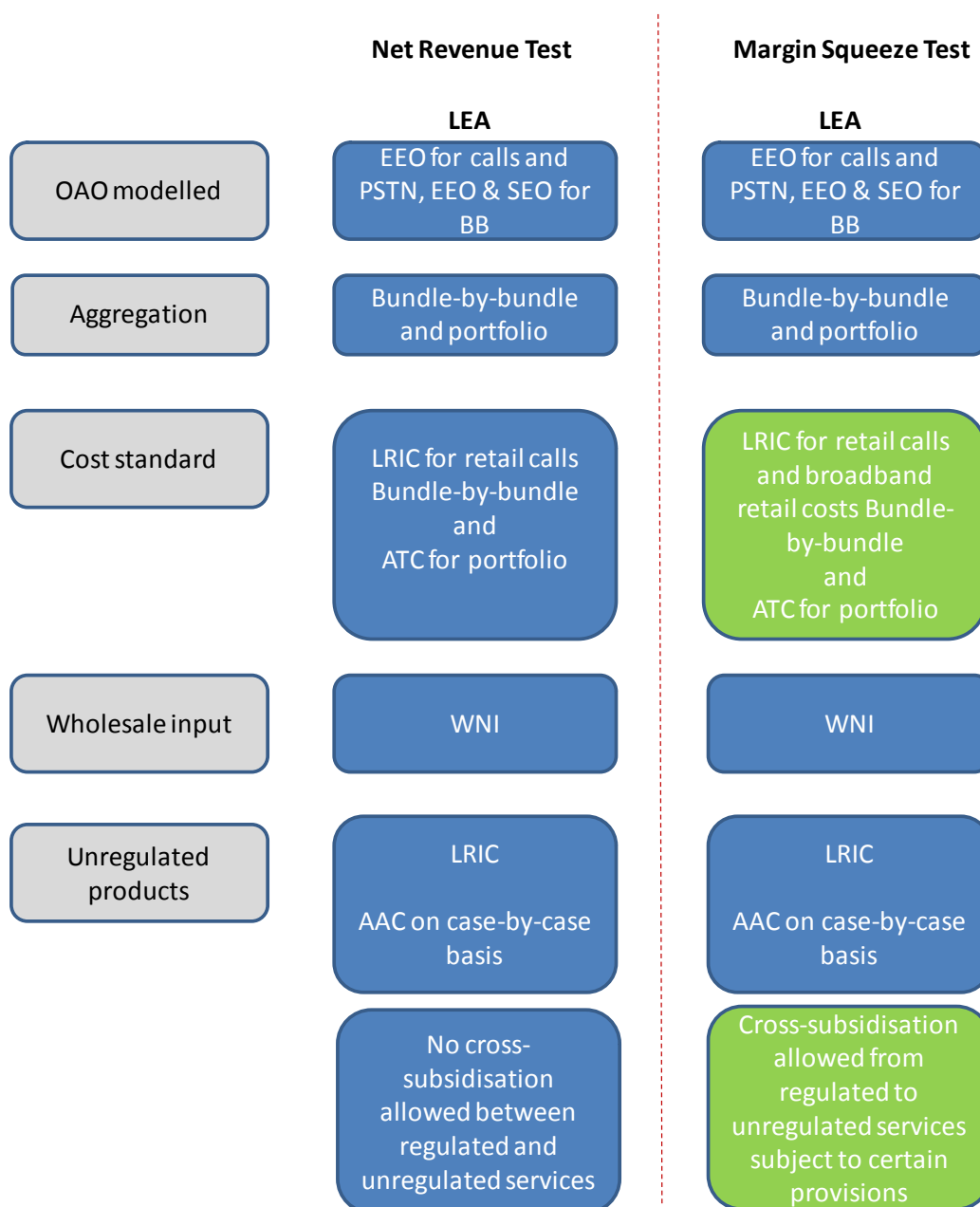
- 27 Where unregulated services¹⁵ are included in a bundle (both inside and outside the LEA), ComReg considers that these unregulated services must cover their own LRIC. ComReg considers that LRIC is the most appropriate cost standard: since it is the lowest price level above which competition would be sustainable. In exceptional circumstances where, in ComReg's view, the bundling of the unregulated service will not have a significant impact on competition, ComReg is of the preliminary view that it will consider the use of the Average Avoidable Costs ('**AAC**') cost standard in the assessment of unregulated services within a bundle. ComReg is of the preliminary view that some form of cross-subsidisation be allowed from regulated to unregulated services which are included in the bundle. ComReg is of the preliminary view that cross-subsidisation would not be allowable from the unregulated services to the regulated services which are included in the bundle.
- 28 With respect to the notification of new or amendment to existing bundles ComReg is of the preliminary view that Eircom must notify ComReg of all new and revised Bundles at least five working days before launch and obtain prima facie approval from ComReg for their launch. If a bundle fails the MST,¹⁶ as a proportionate measure, ComReg will undertake a competitive assessment of the bundle and will consider any robust evidence that may be available to support a view that a bundle will pass the MST going forward. For example, this may potentially occur where known future retail efficiencies or verifiable increased customer lifetimes as a result of bundling can be demonstrated to the satisfaction of ComReg.
- 29 Where an existing bundle is determined by ComReg to be causing a margin squeeze this will be notified to Eircom. Eircom must not add any customers to that relevant bundle unless and until such a bundle is modified to ComReg's satisfaction. Eircom should notify its intention to ComReg to take this action (i.e., to withdraw or modify) within ten working days of the bundle failing the MST. Where Eircom fails to confirm its intention to withdraw / modify the bundle or where the proposal remedial action is deemed insufficient by ComReg, ComReg will consider the use of its statutory enforcement powers to ensure that Eircom brings the non-compliance to an end.

¹⁵ For the purposes of this Draft Decision Paper an unregulated service is a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level.

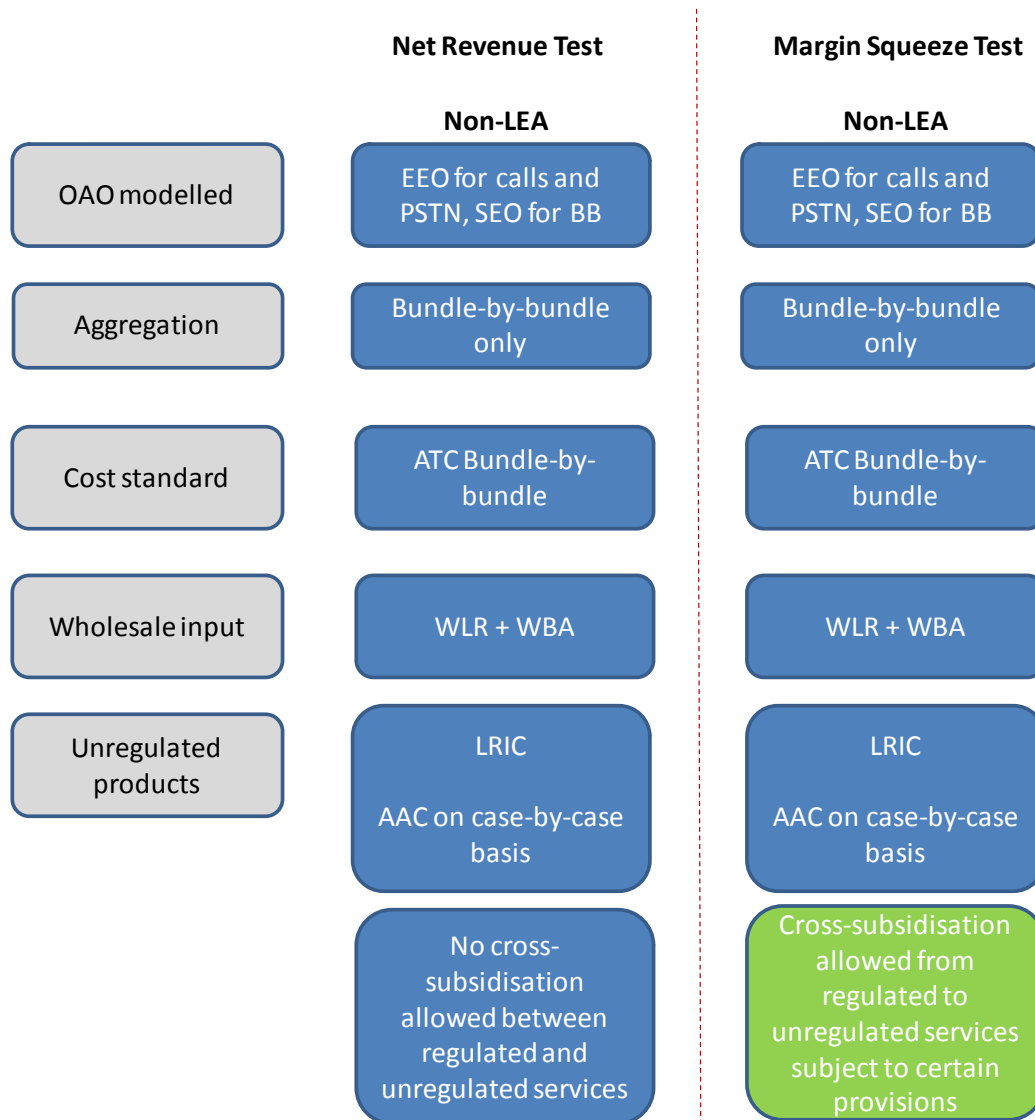
¹⁶ Note that Eircom must at all times ensure it meets its regulatory obligation not to cause a margin squeeze. Therefore, Eircom must notify ComReg immediately together with supporting evidence if it believes that any Bundle may be causing a margin squeeze.

- 30 In the 2014 Fixed Access & Call Origination market analysis consultation paper¹⁷ ComReg consulted on the appropriateness of transferring obligations relating to SB-WLR and CPS from Market 1 upstream to Market 2 (i.e., the wholesale fixed voice access and call origination market). However, ComReg's analysis of Market 2 is not complete and no decision(s) has/have been made in this regard. If Eircom is found to have SMP in that Market and if SB-WLR and CPS are moved upstream it is proposed to impose an obligation not to cause a margin squeeze in Market 2. This Draft Decision would be a further specification of that obligation not to cause a margin squeeze. Pending the outcome and decisions from ComReg's consultation on Market 2, SB-WLR and CPS may either: continue to reside in Market 1; or, may potentially be moved upstream. If SB-WLR and CPS are moved to Market 2, it will be necessary to make a final decision regarding the proposed obligations as set out in this Draft Decision. In that case a final decision will revoke the obligation not to unreasonably bundle in accordance with the NRT as set out in Decision D04/13 from Market 1: Bundled Lower Level Voice Access and High Level Voice Access (see paragraph 73) and impose a further specification of the obligation not to cause a margin squeeze by way of the MST (as consulted on here). Should no finding of SMP be made in Market 2 (or should, for instance, it be deemed more appropriate to maintain SB-WLR and CPS in Market 1) the NRT test as set out in ComReg Decision D04/13 will remain effective (and not the obligations regarding a margin squeeze test as now consulted on here).
- 31 A high-level graphic overview of the components of the proposed MST in the LEA and comparison with the existing NRT is presented below. The differences are highlighted in the green text boxes.

¹⁷ <http://www.comreg.ie/fileupload/publications/ComReg1426.pdf>



32 A high-level graphic overview of the components of the proposed Margin Squeeze Test in the Non-LEA and comparison with the existing NRT is presented below. The differences are highlighted in the green text boxes.



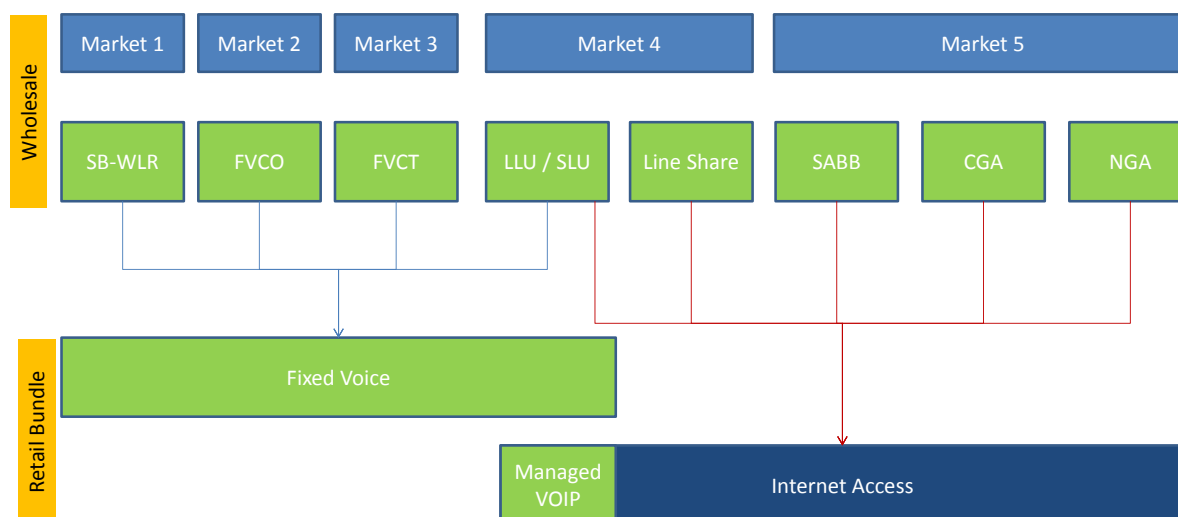
3 Competition Concerns

3.1 Overview

33 The European Commission has identified a number of markets as being susceptible to ex-ante regulation. Following market analysis undertaken by ComReg, Eircom is currently considered to have SMP in a number of markets including:

	Market	Title	Relevant ComReg document
Retail Level	Market 1	Retail Access to The Public Telephone Network at a Fixed Location	Market Review 2007: See ComReg D07/61 Market Review 2014: See ComReg D12/14
	Market 2	Wholesale Call Origination on the Public Telephone Network Provided at a Fixed Location	Market Review 2007: See ComReg D04/07 Currently being reviewed – see ComReg 14/26
Wholesale level	Market 3	Wholesale Call Termination on Individual Public Telephone Networks Provided at a Fixed Location	Market Review 2007: See ComReg D04/07 Currently being reviewed – see ComReg 12/96
	Market 4	Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location	Market Review 2010: See ComReg D05/10 ComReg has recently commenced review
	Market 5	Wholesale Broadband Access	Market Review 2011: See ComReg D06/11 ComReg has recently commenced review

34 Eircom’s wholesale products / services (which are identified in the respective Markets above) are purchased by OAOs in order to provide downstream Retail Fixed Telephony Services (**‘RFTS’**) to end-users. These downstream retail offerings compete with Eircom’s own downstream retail arm.



- 35 The retail sale of telecommunications services by bundling more than one service together using the same bill has grown in significance for most operators. Bundling can have a number of consumer welfare enhancing benefits and can be an effective means for communication providers to realise various efficiencies and cost savings (which ultimately may be passed on to consumers through lower prices). While bundling can lead to a number of dynamic competitive market outcomes, such as: lower prices; increased choice; lower transaction costs etc., often the regulator has a key role to play to ensure the bundling of services does not lead to anti-competitive effects.
- 36 Absent appropriate preventative remedies several related competition problems may arise involving the SMP undertaking's conduct, including:
- exploiting customers or consumers by virtue of its SMP position through, for example, setting excessive wholesale charges. This would raise the input costs for those OAOs that purchase Eircom's wholesale services. Given that such above cost wholesale prices may then be passed on by such OAOs to their retail customers via higher RFTS prices, it could ultimately have the potential to harm the development of effective competition in the RFTS market, potentially through the actual or effective exclusion of downstream competitors;

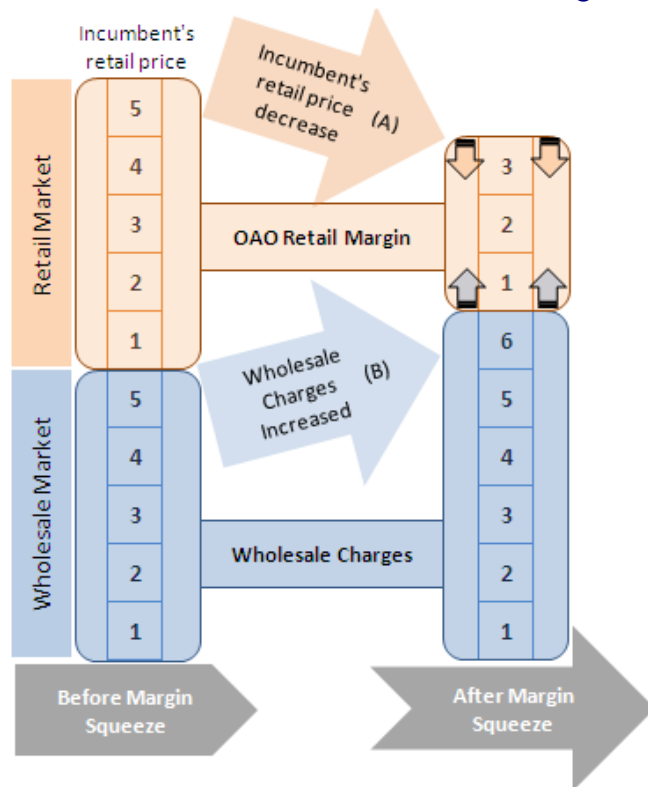
- leveraging its market power into adjacent vertically or horizontally related markets through price and non-price means with the effect of foreclosing or excluding competitors in downstream retail and/or upstream wholesale markets. Eircom, as the SMP undertaking, has the incentive to use its market power in upstream markets to affect the competitive conditions in downstream wholesale and/or retail markets, in particular, through its ability to control the key inputs used by wholesale customers — which compete against Eircom in such markets. This could result in a distortion of or restriction in competition in these downstream markets, ultimately resulting in harm to consumers, potentially in the form of higher prices, lower output/sales, reduced quality or consumer choice; and
- engaging in behaviours, similar to those identified above in the context of leveraging, which delays/deters network investment and entry into the upstream and/or downstream markets.

37 Such conduct could take the form of a margin squeeze. For example, if Eircom were to apply a margin squeeze in respect of the retail narrowband access element of a bundled offering this may undermine the effectiveness of the mandated wholesale inputs since OAOs may not be able to effectively replicate the access element of that bundle (due to an insufficient margin).

3.2 Margin Squeeze

- 38 Vertical leveraging results from an undertaking that is present in the upstream (wholesale) market and downstream market (retail) market. As such, Eircom as a vertically-integrated firm sets two sets of prices, namely: a wholesale price and a retail price.
- 39 On a stand-alone basis (i.e., not in a bundle), OAOs could face a margin-squeeze at the retail level by Eircom lowering its retail price (illustrated by point A in the Figure below) such that OAOs' retail margins are not sufficient to cover its downstream retail costs. This could also occur by Eircom increasing its charges at the wholesale level (illustrated by point B in the Figure below).

Figure 3: The mechanics of a traditional margin squeeze*



*Figures provided for scaling purposes only

- 40 Such leveraging concerns on a stand-alone basis are currently addressed through a number of remedies including: pursuant to ComReg Decision D07/61¹⁸ and further to ComReg document 08/19¹⁹ Eircom's SB-WLR is currently subject to a price cap based on a price control of retail minus of at least 14%²⁰; and pursuant to ComReg Decision D03/13²¹ where Eircom is required not to cause a margin squeeze between *inter alia* the retail price of NGA retail product (s) and the price for NGA Bitstream.

¹⁸ <http://www.comreg.ie/fileupload/publications/ComReg0761.pdf>

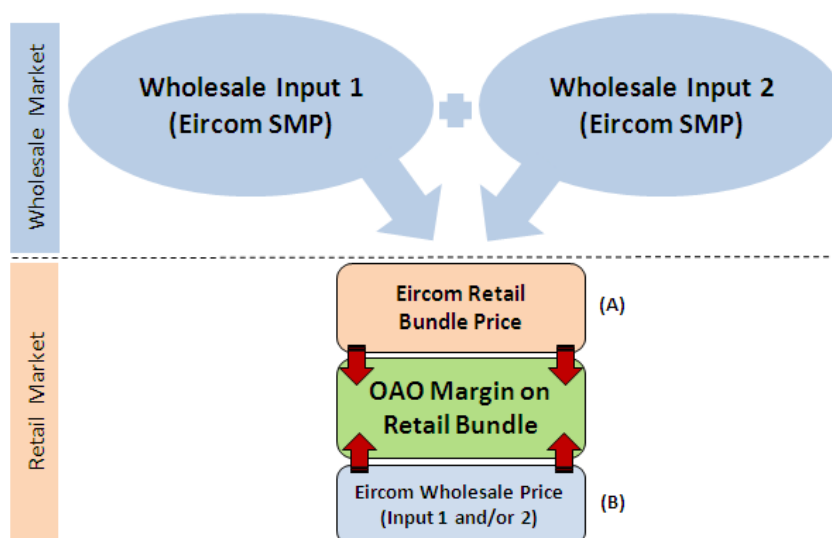
¹⁹ <http://www.comreg.ie/fileupload/publications/ComReg0819.pdf>

²⁰ In other words, the price of SB-WLR should be at least 14% less than the retail price charged by Eircom to its end-users for retail access to the public telephone network at a fixed location or as amended, which is the retail equivalent of such services and facilities.

²¹ <http://www.comreg.ie/fileupload/publications/ComReg1311.pdf>

- 41 While a number of individual wholesale inputs/components, used by OAOs to replicate an Eircom retail offer, are either: cost orientated; subject to retail-minus price obligations, subject to an obligation not to cause a squeeze; or a combination of obligations (such as in Market 5 Wholesale Broadband Access, where Eircom is subject to a cost orientation obligation and an obligation not to cause a margin squeeze for current generation broadband and an obligation not to cause a margin squeeze for next generation broadband) these pricing remedies determine an appropriate wholesale price (or maximum wholesale price in the case of retail-minus obligations). Where there are obligations on Eircom not to cause a margin squeeze between retail and wholesale prices (for example NGA) this pricing remedy is on a standalone basis only. As such, absent the current NRT, there are no pricing remedies to determine whether an Eircom retail bundle (i.e., a package of retail products/ services sold or offered by Eircom consisting of more than one service) is profitably replicable after purchasing the wholesale inputs from Eircom and incurring any downstream retail costs.
- 42 Consequently, absent the NRT, Eircom as a vertically-integrated operator which competes downstream with bundled retail products could exert its upstream dominance by causing a margin squeeze by decreasing the Eircom retail bundle price (illustrated by point A in Figure 4) and/or increasing one or some of the underlying wholesale costs (illustrated by point B in the Figure 4) — to the extent that the downstream retail margins are not sufficient to cover retail costs. This view is supported by our consultants, Oxera, as set out in ComReg Document No 14/90a.

Figure 4: Margin Squeeze on bundles in which Eircom has SMP in all relevant markets



- 43 OAOs' retail margin can be 'squeezed' with the occurrence of either a retail price decrease or wholesale price increase or if both occur together.
- 44 For example, Eircom could raise the wholesale price of NGA which may require an equivalent rise in the standalone retail price of NGA (pursuant to the obligation not to cause a margin squeeze – See ComReg Decision document D03/13). However, in this example, where NGA is sold/offered as part of a bundle at the retail level the required retail price increase may be difficult to isolate in an overall single headline bundle retail price (in particular if the package contains a number of products/services). Consequently, while Eircom could meet its obligation on a standalone basis, Eircom could create a margin squeeze at the retail bundle level which prevents OAOs from profitably replicating the entire Eircom retail bundle — based on the individual price of the wholesale inputs which the OAO is required to purchase from Eircom and its downstream retail costs (that the OAO must incur in order to sell/offer such a bundle at the retail level).
- 45 A potential motivation to cause a margin squeeze is for Eircom to gain market power in the downstream market. Eircom could implement a margin squeeze to the extent that OAOs could no longer profitably supply the bundled service in the long-run. In particular, 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). However, from an OAO perspective which is reliant on Eircom wholesale's products and services this is a real cash outlay. OAOs' current and future business cases may not support continuing to offer or make available loss making retail bundles and therefore over the medium-to-long term may exit the market. This would be to the long-term detriment of consumers (through lower service offerings, product choice and product innovation). Such a margin squeeze strategy could also act as a future deterrent to new entry in the downstream market (i.e., new entrants may not consider entering the retail market as they would consider that Eircom could potentially engage in such behaviour once they have entered the market thereby potentially rendering the investment unviable). Consequently, such a margin squeeze may distort effective competition in the medium-to-long-term to the detriment of end-users.

- 46 Another potential motivation to cause a margin squeeze would be for Eircom to protect its market power upstream. As a potential entrant into the upstream market has to make significant sunk investments it must achieve sufficient downstream demand in order to recover/contribute towards those costs in the long-run. If Eircom instigated a margin squeeze it could exclude downstream rivals such that no current or potential competitor at the upstream level would find it profitable to enter/expand into the market (i.e., as the new entrant upstream (acting as a wholesaler) would have no downstream demand). Consequently, the margin squeeze could effectively not only foreclose competition downstream but could also protect Eircom's upstream market power.
- 47 Similarly, where Eircom includes unregulated services (in which it does not have market power) in a bundle it could increase its market share in those unregulated services markets. While this type of bundling may be pro-competitive and may entail a short-term benefit to consumers, ComReg is concerned that if that type of bundle is not replicable by OAOs then Eircom could strategically be protecting its market position in the upstream telecommunications market and/or foreclose downstream rivals in the telecommunications market — to the long-term detriment of consumers.
- 48 For the reasons identified in paragraphs 38-47, absent effective remedies, Eircom could leverage its dominance in wholesale markets either vertically or diagonally (due to bundling) into the retail market. Consequently, ComReg considers that there is a need for some obligation to prevent bundling being used for anti-competitive purposes. In particular, where it may be used to disguise a possible margin squeeze providing scope for leveraging or market foreclosure into related markets.
- 49 The European Regulators Group ('**ERG**') notes in its report on margin squeeze that: "*[w]hile competition law is intended to prevent margin squeeze as an exclusionary abuse, ex-ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets*".²² As such, ComReg considers that the ex-post enforcement provided under competition law would be inadequate and consequently considers that the express imposition of ex-ante regulatory obligations would be more appropriate. Furthermore, given the identified risk of potential leverage arising from Eircom's SMP upstream, it is considered that identifying a margin squeeze only after it had occurred would not sufficiently protect against possible market foreclosure and the associated consumer harm.

²² ERG (09) 07 Report On the Discussion of The Application Of Margin Squeeze Tests To Bundles, paragraph 6.

- 50 ComReg considers that the anti-competitive concerns identified can be prevented by the further specification of a MST upstream. ComReg is of the preliminary view that a further specification of the price control obligations not to cause a margin squeeze in both Market 2 and Market 5 could address the anti-competitive bundling concerns. This view is supported by our consultants Oxera.²³ ComReg's views on these matters are discussed further in sections 3.3-3.6.
- 51 ComReg considers that the obligation on Eircom not to cause a margin squeeze should not protect inefficient competition. ComReg proposes that the margin squeeze protect certain types of OAOs to ensure that competition is sustainable in the long-run. This is considered further in Chapter 5.

3.3 Market 2: Wholesale Fixed Voice Call Origination and Transit Markets

- 52 ComReg has recently carried out an updated market analysis in relation to Market 2 and published a consultation paper ('**2014 FACO Consultation Document**').²⁴
- 53 The 2014 FACO Consultation Document seeks to address the potential competition problems associated with price related behaviours including excessive pricing and margin squeeze (see Section 8 and Section 9 of ComReg 14/26). Consequently, Eircom may be subject to various price control and cost accounting obligations including an obligation not to cause a margin squeeze. Consequently, the proposed MST (the subject of this Draft Decision) would be a further specification of the price control obligation not to cause a margin squeeze.
- 54 In the 2014 FACO Consultation Document ComReg consulted on its preliminary view that the obligation on Eircom to provide Wholesale Line Rental ('**WLR**') should now be imposed in Market 2 rather than Market 1 (see ComReg 2007 RFNA Decision where this obligation currently resides²⁵). As noted in ComReg 14/26, moving WLR obligations into the Fixed Voice Call Origination ('**FVCO**') market would, insofar as is possible, seek to address competition problems at the most upstream level and allow the potential de-regulation of downstream markets, either entirely or in part.

²³ See ComReg Document 14/90a.

²⁴ <http://www.comreg.ie/fileupload/publications/ComReg1426.pdf>

²⁵ <http://www.comreg.ie/fileupload/publications/ComReg0761.pdf>

- 55 WLR enables OAOs to 'rent' the access line and then, combined with FVCO, to offer a combined retail line rental and calls service to end-users. Eircom provides a WLR and FVCO product called SB-WLR. Some OAOs purchase Single Bill-WLR ('**SB-WLR**') services from Eircom to provide retail fixed telephony services directly to retail customers, while other OAOs do so for the purpose of re-selling services as part of a broader suite of their own wholesale services which are made available to other OAOs.
- 56 As such, ComReg considers that WLR is currently an important wholesale input for OAOs to purchase from Eircom wholesale if they wish to replicate an Eircom retail bundle.
- 57 In terms of call services (including call origination, transit and termination rates – which would take into account Market 2 and Market 3 respectively) these wholesale prices are proposed to be included in the MST as cost inputs (see Chapter 5). As such, the wholesale costs/prices of these services are taken into account to ensure that Eircom can not cause a margin squeeze as identified in paragraph 42).

ComReg's Preliminary view

- 58 ComReg is of the preliminary view that it is appropriate to further specify Eircom's price control obligation in Market 2 not to cause a margin squeeze.
- 59 ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself. Where Bundle means a package of services, consisting of Retail Line Rental and one or more other services, which is on offer or on sale by Eircom to end-users.

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

3.4 Market 5: Wholesale Broadband Access

- 60 Pursuant to the recent Wholesale Broadband Access market review, Eircom was found to have SMP in the Wholesale Broadband Access Market.²⁶

²⁶ ComReg Document 11/49, "Market Review: Wholesale Broadband Access, Response to Consultation and Decision", Decision No. D06/11, 8 July 2011.

- 61 Wholesale Broadband Access (**WBA**) is a non-physical or virtual wholesale input used in the provision of a range of retail products which are used by consumers for broadband internet access. As such, ComReg considers that WBA is a required wholesale input for OAOs that wish to replicate an Eircom retail bundle.
- 62 As part of the WBA Market Decision²⁷, ComReg identified the competition problems associated with the WBA market which included excessive pricing, exclusionary behaviour and concerns around vertical leverage / predatory practices (see Chapter 6 of the WBA Market Decision). The WBA Market Decision imposes an obligation on Eircom not to cause a margin (price) squeeze.
- 63 A review by ComReg of the WBA market has commenced. As this market review will likely take a number of months to complete ComReg notes that recital 15 of the Access Directive²⁸ expressly anticipates that remedies may be imposed on an SMP operator without requiring an additional market analysis, as long as a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified. If as a result of the outcome of these market reviews it is clear that changes are required to the remedies already in place then adjustments will be made accordingly. In the meantime, we have analysed and updated the WBA Market Decision with market information available (both retail and wholesale market shares), for the purposes of amending and further specifying the price control remedy for the WBA market.
- 64 In terms of the future potential for Voice over Internet Protocol (**VOIP**) a margin is included in the cost stacks proposed for the MST (see Chapter 5).

ComReg's Preliminary view

- 65 ComReg is of the preliminary view that it is appropriate to further specify Eircom's price control obligation in Market 5 not to cause a margin squeeze.
- 66 ComReg is of the preliminary view that a MST is required in order to ensure that Eircom is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the retail "Bundle" itself. Where Bundle means a package of services, consisting of Retail broadband internet access (provided at a fixed location) and one or more other services, which is on offer or on sale by Eircom to end-users.

²⁷ <http://www.comreg.ie/fileupload/publications/ComReg1149.pdf>

²⁸ Directive 2002/19/EC. "The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified."

Q. 2 Do you agree with ComReg's preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself.? Where Bundle means a package of services, consisting of a Retail Broadband Product²⁹ and one or more other services. Please provide cogent reasoning to justify your views.

3.5 Market 4: Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location

- 67 Eircom currently has a regulatory obligation in Market 4 not to cause a margin / price squeeze against operators who have either invested or are planning to invest in their own telecommunications infrastructure while purchasing essential facilities from Eircom wholesale (as mandated in Market 4, known as the WPNIA Market).³⁰
- 68 ComReg considers that infrastructure-based competition from OAOs using LLU ('**LLUOs**') has the most potential to offer sustainable competition to Eircom in the provision of broadband to the benefit of end-users. In general, LLUOs are better able to offer differentiated retail products and to set prices independently of Eircom as compared to those OAOs using WBA and WLR. Consequently, it could be in Eircom's interests to set, say, WBA prices low enough to discourage investment in LLU / ULMP even where alternative investment is viable. Therefore, it is important that regulation ensures that LLU based competition is encouraged where it is viable.
- 69 Going forward if and when LLU is replaced by NGA wholesale products, such as Virtual Unbundling Access ('**VUA**'),³¹ the same principle holds to ensure the correct incentives and economic space is available to other operators currently in the market or to potential new entrants. This should ensure that investment is maximised and competition at the highest level of the 'ladder' is promoted to the benefit of end-users.

²⁹ See footnote 12.

³⁰ Pursuant to s.12.4 of the Decision Instrument contained in Appendix C of ComReg Decision No D05/10. ComReg, "Market Review: Wholesale Physical Network Infrastructure Access (Market 4)", 20 May 2010 ('**ComReg D05/10**').

³¹ See ComReg Decision 03/13 for more detail in relation to NGA related products and services.

- 70 For the reasons identified in paragraphs 68-69, ComReg set out its decision as specified in ComReg Decision Document D04/13 to further specify the obligation under Decision D05/10 not to cause a margin / price squeeze for the WPNIA product, ULMP³², to ensure that there is an appropriate relative margin between Eircom's ULMP product and a) its SB-WLR product and b) its Naked WBA³³. The purpose of this further specification is to provide assurance to OAOs using LLU (i.e., LLUOs) that neither the pricing of SB-WLR (especially sold in combination with WBA) nor Naked WBA will be priced at an excessively low level such that LLUOs could be foreclosed.
- 71 As such, ComReg considers that a further specification in Market 4 of the margin squeeze obligation for Eircom not to cause a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail "Bundle" offer and the price of the Eircom retail "Bundle" itself is not required.
- 72 In any event, the underlying wholesale inputs which are used by OAOs (such as LLU) to replicate an Eircom retail bundle are proposed to be included in the MST as wholesale input costs. Consequently, the MST by construct ensures that there is no margin squeeze to Market 4 products / services. See chapter 5 for further information.

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

³² ULMP is the implementation of Full Unbundled Access to the Local Loop.

³³ Naked WBA is a WBA product sold standalone without SB-WLR.

3.6 Market 1: Retail Access to The Public Telephone Network at a Fixed Location

73 It should be noted that ComReg has recently carried out an updated market analysis in relation to Retail Fixed Narrowband Access ('RFNA') and notified the European Commission of its draft measure on 2 July 2014 with the European Commission³⁴ providing comments on 28 July 2014.³⁵ The final decision on the updated market analysis is available on ComReg's website (ComReg Decision Document D12/14). Having regard to the analysis in the FVA Consultation and supplementary consultation (ComReg document number 12/117)³⁶ and having considered responses to the FVA Consultation and Supplementary Consultation, as notified to the European Commission, in ComReg Decision Document D12/14 ComReg defined three separate retail FVA markets (the Relevant FVA Market(s)) as follows:

- **Market 1a Standalone Lower Level Voice Access:** Standalone lower level voice access comprising access via a PSTN, ISDN BRA or analogous broadband connection³⁷ (cable, fibre, FWA or DSL), that is used to provide PSTN, ISDN voice or Managed VOIP service offered or sold on a standalone basis to End-Users or when offered or sold in a package with fixed voice calls to End-Users;
- **Market 1b Bundled Lower Level Voice Access:** Bundled lower level voice access comprising access via PSTN, ISDN BRA or analogous broadband connection (cable, fibre, FWA and DSL) used to provide PSTN, ISDN voice or Managed VOIP service that is sold or offered to End-Users in a product bundle which includes any of broadband, television or mobile services (and which product bundle may include fixed voice calls); and

³⁴ https://circabc.europa.eu/d/d/workspace/SpacesStore/c8827513-1ec0-49bb-9dac-434352a99ed2/ComReg_Final_EU_Notification_Public_020714.pdf

³⁵ Registered as European Commission Case IE/2014/1629: Retail markets for access to the public telephone network at a fixed location in Ireland.

³⁶ ComReg, "Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers", ComReg Document No: 12/117 (the 'Retail Access Consultation'), published on 26 October 2012.

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

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

- 74 The NRT ensures that Eircom is constrained from leveraging its market power from Market 1b and/or Market 1c into other more competitive retail markets (horizontal leverage) and/or reinforcing its market power upstream (vertical/diagonal leverage) in other wholesale markets which are required as inputs by OAOs to replicate the Eircom retail bundle which include RFNA.
- 75 As such, the NRT currently addresses the margin squeeze concerns identified in section 3.2. Furthermore, due to wholesale cost/price components used in the test, the NRT prevents Eircom leveraging its market power from the respective wholesale markets which are used by OAOs to replicate the Eircom retail bundle (which includes as part of that bundle the ability for end-users to make and receive calls on their fixed-telephone line) into the downstream retail market for RFNA and any other downstream retail markets which are included as part of the Eircom retail bundle (e.g., broadband). Put simply, the NRT ensures that Eircom is not able to leverage vertically or diagonally from the upstream market into the retail market when combining wholesale inputs which are sold / offered in a bundle at the retail level.
- 76 Therefore, the NRT currently means that a further specification of a MST obligation (as proposed by this Draft Decision) would not be required as set out above for Market 2 and Market 5. However, ComReg considers that if there is appropriate wholesale regulation upstream (as proposed by this Draft Decision and the 2014 FACO Consultation Document) that the NRT would no longer be required at the retail level. As such, a well-defined MST at the wholesale level on an ex-ante basis could address the leveraging concerns which are currently addressed by the NRT.

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

4 Larger Exchange Area

4.1 Overview

- 77 The WBA Market Decision found evidence of structural change arising in certain overlapping geographic areas. ComReg Decision document D04/13 subsequently defined two areas with prospectively varying competitive conditions namely the LEA and Outside the LEA.
- 78 The Decision Instrument in ComReg Decision D04/13 includes inter alia the definition of the Larger Exchange Area ('**LEA**') and the relevant criteria are described and justified at length in the main body of ComReg Decision D04/13. The purpose of this chapter is to provide an overview of the LEA and recent developments.
- 79 In ComReg Decision D04/13, ComReg identified criteria which could be used to identify areas where uptake of unbundled services, whether LLU and / or virtual unbundling in NGA, is likely to be viable, and the potential for future other alternative infrastructure providers of high-speed broadband at a fixed location ('**AIP**') — which is currently only UPC — which prospectively are more likely to permit a greater degree of competition and where regulation should be responsive to any prospective changes. ComReg identified individual qualifying areas/exchanges based on the criteria whose total geographic area was defined as the LEA. The criteria were fully consulted with industry as part of the consultation process which concluded with ComReg publishing the ComReg Decision D04/13. For ease of the reader, the relevant criteria as set out in ComReg D04/13 for the LEA and explanatory text regarding each criterion is set out in Annex: 2. In addition, the relevant definition of LEA as set-out in ComReg Decision D04/13 has been included in the Draft Decision Instrument of this Draft Decision Paper.
- 80 As part of the consultation process to ComReg Decision D04/13, ComReg assessed in detail the status of competition across all of Eircom's exchanges on an exchange-by-exchange basis to assess the appropriateness of their inclusion in the LEA. In determining the actual exchanges which qualify under each criterion, a detailed database was constructed which allows ComReg to assess the actual number of homes and premises in that exchange (area); the actual number of customers connected on the Eircom wholesale platform; the relative share of OAO customers on the Eircom platform (i.e., through Line Share or LLU); the cable operators' (UPC) footprint; and the number of broadband customers in that exchange area. Detailed information (which is commercially sensitive) has been received from the cable company (UPC) to enable this analysis.

81 The main points are summarised under the following headings:

- Market developments in the LEA.
- Market developments Outside the LEA.

4.2 Market developments in the LEA

82 ComReg has examined recent market developments in the LEA. Since publication of ComReg Decision D04/13, the LEA has continued to evolve and now comprises 201 exchange areas. The growth from 126 exchange areas (at the date of publication of ComReg Decision D04/13) is solely based on the roll-out of NGA. As such, while the criteria to determine the LEA is well established the boundaries continue to evolve. For example:

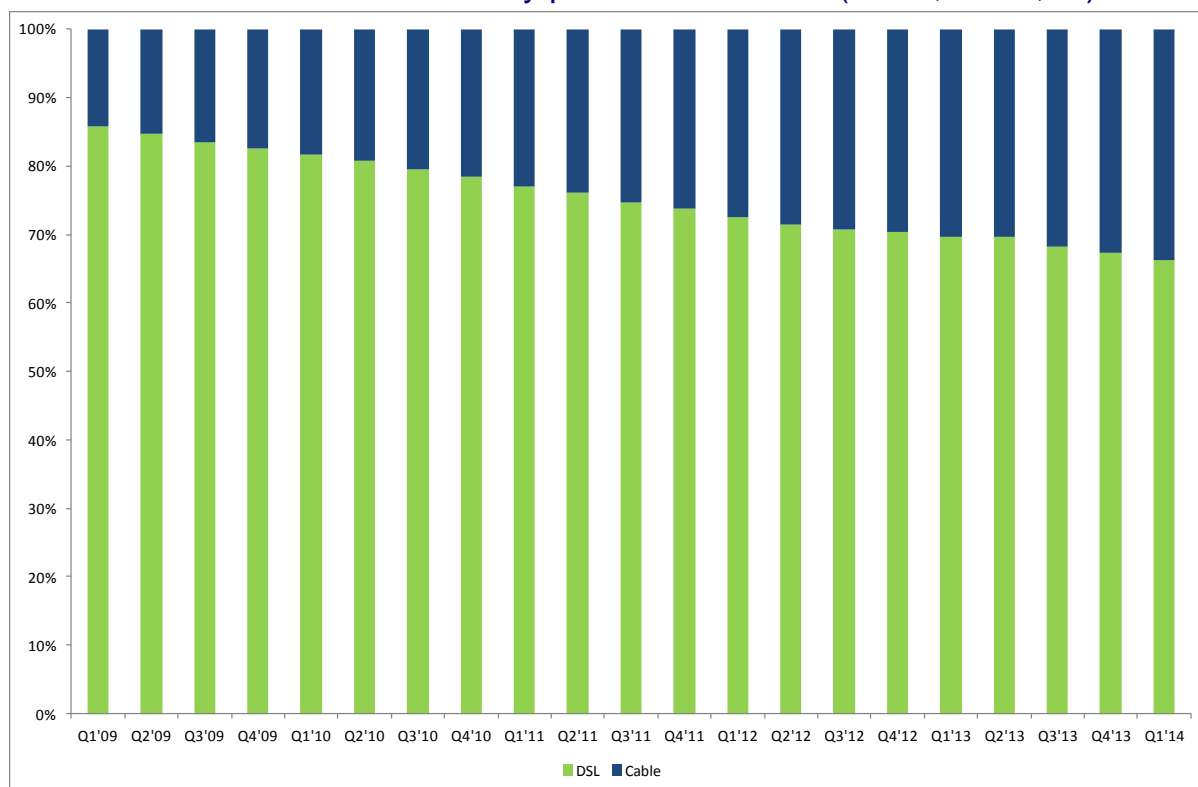
- Eircom's NGA roll-out plan continues to expand outside the current LEA footprint;
- BT's LLU expansion is not yet complete and BT may unbundle some further exchanges.
- While the national electricity supplier (ESB) indicated that it is to be part of a joint venture which intends to enter the Irish broadband market in the LEA by leveraging from their own access network — it remains to be seen whether this will materialise.

83 ComReg considers that Eircom and OAOs utilising its wholesale inputs are facing increased localised competition, centred around demand for broadband from the cable operator UPC and that this prospective competitive pressure appears to differ by geographic area — subject to the underlying structural characteristics and investment incentives / viability of those areas.

84 Nationally, DSL is the dominant form of broadband access, with just 66% of fixed-line (i.e., excluding fixed wireless access) broadband subscriptions in Q1 2014.³⁸ However, while the number of Eircom subscriptions continues to grow it is losing market share to other platforms, most notably cable. Figure 6 illustrates the trend in market shares of the two main platforms on a national basis.

³⁸ ComReg (2014), Quarterly report http://www.comreg.ie/_fileupload/publications/ComReg1461.pdf.

Figure 6 Fixed broadband shares by platform in Ireland (xDSL, cable, %)



Source: ComReg (2014), “Quarterly Key Data Report – Data as of Q1 2014”, market report.

- 85 As these figures are national, they mask the extent of the shifts in market shares occurring within the footprint of UPC’s cable network. However, in assessing UPC’s footprint it is evident that this shift is more apparent in urban areas than the national figures suggest. As such, it appears that UPC is able to attract churning subscribers from Eircom retail (and wholesale) products, as well as new broadband subscribers, while Eircom is losing subscribers in a growing market.
- 86 Publically available data on retail broadband market shares further indicates that end-users are responding to alternative infrastructure providers e.g., UPC’s relatively attractive product offering, putting pressure on both Eircom and Eircom’s wholesale customers to provide competitive offerings to those who have the ability to access the UPC cable network in the LEA.

- 87 As noted in ComReg D11/14³⁹, in the LEA at the end of December 2013 Eircom has circa 30% of the WBA market and Eircom Retail has circa 30% of the retail broadband market while UPC has circa 30% of the retail market and the excess of 30% relates to OAOs providing retail broadband via Bitstream and LLU / Line Share. As such, consumers appear to be responding to UPC's product offering (where UPC has footprint), thereby putting pressure on both Eircom and Eircom's wholesale customers to provide competitive offerings to those consumers who have the ability to access the UPC cable network.
- 88 As identified in the 2014 Fixed Access & Call Origination market analysis consultation paper, there is a trend for the increased consumption of services in packages and bundles. Retail Fixed Voice Calls and Retail Fixed Voice Access are typically sold / purchased together and such RFTS are often bundled with broadband and/or television services. Mobile services are also being offered in bundles with RFTS. These trends appear to have corresponded with the entry of UPC and Sky into the broadband and RFTS markets (both of which offer product bundles to consumers). In addition to these types of double-play and triple-play bundles, quadruple-play bundles (RFTS, broadband, Pay TV and mobile services) have emerged recently following Eircom's entry into the Pay TV market, coupled with its mobile services offered through its eMobile brand⁴⁰.

³⁹ ComReg, "ComReg Decision D11/14 – Wholesale Broadband Access: Price control obligation in relation to current generation Bitstream", published 8 July 2014.

⁴⁰ Eircom's Pay TV product is called eVision, and is advertised on Eircom's website at <https://www.eircom.net/tv/?pageversion=full>

Figure 8: Market shares for bundled fixed voice subscriptions Q4 2013



Figure 9: Fixed Voice Access Bundles – Q4 2013



- 89 Competition between Eircom and OAOs utilising its wholesale inputs is more evident in the LEA where LLU footprints and UPC are also largely present. The 2014 Fixed Access & Call Origination market analysis consultation paper similarly noted that *“there is some variance in competitive conditions within the State, in particular, competition from UPC within LEAs appears to be somewhat greater in certain product bundles involving RFTS, broadband and Pay TV services.”*
- 90 ComReg considers that the competition problems identified in the Market Analysis D04/07 (the competition concerns highlighted in D04/07 were also identified as remaining relevant in the current 2014 Fixed Access & Call Origination market analysis consultation paper) and the WBA Market Decision remain relevant. To take into account the different structural changes arising in certain overlapping areas (as identified in the WBA Market Decision) the implementation of the price control remedy will vary by geographic area (see Chapter 5).
- 91 As such, based on the available data and the competition concerns identified in Chapter 3, ComReg considers that a MST is required in order to protect competition which is based on using Eircom’s network. However, ComReg considers that there must also be appropriate flexibility so that Eircom Retail is not unduly hindered by regulation — in particular in the LEA where prospectively competition appears to be more evolved.

4.3 Market developments Outside the LEA

- 92 The area Outside the LEA corresponds to those exchanges which are in the more sub-urban, rural and remote areas of Ireland. This area has typically higher costs for potential entrants due to longer local loop lengths, greater distance to provide backhaul, and fewer economies of aggregation. Outside the LEA the prospects for entry by a further LLU operator are limited.

- 93 Bitstream is an important access medium Outside the LEA. However, alternative Bitstream-based operators are almost entirely reliant on Bitstream from Eircom in order to provide its retail offering, with only a very small proportion of Bitstream-based subscribers using line share.
- 94 ComReg considers that entry prospects Outside the LEA are limited, largely due to the less favourable cost and scale characteristics. Therefore, currently Outside the LEA there is realistically only one fixed broadband provider, Eircom. This is unlikely to change absent state intervention or the possible entry of ESB Networks.
- 95 Outside the LEA, at the end of December 2013, Eircom had circa 8% of the WBA market while Eircom Retail had circa 8% of the retail broadband market with the excess mainly relating to OAOs providing retail broadband via Bitstream.
- 96 ComReg considers that the competition problems identified in the WBA Market Decision remain relevant. Given that Eircom has little or no competition from alternative providers Outside the LEA, ComReg considers that a MST is required in order to protect competition which is based on using Eircom's network. However, ComReg considers that it would not be appropriate to provide Eircom the flexibility of the MST proposed for inside the LEA. As such, to take into account the different structural changes arising in certain overlapping areas (as identified in the WBA Market Decision) the implementation of the price control remedy will vary by geographic area (see Chapter 5).

4.4 Conclusion

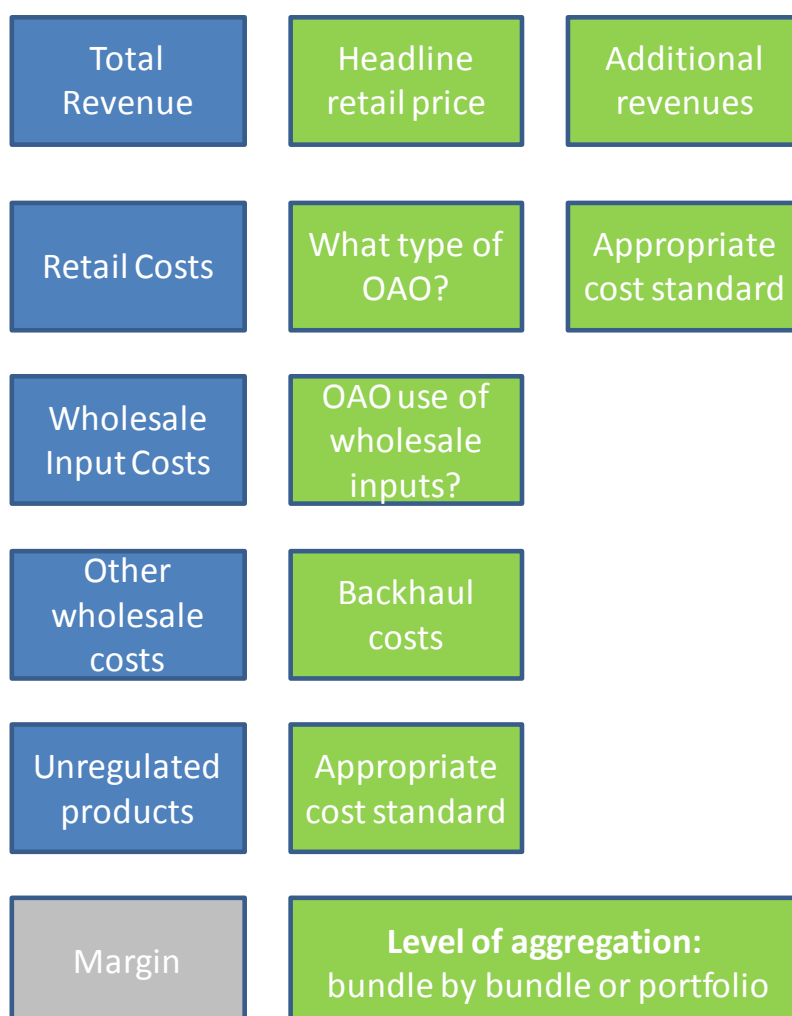
- 97 ComReg has again looked at issues regarding the LEA, and in particular recent market developments. The LEA reflects those areas where greater competition may emerge over time and which may require more flexible regulation of bundles as competition emerges — such that Eircom Retail's pricing is not unduly constrained by regulation at the wholesale level but equally that any flexibility would foreclose OAOs which act as a relevant constraint going forward.

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

5 Components of the Margin Squeeze Test Model

5.1 Overview

98 In order to ensure that Eircom is compliant with its obligation not to cause a margin squeeze (pursuant to the further specification of the margin squeeze obligations following a final decision, if appropriate, subsequent to this Draft Decision) the retail revenues of the Eircom Bundle (and portfolio revenues as appropriate) must cover the sum the wholesale costs of inputs to the Bundle (and portfolio wholesale costs as appropriate) including any relevant costs associated with the Bundle. These components are considered in depth in this chapter and the relative components can be illustrated graphically as follows:



99 The cost components within the proposed MST are intended to reflect those an OAO would be required to incur to replicate an Eircom Bundle. Therefore, in order for a Bundle to be considered reasonable it must cover the costs faced by an OAO seeking to replicate the Bundle (the individual cost components within the MST are discussed in greater detail in section 5.3).

100 ComReg notes that in Eircom's submission to the 2014 Fixed Access & Call Origination market analysis consultation paper that in their view: "*a NRT in the wholesale Market 2 would be subtly different from a similar NRT in the Retail Market 1 ... if there were, for example, R retail products combining W wholesale products in various combinations, the Retail NRT would currently comprise R tests, each considering the retail product revenue against the cost of the Weighted Average Wholesale Network Inputs ("WAWNI") for the relevant retail product. A wholesale test would comprise a test of W wholesale products, where each is used to achieve a Weighted Average Retail Product Output ("WARPO"). This is because the focal point of the test will become the wholesale products, and whether the wholesale price is too high against a "fixed" retail revenue, and not the reverse, as has been the case previously*"⁴¹. ComReg is of the preliminary view that such a test would not be appropriate. ComReg considers that such a margin squeeze test against "a 'fixed' retail revenue" could enable Eircom as a vertically-integrated operator to create a margin squeeze for OAOs purchasing the required wholesale inputs on a number of Eircom "Bundles". In particular, ComReg considers that such a weighted approach of retail bundle offers to determine a "fixed" retail revenue could allow Eircom to foreclose OAOs to replicate "new" Bundle offers. Initially, such "new" Bundle offers may initially represent a small weighting in determining the 'fixed' retail revenue to use in the test. ComReg is concerned that over time such "new" offers may become the dominant offers in the market and if there was a delay in the weighting of such a development in the test Eircom may already have foreclosed OAOs from competing for such bundles based on the cost of the wholesale inputs required to replicate such offers. Consequently, ComReg is of the preliminary view that such an ex-ante test may not be sufficient to protect against the competition concerns outlined in Chapter 3. ComReg welcomes interested parties' views on Eircom's proposed approach and invites Eircom, should they maintain that such an approach to be appropriate, to develop the proposed approach further in its submission to this Draft Decision so that ComReg can fully consider the proposed approach.

⁴¹ Eircom "*Response on behalf of eircom Group to ComReg Consultation 14/26*", page 31-32. All non-confidential submission to the 2014 Fixed Access & Call Origination market analysis will be made available on ComReg's website.

101 Where appropriate, ComReg has taken the utmost account of the ex-ante replicability test parameters as set out in Annex II of the European Commission recommendation published on 11 September 2013.⁴²

5.2 Relevant Revenues

102 ComReg considers that the appropriate retail revenue to take into account in the MST is the Eircom Retail headline monthly published price (for that Bundle) together with any out of Bundle revenue or associated revenues directly attributable to the Bundle sold / offered at that fixed location.

103 For the avoidance of doubt, 'out of bundle revenue' includes those revenues that are incremental to the Bundle and would not have been generated had it not been for the provision of the Bundle being sold / offered at that fixed location (e.g., pay as you go Wi-Fi session tickets).⁴³

5.3 Relevant Costs

104 The cost components within the MST are intended to reflect those faced by an OAO that would be required to replicate Eircom's individual bundle. We consider that these can broadly be categorised between:

- Retail Costs
- Wholesale Input Costs

5.3.1 Retail costs

Narrowband Access Retail Costs

105 As noted in the 2014 FACO Consultation, pending the completion of the Separate Access Network Pricing Consultation, we consider that it remains appropriate at this time for the purposes of pricing WLR that the retail narrowband costs be based on a retail-minus of at least 14% (i.e., the retail price of the SMP operator (i.e., Eircom) minus 14%). The 2014 FACO Consultation, invited interested parties views on the appropriate retail minus margin (with this margin referred to as the 'X' parameter, i.e. Retail minus 'X').

⁴² http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

⁴³ Further details in relation to the specific components of the MST are contained in Table 1 and Table 2 in Section 5.5.

106 A final decision on this matter will be made as part of ComReg's review of the Retail Fixed Access Market and any relevant follow on consultations. Consequently, until such time, the retail margin provided for in the MST will be made pursuant to the 2007 RNA Decision and a subsequent 2008 SB-WLR Direction regarding the SB-WLR price control.⁴⁴

107 For the completeness, we have set out in paragraphs 108-110 an overview of how the current retail costs for narrowband are currently calculated.

108 The current retail minus X-parameter of 14% was derived following various reviews by ComReg (and its consultants Frontier Economics), of Eircom's 2005, 2006 and 2007 Historical Cost Accounting ('HCA') accounts and is specifically based on Eircom's 2006/2007 regulatory accounts, culminating in the 2008 SB-WLR Pricing Decision.

109 Determining the appropriate X-parameter involves the identification, specification and categorisation of relevant costs. Eircom's HCA accounts have previously been the starting position for this analysis. In determining the X-parameter, the definition of retail costs used are the costs of those activities required to provide a retail line rental service that are not required to deliver the wholesale service. These costs include, for example:

- Fault reporting costs, and costs associated with customer facing activities during the fault repair process (e.g., customer care);
- Retail product management costs;
- Retail sales and marketing costs; and
- Billing and collection costs.

110 The X-parameter is calculated on an Equally Efficient Operator ('EEO')⁴⁵ cost standard and is designed to allow an Access Seeker to compete with Eircom in the provision of retail line rental, by ensuring that the Access Seeker can recover the same efficiently incurred retail costs faced by Eircom, while at the same time remaining price competitive in the retail market.

⁴⁴ "ComReg Information Notice: Single Billing Wholesale Line Rental, Directions to Eircom regarding retail minus %, Document 08/19, 22 February 2008" (the "2008 SB-WLR Direction"), available at <http://www.ComReg.ie/fileupload/publications/ComReg0819.pdf>.

⁴⁵ EEO essentially takes Eircom's own retail costs associated with the provision of a retail line rental service, with these then being used to calculate the value of the X-Parameter, on the basis that this represents the margin that would allow Eircom to trade profitably in the retail market on the basis of the margin between its retail price and the wholesale charges its competitors would face.

111 By way of background, as noted in the 2014 FACO Consultation Document, without prejudice to the Separate Access Network Pricing Consultation, ComReg considers that the consistent growth in demand for SB-WLR since 2008 indicates that the 2008 SB-WLR Price Decision, which is based on an EEO cost-standard, is delivering benefits to consumers in terms of contributing to competition in the provision of RFTS. ComReg therefore considers that the retail-minus methodology set out in the 2008 SB-WLR Price Decision is likely to remain appropriate pending a further review in the Separate Access Network Pricing Consultation.

Retail call costs:

112 These are the wholesale and retail costs as calculated for each retail cost, e.g., calls to Local, National, UK etc. The retail costs of each are calculated by including the wholesale interconnection prices applicable in the market plus the latest audited average total retail costs (residential average total costs for a residential bundle, business average total cost for a business bundle) provided by Eircom and as reviewed and approved by ComReg. Where applicable, these total retail costs include relevant international calls out payments costs and mobile termination costs applicable (including the costs and mobile termination costs for those mobile calls that are sold for free).

113 The retail calls used in the MST are to be sourced from Eircom based on cost allocations from the latest set of its separated accounts which are subject to an external audit.

Broadband retail costs:

114 The underlying discounted cash flow ('**DCF**') of ComReg D11/14⁴⁶ provides the retail cost of a Similarly Efficient Operator ('**SEO**')⁴⁷ providing CGA broadband services Outside the LEA. Inside the LEA, ComReg D11/14 uses a combined approach of SEO and EEO to determine the retail costs of providing CGA broadband services. ComReg considers that for the purposes of a MST that such distinction between LEA and Outside the LEA remains appropriate and this is discussed in greater detail below.

115 The costs categorised used in the current DCF model are as follows: sales costs, marketing/advertising, product management & development, help desk, billing, modems, order handling, and corporate overheads.

⁴⁶ ComReg Decision D11/14 – Wholesale Broadband Access: Price control obligation in relation to current generation Bitstream

⁴⁷ A SEO means an operator which shares the same basic cost function as Eircom but does not yet enjoy the same economies of scale and scope as Eircom.

- 116 In summary, as a starting point, the current DCF model uses Eircom's costs — both historic which are based on Eircom's audited Regulated Accounts and Eircom's forecast of those costs — as a data source. These costs (both historic and forecast) are then adjusted to reflect the likely costs that a new retail broadband market entrant would likely incur.
- 117 In ComReg D11/14 ComReg considered that as there are large operators in the LEA using Eircom's network (Vodafone, Sky) with an international presence who can take advantage of economies of scale and scope between their operations in Ireland and other countries in which they operate. ComReg considers with respect to Marketing / Advertising costs; Billing Costs; and Product management costs that these are most susceptible to such scale / scope advantages especially in the context of bundle offers (with fixed voice, mobile voice, broadband, IPTV, etc.) which are more often sold in the LEA. Outside the LEA, ComReg considers that the margin squeeze test should be based on a SEO test given the number of smaller operators in this area with a low retail broadband market penetration ($\leq 5\%$ or less) in this area.
- 118 Similarly, for NGA Bundles the underlying DCF model uses Eircom costs as the basis for establishing those of an SEO and in the case of Advertising, Product Development and Billing those of an EEO.
- 119 EEO means using Eircom's costs without any adjustments for scale. SEO means using Eircom's costs with an adjustment for economies of scale and scope. Economies of scale mean that the SEO has a lower volume than Eircom and as a result of this lower volume implies that its unit costs will be higher. Economies of scope mean that the SEO has a smaller number of products than Eircom over which to spread its overhead costs. Consequently, for the same total cost, an EEO would have a lower per unit cost than a SEO as an EEO has a larger scale and product scope.
- 120 The idea of a SEO recognises that in a regulated market where competition is being introduced it would be difficult, if not impossible, for an entrant at the time of entry to be as efficient as the incumbent.
- 121 The DCF is updated annually and therefore over time reflects those retail costs experienced in the market. However, at a particular point in time (i.e., in between updates) the DCF may not reflect certain retail efficiencies. Consequently, in circumstances where a Bundle fails the MST, ComReg considers that as a proportionate measure it is appropriate to consider any retail efficiencies that may have occurred — as the failing Bundle may in effect pass once the model is updated — to take account of the lower costs experienced in the market (e.g., the reduction of billing costs due to electronic mailing or change in bill cycles).

122 ComReg is of the preliminary view that it is appropriate to use the retail broadband costs associated with CGA and NGA as relevant inputs into the MST and used for assessing the replicability of CGA Bundles and NGA Bundles respectively. This would ensure that relevant downstream retail costs are included in the MST ensuring replicability and that Eircom could not foreclose competitors to the detriment of competition and in the long-run end-users.

123 It is important to note that these broadband retail costs are calculated on an ATC basis. ComReg considers that it may be appropriate to allow some flexibility to this cost standard when assessing a MST on an individual Bundle basis. This is discussed further in paragraphs 150-152.

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

Mailbox costs:

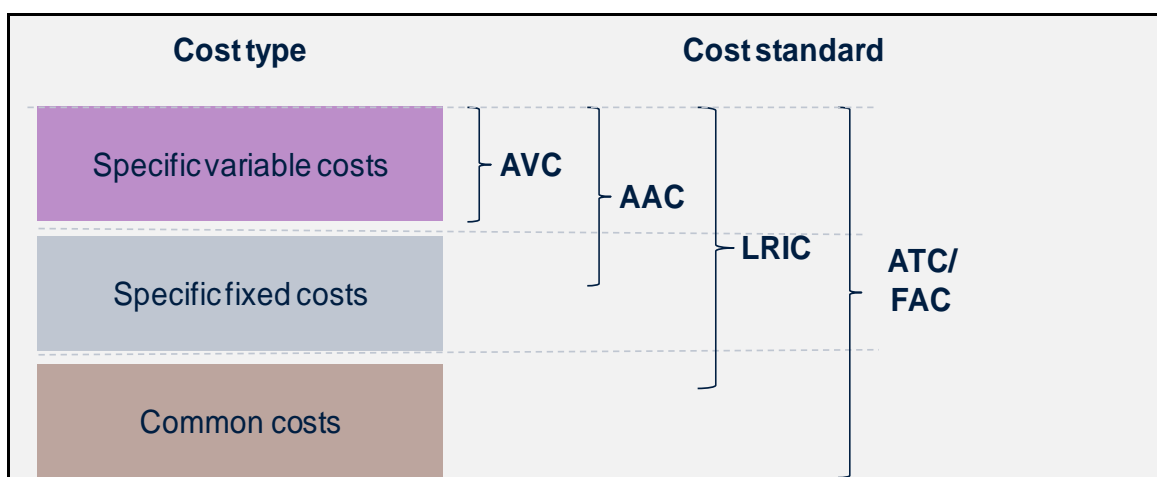
124 ComReg considers that, as applicable, it is appropriate to include the cost associated with the mailbox service. It is unclear whether OAOs can replicate the relevant ancillary services available with the Eircom WLR product, however as technology evolves this will be kept under review and where there is evidence that OAOs can replicate these voice services to a sufficient scale, ComReg may revise the cost stack to include the Modern Equivalent costs of the new technology.

125 Where the Bundle includes free mailbox, the wholesale monthly price of the mailbox (as per the regulated retail minus price control as published in Eircom's Reference Interconnect Offer Price List) must be taken to ensure an operator can replicate the offer.

126 Consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here.

Cost Standard

127 ComReg considers that the appropriate cost standard which merit consideration for the MST is between the lower threshold of average variable cost ('**AVC**') toward the respectively higher thresholds of average avoidable cost ('**AAC**'), then Long Run Incremental Cost ('**LRIC**') and then ATC. This can be presented graphically as follows and is discussed further in the sections below:



Source: Oxera.

- Average variable costs (AVCs)—these are costs that vary with output. They usually refer to small, short-term output changes.
- Average avoidable costs (AACs)—these are costs that can be avoided if production of a given increment (e.g., a product) ceases. AACs may include a proportion of fixed costs if the increment is large and the time horizon long.
- Long run incremental costs (LRIC)—these are costs that can be avoided in the long run if the provision of a given increment (e.g., a product) ceases. They include all fixed costs of the increment, and incorporate common costs if these would be avoided in the long run were the increment no longer to be produced.
- Average total costs (ATC)—these are similar to fully allocated costs (FAC). They would cover LRIC plus a larger proportion of common costs allocated to the product in question.

Source: European Commission (2009), ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’.

128 AVC approximates the variable cost of producing an additional unit of output. ComReg is of the preliminary view that AVC would not be an appropriate measure of cost to be applied as it is too low a cost threshold (for the reasons set out below). AVC does not consider fixed costs, which are the major cost components faced by telecom operators. Therefore, ComReg believes that applying a cost standard on this basis could significantly constrain the potential for entry by efficient entrants. ComReg believes that to use such a cost standard could lead to a medium to long term exit of operators who cannot sustain an entry strategy that may for example involve loss leaders.

- 129 The precise definition of AAC depends critically on its actual implementation. For example, AAC may include avoidable fixed cost elements in addition to variable costs, depending on the timescale over which AAC is assessed. Therefore, these timescales would need to be clearly defined if AAC was to be considered in the MST.
- 130 ComReg considers that AAC are the avoidable variable and incremental fixed costs of the additional sales of the product in question. The inclusion of fixed costs which would otherwise be avoided if the incremental output were no longer produced distinguishes AAC from AVC. Furthermore, the exclusion of a mark-up for overall fixed and common retail costs distinguish AAC from ATC. More specifically, AAC represents the avoidable costs of developing, launching, marketing and servicing each individual product element of the new bundled product. This means that general fixed and overhead costs are excluded, though not the fixed development, launch and any other costs directly attributable to the bundled products and which would be avoided should they cease to be provided.
- 131 As the AAC standard does not include provision for (non-avoidable) fixed costs and common costs, it could be argued that this provides the SMP operator with an advantage given the broad range of products and services over which it could conceivably recover such common costs. Entry/expansion by efficient OAOs, albeit with lower economies of scale and scope than Eircom, could thereby be impeded.
- 132 ComReg believes that ex-ante price controls should seek to ensure entry, and hence, a costing methodology that includes common costs is warranted, as SMP operators will enjoy economies of scope that are not achievable by new entrants. Critically, ComReg believes that the decision to enter, and remain in, the market depends on the expectation that fixed and common costs will be recovered; not only additional avoidable costs incurred by the SMP operator. The reasoning behind this is that an entrant would enter a market only if it considered that it would be profitable to do so, taking into account all the costs that it would have to incur in order to enter the market and sustain a competitive position i.e., the fixed, common, joint and variable costs. Cost measures such as AAC do not ensure this as the total full costs of an operator are not covered. This view is supported by the ERG:

“...Avoidable costs are typically employed in ex post predatory pricing cases and here, they are defined as costs that the vertically integrated SMP firm could avoid if it decided to close its downstream operations while continuing to provide the upstream input to third parties. However, avoidable costs are also subject to criticism. In the context of an ex-ante regulatory tool, they may provide too low a threshold for retail prices, constraining the potential for entry by efficient entrants when the avoidable cost standard does not guarantee the recovery of the fixed costs of entry. Similarly, pricing at the avoidable cost level could even mean that competitors who provide a competitive constraint could be excluded. This is especially so if there are common or joint costs between different downstream services. Accordingly, the use of fully allocated costs as a proxy for average total cost has also been put forward as an alternative cost measure or the allocation of common costs to the LRIC calculation.”⁴⁸

133 Therefore, ComReg is of the preliminary view that to apply an AAC cost rule in an ex-ante context could lead to sub-optimal entry/expansion conditions with little entry/expansion occurring. This would be to the detriment of competition and, in turn, consumers.

134 Therefore, given ComReg’s statutory objective to promote competition, as well as taking account of the current state of market development of retail fixed narrowband access in Ireland, ComReg is of the preliminary view that the use of an AAC test in this ex-ante context is not appropriate.

135 The European Commission in its ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’⁴⁹ noted that:

“Long-run average incremental cost (LRAIC) is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.”

⁴⁸ At paragraph 60 & 61 of ERG 09(07) ‘Report on the Discussion on the application of margin squeeze tests to bundles’ dated March 2009

⁴⁹ European Commission “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, paragraph 26, footnote 2.

- 136 Therefore, as noted by the European Commission above, ComReg does recognise that LRAIC and ATC are good proxies for each other in the case of single product provision. When applying the MST to individual Bundles and where the promotion of efficient entry is a key ex-ante regulatory objective, ComReg believes regulators may only have a choice between a LRAIC or an ATC approach, where regulators may opt for LRAIC (in countries where competition is more developed) or for ATC (in countries where competition is not mature or effective).
- 137 LRAIC generally provides a higher cost benchmark than AAC but, as inter service common costs are not taken into account, provides a lower cost reference than ATC where multiple services are at issue.
- 138 ComReg considers that the use of ATC is appropriate in the context of a MST in light of ComReg's statutory objectives under Section 12 of the Communications Regulation Act 2002 to promote entry, competition and protect the interests of end-users.
- 139 In the context of an ex-ante regulatory tool to be applied by ComReg, ATC is the appropriate ex-ante cost basis to adopt as it enables a potential entrant to recover all its efficiently incurred costs. ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. For example, an operator will consider the current and future potential competitive environment (including price) when formulating its business plan when deciding to enter or expand in the market. ComReg is of the preliminary view that this is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets.
- 140 Under the present market circumstances in Ireland, ComReg believes that it is legitimate and appropriate for ComReg to use ATC as the base for calculating Eircom's retail costs in an ex-ante context assessment of Bundles that include at the portfolio level. Looked at differently, 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.
- 141 ComReg considers that as long as sunk costs are necessary for entry it would not be appropriate to exclude them when considering the medium to long term evolution of the market.

- 142 Therefore, ComReg is of the preliminary view that ATC is the appropriate measure of cost to be applied and this should be applied to the portfolio of Bundles. However, ComReg is of the preliminary view that a lower cost standard — LRIC — estimated by ComReg in this instance from Eircom's accounts as ATC less common costs and fixed indirect costs — could be used for retail costs associated with retail calls and retail broadband costs when Bundles are assessed on a bundle-by-bundle bases and this is discussed in further detail below.
- 143 In terms of the relative increment to determine which costs are appropriate to consider under the LRIC cost standard the increment is the broadband product included in the retail Bundle offer and not the individual Bundle itself. As noted in the Oxera Report: *“these are costs that can be avoided in the long run if the provision of a given increment (eg, a product) ceases. They include all fixed costs of the increment, and incorporate common costs if these would be avoided in the long run were the increment no longer to be produced”*. For example, the retail broadband costs for an up-to 24 MB Bundle under the LRIC cost standard would include all those retail costs that would be avoidable by Eircom were it not to sell/offer any up-to 24 MB in a Bundle.
- 144 ComReg considers that this approach would be more consistent with that produced in competitive markets — where operators make decisions on single and marginal bundles based on the avoidable costs of that Bundle / product. Since LRIC includes all costs related to the additional output it enables an analysis of incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle. However, on a global level an operator would not be able to use this cost standard to inform its business decision as the incremental revenue attained from such bundles on aggregate basis may not make adequate contribution towards fixed and common costs. Consequently, ComReg is proposing a LRIC standard for the retail costs associated with retail calls and retail broadband costs (which ComReg considers to be ATC less common costs and fixed indirect costs) when assessed on a bundle-by-bundle bases. ComReg believes this is an important allowance as to insist on passing an ATC for all individual Bundles may be too restrictive on retail innovation and the ability to test demand etc.

145 As such, due to the proviso that the portfolio must cover its ATC costs, if an individual Bundle will account for most of the sales within an aggregate of the portfolio of the bundles it must cover its ATC to ensure that the aggregate of the Bundles passes ATC. In other words, if an individual Bundle type is sold to the majority of Eircom customers within the portfolio it must cover all (or most) of its retail costs to ensure that its aggregate portfolio of the Bundles passes ATC. If Eircom does not cover these costs then it is likely to incur losses in the medium to long run which is not desirable for either Eircom or the telecommunications sector where a race to the bottom can lead to damaging consequences with respect to future innovation, investment and overall general competitiveness.

What are common costs?

146 ComReg regards common costs as costs incurred across the whole organisation regardless of product — so that the product does not directly benefit from the cost e.g., redundancy costs, asset impairment costs, general finance function costs, general corporate services costs, CEO salary, regulatory affairs costs, cost of voluntary leaving programmes.

147 Similarly, ComReg considers that there may be additional common costs associated with certain cost categories such as sales and marketing costs which may not be incremental to a specific Eircom Retail Bundle.

What are fixed indirect costs?

148 ComReg regards fixed indirect costs as the indirect costs⁵⁰ that do not change with an increase or decrease in output e.g., depreciation, software licence costs (that do not vary per unit), building costs, pension provisions, exceptional items.

149 Therefore, it is proposed that for the retail cost of calls and the retail cost of broadband that the cost standard for individual Bundles must cover their own LRIC (which is estimated from Eircom's regulatory accounting information — which is extracted from Eircom's audited separated accounts — as ATC less common costs less fixed indirect costs), subject to the overall proviso that the aggregate of bundles in the portfolio it is included in covers its ATC.

Appropriate cost standard for LEA and non-LEA

150 As set out in paragraphs 77-91, Eircom Retail is prospectively facing increased competition in LEA relative to Outside the LEA and that consequently it may be appropriate to allow flexibility in the MST so that Eircom Retail's pricing is not unduly constrained by regulation.

⁵⁰ As the product directly benefits from the total cost, ComReg regards indirect costs as a cost allocated to the particular product. These costs are not specific (direct) to one product but to a set of products e.g., general Marketing & Sales spend.

151 As such, ComReg considers that a lower cost standard may be appropriate to apply on a bundle-by-bundle approach for bundles sold / offered in the LEA. As set out in paragraphs 144-145, ComReg considers that this approach would be more consistent with that produced in competitive markets — as the LRIC cost standard enables incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle.

152 Inside the LEA, OAOs who are as efficient as the incumbent and who offer similar Bundles to the incumbent should be in a position to launch an individual Bundle that does not recover common costs in the LEA. However, for the reasons set out in paragraphs 139-140, ComReg considers that it is appropriate at this time that Eircom's aggregate of Bundles in a portfolio must cover its ATC thereby comfort for OAOs that common costs will on aggregate need to be recovered.

153 ComReg considers that Outside the LEA competitive constraints are not as strong as within the LEA. Consequently, any undue flexibility provided to Eircom Outside the LEA could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run and would not be consistent with ComReg's regulatory objective of promoting competition.

154 Consequently, ComReg considers that for Bundles sold / offered Outside the LEA it is appropriate for each Bundle to pass its own ATC.

155 ComReg considers that the over-riding proviso that the ATC cost standard is implemented at the portfolio level in the LEA and on a bundle-by-bundle basis Outside the LEA, allows the promotion of competition by OAOs as ATC includes the relevant amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand.

ComReg's Preliminary view

156 ComReg is of the preliminary view that the appropriate cost standard is ATC for the MST.

157 ComReg is of the preliminary view that for an individual MST for Bundles sold/offered *inside the LEA* that on an individual bundle-by-bundle basis it is appropriate to allow a cost standard of LRIC for both the retail calls and broadband under the proviso that those bundles (i.e., inside the LEA) would be aggregated together into a portfolio and together must pass the portfolio's ATC.

158 ComReg is of the preliminary view that for bundles sold / offered *Outside the LEA* each bundle must pass its own ATC (see paragraphs 138-141).

5.3.2 Wholesale Input cost

159 The wholesale cost components within the MST are intended to reflect those an OAO would be required to incur to replicate an Eircom Bundle. Therefore, in order for a Bundle not to cause a margin squeeze it must cover the costs faced by an OAO seeking to replicate the Bundle.

160 ComReg considers that there is a blend of wholesale access input costs and prices that OAOs incur in replicating or competing with an Eircom Bundle. However, the blend of wholesale inputs may be very different inside and Outside the LEA. Consequently, ComReg considers that the MST should be flexible to take into account the prospective different competitive conditions inside and Outside the LEA. These are discussed in turn below:

Inside the LEA

161 For Bundles sold within the LEA, to recognise the increased investment of OAOs in LLU and NGA, it is proposed that the MST would be set with reference to the prices of network input cost weighted for the relevant usage of each input by OAOs in the area (i.e., the WNI). ComReg considers that it is appropriate for the weighted average wholesale input formula to be updated — such that it will take account of potential changes in wholesale inputs used by OAOs.

162 Consequently, it is proposed that the MST will be set by reference to the different wholesale Access prices available from Eircom weighted for the relevant usage (or number of customers) of each input that OAOs in the LEA use (i.e., the WNI). Consequently, as infrastructure-based competition increases in the LEA the WNI could decrease for Eircom Retail in the MST — which, depending on the number of customers OAOs have succeeded in winning, will allow Eircom Retail a lower network input and therefore additional margin to use in their retail pricing strategy for bundles. As such, there is a direct link between increased competition and regulatory flexibility within the MST (i.e., as OAOs invest in and migrate their customers to Full LLU, Eircom can lower its own Retail prices due to the lower WNI in the MST).

Current Generation Access

163 For current generation services this is the applicable monthly prices plus all relevant wholesale costs⁵¹ of: Unbundled Local Metallic Path ('**ULMP**'); WLR/Line Share; WLR/Bitstream; and Standalone Broadband ('**SABB**') in effect in the LEA weighted by the use of those wholesale inputs by a hypothetical efficient OAO in the LEA (which will be guided by the actual use of OAOs of those wholesale inputs in the LEA). It is important to note that the relative cost stacks on which the weighting is based would include, as appropriate, a margin for VOIP. However, currently the relative weighting of wholesale inputs used by OAOs in the LEA include Plain Old Telephone Service ('**POTS**') and as such includes the relative wholesale cost of SB-WLR.

164 Similarly, for NGA services where it becomes clear that OAOs will migrate from POTS based NGA services to NGA VOIP services then the appropriate WNI will be based on the wholesale price of NGA bitstream including the appropriate margin for VOIP.

165 The wholesale input for WBA in LEA exchanges will be based on the WBA prices on offer. However, in the case of LLU services; Line Share; and SABB, the WBA prices will be based on the underlying financial floors model for WBA (ComReg D06/12). Similarly, for the appropriate NGA costs stacks for Standalone Virtual Unbundling Access ('**VUA**') and POTS based VUA the wholesale inputs will be based on the underlying floors for WBA. In all cases the underlying traffic speeds will need to be continuously monitored and updated as appropriate to ensure their reasonableness and that the underlying traffic is reflective of the costs faced by a SEO.

Next Generation Access

166 For NGA services this is the applicable monthly prices plus all relevant wholesale costs of: POTS based VUA; NGA Bitstream+; Standalone VUA; and Standalone VUA + Voice network input cost in effect in the Larger Exchange Area.

167 In order to ensure that a Margin Squeeze is not created between Eircom Bundles which include current generation broadband and next generation broadband, ComReg considers that two WNIs will be needed for the MST for the purposes of LEA Bundles which contain WBA.

⁵¹ In this context "all relevant wholesale costs" means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life (e.g., connection fees or co-location charges) plus b) other unavoidable non-retail costs which are necessary to provide a retail service (e.g., the cost of a line card, amortised over the relevant customer life). All costs are converted to a monthly average.

- 168 Without a separate NGA WNI, by virtue of the flexibility within the MST (in the LEA only), Eircom could potentially price NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. The use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and that the WNIs are reflective of the average wholesale input costs incurred by an “efficient” operator to replicate legacy and NGA bundles in the LEA. The first WNI will be based on legacy wholesale access inputs and that WNI will be used in both the bundle-by-bundle assessment of individual legacy bundles. The second WNI will be computed based on NGA wholesale access inputs and that WNI will be used in the bundle-by-bundle assessment of individual NGA Bundles.
- 169 The appropriate margin squeeze test for standalone VUA is subject to a separate Decision (see ComReg Decision D03/13). ComReg is cognisant that the SB-WLR-VUA cost stack 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.).
- 170 For the avoidance of doubt, the respective WNIs for bundles sold / offered within the LEA is an input to the MST for the LEA only and is not a change to any published price.
- 171 The WNI is intended to reflect the wholesale input cost inputs faced by an OAO in the LEA. ComReg will continue to review the causality of movements within the WNI and from time-to-time may seek input from OAOs regarding their actual wholesale input usage in the LEA and their underlying commercial reasoning for such usage.
- 172 ComReg considers that in a scenario where OAOs acting as resellers lose significant customers in the LEA which may have caused the WNI to significantly decrease it may not be appropriate to allow such an adjustment to the WNI. As a simplified example, say in the LEA the ‘efficient’ hypothetical operator is determined to be based on a 50:50 weighting on SB-WLR & Bitstream Managed Backhaul (**BMB**) (assume a cost stack for illustrative purposes of €20) and Full LLU (assume a cost stack for illustrative purposes of €10). The resulting WNI in this example would be €15 (i.e., $50\% * 20 + 50\% * 10$). Now assume that OAOs acting as resellers lose all their customers in the LEA, this would result in the weighting being skewed totally against Full LLU (i.e., SB-WLR and BMB is no longer purchased as a wholesale input due to market exit). In this scenario, the WNI would decrease to €10 (i.e., 100% Full LLU). As such, ComReg considers that in determining an appropriate WNI that should it indicate that OAOs are being squeezed (for example if their retail market share on Eircom’s platform is declining or has reached an excessively low level) then ComReg will review the appropriateness of the WNI decreasing in such a scenario.

173 With respect to how the applicable weighted average of all the wholesale inputs to determine the WNI will be calculated, ComReg considers that it is important for this information to be timely. Therefore, for ComReg to await the publication of the quarterly reports would result in a significant time lag for prices to be introduced to the market which reflect OAOs actual usage. Similarly, ComReg considers that this could be an issue for known migrations in the forthcoming period, which if not appropriately taken into account would result in the WNI (and resulting prices) lagging behind actual OAOs usage in a particular month.

174 The WNI for both Current Generation Access and Next Generation Access will be calculated with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be guided by the actual usage of the various wholesale inputs used by OAOs in the LEA. For the avoidance of doubt, ComReg is not defining explicitly what the migration path of an '*efficient hypothetical*' operator would be by introducing a glide path. Rather the test reflects the actual use of wholesale inputs. As such, ComReg considers that Eircom Wholesale would be ideally positioned to give timely data to ComReg on OAOs' wholesale input usage.

175 With respect to paragraph 174, it is important to note that the manner in which the WNI is calculated for Next Generation Access is slightly different to that set-out in ComReg Decision D04/13. The WNI in the NRT for Next Generation Access was originally set using assumed "*certain weightings across the NGA wholesale inputs to determine a WNI for NGA bundles for the NRT until such time as there is sufficient take-up of NGA or once the migration patterns of OAOs using NGA wholesale inputs becomes more apparent — at which time ComReg considers that it would be appropriate for the NGA WNI to be calculated with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be guided by the actual usage of the various NGA wholesale inputs used by OAOs in the LEA*".⁵² As the migration patterns have become more evident on Next Generation Access (although still relatively nascent), ComReg considers as set out in paragraph 174 that the WNI for Next Generation Access will be set with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be guided by the actual usage of the various wholesale inputs used by OAOs in the LEA.

⁵² ComReg Decision D04/13, paragraph 3.15.

176 Furthermore, in exceptional cases ComReg may take into account known future bulk migrations for the forthcoming period where Eircom Wholesale can demonstrate to ComReg's satisfaction that those migrations will occur in the forthcoming period — the actual usage of the various wholesale inputs can reflect these changes. This situation is only likely to arise where there is a significant migration from Line Share to Full Unbundling or to NGA services and where those migrations can take place seamlessly for the OAO concerned. ComReg may bilaterally discuss certain migrations with OAOs to determine their reasonableness and ensure the timing of any orders is correct. Other one-off migrations or business as usual migrations will be taken into account immediately after the quarter in which they occurred and where Eircom Wholesale confirms that the successful migrations actually occurred. In addition, ComReg will continue to monitor actual migrations and in circumstances where future bulk migrations persistently do not actually occur as envisaged, ComReg will review the appropriateness of allowing known future bulk migrations to be permitted in the WNI calculation.

177 It will be essential that any detailed information available to Eircom Wholesale with regard to the number of OAO customers on the various platforms is not made available to Eircom Retail prior to such information being available to the market generally — which is normally via the ComReg quarterly report. However, the outcome of this quarterly update for the OAO connections/migration and cessation information from Eircom Wholesale to ComReg may give rise to a change to the WNI and Eircom Retail will therefore be notified only in respect of the WNI monetary value (and not the underlying information) for the purposes of complying with the MST.

178 ComReg does not believe it is appropriate or necessary to publish the WNI monetary value as this could encourage price following and reduce the dynamism of the market.

Outside the LEA

179 ComReg considers that Outside the LEA competitive intensity is less strong and there is very limited competing infrastructure compared to inside the LEA.⁵³ Consequently, any excessive flexibility provided to Eircom Outside the LEA could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run and would not be consistent with ComReg's regulatory objective of promoting competition.

180 As such, ComReg considers that the flexibility provided by the two-part test for bundles sold / offered by Eircom in the LEA is not appropriate.

⁵³ See ComReg 12/63 and ComReg D04/13.

181 Consequently, ComReg considers that for areas Outside the LEA the SB-WLR and WBA (Bitstream) wholesale access input cost be used in the MST (i.e., the WNI is not available as the wholesale access input cost component in the MST). OAOs Outside the LEA are currently relying on wholesale inputs (SB-WLR and bitstream) to a notable extent, and their business models are based on the prevailing wholesale prices. As noted in paragraph 99, the cost components within the MST are intended to reflect those an OAO would be required to incur to replicate an Eircom Bundle. Consequently, ComReg considers that it is appropriate that the flexibility provided by the WNI is not applied in the bundle-by-bundle assessment Outside the LEA.

182 ComReg is of the preliminary view that Outside of the LEA, the MST is based on the wholesale prices faced by an OAO to replicate the SMP's bundle — and is based in the assumption that all OAOs use WLR and WBA exclusively.

5.3.3 Other Wholesale costs

183 In relation to other wholesale costs, such as interconnection costs, mobile termination rates ('MTRs'), out-payment costs (e.g., international out-payments) etc., ComReg is of the preliminary view that the MST reflects all applicable wholesale input costs that are applicable in the Eircom retail bundle.

184 The wholesale costs are based on Eircom's historic retail costs to derive an ATC cost and adjusted (where appropriate) to reflect known future changes in those costs where these can be adequately verified (e.g., reduction in MTRs etc.).

185 ComReg considers it appropriate to allow known future changes to be used in the MST. ComReg considers that absent such an approach could result in an artificially higher cost stack than an SEO would incur in replicating the Eircom Bundle. ComReg believes that this is an equitable approach and ensures that end-users immediately benefit from known future reductions to input costs. This would require retrospective monitoring to ensure that the cost reductions did, in fact, occur.

186 ComReg has recently received data from interested parties following a Call for Input on Current and future projections on throughput (ComReg 14/18)⁵⁴. ComReg recognises that backhaul/throughput charges are an important element in assessing whether an Eircom retail Bundle is profitably replicable. This is discussed in further detail below:

⁵⁴ <http://www.comreg.ie/fileupload/publications/ComReg1418.pdf>

Backhaul costs

187 In respect of the wholesale input for WBA, in particular the underlying usage charge in the bundle-by-bundle assessment both inside and Outside the LEA, ComReg understands that Eircom is unable to measure or apportion with a reasonable degree of comfort the wholesale bandwidth at peak hour for different individual retail bundles.

188 As such, the usage charge is only quantifiable on an aggregate / portfolio basis. While this is not ideal, similar to OAOs with an efficient profile mix of broadband peak hour usage the overall profitability of bundles is typically determined in aggregate. ComReg will continue to keep the appropriateness of this current measure under review. In particular, given the potential draw-backs of this approach on a bundle-by-bundle assessment basis, as a sense check, Eircom should apply the aggregate usage charge to individual bundles — while the margin (as a result of this calculation) on an individual bundle basis if negative will not cause a bundle to fail the MST, it may indicate to ComReg which bundles may require further analysis on an ongoing basis.

189 For the purposes of any decision (post this consultation, if appropriate), ComReg notes that while the assumptions used by Eircom pre-launch may indicate that a Bundle is compliant with its obligation not to cause a margin squeeze, it is not necessarily the case that it will remain compliant in the future, with the MST — in particular given that the actual outturn of a specific Bundle can ultimately be different from that initially envisaged (including relevant throughput assumptions), such that the relevant Bundle may not in fact pass the MST. It would be incumbent on Eircom to ensure that all Bundles remain compliant at all times.

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

190 Following industry responses to the recent Call for Input - ComReg Document No 14/18⁵⁵ (in which ComReg requested interested parties to provide current and future projections on throughput / usage levels) and ComReg's recent Decision D11/14⁵⁶, ComReg has considered a number of wholesale backhaul pricing structures — in particular, how costs change as throughput increases and how fixed and common costs can be recovered over time. In arriving at a final decision (if appropriate) following this consultation, ComReg will consider interested parties' views in light of Eircom's wholesale backhaul pricing structure and how this can be reflected in an appropriate MST.

5.3.4 Unregulated services

191 For the purposes of this Draft Decision Paper an unregulated service is a retail product or service, where the upstream inputs required to replicate such a retail product or service are not regulated at the wholesale level.

192 For unregulated services in a Bundle (irrespective of whether the Bundle is sold / offered within or Outside the LEA), ComReg considers that as these unregulated services represent markets where competition has evolved sufficiently that an approach analogous to competition law is warranted. Consequently, ComReg considers that LRIC is the most appropriate cost standard.

193 LRIC is the change in total costs resulting from the production of an increment in the quantity of output, which can be the whole output of the product in question or just the incremental output associated with the conduct under investigation. LRIC includes all product-specific fixed costs, even if those costs were sunk before the period of exclusionary conduct. Although pricing below LRIC might be due to exclusionary conduct, it might also be economically rational. This is because the firm could still be covering variable costs and sunk fixed costs with a positive cash flow. LRIC serves in most cases as a price floor, above which concerns about exclusionary below-cost pricing are unlikely to materialise.

194 Where the only mobile service offered in a Bundle is voice, the LRIC cost standard is based on the assumption that the increment in the mobile service is voice only, assuming the network was built for voice, i.e., that the mobile bundle includes voice only and no data access. Where additional mobile services are offered within the bundle that includes mobile voice, ComReg will consider the relevant increment of the additional service when applying the LRIC cost standard.

⁵⁵ Call for Input: Current and future projection on throughput; dated 7 March 2014.

⁵⁶ <http://www.comreg.ie/fileupload/publications/ComReg1473R.pdf>

195 However, ComReg considers that, on a case-by-case basis, it could consider the use of AAC for unregulated products and services where it is clear that competition in the market generally would not be harmed and that this measure would not create material distortions to competition through anti-competitive practices stemming from SMP products and services.

196 AAC includes all per-unit costs (variable costs and product-specific fixed costs) that could have been avoided if the firm had not produced a discrete amount of additional output — i.e., the amount avoided by not participating in a specific activity. In the context of predatory pricing, unlike LRIC, AAC omits all fixed costs that were already sunk before the time of infringement. Furthermore, the European Commission's guidance on Article 102 proposes that prices below AAC indicate that the dominant company is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. As such, the AAC establishes the price floor for the provision of a good or service to a "targeted group of customers for a limited period of time".⁵⁷ Consequently, ComReg's Draft Decision is that the use of this cost standard would only occur in exceptional circumstances.

197 For the avoidance of doubt, in all cases, the onus would be on Eircom to ensure that it is compliant with the required cost standard based on information available to it. While ComReg does have a cost model for mobile termination services it does not for other unregulated products and services. However, ComReg would be able to request from Eircom Additional Financial Statements ('AFS') where required to cover unregulated products and services. Where necessary ComReg will use available information to build cost models to ensure the MST remains robust.

198 With respect to the level of aggregation of the MST which includes unregulated service(s) please refer to paragraphs 210-218.

5.4 Bundle-by-Bundle versus Portfolio

199 The MST can be conducted on:

- A single Bundle offered by the SMP operator; and / or
- A number of Bundles as a whole i.e., a portfolio of Bundles.

⁵⁷ Niels G., Jenkins H. Kavanagh J. (2011), 'Economics for competition lawyers', Oxford University Press, pp. 192-193.

200 ComReg considers that there are a number of reasons underpinning the use of a Bundle-by-Bundle test in an ex-ante setting where Eircom has SMP upstream to one or a number of wholesale inputs required to replicate that Bundle at the retail level.

- It may not be realistic to require a new entrant to replicate all, or a large part, of Eircom's retail product mix or, at the extreme, its entire product portfolio.
- Carrying out the margin squeeze analysis at the individual Bundle level provides for a range of competitive outcomes.
- A Bundle-by-Bundle approach may be appropriate when there might be "a new offer giving rise to a margin squeeze, which is currently subsidised by other profitable offers but whose volumes could increase substantially in the future, subsequently leading to an overall negative margin in the future."⁵⁸

201 From an economic perspective, ComReg recognises that there are efficiency gains that could be achieved through a portfolio assessment approach:

- A welfare-maximising pricing structure of a multi-product firm with market power is one where common costs are recovered such that there is an inverse relationship between prices and elasticities of demand. Thus, in a static sense, this would suggest that as long as the overall portfolio passes the MST the aggregate approach would be beneficial for consumer welfare.
- As an entrant gains market shares, its decision-making process entails an assessment of the profitability of its investment over the entire range of products it will offer in the market — which suggests that the aggregate test should be applied.

202 Furthermore, ComReg considers that a review of OAOs' retail bundled offers shows that OAOs do offer broad portfolios of services, rather than focusing on a particular product specification, or indeed a narrow customer segment generally.

203 ComReg considers that a portfolio approach would allow Eircom retail greater pricing flexibility. ComReg considers that the portfolio approach may be reasonable given that Eircom retail is facing prospectively greater competition from other operators in the LEA.

204 However, as noted in paragraph 200, and highlighted in the Oxera Report:

⁵⁸ European Commission (2007), 'Wanadoo España vs. Telefónica', Case COMP/38.784, paragraph 387, p.109.

“...even though the take-up of double-play bundles is decreasing and the take-up of triple-play bundles is increasing, double-play bundles are still the most popular bundles in the Irish market. A move to a one-stage portfolio test (for all double- and triple-play bundles) in the LEAs at the present time is thus likely to allow eircom to use double-play bundles to cross-subsidise triple-play bundles (or vice versa). As a result, other operators who do not offer the same range of service bundles may be disadvantaged and find it difficult to compete in the double- and/or triple-play market”.

205 Consequently, a possible way forward which combines the advantages of both approaches might be to apply a test both at a portfolio level and at an individual Bundle level.

206 ComReg proposes that the MST in the LEA should be based on a two-stage combinatorial test; namely a bundle-by-bundle approach and a portfolio approach. ComReg considers that this two-stage test could allow appropriate flexibility to Eircom retail to make informed business decisions on an individual bundle while ensuring that nationally Eircom does not cause a margin squeeze test. The proposed flexibility of the MST two-stage approach is discussed in paragraphs 150-155.

207 As there are proposed to be two WNIs (see paragraphs 161-178), ComReg considers that it would be appropriate that the portfolio approach also recognise the different wholesale inputs for CGA and NGA Bundles and therefore two portfolios would be required.

208 ComReg will continue to review the competitive dynamics in the LEA, while we believe it is currently not appropriate to assess the MST solely on a portfolio basis there may be merit in moving to such an approach in future.

209 ComReg considers that Outside the LEA the bundle-by-bundle approach should be adopted. ComReg considers that Outside the LEA the prospective competitive conditions are not as evident as those within the LEA. The majority of competitors Outside the LEA rely on Bitstream from Eircom to provide broadband Bundles. As such, the added flexibility (of a portfolio approach) is not appropriate Outside the LEA.

Unregulated products

210 With the addition of unregulated services in a Bundle, ComReg recognises that it may be consumer welfare enhancing if those Bundles, which include an unregulated service, are permitted some form of cross-subsidy between those specific Bundle types. For example, a positive margin on the element of the bundle that is Dual-Play (i.e., which contain the underlying regulated wholesale products/services) may cross subsidise the specific component of the Bundle (i.e. the unregulated products/services), such as IPTV, which is assessed on a standalone basis using a LRIC cost standard (see also paragraphs 191-197)).

211 Under this proposed approach:

- a. the Bundle (excluding any revenues or costs associated with the unregulated service) would be assessed as proposed in paragraph 206 (i.e., a combinatorial test namely on a bundle-by-bundle and portfolio basis) for Bundles sold/offered in the LEA and on a bundle-by-bundle basis for those Bundles sold/offered Outside the LEA (see paragraph 209); and
- b. the unregulated service would then be assessed separately on a LRIC cost basis (see paragraphs 191-197).

In the LEA: where the unregulated service which is to be included in the Bundle is below the LRIC cost standard (as calculated by part b above), the portfolio margin (as calculated by part a above) available for those specific Bundles which include the unregulated service may be used to cross-subsidise that specific unregulated service margin.

Outside the LEA: where the unregulated service which is to be included in the Bundle is below the LRIC cost standard (as calculated by part b above), the individual Bundle margin (as calculated per part a above) available may be used to cross-subsidise that specific unregulated service margin.

212 Therefore, the flexibility provided by this approach is based on the proviso that:

1. on aggregate those Bundles which include the unregulated service(s) is replicable as demonstrated by the MST at all times; and
2. excluding the revenues and costs of the unregulated services that the Bundle is replicable as demonstrated by the bundle-by-bundle test (see paragraphs 206 and 209).

213 Under this proposed approach ComReg considers that while certain OAOs may be excluded from certain narrow Bundle types (which include unregulated services as part of that Bundle) it ensures that overall the Eircom retail offer is not anti-competitive (as the portfolio is replicable in the LEA and that Outside the LEA the bundle-by-bundle is replicable). ComReg considers that as Eircom's position may not be as strong with respect to new services such as mobile voice, television etc., that requiring each Bundle to pass a MST in the LEA may be a form of entry assistance (for OAOs) into an unregulated market which is already competitive.

214 As noted in the Oxera Report⁵⁹: *“Allowing the additional margin (if available) from services based on regulated wholesale inputs (such as voice and broadband) to cross-subsidise unregulated services such as IPTV may enhance consumer welfare by providing a greater variety of bundles and/or lower prices for these bundles. Thus as long as the bundle passes the MST there is no need to force the unregulated service to recover its own LRIC – a position that would provide entry assistance for OAOs to supply bundles including unregulated services. As mentioned earlier, given that OAOs like Sky and Vodafone will be in a stronger market position to supply these unregulated services; such entry assistance is not required”*.

215 In the LEA Eircom would need to monitor the relevant take-up of these types of Bundles to ensure it remains compliant with its obligations at all times. In addition, the portfolio approach in the LEA ensures that OAOs would not be excluded from a large portion of the market for Bundles which include certain unregulated services.

216 For Bundles Outside the LEA, ComReg considers that the prospective competitive conditions are not as evident as those within the LEA. As such, ComReg considers that while cross-subsidisation may be consumer welfare enhancing for those Bundles which include an unregulated service — that it would only be appropriate to allow this on a Bundle-by-Bundle basis. Outside the LEA as Eircom Retail has a large incumbent customer base the portfolio approach may provide undue pricing flexibility due to the relative weighting of legacy Bundles types. ComReg considers that any undue pricing flexibility Outside the LEA could force OAOs onto a loss making trajectory to the long-term detriment of consumers.

217 For the avoidance of doubt, any positive margin from the LRIC of unregulated services may not cross-subsidise any margin assessment (which excludes the revenues and costs associated with the unregulated service) of the Dual-Play assessment (see paragraphs 156-158).

⁵⁹ ComReg document 14/90a.

218 For illustrative purposes a schematic is provided for a number of examples below:

Figure 10: Illustrative example of NGA Triple-Play Bundle in LEA including unregulated product / service

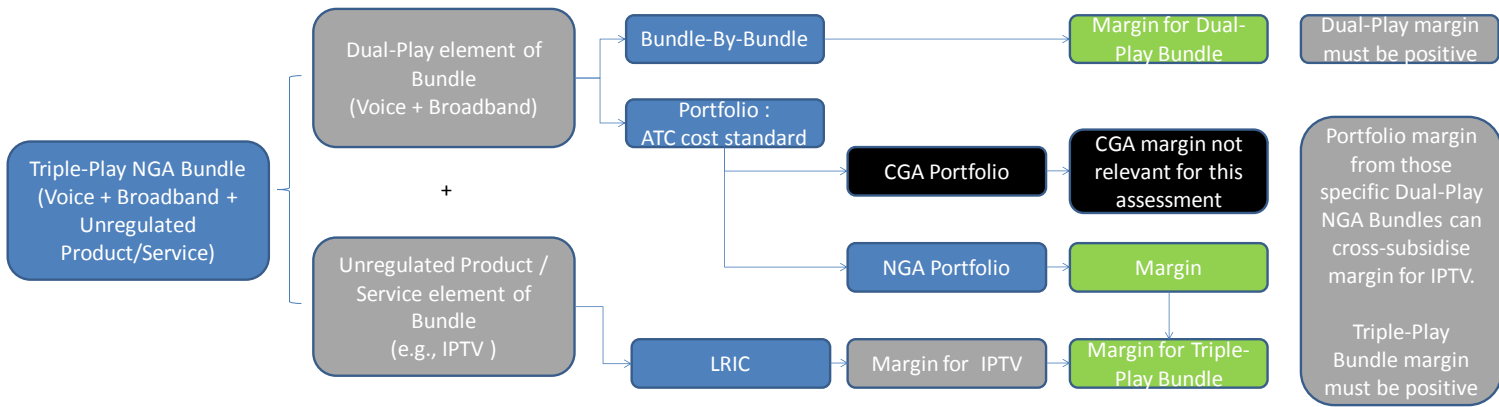


Figure 11: Illustrative example of CGA Triple-Play Bundle in LEA including unregulated product / service

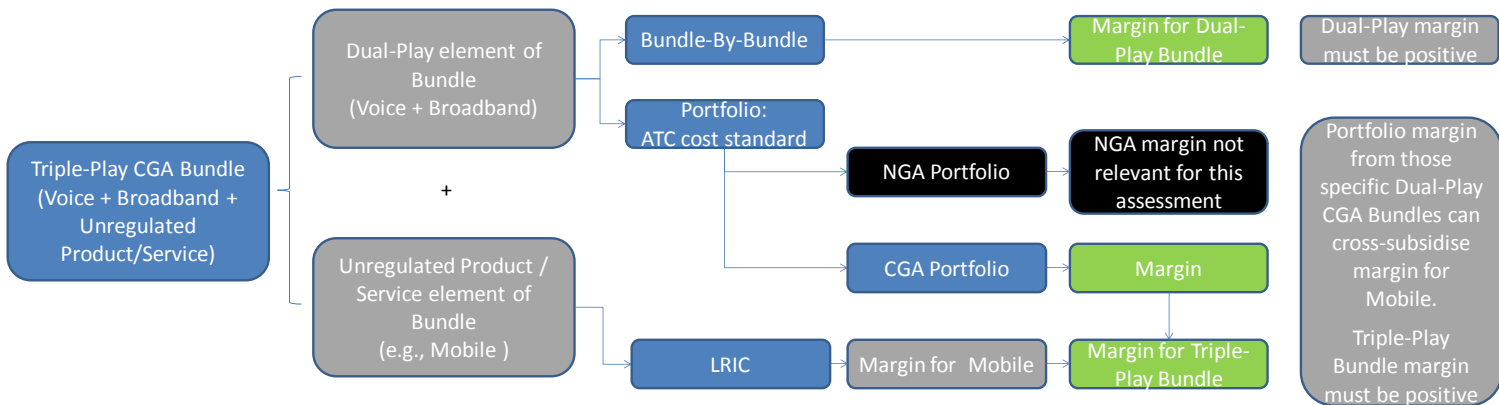
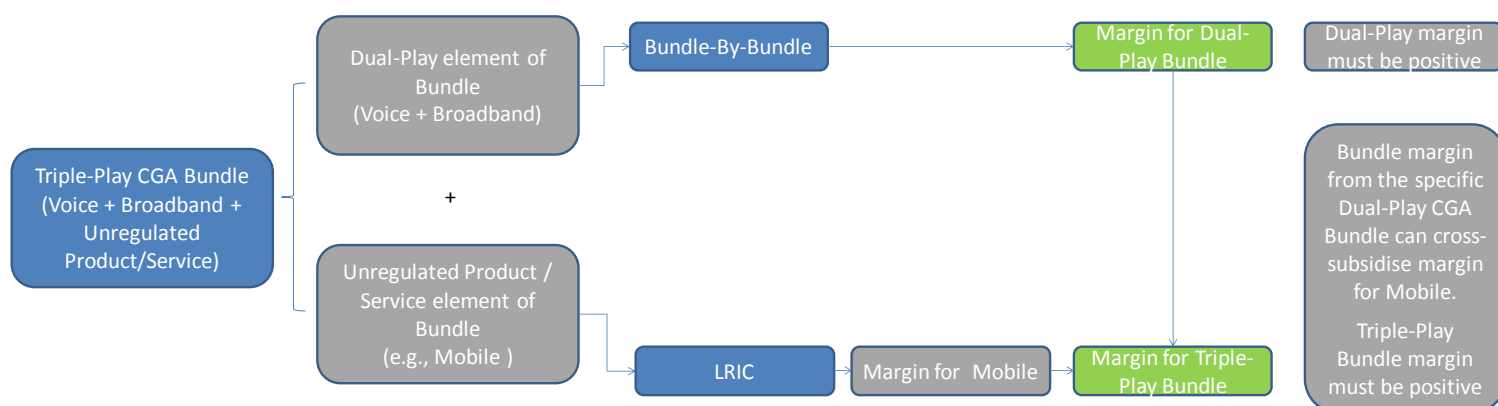


Figure 12: Illustrative example of CGA Triple-Play Bundle Outside the LEA including unregulated product / service



5.5 ComReg Preliminary View

219 For bundles sold / offered within the Larger Exchange Area, in order to pass the Margin Squeeze Test:

1. as regards every Portfolio, the Total Monthly LEA Portfolio Revenue (Reference R5) shall be equal to or exceed the Total Monthly LEA Portfolio Cost (Reference C10);
2. as regards each individual Bundle, the Total Monthly LEA Bundle Revenue (Reference R4) shall be equal to or exceed the Total Monthly Adjusted LEA Bundle Cost (Reference C9);
3. when a given Bundle includes unregulated retail services, compliance with the Margin Squeeze Test (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled “Unregulated Retail Services Assessment”.

Note: The component references R4, R5, C9 and C10 including their computation is detailed in Table 1 below.

220 For bundles sold / offered outside of the Larger Exchange Area, in order to pass the Margin Squeeze Test:

1. as regards each individual Bundle, the Total Monthly non-LEA Bundle Revenue (Reference R(iv)) shall be equal to or exceed the Total Monthly non-LEA Bundle Cost (C(vi));

2. when a given Bundle includes unregulated retail services, compliance with the Margin Squeeze Test (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled “Unregulated Retail Services Assessment”.

Note: The component references R(iv), C(vi), including their computation is detailed in Table 2 below.

Table 1: Bundles sold / offered within the LEA

REF	ITEM (all ex VAT)	Description
	Revenue:	
R1	Monthly Bundle Price	This is the headline monthly price of a bundle.
R2	Monthly Out of Bundle Calls Revenue	<p>This is a weighted average of the total calls revenue earned on average outside the bundle per month based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment).</p> <p>This is calculated for each component call that is charged separately outside the bundle by: (i) taking the total number of calls for that component that are outside by bundle allowance and multiplying that by the call set up fee; and (ii) taking the total minutes for that component that are outside bundle allowance and multiplying that by the retail price per minute. This total revenue for the component outside bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component used outside of bundle allowance.</p>
R3	Monthly Out of Bundle Other Revenue	This is the average of any other monthly out of bundle revenue.

R4	Total Monthly LEA Bundle Revenue	This is the sum of the Monthly Bundle Price (R1) plus Monthly Out of Bundle Calls Revenue (R2) plus Monthly Out of Bundle Other Revenue (R3).
R5	Total Monthly LEA Portfolio Revenue	This is a weighted average of Total Monthly LEA Bundle Revenue (R4) based on the actual volumes of each Bundle sold / offered in the Larger Exchange Area (in the case of post-launch assessment) or the forecast volumes for each Bundle sold / offered in the Larger Exchange Area (in the case of pre-launch assessment)

Costs:		
C1	Total Wholesale Access Input Cost	<p>For legacy services this is the applicable monthly prices plus all relevant wholesale costs of: ULMP; WLR/LS; WLR/Bitstream; and SABB in effect in the Larger Exchange Area weighted by the use of those wholesale inputs by a hypothetical efficient OAO in the Larger Exchange Area (which will be guided by the actual use of OAOs of those wholesale inputs in the LEA).</p> <p>For NGA services this is the applicable monthly prices plus all relevant wholesale costs of: POTS based VUA; NGA Bitstream+; Standalone VUA; and Standalone VUA + Voice network input cost in effect in the Larger Exchange Area weighted by the use of those wholesale inputs by a hypothetical efficient OAO in the Larger Exchange Area (which will be guided by the actual use of OAOs of those wholesale inputs in the LEA).</p> <p>In respect of the wholesale input for the WBA underlying usage charge this will be based on the relevant weighting of bitstream managed backhaul prices as published by Eircom and backhaul transmission costs as determined by ComReg D06/12 (or as updated).</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life⁶⁰ plus b) other</p>

⁶⁰ For example, connection fees or co-location charges.

		unavoidable non-retail costs which are necessary to provide a retail service ⁶¹ . All costs are converted to a monthly average.
C2	Retail Costs Associated with Retail Line Rental	These are the monthly operating costs as derived from the SB-WLR regulated retail minus price control.
C3	Mailbox cost	<p>Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as per the regulated retail minus price control as published in Eircom's Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer.</p> <p>However, consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here.</p>
C4	Total Cost of Calls	<p>These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common cost.</p> <p>Costs are based on wholesale prices and Eircom's retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.</p>
C5	Total Adjusted Cost of Calls	This is estimated from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs (i.e., the LRIC of retail calls).
C6	Retail Costs Associated with Retail Broadband	These are the monthly operating costs as derived from the WBA regulated margin squeeze price control (ComReg D11/14), or ComReg D03/13 as appropriate.
C7	Total Adjusted Retail Costs Associated	These are the retail costs associated with retail broadband (C6) less common costs less fixed indirect costs associated the broadband product included in the

⁶¹ For example, the cost of a line card, amortised over the relevant customer life.

	with Retail Broadband	retail Bundle offer and not the individual Bundle itself (i.e., the LRIC of retail costs of a broadband product).
C8	Total Monthly LEA Bundle Cost	This is the Total Wholesale Access Input Cost (C1) plus Retail Costs Associated with Retail Line Rental (C2) plus Retail Costs Associated with Retail Broadband (C6) plus Total Cost of Calls (C4) plus Mailbox Cost (C3) where applicable.
C9	Total Monthly LEA Adjusted Bundle Cost	This is the Total Wholesale Access Input Cost (C1) plus Retail Costs Associated with Retail Line Rental (C2) plus Total Adjusted Cost of Calls (C5) plus Total Adjusted Retail Costs Associated with Retail Broadband (C7) plus Mailbox Cost (C3) where applicable.
C10	Total Monthly LEA Portfolio Cost	This is the weighted average by volume of Total LEA Bundle Cost (C8) based on actual monthly volume for each Bundle in the Larger Exchange Area (in the case of post-launch assessment) or the forecast monthly volume for each Bundle in the Larger Exchange Area (in the case of pre-launch assessment).

Unregulated Retail Services Assessment

This applies to those retail services that are unregulated.⁶²

The incremental revenues over the average customer lifetime (which can be different for different unregulated products) of any unregulated product in a Bundle must cover its long-run incremental costs ('LRIC') including applicable avoidable retail costs.

However, there may be cross-subsidisation between the regulated services and unregulated services within the Bundle portfolio (where the portfolio is defined as those specific Bundles which include the unregulated service), subject to the proviso that the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the Bundle is profitably replicable (i.e., that the Total Monthly LEA Bundle Revenue (Reference R4) shall be equal to or exceed the Total Monthly Adjusted LEA Bundle Cost (Reference C9) excluding any revenues or costs associated with the unregulated service).

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

⁶² See paragraphs 191-198.

Unreasonable Bundle Assessment/Complementary Competitive Assessment

If a Bundle does not pass the Margin Squeeze Test, as outlined in Section [...] of the Direction, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Margin Squeeze Test, the offer for sale by Eircom of that Bundle does not constitute a breach of the obligation under [...].

For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition, including by reference to the promotion of sustainable competition in the medium to long term and the likelihood of any potential foreclosure and associated consumer harm.

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

221 A high-level graphic overview of the components of the proposed MST in the LEA and comparison with the existing NRT is presented below. The differences are highlighted in the green text boxes.

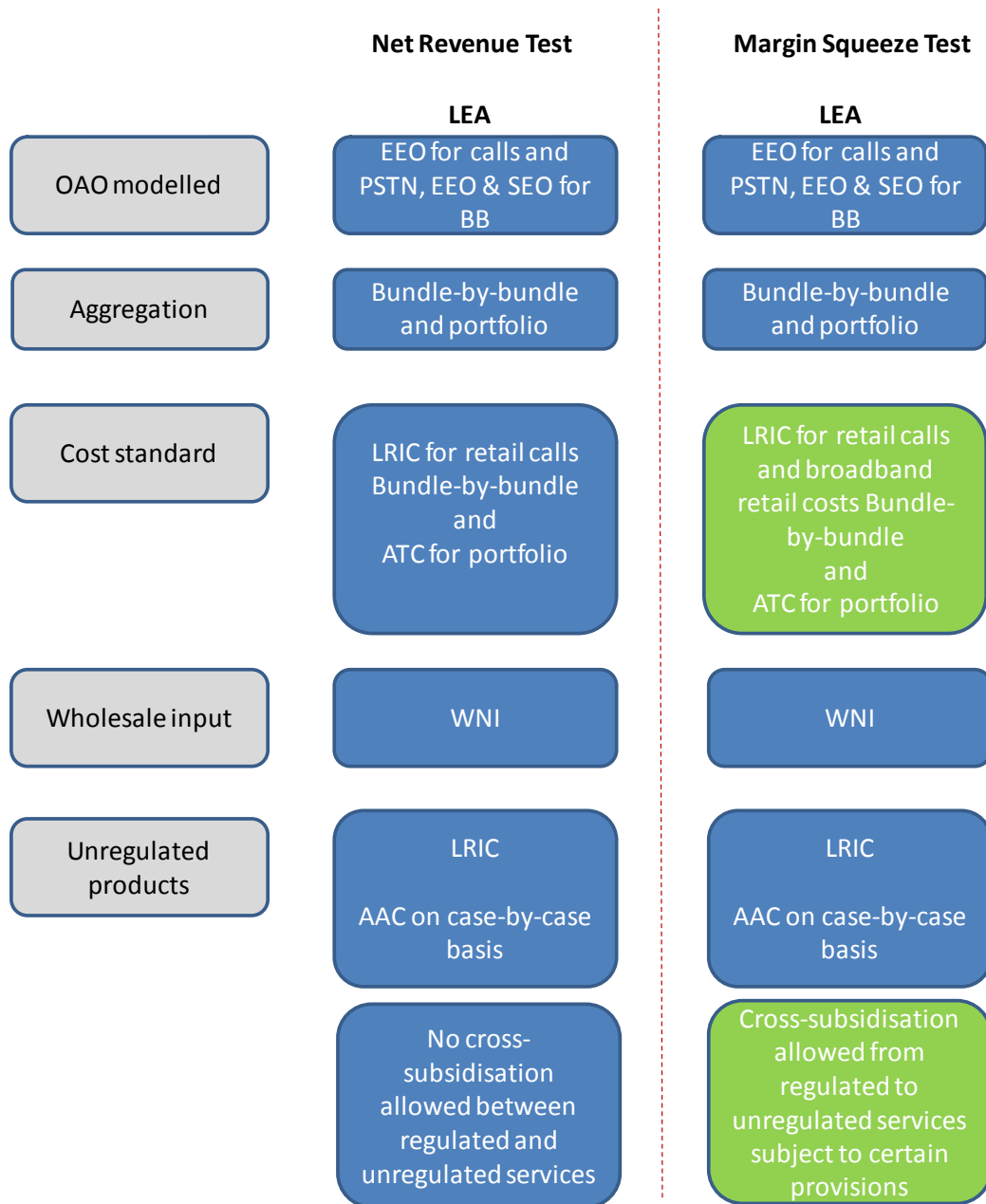


Table 2: Bundles sold / offered Outside the LEA

REF	ITEM (all ex VAT)	Description
	Revenue:	
R(i)	Monthly Bundle Price	This is the headline monthly price of a bundle.
R(ii)	Monthly Out of Bundle Calls Revenue	<p>This is a weighted average of the total calls revenue earned on average outside the bundle per month based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment).</p> <p>This is calculated for each component call that is charged separately outside the bundle by: (i) taking the total number of calls for that component that are outside by bundle allowance and multiplying that by the call set up fee; and (ii) taking the total minutes for that component that are outside bundle allowance and multiplying that by the retail price per minute. This total revenue for the component outside bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component used outside of bundle allowance.</p>
R(iii)	Monthly Out of Bundle Other Revenue	This is the average of any other monthly out of bundle revenue.
R(iv)	Total Monthly non-LEA Bundle Revenue	This is the sum of the Monthly Bundle Price (R(i)) plus Monthly Out of Bundle Calls Revenue (R(ii)) plus Monthly Out of Bundle Other Revenue (R(iii)).

	Costs:	
C(i)	Total Wholesale Access Input Cost	<p>This is the sum of the monthly prices of SB-WLR and WBA plus the monthly average of all relevant wholesale costs levied by Eircom.</p> <p>In respect of the wholesale input for the WBA underlying usage charge this will be based on the bitstream managed backhaul prices as published Eircom.</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life⁶³ plus b) other unavoidable non-retail costs which are necessary to provide a retail service⁶⁴. All costs are converted to a monthly average.</p>
C(ii)	Retail Costs Associated with Retail Line Rental	These are the monthly operating costs as derived from the SB-WLR regulated retail minus price control.
C(iii)	Mailbox cost	Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as per the regulated retail minus price control as published in Eircom’s Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer. However, consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here.
C(iv)	Total Cost of Calls	<p>These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common cost.</p> <p>Costs are based on wholesale prices and Eircom’s retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.</p>

⁶³ For example, connection fees or co-location charges.

⁶⁴ For example, the cost of a line card amortised over the relevant customer life.

C(v)	Retail Costs Associated with Retail Broadband	These are the monthly operating costs as derived from the WBA regulated margin squeeze price control (ComReg D11/14).
C(vi)	Total Monthly non-LEA Bundle Cost	This is the Total Wholesale Access Input Cost (C(i)) plus Retail Costs Associated with Retail Line Rental (C(ii)) plus Retail Costs Associated with Retail Broadband (C(v)) plus Total Cost of Calls (C(iv)) plus Mailbox Cost (C(iii)) where applicable.

Unregulated Retail Services Assessment

This applies to those retail services that are unregulated.⁶⁵

The incremental revenues over the average customer lifetime (which can be different for different unregulated products) of any unregulated product in a Bundle must cover its long-run incremental costs ('LRIC') including applicable avoidable retail costs.

However, there may be cross-subsidisation between the regulated services and unregulated services included as part of the Bundle, subject to the proviso that the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the Bundle is profitably replicable (i.e., that the Total Monthly LEA Bundle Revenue (Reference R (iv)) shall be equal to or exceed the Total non-LEA Bundle Cost (Reference C (vi) excluding any revenues or costs associated with the unregulated service);.

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

⁶⁵ See paragraphs 191-198.

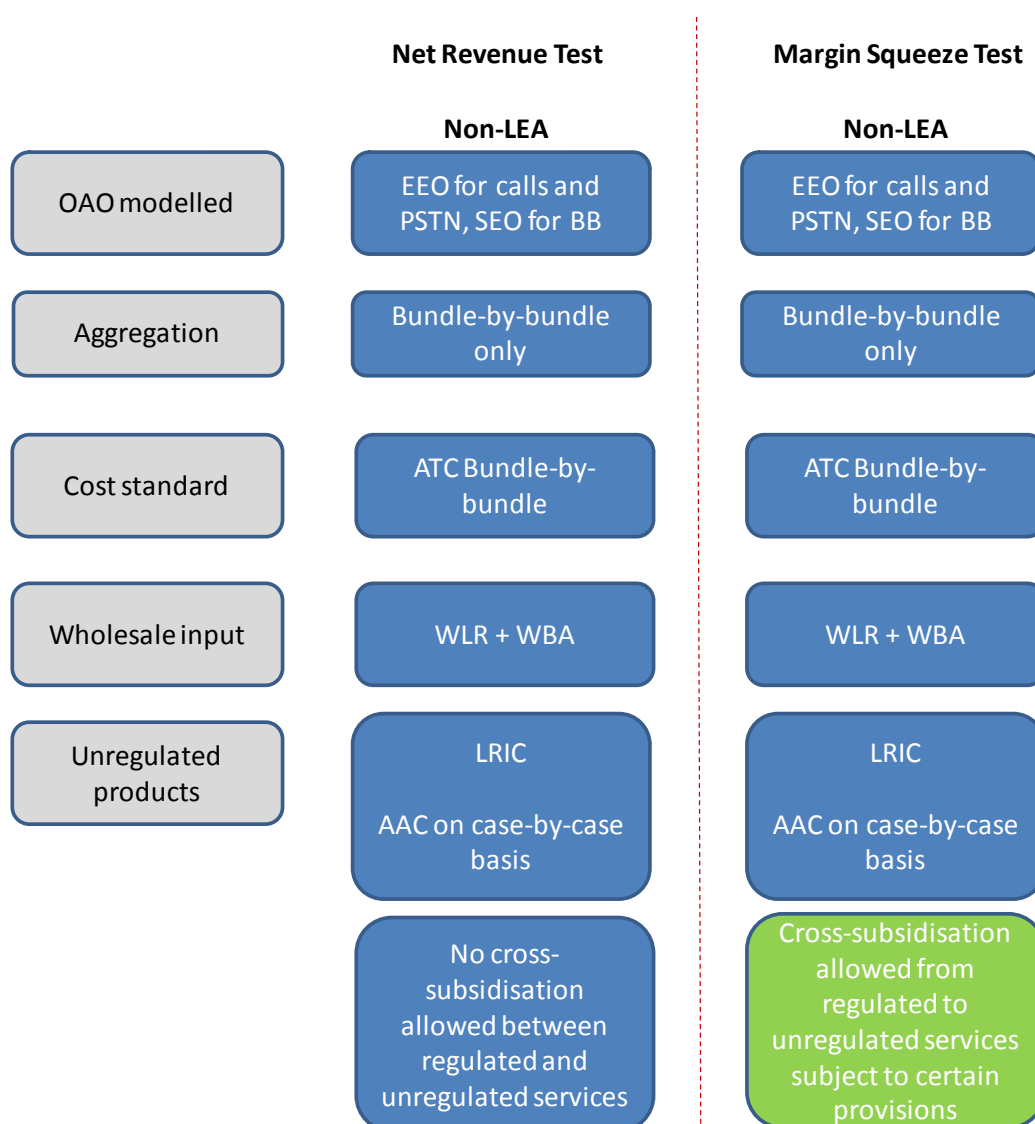
Unreasonable Bundle Assessment/Complementary Competitive Assessment

If a Bundle does not pass the Margin Squeeze Test, as outlined in Section [...] of the Direction, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Margin Squeeze Test, the offer for sale by Eircom of that Bundle does not constitute a breach of the obligation under [...].

For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition, including by reference to the promotion of sustainable competition in the medium to long term and the likelihood of any potential foreclosure and associated consumer harm.

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

222A high-level graphic overview of the components of the proposed Margin Squeeze Test in the Non-LEA and comparison with the existing NRT is presented below. The differences are highlighted in the green text boxes.



5.6 Case-by-case assessment of a Bundles reasonableness

223 Where a Bundle does not pass the relevant test, ComReg considers it proportionate to undertake a case-by-case assessment of the Bundle to determine the cause of the Bundle failing the MST. While failing the MST provides a useful measure to highlight which Bundles require further investigation, ComReg considers that it is more proportionate to consider the causality of that Bundle failing the MST and whether there are additional considerations which need to be taken into account.

224 In undertaking this assessment, ComReg considers that it is appropriate to consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of Bundling in order to determine whether the bundle complies with the obligation not to cause a margin squeeze.

225 For the avoidance of doubt, ComReg has the power to intervene in all cases, but might not if the impact is immaterial. ComReg believes that it might be excessive to prohibit all offers in all circumstances and that some flexibility is needed — and it is in this context the case-by-case assessment is carried out.

226 Therefore, ComReg considers that just because a Bundle fails the MST, it does not automatically lead to that Bundle being considered as causing a margin squeeze, ComReg will assess other factors and those factors include:

- Retail efficiencies
- Increase customer lifetimes
- Competitive assessment

Each of these is discussed in turn below:

5.6.1 Retail efficiencies

227 For the purposes of applying the MST, ComReg accepts that, in principle, it is appropriate to have regard to retail efficiencies and related savings, subject to the existence and/or quantum of such being demonstrated to ComReg's satisfaction, with robust supporting evidence, by Eircom. For example, such retail efficiencies could relate to cost savings derived from reduced billing and customer service costs to the extent that such savings could also be replicated by equally efficient entrants.

ComReg's Preliminary View

228 ComReg is of the preliminary view that it is appropriate that retail efficiencies be considered in determining whether a Bundle, which fails the MST, once supported by robust evidence, to determine if it is nonetheless compliant with Eircom's obligation not to cause a margin squeeze. ComReg considers that it would not be appropriate simply to rely on a view that certain costs have decreased due to efficiencies without adequate reasoning (and supporting evidence) provided to ComReg to justify that certain efficiencies have been achieved.

5.6.2 Increase customer lifetimes

229 In circumstances where a Bundle fails the MST ComReg will consider, amongst others, once supported by robust evidence, whether as a result of increased customer lifetimes such a Bundle is nonetheless compliant with Eircom's obligation not to cause a margin squeeze test.

230 While the criteria for exchange areas to be assessed by ComReg to form part of the LEA are well established the boundaries of the exchange areas in the LEA continue to evolve. Consequently, ComReg will continue to monitor the average customer lifetime — in particular, whether a different average customer lifetime is appropriate in the LEA. As appropriate, ComReg may seek information from OAOs and Eircom from time-to-time to determine whether the average customer lifetime used in the MST remains reasonable. At this time, ComReg considers that the average customer lifetime of 42 months in the MST is appropriate.

231 ComReg is interested in views from interested parties regarding whether they consider the 42 months to be appropriate. If alternative customer lifetimes are proposed by interested parties these views must be supported by cogent reasoning and supporting information where available.

ComReg's Preliminary View

232 ComReg is of the preliminary view that it is appropriate that customer lifetimes be considered in determining whether a Bundle, which fails the MST, once supported by robust evidence, to determine if it is nonetheless compliant with Eircom's obligation not to cause a margin squeeze.

5.6.3 Competitive assessment

233 Relevant considerations which ComReg considers to be appropriate in taking into account when assessing each Bundle in its relevant competitive context will include relevant commercial or strategic reasons for the bundled offer; the duration and scope of the Bundled offer; whether the pricing of the Bundle in question is likely to have an appreciable effect on existing competitors or new or potential entrants to the market; and medium-to-longer term implications for retail pricing and consumers, etc.

234 As part of that competitive assessment, ComReg will consider the number of customers on the Bundle and the importance of that Bundle to the market. In addition, ComReg will consider all available information to hand in order to assess the impact of the below cost selling a Bundle on competing operators and the ability of entrants to enter / remain in the market(s) and promote sustainable competition in the medium to long term.

ComReg's Preliminary View

235 ComReg considers that it is proportionate to undertake a competitive assessment before a Bundle is found to be in breach of the obligation not to cause a margin squeeze.

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

5.7 Other possible options for revisions to the MST

236 ComReg has considered a number of potential scenarios which may impact whether the MST needs to be revised. Each of these scenarios / circumstances is discussed in turn below including ComReg's preliminary views on each:

5.7.1 When the bundle is in response to a competitor's bundle

237 ComReg believes that if entrants knew that Eircom could respond to entry by dropping prices below efficient cost, this would increase the risk that the entrant would not be able to recover its fixed costs, and might therefore preclude or deter efficient entry. Furthermore, as noted in paragraph 141, ComReg does not consider it appropriate to exclude sunk costs from the MST.

238 The MST has a clear underlying logic: if Eircom's pricing does not cover its ATC (at the portfolio level in the LEA and at the bundle-by-bundle level Outside the LEA) it is reasonable to assume, subject to the outcome of the complementary competitive assessment, that an efficient rival would also not be covering its full costs — since Eircom has economies of scale and scope within the fixed sector that others are unlikely to be able to match. 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.

ComReg's Preliminary View

239 ComReg considers that the MST should not change when a Bundle is claimed to be a response to a competitor's bundle. However, the complementary competitive assessment would investigate the competitive context of the Bundle.

5.7.2 A different test for when a bundle is found unreasonable post launch

240 ComReg considers that a different test should not apply post-launch if a Bundle is found to be unreasonable. ComReg considers it more proportionate to undertake a case-by-case assessment of the bundle to determine the cause of the bundle failing the MST (see paragraphs 223-235). As such, ComReg considers that a competitive assessment is more reasonable than a revised MST. If it is believed following this competitive assessment that no competitive harm will come from allowing Eircom to continue to offer the bundle, e.g., if consumer demand for the Bundled offer is particularly weak relative to the standalone components, ComReg would likely not find the Bundle to be unreasonable even though it is below cost.

ComReg's Preliminary View

241 ComReg is of the preliminary view that a different test should not apply post-launch if a Bundle is found to be unreasonable.

5.7.3 The ability to 'bank' / carry forward past margins to use as future discounts

242 ComReg does not consider it appropriate that Eircom be allowed to carry forward past margins on Bundles, such that future bundles could avail of a discount using those 'banked' margins.

243 ComReg considers that to allow Eircom to do so could distort competition in the market. Eircom could build a defensive bank of available margins for a Bundle which Eircom could then use when a competing operator tried to make a competing offer to that Bundle. ComReg considers that the Bundle should be reasonable at all times.

244 ComReg proposes that the assessment of Bundles should be on a case-by-case basis and consider the likely future impact; consequently, taking into account past performance and profitability may not be a useful indicator of likely anti-competitive effects. ComReg notes that its approach is consistent with ex-post competition law where previously "banked" margins would not be considered as part of an assessment for a given specific financial period.

ComReg's Preliminary View

245 ComReg is of the preliminary view that margins can not be "banked" / carried forward.

5.7.4 Promotions and promotional discounts

246 ComReg believes that a Bundle should be reasonable at all times. ComReg believes that it would not make sense for promotions not to be subject to full regulatory controls. ComReg believes just because a Bundle is offered for a promotional period only does not automatically demonstrate that there is no potential harm to efficient competitors.

247 ComReg considers that the obligation not to cause a margin squeeze and all its facets still apply even if a Bundle is only planned to be offered for a limited promotional period.

248 ComReg considers that a promotional discount could be considered to be reasonable if the cost of the promotional discount is covered over the average customer lifetime, which ComReg estimates to be 42 months. ComReg will continue to monitor the appropriateness of the average customer lifetime used in the MST. However, ComReg exercises caution in the use of average customer lifetimes where it believes the 42 month assumption may not be appropriate for the particular circumstance of the Bundle under review.

ComReg's Preliminary View

249 ComReg is of the preliminary view that a Bundle must be reasonable at all times and a promotional discount is considered reasonable if the cost of the promotional discount is covered over the average customer lifetime.

5.7.5 Discretionary promotions / opt-ins

250 In relation to a Bundle that allows new customers to avail of a discretionary / opt-in offer / discount, ComReg considers that it is proportionate to take into account the expected take-up of such Bundles in the MST.

251 ComReg considers this approach to be reflective of the underlying replicability of the Bundle — where it is anticipated that only a small percentage of new customers would actually avail of the offer — that the MST reflect the proportionate cost of that opt-in promotion. ComReg considers that this approach is consistent with that of a commercial operator, where a cost assessment of discretionary promotions may be offered to end-users which may have various degrees of take-up and therefore may not impact the overall profitability of that type of bundle.

252 However, it should be noted that the onus is on Eircom to ensure that a Bundle remains reasonable at all times and therefore Eircom should be mindful of its requirement not to cause a margin squeeze where the actual opt-in of customers is higher than anticipated (i.e., that the Bundle after the actual cost of promotion is taken into account remains positive).

ComReg's Preliminary View

253 ComReg is of the preliminary view where it is anticipated that only a small percentage of customers would actually avail of the offer that the MST reflect the proportionate cost of that opt-in promotion.

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

6 Notification, pre-clearance, modification / withdrawal of retail bundles

6.1 Overview

254 ComReg considered in ComReg Decision D04/13 that the requirement on Eircom to obtain pre-clearance⁶⁶ from ComReg prior to launching any new or revised bundles containing RFNA was necessary in order to minimise the risk of non-compliant bundles entering the market. Consequently, pursuant to ComReg Decision D04/13:

- Eircom must notify and obtain approval (see also paragraph 3.19 of ComReg Decision D04/13) for all new and revised bundles that include RFNA at least five working days before launch.
- Where a bundle fails the NRT and where ComReg considers that bundle to be non-compliant with the obligation not to unreasonably bundle services (as further specified in the present Decision), Eircom must notify ComReg within ten working days as to whether it proposes to withdraw / modify that bundle. Once it is informed of ComReg's preliminary view that a particular bundle is non-compliant, Eircom must not add any customers to the relevant bundle until further notice by ComReg. 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 for the purposes of enforcing compliance with the obligation not to unreasonably bundle services.

255 An important consideration in applying a MST is whether such pre-notification and withdrawal requirements continue to be required.

⁶⁶ See paragraph 3.19 of ComReg Decision D04/13.

6.2 Notification and pre-clearance considerations

256 Since publication of ComReg D04/13, Eircom has notified ComReg of approximately 69 retail amendments — which considered a range of bundle offers for a number of double-play, triple-play and quadruple-play combinations. Based on the evidence submitted to ComReg to date and continued monitoring of margins of selected bundles post launch, it appears that Eircom is sufficiently aware of their requirements/obligations. While the proposed MST has slightly different nuances to the current NRT, ComReg considers that from a regulatory burden perspective they are both relatively similar in order for Eircom to demonstrate compliance.

257 ComReg notes that respondents were largely in favour of the pre-notification requirement currently set out in ComReg Decision D04/13 for the NRT. ComReg considers that such a pre-notification period may minimise the risk of non-compliant Bundles entering the market.

258 Under this approach prior to making a new or revised Bundle available for offer or sale, Eircom must furnish ComReg with a detailed written submission demonstrating the Bundle's compliance with the obligation not to cause a margin squeeze.

259 Upon receipt of the submission, ComReg will review the submission and within five working days communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised bundle — such prima facie approval will not be unreasonably withheld by ComReg. Eircom will not be permitted to launch any new or revised Bundle without having received such prior prima facie approval from ComReg. For the avoidance of doubt, it should be noted that the making available of a promotion or discount to end-users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall be deemed to constitute the making available of a “revised” Bundle.

260 The granting of approval does not amount to a definitive finding by ComReg that a particular bundle is compliant, or will remain compliant in the future, with the MST — in particular given that the actual outturn of a specific Bundle can ultimately be different from that initially envisaged, such that the relevant bundle may not in fact pass the MST. It should be noted that the granting of approval is strictly without prejudice to ComReg's right to take action (whether pursuant to a final Decision following this consultation and/or pursuant to any of its relevant statutory enforcement powers) in respect of any Bundle that it believes may be non-compliant with Eircom's regulatory or competition law obligations.

261 It is incumbent on Eircom to ensure that all Bundles containing remain compliant with its obligation not to cause a margin squeeze at all times (pursuant to a final decision, if appropriate, following this consultation). It should be noted that by ComReg providing Eircom with prima facie approval it is strictly without prejudice to ComReg's right to take action (whether pursuant to a final decision and/or pursuant to any of its relevant statutory enforcement powers) in respect of any Bundle that it believes may be non-compliant with Eircom's regulatory or competition law obligations.

262 Any submission made to ComReg shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the obligation not to cause a margin squeeze, in particular, with the MST set out in the Decision Instrument (pursuant to a final decision, if appropriate, following this consultation). In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The MST Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a promotion or discount to End-Users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.

263 As regards Bundles that have already been launched and are in the market, it should be noted for the avoidance of doubt that Eircom is under an ongoing obligation to ensure at all times that it meets its regulatory obligation not to cause a margin squeeze. Eircom must notify ComReg immediately, together with supporting evidence, if it believes that an existing Bundle in the market may be causing a margin squeeze. Also, if requested by ComReg at any time, Eircom must provide such data as may be requested by ComReg for the purposes of verifying Eircom's ongoing compliance with the obligation not to cause a margin squeeze. In this submission, Eircom should also provide any other relevant information it believes is required so that ComReg can make an informed decision as to whether the Bundle is compliant with Eircom's regulatory obligations, in particular its obligation not to cause a margin squeeze.

264 ComReg considers that there may be an alternative approach which may merit further consideration. ComReg is interested in receiving views from interested parties regarding an alternative requirement which would merely require Eircom to demonstrate it has undertaken a form of self-compliance — to ensure ahead of launching a new or revise Bundle Eircom meets its obligations not to cause a margin squeeze.

265 ComReg considers that in light of the factors set out in paragraph 256 that it may be sufficient to require Eircom to simply notify ComReg of new or revised Bundles. In other words, Eircom would simply be required to provide the details of the retail amendment (e.g., relevant Bundle name, promotions details etc.) of the new or revised Bundle to ComReg. Such notifications would not require ComReg's pre-clearance for launch. However, notifications would need to include a unique reference such that the Bundle could be monitored ex-post.

266 Under this potential approach, ComReg proposes that Eircom would be required to demonstrate its ongoing compliance in respect of at least one retail amendment (chosen by ComReg) every three months. Where there appears to be issues with such retail amendments, subject to the process outlined in paragraphs 270-272, ComReg may require Eircom to revert to a five-day pre-notification and pre-clearance requirement.

267 For the avoidance of doubt, Eircom would be required to maintain records which demonstrated that a MST was undertaken prior to launch and that based on the reasonable assumptions used that no margin squeeze issues were raised.

268 Under a self-certification approach paragraphs 262-263 would still apply.

6.3 ComReg's Preliminary View

269 ComReg is of the preliminary view that the pre-clearance requirement is appropriate. Eircom must notify ComReg of all new and revised Bundles at least five working days before launch and obtain prima facie approval from ComReg for their launch.

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

6.4 Non-compliance, modification and withdrawal

270 If on the basis of ComReg's review, complemented by an assessment of the competitive context of the Bundle in question, ComReg considers that a Bundle is non-compliant with the obligation not to cause a margin squeeze, ComReg will inform Eircom in writing of such a view. Upon receipt of that view Eircom must immediately refrain from selling or offering the relevant bundle to new retail customers until further notice by ComReg.

271 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 not to cause a margin squeeze. 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.

272 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, or if deemed necessary by ComReg within the ten-day period irrespective of interaction with Eircom, it 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 cause a margin squeeze. 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 19 of the Access Regulations, criminal enforcement under Regulations 13 and/or 19 of the same Regulations, and/or the issuing of urgent directions under Regulation 18 of the Access Regulations (in conjunction with Regulations 12(2) and 13(8) of the Framework Regulations).

6.5 ComReg's Preliminary View

273 ComReg is of the preliminary view that where a Bundle fails the MST and where ComReg considers that Bundle to be non-compliant with the obligation not to cause a margin squeeze (as further specified by a final decision following this consultation, if appropriate), Eircom must notify ComReg within ten working days as to whether it proposes to withdraw / modify that Bundle. Once it is informed of ComReg's preliminary view that a particular Bundle is non-compliant, Eircom must not add any customers to the relevant Bundle until further notice by ComReg.

274 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; or, if deemed necessary by ComReg within the ten-day period irrespective of interaction with Eircom, ComReg may decide to use its existing statutory enforcement powers for the purposes of enforcing compliance with the obligation not to cause a margin squeeze.

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

7 Draft Decision Instrument (Market 2)

275 ComReg would appreciate respondents' views on these draft directions.

⁶⁷Annex A: Decision Instrument in relation to ComReg Decision D[...] “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, Market 2.

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1. This Direction and Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to a further specification of the obligation not to cause a margin squeeze imposed by ComReg on Eircom under Section [...] of the Decision Instrument annexed to ComReg Decision D[...], entitled “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, ComReg Decision D[...], ComReg Document [...].

1.2. This Decision Instrument is made:

- (i) Pursuant to Regulations 8, 13, and 18 of the Access Regulations;
- (ii) Having had regard to sections 10 and 12 of the Communications Regulation Act 2002 and Regulation 16 of the Framework Regulations and Regulation 6 and Regulation 13(2) of the Access Regulations;
- (iii) Having, where appropriate, pursuant to Section 13 of the Communications Regulation Act 2002 complied with policy directions made by the Minister for Communications, Marine and Natural Resources⁶⁸;
- (iv) Pursuant to and having regard to the Significant Market Power (“SMP”) designation imposed on Eircom in the ComReg Decision D[...], and the obligations imposed on Eircom by Section [...] of the Decision Instrument annexed to ComReg Decision D[...], not to cause a margin squeeze;
- (v) Having had regard to the reasoning and analysis set out in ComReg Decision [...] and having taken account of submissions received from interested parties

⁶⁷ This draft Decision Instrument depends on the outcome of any decision(s) reached in respect of ComReg Document “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, dated 4 April 2014, which is the subject of a public consultation process and regarding which no decision(s) have yet been made.

⁶⁸ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

in response to ComReg Document [...] following public consultation pursuant to Regulation 12 of the Framework Regulations;

- (vi) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, the Body of European Regulators for Electronic Communications (BEREC) and national regulatory authorities in other EU Member States pursuant to Regulations 13 and 14 of the Framework Regulations and having taken the utmost account of comments made by those parties; and
 - (vii) Having taken utmost account of the European Commission's recommendation of 11 September 2013 on non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment⁶⁹.
- 1.3. The provisions of ComReg Decision D [...], ComReg Document 14/26, ComReg Document [...], and ComReg Decision D [...], shall, where appropriate, be construed together with this Decision Instrument.

2. DEFINITIONS

2.1. In this Decision Instrument, unless the context otherwise suggests:

“Access Path” means the Physical Transmission Path(s) between the line-card or equivalent in the Exchange or RSU to the NTP or NTU;

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

“Alternative Infrastructure Provider (AIP)” means an Undertaking providing retail broadband services to End-Users at a fixed location by means of alternative infrastructure. For the purposes of this definition, services are deemed to be provided by means of “alternative infrastructure” when the relevant AIP does not rely on any wholesale access inputs from Eircom in respect of the Local Loop (e.g. including Wholesale Line Rental (WLR), Bitstream, VUA or LLU) in order to provide services to End-Users in a particular exchange area;

“Associated Facilities” “shall have the same meaning as under Regulation 2 of the Framework Regulations;

⁶⁹ Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (C(2013) 5671 final).

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

“Authorised Undertaking(s)” shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

“Average Total Cost (ATC)” means a cost standard which reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Bundle” means a package of services, consisting of Retail Line Rental and one or more other retail products or services which is on offer or on sale by Eircom to End Users;

“Communications Regulation Act 2002” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (“Communications Regulation Act 2002 as amended”);

“ComReg” means the Commission for Communications Regulation, established under the Communications Regulation Act 2002;

“ComReg Decision D03/13” means ComReg Document 13/11 ComReg Decision D03/13 entitled “Next Generation Access (‘NGA’): Remedies for Next Generation Access Markets”, dated 31 January 2013;

“ComReg Decision D04/13” means ComReg Document 13/14 ComReg Decision D04/13 entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4”, dated 8 February 2013;

“ComReg Document 14/26” means ComReg Document 14/26 entitled “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, dated 4 April 2014;

“ComReg Decision D[...]” means ComReg Document [] ComReg Decision D[...] entitled “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, dated [];

“ComReg Decision D[...]” means ComReg Document [] ComReg Decision D[...] entitled “Replicability Test: Further Specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5”, dated [];

“Carrier Pre-Selection” or **“CPS”** is defined as an FVCO product, service or facility (whether provided standalone or as part of SB-WLR) that permits an End-User to decide, in advance, to nominate and use an Undertaking of its choice to provide certain voice call services over Eircom’s fixed network, with such voice calls currently described in the “Carrier Pre-Selection All Calls Inclusion and Exclusion List, Version [...]” and as published on Eircom’s wholesale website;

“Effective Date” means the date set out in Section 9.1 of this Decision Instrument;

“Eircom” means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

“End-User(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Authorised Undertaking;

“Exchange” means an Eircom premises or equivalent facility used to house network and associated equipment, and includes a Remote Subscriber Unit (RSU);

“Fixed Voice Call Origination” or **“FVCO”** means a service whereby voice calls originating at a fixed location of an End-User are conveyed and routed through any switching stages (or equivalent, regardless of underlying technology) up to a Point of Handover nominated by an OAO seeking access to this service. The nominated Point of Handover can be the primary, tandem, or double tandem Exchange associated with the Access Path on which the voice call was originated;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“Full Unbundled Access to the Local Loop” shall have the same meaning as in the Schedule to the Access Regulations;

“Larger Exchange Area” means the total geographic area comprising individual exchange areas each of which satisfies at least one of the following criteria:

- (i) Criterion 1: An exchange area in which:

- (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
- (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),

subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (ii) Criterion 2: An exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA) - subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (iii) Criterion 3: An exchange area in which:

- (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
- (b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that exchange area,

subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (iv) Criterion 4: An exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available wholesale website (in accordance with Section 9.13(i) of the Decision Instrument contained in Annex 1 of ComReg Decision D03/13 and/or Section 9.13(i) of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13) regarding the launch of NGA services by Eircom in cabinets in the relevant exchange area, subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that exchange area;

- (v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an exchange area in which the relevant exchange:
- (a) Is surrounded by Qualifying Exchanges; or
 - (b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s); or
 - (c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

For the purposes of this definition of “Larger Exchange Area”, ComReg will construe “reasonable market share and reasonable market coverage” and “reasonable number of lines” in accordance with the relevant factors identified in Annex [...] of ComReg Decision D[...] entitled “LEA”;

“Local Loop” shall have the same meaning as under Regulation 2(2) of the Access Regulations;

“Local Loop Unbundling (LLU)” means local loop unbundling. The local loop is the final section of Eircom’s access network that provides access into premises (whether residential, business or other premises). It runs between the local exchange and the relevant customer premises. LLU occurs where an OAO rents access to the local loop and uses it to supply services to its customers either on a wholesale or retail basis;

“Margin Squeeze Test” means the Margin Squeeze Test set out in Section 4.3 of this Decision Instrument;

“Margin Squeeze Test Model” is the model approved by ComReg and used by Eircom to demonstrate whether a particular Bundle complies with the Margin Squeeze Test;

“the Market” means the Relevant Market(s) defined in section 4 of the Decision Instrument attached to ComReg Decision D [...], and is synonymous with the term FACO (Fixed Access Call Origination);

“Next Generation Access (NGA)” means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access;

“Network Termination Point” or **“Network Termination Unit”** or **“NTP”** **“NTU”** means the physical interface which provides the service demarcation point or point of handover of a wholesale service(s) within the End User’s premises;

“Other Authorised Operators (OAOs)” means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“Physical Transmission Path(s)” means a form of copper, fibre or wireless physical infrastructure (including and any combination of these) or its nearest equivalent which may be used to transmit Electronic Communications Services;

“Point of Handover” means the physical point at which two networks are interconnected to allow traffic between these networks;

“Portfolio” means the aggregation of Bundles on offer or on sale by Eircom to End-Users in the Larger Exchange Area;

“Qualifying Exchange” means an exchange that has been determined by ComReg to satisfy at least one of the criteria contained in the definition of the Larger Exchange Area. ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange for the purposes of this Decision Instrument. The list of exchanges determined by ComReg to constitute Qualifying Exchanges will be made available to interested parties upon request (and may be amended by ComReg from time to time)

“Retail Line Rental”, means an Eircom retail line rental product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated in the Market;

“Remote Subscriber Unit” or **“RSU”** means a subordinate type of Exchange that is attached to an upstream primary Exchange;

“Single Billing - Wholesale Line Rental” or **“SB-WLR”** means a wholesale service comprised of both CPS and WLR;

“Total Monthly LEA Adjusted Bundle Cost shall be construed in accordance with Reference C(9) in Table 1 in Chapter 6 of ComReg Decision D[...];

“Total Monthly Non-LEA Bundle Cost” shall be construed in accordance with Reference C(vi) in Table 2 in Chapter 6 of ComReg Decision D[...];

“Total Monthly Non-LEA Bundle Revenue” shall be construed in accordance with Reference R(iv) in Table 2 in Chapter 6 of ComReg Decision D[...];

“Total Monthly LEA Bundle Revenue” shall be construed in accordance with Reference R4 in Table 1 in Chapter 6 of ComReg Decision D[...];

“Total Monthly LEA Portfolio Cost” shall be construed in accordance with Reference C10 in Table 1 in Chapter 6 of ComReg Decision D[...];

“Total Monthly LEA Portfolio Revenue” shall be construed in accordance with Reference R5 in Table 1 in Chapter 6 of ComReg Decision D[...];

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Virtual Unbundled Access (VUA)” means the wholesale active access product proposed by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users’ connections at the local exchange. It allows a level of control to the access seeker similar to that afforded by the access seeker connecting their own equipment to a full(y) unbundled Local Loop.

“week” means 5 working days; and

“Wholesale Line Rental” or **“WLR”** means the wholesale service that allows an OAO to rent an Access Path(s) from Eircom which in turn enables that OAO to offer or provide services over such an Access Path(s) to either an End User or another OAO.

3. SCOPE AND APPLICATION

- 3.1. This Decision Instrument applies to Eircom.
- 3.2. This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.3. This Decision Instrument relates to a further specification of the obligation not to cause a margin squeeze imposed by ComReg on Eircom under ComReg Decision D[...].

4. FURTHER SPECIFICATION OF THE OBLIGATION NOT TO CAUSE A MARGIN SQUEEZE

- 4.1. Section 12.9 of the Decision Instrument annexed to ComReg Decision D[...] imposed an obligation on Eircom not to cause a margin squeeze in the Market. For the purpose of further specifying requirements to be complied with relating to that obligation, and pursuant to Regulation 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).

4.2. Eircom shall use the Margin Squeeze Test Model to demonstrate whether a particular Bundle complies with the Margin Squeeze Test. Eircom will keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.

4.3. In order to comply with the Margin Squeeze Test :

4.3.1 Insofar as Bundles sold or offered within the Larger Exchange Area are concerned:

(i) as regards every Portfolio, the Total Monthly LEA Portfolio Revenue (Reference R5 in Table 1 in Chapter 6 of ComReg Decision D[...]) shall be equal to or exceed the Total Monthly LEA Portfolio Cost (Reference C10 of ComReg Decision [...]); and

(ii) as regards each individual Bundle, the Total Monthly LEA Bundle Revenue (Reference R4 in Table 1 in Chapter 6 of ComReg Decision D[...]) shall be equal to or exceed the Total Monthly LEA Adjusted Bundle Cost (Reference C9 in Table 1 in Chapter 6 of ComReg Decision D[...]); and

(iii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market, then compliance with the Margin Squeeze Test shall be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 1 in Chapter 6 of ComReg Decision D[...].

4.3.2 Insofar as Bundles sold or offered outside of the Larger Exchange Area are concerned:

(i) as regards each individual Bundle, the Total Monthly Non-LEA Bundle Revenue (Reference R(iv) in Table 2 in Chapter 6 of ComReg Decision D[...]) shall be equal to or exceed the Total Monthly Non-LEA Bundle Cost (Reference C(vi) in Table 1 in Chapter 6 of ComReg Decision D[...]); and

(ii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market, then compliance with the Margin Squeeze Test shall be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 1 in Chapter 6 of ComReg Decision D[...].

- 4.4. If a Bundle complies with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, it will be deemed to comply with the obligation under ComReg Decision D[...] not to cause a margin squeeze. If a Bundle does not comply with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Margin Squeeze Test, the offer or sale by Eircom of that Bundle does not constitute a breach of the obligation under ComReg Decision D[...] not to cause a margin squeeze. For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition in the Market or in other relevant markets, including by reference to the promotion of sustainable competition in the medium to long term and the ability of entrants to enter and/or remain in the market(s) in question.
- 4.5. For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the relevant Bundles to its audited separated (regulatory) accounts.⁷⁰

Pre-launch assessment of Bundles

- 4.6. Prior to making a proposed new or revised Bundle available for offer or sale to End-Users, Eircom shall furnish ComReg with a detailed written submission demonstrating that the proposed new or revised Bundle complies with the obligation under ComReg Decision D[...] not to cause a margin squeeze and, in particular, with the Margin Squeeze Test set out in this Decision Instrument. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the obligation not to cause a margin squeeze and, in particular, with the Margin Squeeze Test set out in this Decision Instrument. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The Margin Squeeze Test Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a promotion or discount to End-Users which affects an existing Bundle, or any

⁷⁰ Eircom's current accounting separation and cost accounting obligations are set out in Response to Consultation Document 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited (Decision D08/10, Document 10/67, 31 August 2010).

other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.

- 4.7. Upon receipt of the submission, ComReg shall review the submission and, within five (5) working days, communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised Bundle without having received such prima facie approval from ComReg. Prior to the expiry of the five working day period, ComReg may seek further information from Eircom to inform its decision as to whether prima facie approval to launch should be given or withheld. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, prima facie approval to launch the proposed new or revised Bundle shall be withheld pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed to make a decision as to whether prima facie approval for launch of the new or revised Bundle should be granted or withheld.

Post-launch assessment of Bundles / assessment of existing Bundles

- 4.8. Once a new or revised Bundle is made available for offer or for sale to End-Users, Eircom must at all times ensure it meets its obligation under ComReg Decision D[...] not cause a margin squeeze and, in particular, that it complies with the relevant Margin Squeeze Test set out in this Decision Instrument. Eircom shall notify ComReg immediately if it believes that any Bundle may not be so compliant.
- 4.9. If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation under ComReg Decision D[...] not to cause a margin squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test as set out in this Decision Instrument. Eircom shall also provide any other relevant information required so that ComReg can make an informed decision as to whether Eircom is meeting its regulatory obligations including, in particular, its obligation not to cause a margin squeeze.
- 4.10. As regards the monitoring of ongoing compliance, if on the basis of its review of not less than two consecutive Margin Squeeze Test monthly data sets, complemented by its general assessment of the reasonableness of the Bundle (as provided for in Section 4.4 above), ComReg is of the preliminary view that the Bundle is non-compliant with the obligation under ComReg Decision D[...] not to cause a price/margin squeeze, ComReg will inform Eircom in writing of its preliminary view. Upon receipt of such view, Eircom shall immediately refrain

from selling or offering the relevant Bundle to new End-Users until further notice by ComReg.

- 4.11. Within two weeks of ComReg informing Eircom in writing of its preliminary view under Section 4.10 of this Decision Instrument, Eircom shall inform ComReg in writing as to whether it proposes to modify or withdraw the relevant Bundle (including details of any proposed modification). In making any proposal to modify the relevant Bundle, Eircom shall be cognisant of any other regulatory notification requirements it may have, including its regulatory obligation to notify OAOs of any proposed change to the price of products in the Market (in accordance with its notification and transparency obligations pursuant to ComReg Decision D[...].
- 4.12. In particular, in the case of any proposed modification, Eircom shall provide assurances to ComReg that the Bundle considered by ComReg to be non-compliant will be withdrawn and that the proposed modified Bundle will become available to End-Users within the shortest possible time-frame, having regard to Eircom's relevant regulatory notification requirements. ComReg shall inform Eircom in writing of its view as to whether the proposed modified Bundle complies with the obligation under Section [...] of ComReg Decision D[...] not to cause a margin squeeze. Prior to so 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 shall 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.
- 4.13. ComReg's powers in respect of Eircom's obligation not to cause a margin squeeze as set out in this Decision Instrument shall be without prejudice to its statutory powers provided for under, *inter alia*, the Communications Regulation Act 2002, the Access Regulations, the Framework Regulations and the Authorisation Regulations.

5. CONTINUATION OF OBLIGATIONS

- 5.1. In accordance with and pursuant to Regulations 8, 13 and 18 of the Access Regulations and for the avoidance of doubt, Annex 4 of ComReg Decision D04/13 “Decision Instrument: Market 4” shall continue in force until further notice by ComReg.

6. WITHDRAWAL OF OBLIGATIONS

- 6.1 Annex 3 of ComReg Decision D04/13 “Decision Instrument: Market 1” is withdrawn when the Decision Instrument contained in Annex B of ComReg Decision D[...] “ComReg Decisions D06/11 and D03/13, WBA, Market 5”, and this Decision Instrument contained in Annex A of ComReg Decision D[...] “ComReg Decision D[...] Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, Market 2”, shall together take effect.
- 6.2 Section 8 of the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA of ComReg Decision D12/14, is withdrawn when the Decision Instrument contained in Annex B of ComReg Decision D[...] “ComReg Decisions D06/11 and D03/13, WBA, Market 5”, and this Decision Instrument contained in Annex A of ComReg Decision D[...] “ComReg Decision D[...] Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, Market 2”, shall together take effect.
- 6.3 Section 8 of the Decision Instrument contained in Appendix 8 Market 1c: HLVA of ComReg Decision D12/14, is withdrawn when the Decision Instrument contained in Annex B of ComReg Decision D[...] “ComReg Decisions D06/11 and D03/13, WBA, Market 5”, and this Decision Instrument contained in Annex A of ComReg Decision D[...] “ComReg Decision D[...] Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, Market 2”, shall together take effect.

7. MAINTENANCE OF OBLIGATIONS

- 7.1. Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.
- 7.2. If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without

modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

- 7.3. For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

8. STATUTORY POWERS NOT AFFECTED

- 8.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

9. EFFECTIVE DATE

- 9.1. The Effective Date of this Decision Instrument shall be the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [...] DAY OF [...] 201[...]

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

8 Draft Decision Instrument (Market 5)

276 ComReg would appreciate respondents' views on these draft directions.

⁷¹Annex B: Decision Instrument in relation to ComReg Decisions D06/11 & D03/13, Wholesale Broadband Access (WBA), Market 5

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1. This Direction and Decision Instrument ("Decision Instrument") is made by the Commission for Communications Regulation ("ComReg") and relates to a further specification of the obligation not to cause a margin/price squeeze imposed by ComReg on Eircom under Section 12.4 of the Decision Instrument annexed to ComReg Decision D06/11 and Section 11.4 of the Decision Instrument at Annex 2 to ComReg Decision D03/13.

1.2. This Decision Instrument is made:

- (i) Pursuant to Regulations 8, 13, and 18 of the Access Regulations;
- (ii) Having had regard to sections 10 and 12 of the Communications Regulation Act 2002 and Regulation 16 of the Framework Regulations and Regulation 6 and Regulation 13(2) of the Access Regulations;
- (iii) Having, where appropriate, pursuant to Section 13 of the Communications Regulation Act 2002 complied with policy directions made by the Minister for Communications, Marine and Natural Resources⁷²;
- (iv) Pursuant to and having regard to the Significant Market Power ("SMP") designation on Eircom in the market for Wholesale Broadband Access (WBA) and the obligations imposed on Eircom by Section 12.4 of the Decision Instrument annexed to ComReg Decision D06/11 and Section 11.4 of the Decision Instrument contained at Annex 2 of ComReg Decision D03/13 not to cause a margin/price squeeze;
- (v) Having regard to the reasoning and analysis set out in ComReg Decision D11/14;

⁷¹ This draft Decision Instrument depends on the outcome of any decision(s) reached in respect of ComReg Document "Market Review: Wholesale Fixed Voice Call Origination and Transit Markets", dated 4 April 2014, which is the subject of a public consultation process and regarding which no decision(s) have yet been made.

⁷² Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

- (vi) Having had regard to the reasoning and analysis set out in ComReg Document [...] and having taken account of submissions received from interested parties in response to ComReg Document [...] following public consultation pursuant to Regulation 12 of the Framework Regulations;
 - (vii) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, the Body of European Regulators for Electronic Communications (BEREC) and national regulatory authorities in other EU Member States pursuant to Regulations 13 and 14 of the Framework Regulations and having taken the utmost account of comments made by those parties; and
 - (viii) Having taken utmost account of the European Commission's recommendation of 11 September 2013 on non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment⁷³.
- 1.3. The provisions of ComReg Decision D06/11 and ComReg Decision D03/13, and ComReg Document [...], and ComReg Decision D [...], shall, where appropriate, be construed together with this Decision Instrument.

2. DEFINITIONS

2.1 In this Decision Instrument, unless the context otherwise suggests:

“Access Path” means the Physical Transmission Path(s) between the line-card or equivalent in the Exchange or RSU to the NTP or NTU;

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);

“Alternative Infrastructure Provider (AIP)” means an Undertaking providing high-speed retail broadband services to End-Users at a fixed location by means of alternative infrastructure. For the purposes of this definition, services are deemed to be provided by means of “alternative infrastructure” when the relevant AIP does not rely on any wholesale access inputs from Eircom in respect of the Local Loop (e.g. including Wholesale Line Rental (WLR), Bitstream, VUA or LLU) in order to provide services to End-Users in a particular exchange area;

“Associated Facilities” “shall have the same meaning as under Regulation 2 of the

⁷³ Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (C(2013) 5671 final).

Framework Regulations;

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011);

“Authorised Undertaking(s)” shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

“Average Total Cost (ATC)” means a cost standard which reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Bundle” means a package of services, consisting of a Retail Broadband Product and one or more other retail products or services (which is on offer or on sale by Eircom to End-Users), and which other retail product or service may include, for the avoidance of doubt, fixed voice access via PSTN, ISDN and analogous broadband connection (cable, fibre, FWA and DSL);

“the Communications Regulation Act 2002” means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (“Communications Regulation Act 2002 to 2011”);

“ComReg” means the Commission for Communications Regulation, established under the Communications Regulation Act 2002;

“ComReg Decision D06/11” means ComReg Document 11/49 entitled “Response to Consultations and Decision – Market Review: Wholesale Broadband Access (Market 5)” dated 8 July 2011;

“ComReg Decision D03/13” means ComReg Document 13/11 entitled “Next Generation Access (‘NGA’): Remedies for Next Generation Access Markets” dated 31 January 2013;

“ComReg Decision D04/13” means ComReg Document 13/14 entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4” dated 8 February 2013;

“ComReg Decision D11/14” means ComReg Document 14/73r entitled “Price Control Obligation in relation to Current Generation Bitstream” ComReg Decision D11/14 dated 9 July 2014;

“ComReg Decision D[...]” means ComReg Document [] ComReg Decision D[...] entitled “Replicability Test: Further Specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5”, dated [];

“Current Generation Retail Broadband Product” means a Retail Broadband Product which uses Eircom’s network equipment to transmit data signals and includes existing current generation retail products and new current generation retail products;

“DSL” means digital subscriber line;

“Effective Date” means the date set out in Section 9.1 of this Decision Instrument;

“Eircom” means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

“End-User(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Authorised Undertaking;

“Exchange” means an Eircom premises or equivalent facility used to house network and associated equipment, and includes a Remote Subscriber Unit (RSU);

“FWA” means fixed wireless access;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“Full Unbundled Access to the Local Loop” shall have the same meaning as in the Schedule to the Access Regulations;

“ISDN” means Integrated Services Digital Network and includes ISDN BRA; ISDN FRA and ISDN PRA;

“ISDN BRA” means ISDN basic rate access;

“ISDN FRA” means ISDN fractional primary rate access;

“ISDN PRA” means ISDN primary rate access;

“Larger Exchange Area” means the total geographic area comprising individual exchange areas each of which satisfies at least one of the following criteria:

- (i) Criterion 1: An exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),

subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;
- (ii) Criterion 2: An exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA) - subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;
- (iii) Criterion 3: An exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that exchange area,

subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;
- (iv) Criterion 4: An exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available wholesale website (in accordance with Section 9.13(i) of the Decision Instrument contained in Annex 1 of ComReg Decision D03/13 and/or Section 9.13(i) of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13) regarding the launch of NGA

services by Eircom in cabinets in the relevant exchange area, subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that exchange area;

(v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an exchange area in which the relevant exchange:

(a) Is surrounded by Qualifying Exchanges; or

(b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s); or

(c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

For the purposes of this definition of “Larger Exchange Area”, ComReg will construe “reasonable market share and reasonable market coverage” and “reasonable number of lines” in accordance with the relevant factors identified in Annex 2 of ComReg Decision D[...] entitled “LEA”;

“**Local Loop**” shall have the same meaning as under Regulation 2(2) of the Access Regulations;

“**Local Loop Unbundling (LLU)**” means local loop unbundling. The local loop is the final section of Eircom’s access network that provides access into premises (whether residential, business or other premises). It runs between the local exchange and the relevant customer premises. LLU occurs where an OAO rents access to the local loop and uses it to supply services to its customers either on a wholesale or retail basis;

“**Market**” means the market for Wholesale Broadband Access (WBA). The Market is more particularly described in Section 4 of the Decision Instrument annexed to ComReg Decision D06/11;

“**Margin Squeeze Test**” means the Margin Squeeze Test set out in Section 4.3 of this Decision Instrument;

“**Margin Squeeze Test Model**” is the model approved by ComReg and used by Eircom to demonstrate whether a particular Bundle complies with the Margin Squeeze Test;

“**Next Generation Access (NGA)**” means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband

access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access;

“Next Generation Retail Broadband Product” means a Retail Broadband Product which uses next generation access network infrastructure and its Associated Facilities, and includes Access Paths that are either exclusively fibre or a combination of fibre and copper;

“Network Termination Point” or **“Network Termination Unit”** or **“NTP”** **“NTU”** means the physical interface which provides the service demarcation point or point of handover of a wholesale service(s) within the End User’s premises;

“Other Authorised Operators (OAOs)” means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“Point of Handover” means the physical point at which two networks are interconnected to allow traffic between these networks;

“Portfolio” means the aggregation of Bundles on offer or on sale by Eircom to End-Users in the Larger Exchange Area;

“PSTN” means public switched telephone network(s);

“Qualifying Exchange” means an exchange that has been determined by ComReg to satisfy at least one of the criteria contained in the definition of the Larger Exchange Area. ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange for the purposes of this Decision Instrument. The list of exchanges determined by ComReg to constitute Qualifying Exchanges will be made available to interested parties upon request (and may be amended by ComReg from time to time);

“Retail Broadband Product”, for the purposes of this Decision Instrument, means any Eircom Current Retail Broadband Product or Next Generation Retail Broadband Product on offer or on sale by Eircom, the upstream inputs of which, or the upstream inputs required to replicate such a retail product or service, are regulated at the wholesale level in the Market in accordance with ComReg Decision D06/11 and/or Annex 2 of ComReg Decision D03/13;

“Remote Subscriber Unit” or **“RSU”** means a subordinate type of Exchange that is attached to an upstream primary Exchange;

“Total Monthly LEA Adjusted Bundle Cost” shall be construed in accordance with Reference C(9) in Table 1 in Chapter 6 of ComReg Decision D[...];

“Total Monthly Non-LEA Bundle Cost” shall be construed in accordance with Reference C(vi) in Table 2 in Chapter 6 of ComReg Decision D[...];

“Total Monthly Non-LEA Bundle Revenue” shall be construed in accordance with Reference R(iv) in Table 2 in Chapter 6 of ComReg Decision D[...];

“Total Monthly LEA Bundle Revenue” shall be construed in accordance with Reference R4 in Table 1 in Chapter 6 of ComReg Decision D[...];

“Total Monthly LEA Portfolio Cost” shall be construed in accordance with Reference C10 in Table 1 in Chapter 6 of ComReg Decision D[...];

“Total Monthly LEA Portfolio Revenue” shall be construed in accordance with Reference R5 in Table 1 in Chapter 6 of ComReg Decision D[...];

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations;

“Virtual Unbundled Access (VUA)” means the wholesale active access product proposed by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users’ connections at the local exchange. It allows a level of control to the access seeker similar to that afforded by the access seeker connecting their own equipment to a full(y) unbundled Local Loop;

“week” means 5 working day;

“Wholesale Line Rental” or **“WLR”** means the wholesale service that allows an OAO to rent an Access Path(s) from Eircom which in turn enables that OAO to offer or provide services over such an Access Path(s) to either an End User or another OAO.

3. SCOPE AND APPLICATION

- 3.1 This Decision Instrument applies to Eircom.
- 3.2 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.3 This Decision Instrument relates to a further specification of the obligation not to cause a margin squeeze imposed by ComReg on Eircom pursuant to Section 12.4 of the Decision Instrument annexed to ComReg Decision D06/11 and Section 11.4 of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13.

4. FURTHER SPECIFICATION OF THE OBLIGATION NOT TO CAUSE A MARGIN/PRICE SQUEEZE

- 4.1 Section 12.4 of the Decision Instrument annexed to ComReg Decision D06/11 and Section 11.4 of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13 imposed an obligation on Eircom not to cause a margin squeeze in the Market. For the purpose of further specifying requirements to be complied with relating to that obligation, and pursuant to Regulation 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).
- 4.2 Eircom shall use the Margin Squeeze Test Model to demonstrate whether a particular Bundle complies with the Margin Squeeze Test. Eircom will keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.
- 4.3 In order to comply with the Margin Squeeze Test:
- 4.3.1 Insofar as Bundles sold or offered within the Larger Exchange Area are concerned:
- (i) as regards every Portfolio, the Total Monthly LEA Portfolio Revenue (Reference R5 in Table 1 in Chapter 6 of ComReg Decision D[...] shall be equal to or exceed the Total Monthly LEA Portfolio Cost (Reference C10 of ComReg Decision [...]); and
 - (ii) as regards each individual Bundle, the Total Monthly LEA Bundle Revenue (Reference R4 in Table 1 in Chapter 6 of ComReg Decision [...]) shall be equal to or exceed the Total Monthly LEA Adjusted Bundle Cost (Reference C9 in Table 1 in Chapter 6 of ComReg Decision [...]); and
 - (iii) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall be evaluated in accordance with the section entitled "Unregulated Retail Services Assessment" which is set out in Table 1 in Chapter 6 of ComReg Decision [...].
- 4.3.2 Insofar as Bundles sold or offered outside of the Larger Exchange Area are concerned:
- (iii) as regards each individual Bundle, the Total Monthly Non-LEA Bundle Revenue (Reference R(iv) in Table 2 in Chapter 6 of ComReg Decision [...]) shall be equal to or exceed the Total Monthly Non-LEA Bundle Cost (Reference C(vi) in Table 1 in Chapter 6 of ComReg Decision [...]); and

- (iv) when a Bundle includes a retail product or service, the upstream inputs of which, or the upstream inputs required to, replicate such a retail product or service, are not regulated at the wholesale level in any market then compliance with the Margin Squeeze Test shall be evaluated in accordance with the section entitled “Unregulated Retail Services Assessment” which is set out in Table 1 in Chapter [...] of ComReg Decision D[...].
- 4.4 If a Bundle complies with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, it will be deemed to comply with the obligation under ComReg Decision D06/11 and set out in Annex 2 of ComReg Decision D03/13 not to cause a margin squeeze. If a Bundle does not comply with the relevant Margin Squeeze Test, as outlined in Section 4.3 above, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Margin Squeeze Test, the offer or sale by Eircom of that Bundle does not constitute a breach of the obligation under ComReg Decision D06/11 and under Annex 2 of ComReg Decision D03/13 not to cause a margin squeeze. For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition in the Market or in other relevant markets, including by reference to the promotion of sustainable competition in the medium to long term and the ability of entrants to enter and/or remain in the market(s) in question.
- 4.5 For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the relevant Bundles to its audited separated (regulatory) accounts.⁷⁴

Pre-launch assessment of Bundles

- 4.6 Prior to making a proposed new or revised Bundle available for offer or sale to End-Users, Eircom shall furnish ComReg with a detailed written submission demonstrating that the proposed new or revised Bundle complies with the obligation under ComReg Decision D06/11 and/or the obligation in Annex 2 of ComReg Decision D03/13 not to cause a margin squeeze and, in particular, with the Margin Squeeze Test set out in this Decision Instrument. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the obligation not to cause a margin squeeze and, in particular, with the

⁷⁴ Eircom’s current accounting separation and cost accounting obligations are set out in Response to Consultation Document 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited (Decision D08/10, Document 10/67, 31 August 2010).

Margin Squeeze Test set out in this Decision Instrument. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The Margin Squeeze Test Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a promotion or discount to End-Users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.

- 4.7 Upon receipt of the submission, ComReg shall review the submission and, within five (5) working days, communicate to Eircom its decision whether to give or withhold prima facie approval for launch of the proposed new or revised Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised Bundle without having received such prima facie approval from ComReg. Prior to the expiry of the five working day period, ComReg may seek further information from Eircom to inform its decision as to whether prima facie approval to launch should be given or withheld. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, prima facie approval to launch the proposed new or revised Bundle shall be withheld pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed to make a decision as to whether prima facie approval for launch of the new or revised Bundle should be granted or withheld.

Post-launch assessment of Bundles / assessment of existing Bundles

- 4.8 Once a new or revised Bundle is made available for offer or for sale to End-Users, Eircom must at all times ensure it meets its obligation under ComReg Decision D06/11 and/ or under the obligation contained in Annex 2 of ComReg Decision D03/13 and not cause a margin squeeze and, in particular, ensure that it complies with the relevant Margin Squeeze Test set out in this Decision Instrument. Eircom shall notify ComReg immediately if it believes that any Bundle may not be so compliant.
- 4.9 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation under ComReg Decision D06/11 and /or under Annex 2 of ComReg Decision D03/13 not to cause a margin squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test as set out in this Decision Instrument. Eircom shall also provide any other relevant information required so that ComReg can

make an informed decision as to whether Eircom is meeting its regulatory obligations including, in particular, its obligation not to cause a margin squeeze.

- 4.10 As regards the monitoring of ongoing compliance, if on the basis of its review of not less than two consecutive Margin Squeeze Test monthly data sets, complemented by its general assessment of the reasonableness of the Bundle (as provided for in Section 4.4 above), ComReg is of the preliminary view that the Bundle is non-compliant with the obligation under ComReg Decision D06/11 and/or under Annex 2 of ComReg Decision D03/13 not to cause a price/margin squeeze, ComReg will inform Eircom in writing of its preliminary view. Upon receipt of such view, Eircom shall immediately refrain from selling or offering the relevant Bundle to new End-Users until further notice by ComReg.
- 4.11 Within two weeks of ComReg informing Eircom in writing of its preliminary view under Section 4.10 of this Decision Instrument, Eircom shall inform ComReg in writing as to whether it proposes to modify or withdraw the relevant Bundle (including details of any proposed modification). In making any proposal to modify the relevant Bundle, Eircom shall be cognisant of any other regulatory notification requirements it may have, including its regulatory obligation to notify OAOs of any proposed change to the price of products in the Market (in accordance with its notification and transparency obligations pursuant to ComReg Decision D06/11, Annex 2 of ComReg Decision D03/13 and ComReg Decision D11/14).
- 4.12 In particular, in the case of any proposed modification, Eircom shall provide assurances to ComReg that the Bundle considered by ComReg to be non-compliant will be withdrawn and that the proposed modified Bundle will become available to End-Users within the shortest possible time-frame, having regard to Eircom's relevant regulatory notification requirements. ComReg shall inform Eircom in writing of its view as to whether the proposed modified Bundle complies with the obligation under ComReg Decision D06/11 and/or under Annex 2 of ComReg Decision D03/13 not to cause a margin squeeze. Prior to so 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 shall 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.
- 4.13 ComReg's powers in respect of Eircom's obligation not to cause a price/margin squeeze as set out in this Decision Instrument shall be without prejudice to its statutory powers provided for under, inter alia, the Communications Regulation

Act 2002, the Access Regulations, the Framework Regulations and the Authorisation Regulations.

5. CONTINUATION OF OBLIGATIONS

- 5.1 In accordance with and pursuant to Regulations 8, 13 and 18 of the Access Regulations and for the avoidance of doubt, Annex 4 of ComReg Decision D04/13 “Decision Instrument: Market 4” shall continue in force until further notice by ComReg.

6. WITHDRAWAL OF OBLIGATIONS

- 6.1 Annex 3 of ComReg Decision D04/13 “Decision Instrument: Market 1” is withdrawn when this Decision Instrument contained in Annex B of ComReg Decision D[...] “ComReg Decisions D06/11 and D03/13, WBA, Market 5”, and the Decision Instrument contained in Annex A of ComReg Decision D[...] “ComReg Decision D[...] Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, Market 2”, shall together take effect.
- 6.2 Section 8 of the Decision Instrument contained in Appendix 7 Market 1b: Bundled LLVA of ComReg Decision D12/14, is withdrawn when this Decision Instrument contained in Annex B of ComReg Decision D[...] “ComReg Decisions D06/11 and D03/13, WBA, Market 5”, and the Decision Instrument contained in Annex A of ComReg Decision D[...] “ComReg Decision D[...] Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, Market 2”, shall together take effect.
- 6.3 Section 8 of the Decision Instrument contained in Appendix 8 Market 1c: HLVA of ComReg Decision D12/14, is withdrawn when this Decision Instrument contained in Annex B of ComReg Decision D[...] “ComReg Decisions D06/11 and D03/13, WBA, Market 5”, and the Decision Instrument contained in Annex A of ComReg Decision D[...] “ComReg Decision D[...] Market Review: Wholesale Fixed Voice Call Origination and Transit Markets, Market 2”, shall together take effect.

7. MAINTENANCE OF OBLIGATIONS

- 7.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.
- 7.2 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.
- 7.3 For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and Eircom's obligations now set out herein, this Decision Instrument shall prevail, unless otherwise indicated by ComReg.

8. STATUTORY POWERS NOT AFFECTED

- 8.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

9. EFFECTIVE DATE

- 9.1 The Effective Date of this Decision Instrument shall be the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

KEVIN O'BRIEN

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [...] DAY OF [...] 201[...]

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

9 Regulatory Impact Assessment

9.1 Introduction

277 A Regulatory Impact Assessment ('**RIA**') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy and analyses the impact of regulatory options on different stakeholders.

278 ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a.

279 In conducting the RIA, ComReg takes into account the RIA Guidelines⁷⁵ issued by the Department of An Taoiseach in June 2009 under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002 requires ComReg to comply with Ministerial Policy Directions. The Policy Direction issued in February 2003⁷⁶ requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.

280 In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions e.g., imposing obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. Our ultimate aim in conducting a RIA is to ensure that all measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation a decision appears to have relatively low impact, ComReg may carry out a lighter RIA in respect of those decisions.

⁷⁵ See "Revised RIA Guidelines How to Conduct a Regulatory Impact Analysis", June 2009. http://www.betterregulation.ie/eng/Developments_in_Better_Regulation_Policy/Revised_RIA_Guidelines.pdf.

⁷⁶ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

9.2 Steps for assessing regulatory options

281 In assessing the available regulatory options, ComReg's approach to the RIA followed five steps as follows:

Step 1: describe the policy issue and identify the objectives

Step 2: identify and describe the regulatory options

Step 3: determine the likely impacts on stakeholders

Step 4: determine the likely impacts on competition

Step 5: assess the likely impacts and choose the best option.

282 The principles applied when assessing and selecting remedies are:

- Does current regulation achieve objectives as effectively as possible?
- Are changes to regulation required to improve regulation in these markets?
- The impact of the proposed changes.
- Assessing the impacts and choosing the best option.

9.3 Step 1 - Describe the policy issue and identify the objectives

283 As both Market 2 and Market 5 already provides for price control obligation for the avoidance of a margin squeeze the available regulatory options in the current RIA relate to further specification of that obligation and further specifying the pre-notification, pre-clearance and modification / withdrawal obligations.

284 In setting out its draft decision, ComReg has had regard to its relevant statutory functions, objectives and obligations, as set out in section 12 of the Communications Regulation Acts, Regulation 16 of the Framework Regulations and in Regulations 8 and 13 of the Access Regulations. These are discussed in some detail below.

9.3.1 Regulation 8 of the Access Regulations

285 Regulation 8(6) of the Access Regulations provides that:
Any obligations imposed in accordance with this Regulation shall –

- (a) Be based on the nature of the problem identified,*
- (b) Be proportionate and justified in light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, and*
- (c) Only be imposed following consultation in accordance with Regulation 12 and 13 of the Framework Regulations.*

Based on the nature of the problem identified:

286 There is a significant risk that Eircom could cause a margin squeeze against OAOs, by pricing its bundles in a manner that may be anti-competitive — such that the space between retail prices and the prices of the underlying wholesale inputs that other OAOs rely on to compete could be too narrow for efficient OAOs to operate profitably. If this occurred, it is quite likely that OAOs would not be in a position to match or replicate Eircom's retail pricing offers. This could result in preventing OAOs to compete effectively to the detriment of consumers in the long-run.

287 See paragraphs 33-76.

Proportionate and justified:

288 ComReg considers that with effective upstream regulation that it might permit the removal downstream of the current NRT in the retail Fixed Voice Access market.

289 See also paragraphs 33-76.

9.3.2 Section 12 of the Communications Regulations Act

290 Our objectives as set out in Section 12 of the Communications Regulations Act aim to:

- (i) *To promote competition;*
- (ii) *Encourage efficient investment in infrastructure and promoting innovation; and*
- (iii) *Promote the interests of users within the Community*

Promote competition:

291 Eircom as a vertically-integrated operator which competes downstream with bundled retail products could exert its upstream dominance by causing a margin squeeze by decreasing the Eircom retail bundle price or increasing one or some of the underlying wholesale costs — to the extent that the downstream retail margins are not sufficient to cover retail costs. An OAOs' retail margin can be 'squeezed' with the occurrence of either a retail price decrease or wholesale price increase or if both occur together. Such a margin squeeze could be used by Eircom to reinforce its dominance upstream and/or foreclose competition downstream. Eircom could implement a margin squeeze to the extent that OAOs could no longer profitably supply the bundled service in the long-run.

292 The MST is designed to ensure that Eircom is not able to leverage vertically or diagonally from the upstream market into the retail market when combining wholesale inputs which are sold / offered in a bundle at the retail level. This should provide comfort to OAOs (who use respective wholesale inputs from Eircom) in making commercial decisions of launching and promoting their own retail bundles.

Encouraging efficient investment in infrastructure and promoting innovation:

293 Inside the LEA one of the components of the MST reflects the actual use by OAOs of Eircom's wholesale inputs (i.e., the WNI) in the LEA. This could allow Eircom to use a lower cost wholesale input in order to offer cheaper bundles to the benefit of end-users. This in turn should encourage Eircom to promote the use of LLU/VUA by OAOs in order to further reduce the weighted average wholesale input.

294 Outside the LEA the MST is based on SB-WLR / legacy WBA products — it is assumed that in order for a Bundle to be replicable by an OAO that all OAOs use WLR and WBA exclusively. This would also allow for the emergent use of LLU as those areas will not be included in the LEA until OAOs' using LLU have reasonable coverage (i.e., it must be capable of serving a reasonable number of premises in that exchange area) and a reasonable market share of those customers (i.e., the OAO is simply not just present in that exchange but has a reasonable number of customers relative to the addressable market in that exchange).

Promoting the interests of users within the Community:

295 Safeguarding efficient competitors from a possible margin squeeze by the SMP operator in respect of where wholesale inputs are required by OAOs in order to replicate an Eircom retail Bundle should help to facilitate greater regulatory certainty for longer-term competitive entry and expansion, with positive implications for the price, choice and quality of services ultimately delivered to end-users.

9.3.3 Regulation 13 of the Access Regulations

296 Regulation 13(1) of the Access Regulations provides that ComReg may:

impose on an operator obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end-users.

297 The requirements set out in Regulation 13(1) of the Access Regulations have been addressed in the recent WBA Market Decision⁷⁷ and ComReg Decision D11/14⁷⁸. Both include an obligation on Eircom not to cause a margin (price) squeeze.

298 Regulation 13(3) of the Access Regulations provides that:

⁷⁷ <http://www.comreg.ie/fileupload/publications/ComReg1149.pdf>

⁷⁸ <http://www.comreg.ie/fileupload/publications/ComReg1473R.pdf>

The Regulator shall ensure that any cost recovery mechanism or pricing methodology that ComReg imposes under this Regulation serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard, the Regulator may also take account of prices available in comparable competitive markets.

299 Each of these key objectives outlined in Regulation 13(3) are discussed briefly below.

Promote efficiency:

300 Efficiency can be thought of in a number of ways including:

- Allocative efficiency: Where prices of different products result in an optimum allocation of resources to consumers;
- Productive efficiency: The cost of producing the products is minimised; and
- Dynamic efficiency: The efficiency of investor and customer behaviour over time.

301 The MST provides certainty ex-ante for OAOs that Eircom can not engage in a margin squeeze. The provision of the MST ensures that Eircom and OAOs competing in the market will focus on productive and allocative efficiencies in order to attain a competitive advantage. Firms striving for competitive advantage should ensure that in the long-run consumers benefit. Such benefits can take the form of lower prices, greater choice and product innovation.

302 The MST can take into account known future changes in wholesale/retail costs where these can be adequately verified (i.e., dynamic efficiency). As such, it allows Eircom to reflect in its pricing known future changes in prices / costs which are supported by robust evidence which should ultimately be to the benefit of the consumer. OAOs / entrants should also be able to factor known future changes in prices into their pricing decisions which will be to the benefit of end-users.

Promote sustainable competition:

Please refer to paragraphs 291-292 above for a detailed discussion on the impacts on competition.

Maximise consumer benefits:

303 Please refer to paragraph 295 above for a detailed discussion with regard to the benefits to end-users.

9.3.4 Regulation 16 of the Framework Regulations

304 While some of the main requirements / objectives of Regulation 16 of the Framework Regulations have already been addressed above as part of the discussion on Regulation 8 of the Access Regulations, Section 12 of the Communications Regulation Act and / or Regulation 13 of the Access Regulations, set out below is some other key requirements associated with Regulation 16 which have not been addressed so far as part of the discussions above.

Contributing to the development of the internal market (BEREC and European Union):

305 As part of this consultation process the draft measures contained in this document and the reasoning which the measures are based on will be provided to the European Commission, once we receive responses to the consultation and we have considered our position in that regard. ComReg will take utmost account of any comments from the European Commission.

306 Further to Regulations 13 and 14 of the Framework Regulations, the draft measures will also be made accessible to the Body of European Regulators for Electronic Communications (“BEREC”) as well as other national regulatory authorities (“NRAs”) in other EU Member States.

Promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods:

307 The Net Revenue Test ('NRT') pursuant to ComReg Decision D04/13 is used to assess whether or not Eircom is covering its total costs when it sells a bundle of services together. ComReg considers that if there is appropriate wholesale regulation upstream that the NRT would no longer be required at the retail level. As such, a well-defined MST at the wholesale level on an ex-ante basis could address the leveraging concerns which are currently addressed by the NRT.

308 This should ensure regulatory consistency and predictability over the next three years.

Taking due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within the State:

309 As set out in detail in Chapter 4 of this document, we recognise that there may be varying structural and competitive conditions prospectively between the LEA (Urban areas) and Outside the LEA (rural areas). This was established in ComReg D04/13. Our proposed approach for MST takes into account a differentiation of the price control between the LEA and Outside the LEA in order to address the relevant competition problem(s) in the particular areas.

9.4 Step 2 - Identify and describe the regulatory options

310 In relation to the further specification of the price control obligation not to cause a margin squeeze, the possible specification options for the Margin Squeeze Test, as an ex-ante imputation test include the following:

- Option 1: No Margin Squeeze Test for Bundles is implemented.
- Option 2: The Margin Squeeze Test takes into account that Eircom including OAOs using its wholesale platform are prospectively facing more competition in certain areas.
- Option 2a: The Margin Squeeze Test is conducted on a combinatorial two-part test (i.e., a bundle-by-bundle and portfolio test).
- Option 2b: A lower cost standard for retail calls and retail broadband costs and the overall appropriate cost standard for the Margin Squeeze Test.
- Option 2c: The Margin Squeeze Tests reflects a weighted average cost of the applicable wholesale input.

- Option 3 The ATC cost standard, on a case-by-case basis allows reflection of known future reductions in cost e.g., Mobile Termination Rates.
- Option 4 That the Margin Squeeze Tests to use the SEO and EEO cost standard for retail costs for broadband in the LEA and SEO Outside the LEA.
- Option 5 Unregulated products and services will be included at LRIC cost with some cross-subsidisation allowed from regulated to unregulated services.
- Option 6a That the introduction of new/revised Bundles be pre-notified and pre-cleared with ComReg.
- Option 6b Eircom be allowed to self-certify its obligation not to cause a margin squeeze for the introduction of new/revised Bundles.
- Option 7 Should unreasonable bundles be modified / withdrawn?

9.5 Step 3 - Likely Impacts on Stakeholders

Option 1: No Margin Squeeze Test is implemented

311 Impact on Incumbent:

- No impact, the net revenue test (i.e., the NRT) would continue to be required pursuant to Market 1 as there is not sufficient wholesale regulation to permit the removal downstream of the current NRT.
- Absent the NRT and assuming that a Margin Squeeze Test was not implemented, the incumbent would be subject to the obligation not to margin / price squeeze only under competition law.

312 Impact on OAOs:

- Absent the NRT and assuming that a Margin Squeeze Test was not implemented, would require 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.

313 Impact on Consumers:

- No impact as the NRT would continue to be required pursuant to Market 1.
- Absent the NRT and assuming that a Margin Squeeze Test was not implemented, where those low priced bundles are priced anti-competitively, consumers could lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit.

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

314 Impact on Incumbent:

- Subject to the components of the Margin Squeeze Test (as discussed below) it could allow Eircom more pricing flexibility in certain qualifying exchanges (i.e., the LEA) to recognise that Eircom may be facing greater competition in those areas. See paragraphs 77-91.
- Outside the LEA where prospective competition from OAOs and in particular from infrastructural-based competition is not as prevalent compared to that in the LEA. The flexibility provided by the Margin Squeeze Test (if it were to be allowed Outside the LEA) could allow Eircom Retail lower prices in those areas — potentially due to the relative weighting and margins from Bundles sold / offered in the LEA. This could result in Eircom foreclosing competition from OAOs in those areas and leveraging its dominance unduly in those areas.

315 Impact on OAOs:

- The LEA predominantly reflects those areas where OAOs infrastructural investment has occurred (see paragraphs 77-91).
- Eircom could have more price flexibility within the LEA. However, the greater flexibility within the Margin Squeeze Test is directly linked to increased competition — as such, under the status quo there is little impact on OAOs. As competition increases in the LEA the greater the pricing flexibility for Eircom Retail which is weighted (see paragraphs 159-178) relative to OAOs development / progression in those areas.
- Outside the LEA, the flexibility for Eircom Retail provided by the Margin Squeeze Test (if it were to be allowed Outside the LEA) could mean that competition from OAOs is foreclosed. Similarly, the flexibility for Eircom Retail could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraphs 179-182.

316 Impact on Consumers:

- Providing flexibility in the LEA should allow Eircom to offer cheaper Bundles to consumers in that area (see paragraphs 159-178).

- If the flexibility within the Margin Squeeze Test was allowed for Bundles sold / offered Outside the LEA, consumers may benefit initially from lower priced bundles from incumbent in certain areas — potentially due to the relative weighting and flexibility from Bundles sold / offered in the LEA. However, consumers will lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit. Furthermore, as competition Outside the LEA from OAOs is relatively limited the likelihood is that Eircom Retail in any event would have no incentive to lower prices and in fact (absent a net revenue test) may have the incentive to raise prices in those areas.
- However, Outside the LEA where the existence of alternative infrastructural-based competition from OAOs is weaker, consumers continue to be protected from any potential anti-competitive pricing by the incumbent by the continuance of a Margin Squeeze Test (see discussion under Option 1). In addition, the Margin Squeeze Test allows the promotion of sustainable competition by OAOs / entrants to the benefit of consumers in terms of price, choice and quality of services available over medium to longer term. Consequently, in summary, consumers Outside the LEA are not unduly impacted financially by the flexibility provided by the Margin Squeeze Test and would benefit by the implementation of the Margin Squeeze Test in the long-run. See paragraphs 179-182.

Option 2a: The Margin Squeeze Test is conducted on a combinatorial two-part test (i.e., a bundle-by-bundle and portfolio test)

317 Impact on Incumbent:

- Inside the LEA, the combinatorial test allows the incumbent flexibility to price differentiate individual bundles within the aggregate of the bundles which ultimately should benefit consumers (see paragraphs 199-207).
- Outside the LEA, if the flexibility provided by the portfolio approach (if it were to be allowed Outside the LEA) could allow Eircom Retail lower prices in those areas — potentially due to the relative weighting and margins from Bundles sold / offered in the LEA. This could result in Eircom foreclosing competition from OAOs in those areas and leveraging its dominance unduly in those areas.
- Additional regulatory compliance due to different tests in LEA and non-LEA exchanges. However, the revised approach creates a balance between allowing the incumbent certain pricing flexibility and that the Margin Squeeze Test (as noted above in Option 1) remains a vital regulatory requirement to ensure competition and efficient infrastructure investment is protected.

318 Impact on OAOs:

- Inside the LEA, the portfolio approach promotes intra-platform competition by OAOs / entrants by recognising that OAOs have a similar range of retail services and Bundles as the incumbent. In addition, the overall bundle-by-bundle approach ensures that at the bundle level Eircom is recovering ATC (See also paragraphs 150-152).
- Outside the LEA, the flexibility of the portfolio approach (if it were to be allowed Outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraphs 179-182.

319 Impact on Consumers:

- In the LEA, provides ability to realise scope economies and cost savings in consumers' interests. In addition, allows the promotion of competition by OAOs / entrants which may have a smaller / different range of retail services and bundles as the incumbent to the benefit of consumers.
- Outside the LEA, see bullets 2 and 3 paragraph 316.

Option 2b: A lower cost standard for both retail calls and retail broadband costs and the overall appropriate cost standard for the Margin Squeeze Test**320 Impact on Incumbent:**

- The LRIC cost standard for retail calls and LRIC for retail broadband costs (see paragraph 142) allows flexibility to the incumbent to offer an individual Bundle that does not recover common costs in the LEA.
- As noted in paragraph 144, on a global level an operator would not be able to use this cost standard to inform its business decision as the incremental revenue attained from such bundles on an aggregate basis may not make adequate contribution towards fixed and common costs (i.e., an ATC cost standard is more appropriate on a global basis). Consequently, the flexibility of the lower cost standard of LRIC is subject to the proviso that the aggregate of Bundles in the LEA pass ATC.
- ATC is the appropriate measure of cost in Margin Squeeze Test at the portfolio level in the LEA and at the bundle-by-bundle level Outside the LEA. The use of ATC ensures that the incumbent recovers all efficiently incurred costs (see paragraphs 138-142). As such, the Margin Squeeze Test ensures that nationally Eircom passes the ATC cost standard.

- The LRIC cost standard for retail calls and for retail broadband costs (if allowed in the Margin Squeeze Test Outside the LEA) would allow flexibility to the incumbent to offer an individual Bundle that does not recover common costs.

321 Impact on OAOs:

- Inside the LEA, OAOs who are as efficient as the incumbent and who offer similar bundles to the incumbent should be in a position to launch an individual bundle that does not recover common costs in the LEA. OAOs have some reassurance that Eircom's aggregate of bundles in a portfolio must cover its ATC thereby providing opportunity to recover common costs.
- Inside the LEA the over-riding proviso of the ATC cost standard at the portfolio level and Outside the LEA on a bundle-by-bundle test, allows the promotion of competition by OAOs as ATC includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand.
- Outside the LEA, (if it were to be allowed Outside the LEA) the flexibility of the portfolio approach could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraphs 179-181.

322 Impact on Consumers:

- The use of LRIC cost standard for retail calls and retail cost of broadband at the bundle-by-bundle test in the LEA allows the promotion of efficient competition (as competition is prospectively greater for bundles sold / offered inside the LEA) to the benefit of consumers.
- Outside the LEA, see bullets 2 and 3 paragraph 316.

Option 2c The Margin Squeeze Test reflects a weighted average cost of the applicable wholesale input

323 Impact on Incumbent:

- Inside the LEA the approach reflecting actual use by OAOs of Eircom's wholesale inputs (i.e., the WNI) in the LEA could allow Eircom to use a lower cost wholesale input in order to offer cheaper bundles to the benefit of end-users. This in turn should encourage Eircom to promote the use of LLU by OAOs in order to further reduce the weighted average wholesale input.

- Inside the LEA, without a separate NGA WNI by virtue of the flexibility within the MST (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. See paragraphs 166-168. The use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and ensures that the WNI is reflective of the average wholesale input costs incurred by an “efficient” operator to replicate legacy and NGA bundles in the LEA.
- Outside the LEA if the WNI was implemented the flexibility for Eircom Retail provided by the MST (if it were to be allowed Outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence.
- Outside the LEA the MST is based on SB-WLR / legacy WBA products — it is assumed that in order for a Bundle to be replicable by an OAO that all OAOs use WLR and WBA exclusively in order to reflect emergent use of LLU.

324 Impact on OAOs:

- The LEA predominantly reflects those areas where OAOs infrastructural investment has occurred (see Chapter 4).
- Reflects the weighted average use of actual wholesale inputs by OAOs in the LEA. Those OAOs who remain on resale wholesale inputs only will find it harder to be competitive as LLU uptake grows. This approach should encourage OAOs to invest in infrastructure to avail of LLU inputs in order to be able to beat the weighted average input.
- Eircom could have more price flexibility within the LEA. However, the greater flexibility within the Margin Squeeze Test is directly linked to increased competition — as such, under the status quo there is little impact on OAOs. As competition increases in the LEA the greater the pricing flexibility for Eircom Retail which is weighted (see paragraphs 171-178) relative to OAOs development / progression in those areas.

- Inside the LEA, without a separate NGA WNI by virtue of the flexibility within the MST (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. See paragraph 166-168/167. This could result in undue flexibility to Eircom and could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run. However, the use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and ensures that the WNIs are reflective of the average wholesale input costs incurred by an “efficient” operator to replicate legacy and NGA bundles in the LEA.
- Outside the LEA, the flexibility for Eircom Retail provided by the MST (if it were to be allowed Outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraph 179.

325 Impact on Consumers:

- Inside the LEA, customers should benefit from lower priced bundles and product innovation/differentiation in those areas where LLU competition is encouraged. OAOs that use Eircom’s LLU product may be able to offer a more sustainable source of infrastructure-based competition in addition to any alternative platform competitors, e.g., Cable / Wi-Max which may further contribute potential competitive constraints to the benefit of consumers.
- Inside the LEA, without a separate NGA WNI by virtue of the flexibility within the MST (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. See paragraphs 166-167. Consumers may benefit initially from lower priced bundles from incumbent in certain areas. Where those low priced Bundles are priced anti-competitively, consumers will lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit.
- Outside the LEA, no additional impact on customers as bundles currently offered to customers in these areas reflects that OAOs can offer competing Bundles in those areas based on different WBA inputs provided by Eircom (i.e., there is no flexibility in the Margin Squeeze Test Outside the LEA).
- Outside the LEA, see also bullets 2 and 3 paragraph 316.

Option 3 The ATC cost standard, on a case-by-case basis, allows reflection of known future reductions in cost e.g., Mobile Termination Rates

326 Impact on Incumbent:

- Allows the incumbent to reflect in its pricing known future changes in prices / costs which are supported by robust evidence which should ultimately be to the benefit of the consumer.

327 Impact on OAOs:

- OAOs / entrants should also be able to factor known future changes in prices into their pricing decisions which will be to the benefit of end-users. Eircom will be required to reconcile this ATC available from the audited regulatory accounts the following year. This should provide some assurance to OAOs that Eircom is covering its costs.

328 Impact on Consumers:

- Allows pricing to reflect known future reductions in prices / costs which will be to the benefit of consumers now as opposed to waiting for the known cost reductions to come into effect.

Option 4 That the Margin Squeeze Test uses SEO and EEO for retail costs for broadband in the LEA and SEO Outside the LEA

329 Impact on Incumbent:

- In the LEA, the SEO / EEO approach ensures a higher margin to cover downstream retail costs (compared to an entire EEO). Therefore the margin between wholesale broadband access charge and the retail price Eircom sets is larger compared to entirely on EEO.
- This approach takes account of the fact that there are large operators in certain parts of the country i.e., the LEA, with an international presence who can take advantage of economies of scale and scope between their operations in Ireland and other countries in which they operate. Therefore, this approach takes account of the fact that there are certain retail costs which are more susceptible to such scale / scope advantages especially in the context of bundle offers (with fixed voice, mobile voice, broadband, IPTV, etc.) which are more often sold in the retail broadband market, for example, advertising costs.
- Outside the LEA, the SEO assumes higher costs (compared to EEO) for Eircom so allowing a lower wholesale access charge to be set by Eircom.

- This approach may increase the willingness of OAOs to enter the retail broadband market using Eircom wholesale inputs.

330 Impact on OAOs:

- In the LEA, the SEO / EEO approach takes account of the fact that entrants in general have not yet gained sufficient economies of scale as Eircom in the LEA.
- Outside the LEA, the SEO approach should encourage entry to the retail broadband market and allow existing smaller operators to grow their customer base, by giving rise to a greater space between retail prices and wholesale prices that enable OAOs to supply wholesale and retail services more competitively based on Eircom wholesale inputs.

331 Impact on Consumers:

- In the LEA, a combination of SEO and EEO costs provides a higher gap between retail and wholesale prices than an EEO test which provides lower prices and more choice, due to higher levels of competition from OAOs.
- Outside the LEA, the SEO may result in the medium/long-term (marginally) lower retail prices and more choice, due to higher levels of competition from OAOs, compared to EEO or SEO/EEO approach. As competition at the retail level becomes more entrenched it may be possible to move to EEO which may see more price benefits for end-users.

Option 5 Unregulated products and services will be included at LRIC cost standard. Cross subsidisation is allowed from the regulated product / services to the unregulated services

332 Impact on Incumbent:

- Will enable incumbent to include unregulated products and services⁷⁹ in Bundles at a competitive price.

333 Impact on OAOs:

- A LRIC cost standard is analogous to the standard used under competition law.

⁷⁹ See paragraphs 191-198.

- While the ability of Eircom to cross-subsidise between regulated and unregulated services may mean that certain OAOs may be excluded from certain narrow Bundle types (which include unregulated services as part of that Bundle). Subject to the proviso that the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the Bundle is profitably replicable it ensures that overall the Eircom retail offer is not anti-competitive (as the portfolio is replicable in the LEA and that the bundle-by-bundle is replicable Outside the LEA).
- See paragraphs 210-218.

334 Impact on Consumers:

- Enables flexibility, subject to certain provisions, for all products to be included in bundles to the benefit of consumers thus promoting product innovation while also protecting against possible anti-competitive practices which could negatively impact on service price, choice and quality.

Option 6a New/revised Bundles must be pre-notified by Eircom to ComReg

335 Impact on Incumbent:

- Eircom is currently subject to a pre-notification requirement pursuant to ComReg D04/13. Therefore, no additional regulatory burden.

336 Impact on OAOs:

- Will give OAOs legal certainty that there will be regulatory monitoring of Bundles provided by the SMP operator prior to their launch.

337 Impact on Consumers:

- Ensures a transparent regulatory environment which monitors bundles at risk of being anti-competitive and which may have long-term negative impacts for consumer choice.

Option 6b Eircom must self-certify that new/revised Bundle meets its obligation not to cause a margin squeeze

338 Impact on Incumbent:

- Eircom would not need to get pre-clearance from ComReg when it wishes to launch a new/revised Bundle. Eircom would only need to notify ComReg of the details of the new/revised Bundle.
- Eircom would be required to maintain records which demonstrated that a MST was undertaken prior to launch and that based on the reasonable assumptions used that no margin squeeze issues were raised.

339 Impact on OAOs:

- OAOs would have no certainty of whether a Bundle launched by Eircom met its obligation not to cause a margin squeeze. However, as Eircom would be required to demonstrate its ongoing compliance in respect of at least one retail amendment (chosen by ComReg) every three months, OAOs would have some comfort as a result of this continued regulatory monitoring.

340 Impact on Consumers:

- Ensures a transparent regulatory environment which monitors Bundles at risk of being anti-competitive and which may have long-term negative impacts for consumer choice.

Option 7 For bundles causing a margin squeeze, Eircom should withdraw / modify such bundles**341 Impact on Incumbent:**

- Where a Bundle is found to be non-compliant Eircom should modify or withdraw the Bundle as soon as possible, otherwise ComReg will be left with no option but to intervene pursuant to any of its relevant statutory enforcement powers. It is also likely that other operators impacted by the non-compliant Bundle may also act. As previously experienced the continuation of non-compliant bundles can have very significant consequences on Eircom, OAOs and consumers and should be avoided⁸⁰.

342 Impact on OAOs:

- OAOs have assurances that Eircom will be subject to regular and rigorous review of significant Bundles in the market to ensure they comply. Where Bundles are found to be non-compliant OAOs can be confident that they will be dealt with in a timely manner to mitigate any negative effects.

343 Impact on Consumers:

- Non-compliant Bundles should not be allowed in the market for a prolonged period of time.

⁸⁰ ComReg notes in this regard that certain October 2008 bundles were launched by Eircom despite concerns raised by ComReg pre-launch in relation to the assumptions made by Eircom in relation to free calls to Meteor. ComReg believes that the market was damaged as a result of Eircom launching the bundles in question and, in particular, as a result of the period of time it took to remedy the non-compliant bundles due to a legal challenge from Eircom.

- The longer the non-compliant Bundle remains in the market the more customers are likely to have signed up for that Bundle. These customers could be faced with changes to the Bundle they signed up to which can cause confusion and undue annoyance. Therefore this should be mitigated by swift and timely action by Eircom to ensure such difficulties are minimised.

9.6 Step 4 - Assess the likely impact on competition:

344 This is discussed under the relevant headings of “Impact on Incumbent” and “Impact on OAOs” at paragraphs 311- 343.

9.7 Step 5 - Assess the impacts and choose the best option

345 Having reviewed the options above, ComReg proposes that:

1. It is legitimate and appropriate to apply the MST as a combinatorial two-part approach. For Bundles sold / offered in the LEA, there will be a two-part ex-ante MST test. The test is combinatorial and the tests are evaluated simultaneously. That is to say that both tests must be passed. For Bundles sold / offered Outside the LEA the bundles are assessed on an individual bundle basis (i.e., bundle-by-bundle) only (i.e., there is no portfolio approach for Bundles sold / offered Outside the LEA).
2. It is legitimate and appropriate to apply the more flexible MST inside the LEA only. ComReg considers that the LEA should reflect those areas where uptake of unbundled services, whether LLU and / or virtual unbundling in NGA, is likely to be viable, which prospectively are more likely to permit a greater degree of competition and where regulation should be responsive to any prospective changes.
3. For the time being, it is legitimate and appropriate for ComReg to continue to use the existing retail-minus price controls for narrowband retail costs and retail margin squeeze test to determine broadband retail costs in the MST as to do otherwise would result in a different treatment within Bundles. Notwithstanding this, there is some flexibility in that ComReg recognises that there may be some potential for double-count of certain retail costs when narrowband and broadband are bundled together e.g., billing costs. At a later stage, it may be appropriate to allow Eircom use retail costs for broadband based on EEO as opposed to the current SEO and EEO approach. However, ComReg does not believe that competition is sufficiently developed at this time to consider the use of EEO for the retail costs of broadband.

4. ATC as the appropriate basis of cost in an ex-ante context for the portfolio of Bundles sold in the LEA and the bundle-by-bundle test Outside the LEA. ATC is the correct cost input for the MST in light of ComReg's statutory objectives under Section 12 of the Act to promote competition and protect the interests of end-users. In the context of an ex-ante regulatory tool to be applied by ComReg, ATC is the appropriate ex-ante cost basis to adopt as it should enable a potential entrant to recover all its efficiently incurred costs. ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ComReg believes that, under the present market conditions in Ireland, this cost measure is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets. However, ComReg proposes to allow the pricing below ATC for retail costs for calls in an individual bundle (with common and fixed indirect costs excluded for retail calls) and for retail broadband costs (with common and fixed indirect costs excluded) for Bundles sold / offered inside the LEA only (subject to the proviso that the portfolio of Bundles inside the LEA passes its ATC).
5. ComReg considers that it is appropriate to allow ATC reflect known future reductions in costs (e.g., Mobile Termination Rates) where these can be supported. ComReg believes that this will allow end-customers to benefit from future known reductions in costs now.
6. Outside the LEA, ComReg considers it legitimate and appropriate to propose that the applicable wholesale inputs in the Margin Squeeze Test are SB-WLR and legacy WBA. For the LEA, ComReg considers it legitimate and appropriate to propose a weighted average wholesale input of the applicable wholesale inputs used by OAOs in the area is taken as this reflects the actual usage of different wholesale inputs by OAOs in that area. ComReg believes that otherwise consumers may not be in a position to avail of lower prices for high speed broadband in that area, in particular where this is as a result of high unit costs driven by the national average cost of the copper access network. Thus the proposed approach recognises the importance of facilitating the development of efficient competition and the delivery of relevant competitive benefits to consumers.

7. In relation to unregulated products and services included in a Bundle these will be assessed on a LRIC cost standard. Inside the LEA, ComReg considers that provided that the portfolio of Bundles which includes those specific unregulated service is profitably replicable as demonstrated by the MST that it may be appropriate for some form of cross-subsidisation. However, this is subject to the proviso that the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the Bundle is profitably replicable. While certain OAOs may be excluded from certain narrow Bundle types (which include unregulated services as part of that Bundle) it ensures that overall the Eircom retail offer is not anti-competitive (as the portfolio is replicable). ComReg considers that as Eircom's position may not be strong with respect to new services such as mobile voice, television etc., that requiring each Bundle to pass a MST may be a form of entry assistance (for OAOs) into a market which is already competitive. On a case-by-case basis, where there is unlikely to be medium to long term harm on competition, ComReg will consider AAC as opposed to LRIC for the unregulated product and service.
8. Similarly, Outside the LEA ComReg considers that provided that the Bundle-by-Bundle which includes those specific unregulated service is profitably replicable as demonstrated by the MST that it may be appropriate for some form of cross-subsidisation. However, this is subject to the proviso that the bundle-by-bundle assessment demonstrates that excluding the unregulated service(s) that the Bundle is profitably replicable. While certain OAOs may be excluded from certain narrow Bundle types (which include unregulated services as part of that Bundle) it ensures that overall the Eircom retail offer is not anti-competitive (as the Bundle-by-Bundle is replicable).
9. ComReg considers that either pre-notification and pre-clearance requirement or a self-certification for a new/revised Bundle may be appropriate. On balance ComReg is of the preliminary view that a pre-notification and pre-clearance requirement may be more appropriate as it could provide a stronger control based on the prima facie submission made by Eircom to ComReg to ensure that new/revised Eircom Bundles are compliant with its obligations not to cause a margin squeeze.

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

10 Submitting comments

346 All comments are welcome to the consultation. However, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.

347 The consultation period will run from 28 August 2014 to 9 October 2014 during which we welcome written comments on any of the issues raised in this paper.

348 Having analysed and considered the comments received, we will review the main proposals set out in the consultation, amend if necessary in light of representations received and will then notify the draft measure to the European Commission, the NRAs and BEREC, pursuant to Regulation 13 of the Framework Regulations. We will take utmost account of any comments received from the European Commission and will adopt and publish the final decision.

349 In order to promote further openness and transparency we will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No. 05/24. We would request that electronic submissions be submitted in an-unprotected format so that they can be appended into the ComReg submissions document for publishing electronically.

Please note:

350 We appreciate that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful.

351 As it is ComReg's policy to make all responses available on its website and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response.

352 Such Information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information as set out in ComReg Document No. 05/24.

Annex: 1 Legal Basis

Market 2 (FVCO): Obligation not to unreasonably bundle

353 By Decision D[...], and pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations (European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011)), ComReg designated Eircom as having SMP on the FACO Market and imposed a number of SMP obligations. In particular, Section 12.9 (tbc) of the Decision Instrument annexed to Decision D[...] states that Eircom shall have an obligation not to cause a margin squeeze.

354 Pursuant to Regulation 18 of the Access Regulations ComReg may impose directions as follows:

- “The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations issue directions to an operator or undertaking to do or refrain from doing anything which the Regulator specifies in the direction”.
- ComReg pursuant to Regulation 18 and for the purposes of this Draft Decision, further specifies Eircom’s obligation not to cause a margin squeeze.
- Regulation 12(3) of the 2011 Framework Regulations provides that, except in cases falling within Regulation 13(8) (i.e., exceptional cases involving urgency), before taking a measure which has a significant impact on a relevant market, ComReg must publish the text of the proposed measure, give the reasons for it, including information as to which of ComReg’s statutory powers gives rise to the measure, and specify the period within which submissions relating to the proposal may be made by interested parties.
- Regulation 12(4) states that ComReg, having considered any representations received under Regulation 12(3), may take the measure with or without amendment. Regulation 12 implements Article 6 of the Framework Directive.
- Regulation 13(3) of the 2011 Framework Regulations provides that, upon completion of the consultation provided for in Regulation 12, where ComReg intends to take a measure which falls within the scope of Regulation 26 or 27 of the Framework Regulations, or Regulation 6 or 8 of the Access Regulations, and which would affect trade between Member States, it shall make the draft measure accessible to the Commission, BEREC and the NRAs in other Member States at the same time, together with the reasoning on which the measure is based. Regulation 13 implements Article 7 of the Framework Directive.

- Where appropriate, ComReg has taken the utmost account of the ex-ante replicability test parameters as set out in Annex II of the European Commission recommendation published on 11 September 2013.⁸¹

Market 5 (WBA): Obligation not to unreasonably bundle

355 By Decision D06/11 and Decision D03/13 and pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11, 12, and 13 of the Access Regulations (European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011)), ComReg designated Eircom as having SMP on the WBA Market and imposed a number of SMP obligations. In particular, Section 12.4 of the Decision Instrument annexed to ComReg Decision D06/11 and Section 11.4 of the Decision Instrument annexed to ComReg Decision D03/13 states that Eircom shall have an obligation not to cause a margin squeeze.

356 Pursuant to Regulation 18 of the Access Regulations ComReg may impose directions as follows:

- “The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations issue directions to an operator or undertaking to do or refrain from doing anything which the Regulator specifies in the direction”.
- ComReg pursuant to Regulation 18 and for the purposes of this Draft Decision, further specifies Eircom’s obligation not to cause a margin squeeze.
- Regulation 12(3) of the 2011 Framework Regulations provides that, except in cases falling within Regulation 13(8) (i.e., exceptional cases involving urgency), before taking a measure which has a significant impact on a relevant market, ComReg must publish the text of the proposed measure, give the reasons for it, including information as to which of ComReg’s statutory powers gives rise to the measure, and specify the period within which submissions relating to the proposal may be made by interested parties.
- Regulation 12(4) states that ComReg, having considered any representations received under Regulation 12(3), may take the measure with or without amendment. Regulation 12 implements Article 6 of the Framework Directive.

⁸¹ http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

- Regulation 13(3) of the 2011 Framework Regulations provides that, upon completion of the consultation provided for in Regulation 12, where ComReg intends to take a measure which falls within the scope of Regulation 26 or 27 of the Framework Regulations, or Regulation 6 or 8 of the Access Regulations, and which would affect trade between Member States, it shall make the draft measure accessible to the Commission, BEREC and the NRAs in other Member States at the same time, together with the reasoning on which the measure is based. Regulation 13 implements Article 7 of the Framework Directive.
- Where appropriate, ComReg has taken the utmost account of the ex-ante replicability test parameters as set out in Annex II of the European Commission recommendation published on 11 September 2013.⁸²

⁸² http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf

Annex: 2 LEA

A 2.1 For ease of the reader, the relevant criteria as set out in ComReg D04/13 for the LEA and explanatory text regarding each criterion (as provided in section 4.4.4 in ComReg D04/13) is set out below. For continuity with this Draft Decision, the paragraphs numbers and internal cross-references used have been updated. Where cross-references are referring to other paragraphs not replicated below, original paragraphs numbers have been kept from ComReg D04/13 and are demarcated with *[ComReg D04/13]*:

“Identifying the LEA

357 ComReg considers that the LEA should reflect those areas where uptake of unbundled services, whether LLU and / or virtual unbundling in NGA, is likely to be viable, which prospectively are more likely to permit a greater degree of competition and where regulation should be responsive to any prospective changes.

358 ComReg undertook a preliminary assessment, based on the criteria published in ComReg 12/63 on an exchange-by-exchange basis, whether an exchange would be included in the LEA. It became apparent using real-life data that the original criteria could exclude certain exchanges that would otherwise have been included in the *spirit* of developing these criteria. As such, and taking into account respondents’ views, ComReg considers that the LEA should be comprised of exchanges where:

358.1 UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU/VUA (either directly or through the provision of a wholesale service from an LLU/VUA operator).⁸³

359 ComReg also proposes several additional criteria, which are described below. However, the impact of these is not very material as approximately 759k (87%) premises fall within the criterion outlined in paragraph 358.1 out of a total number of 874k premises in the LEA as proposed. The over-riding competitive assessment of each exchange to qualify for inclusion into the LEA (i.e., the reasonable coverage and market share), ensures that the competitive conditions within such exchanges is such that the proposed flexibility within the revised NRT is appropriate.

⁸³ Subject to UPC and the other operator using LLU/VUA having a reasonable coverage and market share in that exchange (area).

360 ComReg is cognisant that the LEA may create 'islands' or 'pockets' of exchanges that do not meet any of the primary criteria (i.e., criteria 1-4) but are surrounded by exchanges and neighbouring communities that do. ComReg does not agree with the view that to include these exchanges into the LEA by default would be discriminatory. ComReg considers that to exclude such exchanges would be inconsistent with commercial dynamic outcomes of competitive markets where the same bundle / offering would not be available on equal terms in neighbouring exchanges. However, ComReg agrees with respondents' views that these 'islands' should not be included in the LEA by default — as such, the inclusion of these types of exchanges will be considered on a case-by-case basis.⁸⁴

361 ComReg assessed in detail the status of competition across all of Eircom's exchanges, against the LEA criteria published in ComReg 12/63 on an exchange-by-exchange basis. ComReg assessed each exchange for the presence of alternative infrastructure and taking into account respondents' views, ComReg has made certain refinements to the criteria proposed in ComReg 12/63. In particular, the criteria which stipulate the presence of alternative infrastructure now acknowledge the requirement of reasonable coverage and market share of competition. The revised wording of the criteria is provided in paragraph 363.

362 In addition, to recognise the potential for future other alternative infrastructure providers of high-speed broadband at a fixed location ('AIP'), which is currently only UPC, ComReg considers that it is appropriate that the criterion which previously specified UPC as such a provider that the respective criterion are updated to be neutral regarding such actual operator(s). Consequently, ComReg considers that it is more appropriate to use the term AIP rather than UPC in the respective criteria.

363 Consequently, ComReg now proposes that the LEA should be comprised of Qualifying Exchanges, which are defined/categorised as:

- (i) Criterion 1: An exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),

⁸⁴ See paragraphs 373-376.

subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (ii) Criterion 2: An exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA),

subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (iii) Criterion 3: An exchange area in which:

- (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
- (b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that exchange area,

subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (iv) Criterion 4: An exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available Wholesale website (in accordance with Section 9.13(i) of the Decision Instrument contained in Annex 1 of ComReg Decision D03/13 and/or Section 9.13(i) of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13) regarding the launch of NGA services by Eircom in cabinets in the relevant exchange area,

subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that exchange area;

- (v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an exchange area in which the relevant exchange:

- (a) Is surrounded by Qualifying Exchanges; or
- (b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s); or

(c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

364 In determining whether an exchange is a Qualifying Exchange (i.e., whether it will be included in the LEA) ComReg has the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange.

365 ComReg considers that criterion 1; criterion 2 and criterion 3 take into account the different prospective structural conditions of certain exchanges. In addition, each of these criteria recognises the addressable market of specific exchanges and thus the competitive structural conditions of a specific exchange (which also addresses the issues raised by a number of interested parties, see paragraph 4.29 [*ComReg D04/13*], to the original criteria). As such, in determining whether an exchange qualifies for inclusion into the LEA under criterion 1-3, ComReg shall as part of its determination consider: the exchange size, the addressable market in the exchange (e.g., PSTN and DSL penetration), the competitive structural presence of OAOs and their relative market share of the addressable market. As such, for an exchange to be included in the LEA under criterion 1-3, an OAO must have a reasonable coverage (i.e., it must be capable of serving a reasonable number of premises in that exchange area) and must have a reasonable market share of those customers (i.e., the OAO is simply not just present in that exchange but has a reasonable number of customers relative to the addressable market in that exchange). Consequently, ComReg considers that Eircom's proposed criteria 1-2 (see paragraph 4.31 [*ComReg D04/13*]) are not appropriate as they do not take into account the addressable market of these exchanges and only consider the physical presence of prospective competitors as opposed to their actual impact on that exchange.

366 Indicatively for criterion 1, ComReg considers that as part of its determination (as described in paragraph 365) whether an exchange should be included in the LEA, that the minimum combined market share of the AIP and the LLU / VUA provider of all broadband customers in that exchange should be at least ca. 25% - 30%. As RFNA is typically sold / offered with broadband by Eircom (which would constitute a bundle) this criterion provides that at least ca. 25% - 30% of all customers that have fixed or high-speed broadband are with an OAO. ComReg considers it appropriate that as this criterion requires the physical presence of competitive infrastructure that their market shares are combined. ComReg considers that to require a separate specified market share of individual OAOs could mask the competitive dynamics evident in the exchange — in particular where one OAO is significantly gaining market share at the expense of the other. Based on the results of the LEA (see paragraphs 4.103-4.114 [*ComReg D04/13*]) the average combined market share in those exchanges qualifying under criterion 1 is significantly above the minimum indicative level, meaning that of all broadband customers in those exchanges they are predominantly customers of an OAO.

367 Criterion 2 recognises that where at least two operators are present in an exchange with reasonable coverage and market presence that the prospective competitive conditions in that exchange would not be dissimilar to that evident in Qualifying Exchanges under criterion 1.

368 Indicatively for criterion 2, ComReg considers that as part of its determination (as described in paragraph 365) whether an exchange should be included in the LEA, that LS as a percentage of broadband customers on Eircom's DSL platform should at least be ca. 20%. As LS is provided over Eircom's DSL platform it ensures that at least ca. 20% of all customers that have fixed-broadband are with an OAO. Based on the results of the LEA (see paragraphs 4.103-4.114 [*ComReg D04/13*]) in those exchanges qualifying under criterion 2 is above the indicative level, meaning that a large proportion of all broadband customers in those exchanges are customers of an OAO.

369 In particular, criterion 3 seeks to provide Eircom with appropriate flexibility in those exchanges where it is likely that AIP (i.e., currently UPC) has a significant presence. Assuming a reasonable national average broadband penetration of 60% in exchanges, this criterion provides that for an Eircom exchange to be included in the LEA its DSL market share is 33% or less (i.e., Eircom wholesale supports broadband to fewer than 20% of the premises served in that exchange).

370 Indicatively for criterion 3, ComReg considers that as part of its determination (as described in paragraph 365) whether an exchange should be included in the LEA, in addition to that outlined in paragraph 369, that the market share of the AIP (currently only UPC) as a percentage of all broadband customers in that exchange should be at least ca. 25% - 30%. As RFNA is typically sold / offered with broadband by Eircom (which would constitute a bundle) this criterion provides that at least ca. 25% - 30% of all customers that have fixed or high-speed broadband⁸⁵ are with an OAO. At present, this criterion only applies to the presence of UPC providing retail telecommunications services in that exchange area. In the future, similar to criterion 1, where there is an alternative AIP in addition to UPC (or another AIP) that market share will be the minimum combined market share. Where there is only UPC or just an AIP, ComReg considers that it is appropriate that the minimum market share that the OAO would have is ca. 25% - 30%, so as not to provide Eircom undue pricing flexibility in exchanges where the competitive pressure from OAOs is only relatively nascent. Based on the results of the LEA (see paragraphs 4.103-4.114 [*ComReg D04/13*]) in those exchanges qualifying under criterion 3 the average market share is significantly above the minimum indicative level.

⁸⁵ With regard to what constitutes high-speed broadband, ComReg will be guided by the speeds on offer in the market generally and public documents from local Government and Europe such as the Digital Agenda for Europe (<http://ec.europa.eu/digital-agenda/>) and the national broadband strategy (<http://www.dcenr.gov.ie/Communications/Communications+Policy/Next+Generation+Broadband/>)

371 With respect to criterion 4, ComReg considers that the relative competitive dynamics of these exchanges would prospectively not be dissimilar to those evident in Qualifying Exchanges under criterion 1, 2 or 3. Namely, that they generally have high population densities, that typically AIP (i.e., currently UPC) provides telecommunications services at the retail level in those exchange areas (as Eircom's NGA proposed footprint overlaps a number of UPC exchange areas) and represent exchanges which have already been unbundled. In addition, NGA products and processes will be in place at least six months⁸⁶ in advance to ensure OAOs are in a position to replicate the services of Eircom. Furthermore, ComReg considers, as noted by Eircom's submission, *"that where NGA and VUA are deployed in a given exchange, there will be strong prospect of competitive OAO entry, which will act as a constraint on eircom's retail pricing"*.⁸⁷ As such, ComReg considers that it is appropriate to include such exchanges in the LEA to reflect those areas which prospectively are more likely to permit a greater degree of competition. In addition, as noted in paragraph 4.68 [ComReg D04/13], it is only when the actual use of LLU or virtually unbundling in NGA by OAOs increases, that the WNI could decrease for Eircom Retail — which should act as an incentive for Eircom Wholesale to encourage OAOs to use LLU or VUA. Consequently, ComReg considers that the inclusion of NGA exchanges into the LEA is consistent with ComReg's regulatory objectives. ComReg will continue to monitor the competitive conditions within such exchanges as the use of NGA services evolves over time.

372 Indicatively, for criterion 4 ComReg considers that for an exchange to qualify under this criterion, that the six months notification pertaining to the cabinets that will be NGA-enabled in that relevant exchange, that those cabinets must cover a reasonable number of all lines in that exchange. ComReg considers that for this purpose that it is appropriate that ca. two-thirds of all lines in that exchange should be served by those proposed NGA-enabled cabinets before that exchange is included in the LEA under this criterion.

⁸⁶ See ComReg Decision 03/13.

⁸⁷ Eircom. *"Response on behalf of eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers"*, 29 August 2012, page 10.

373 ComReg considers that it is appropriate to consider on a case-by-case basis the inclusion of a limited number of additional exchanges which would not meet any of the criteria above. ComReg is cognisant that ‘islands’ or ‘pockets’ of exchanges could be created where exchanges are completely surrounded by Qualifying Exchanges. Consequently, ComReg considers it appropriate that ‘island’ or ‘pocket’ exchanges (per criterion 5 (a)) be included in the LEA on a case-by-case basis. Island or pocket exchanges can occur particularly in inner-city or suburban areas due to the network architecture. ComReg considers that it would be inconsistent to have a ‘pocket’ of customers where a bundle offering / price may not be available but is available in neighbouring housing estates or streets.

374 Eircom notes in its submission that it is in favour of the ‘island’ proposal. Furthermore, Vodafone note that: *“there are good reasons for the inclusion of “island” exchanges”*.⁸⁸ ComReg considers that from a practical commercial perspective (to avoid marketing black-spots), and to avoid the social exclusion of consumers (in particular as the infrastructure is already in place to provide these bundles to these ‘pocket’ exchanges); it would be appropriate to include those exchanges that are completely surrounded by Qualifying Exchanges in the LEA. In addition, ComReg considers that due to the benefits of a contiguous network, the fact that these ‘pocket’ exchanges are surrounded by Qualifying Exchanges may increase the future roll-out of infrastructure-based investment in those exchanges. With respect to Magnet’s concern that this approach could include exchanges that may never be unbundled, as noted in paragraph 361, in determining the actual exchanges which qualify, ComReg will assess in detail the status of competition across all of Eircom’s exchanges on an exchange-by-exchange basis to assess the appropriateness of their inclusion in the LEA. As such, ComReg considers that while there are appropriate reasons for including certain exchanges which are ‘islands’ in the LEA (e.g., it would ultimately be consumer welfare enhancing, see also paragraph 360), these must be assessed on a case-by-case basis. Consequently, ComReg will consider, amongst others, the actual number of homes and premises in that exchange (area), the actual number of customers connected on the Eircom wholesale platform to mitigate against the inclusion of inappropriate exchanges into the LEA — as such exchanges will not be included by default, which is the concern raised by a number of respondents.

⁸⁸ Vodafone, “Vodafone Response to ComReg Document 12/63”, 20 August 2012, page 4.

375 Similarly, ComReg considers that criterion 5 (b) (i.e., the exchange has fewer than 500 residential homes and is located either adjacent to, or, in reasonable proximity to, Qualifying Exchange(s)), which is in addition to the original criteria proposed in ComReg 12/63, would prevent inappropriate regulatory outcomes, i.e., where a bundle offering / price may not be available in neighbouring estates. ComReg considers that the inclusion of such exchanges in the LEA is consumer welfare enhancing and that the competitive dynamics of these exchanges would not be unduly impacted. In addition, the relative addressable market of these exchanges may be too small to justify commercial investments by OAOs, although the barriers to unbundling such exchanges are likely to be low.

376 Furthermore, ComReg considers that it is appropriate for it to determine on a case-by-case basis the inclusion of a limited number of additional exchanges which would not meet any of the criterion above but for economic affinity reasons should be included in the LEA (i.e., criterion 5 (c)). Eircom will be required to demonstrate to the satisfaction of ComReg that the inclusion of such an exchange will not impact the competitive dynamics of that exchange and through cogent reasoning demonstrate that it is appropriate that the additional exchange should be included in the LEA.

377 ComReg considers that it is appropriate to cap the number of Qualifying Exchanges under criterion 5 (c) so that appropriate incentives are maintained on Eircom Wholesale to encourage infrastructure-based competition in non-LEA exchanges or incentivise NGA roll-out.

378 For the avoidance of doubt, as noted in paragraph 364, ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange. Where the inclusion of any particular exchange in the LEA is likely to lead to anti-competitive outcomes and where long-term benefits of consumers is likely to be negatively impacted ComReg will not allow that exchange into the LEA. As such, currently there are a number of exchanges / areas where LLU and / or UPC are present but have not been included in the current LEA — as to date, competition from these OAOs has not achieved a reasonable coverage or market share in those exchanges / areas (see paragraphs 4.84 and 4.103 [*ComReg D04/13*]).

379 In addition, in order to provide retail certainty for all operators including Eircom Retail, once an exchange is included in the LEA it will remain so. However, Eircom's retail market share in those Qualifying Exchanges will continue to be monitored by ComReg and should it indicate that OAOs are being squeezed (for example if their retail market share on Eircom's platform is declining or has reached an excessively low level) then ComReg will review the appropriateness for the continued inclusion of that exchange in the LEA."

Questions

Section

Page

- Q. 1 Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Where Bundle means a package of services, consisting of Retail Line Rental and one or more other services. Please provide cogent reasoning to justify your views..... 25
- Q. 2 Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s)/cost(s) of the wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself.? Where Bundle means a package of services, consisting of a Retail Broadband Product and one or more other services. Please provide cogent reasoning to justify your views..... 27
- Q. 3 Do you agree with ComReg’s preliminary view that a further specification of the obligation not cause a margin squeeze is not currently required in Market 4? Please provide cogent reasoning to justify your views. 28
- Q. 4 Do you agree with ComReg’s preliminary view that the NRT could be removed as a pricing remedy in Market 1 if there was appropriate wholesale regulation upstream? Please provide cogent reasoning to justify your views. 30
- Q. 5 ComReg is interested in receiving views from interested parties on developments in the LEA which submitters consider relevant and which have occurred since publication of the LEA criterion as set out in ComReg Decision D04/13. Please provide detailed reasoning and supporting information (where available) to support your views. 36
- Q. 6 When do you believe it might be appropriate to use only the EEO cost standard to determine the downstream broadband retail costs in the MST for Bundles? Please support your view with relevant data and evidence. 43
- Q. 7 ComReg is interested in receiving views from interested parties as to whether it would be more appropriate to apportion “approximated” (where the data is not actually quantifiable by Eircom) wholesale bandwidth at peak hour for different portfolios or bundles of retail bundles offers (e.g., whether a separate usage profile is used to assess Bundles including “Unlimited” broadband which may be more reflective of the type of average customer usage on such packages compared to the portfolio of all packages). Please support your views with cogent reasoning. 57
- Q. 8 Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the LEA? Please give a detailed response with supporting data where appropriate to support your view. 70

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

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

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

Q. 12 Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised Bundle? Please provide detailed reasoning to support your view. ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance. 86

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

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

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

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